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# The 1998 Argentine Labor Reform Act: A Perpetuation of the "Incoherent State"?

Paul Keenan

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# The 1998 Argentine Labor Reform Act: A Perpetuation of the “Incoherent State”?

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### I. INTRODUCTION TO THE LABOR DEBATE IN ARGENTINA

During the afternoon of August 26, 1998, gridlock froze the major avenues of downtown Buenos Aires. Hundreds of workers from an opposition truckers' union had taken to the streets to demonstrate their aversion to the Labor Reform Act that would soon be debated in the National Congress.<sup>1</sup> In addition, thousands of other unionists protested in front of the National Congress.<sup>2</sup> The government coalition party, the Peronista Justicialist Party (*Partido Justicialista*), had for the third time failed to obtain the quorum needed to bring the reform to the congress-

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1. See *Caos en la ciudad por las protestas [Chaos in the City Due to Protests]*, LA NACIÓN (Buenos Aires), August 27, 1998, <<http://www.lanacion.com.ar>>.

2. See *Reforma laboral: otra vez sin debate [Labor Reform: Once Again Without Debate]*, LA NACIÓN (Buenos Aires), August 27, 1998, <<http://www.lanacion.com.ar>>.

sional floor.<sup>3</sup> Previously, President Menem had warned that, if necessary, he would enact the reforms as a presidential decree.<sup>4</sup>

In 1976, the Argentine National Congress passed the Labor Contract Law (Law No. 20.744) which established a regime for the governance of employment contracts.<sup>5</sup> Law No. 20.744 has two hundred and seventy-seven articles and governs almost every aspect of the labor-management relationship. The law presumes the existence of a labor contract between an employer and employee, even in the absence of a written agreement<sup>6</sup> and it also prescribes the employer's duties and obligations.<sup>7</sup> The most controversial of the statutory obligations are those that direct an employer to indemnify a former employee after an unjust discharge or after a discharge due to reduced business activity that is not attributable to the employer.<sup>8</sup>

Critics of the 1976 Labor Contract Law claim that the burdensome indemnification is a major cause of the high rate of unemployment in Argentina.<sup>9</sup> These critics argue that employers are reluctant to hire new employees, even during a period of economic growth, since a subsequent economic downturn might require layoffs that generate substantial indemnification costs for employers.<sup>10</sup> On the other hand, proponents of the Labor Contract Law assert that the indemnification system protects workers from arbitrary discharge and provides Argentines with a more humane labor market that does not subject their livelihoods to the whims of a market economy.<sup>11</sup>

At the heart of this debate is the clash between the pro-labor Peronist ideologues and the business leaders who believe that the economy and unemployment would benefit from an unrestrained labor market.

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3. *See id.*

4. *See En el gobierno ya no hay apuro [The Government Is No Longer in a Rush]*, LA NACIÓN (Buenos Aires), August 27, 1998, <<http://www.lanacion.com.ar>>.

5. Law No. 20.744, September 20, 1974 [XXXIV-D] A.D.L.A. 3207. In 1974, the Argentine Congress passed law number 20.744, which governed labor contracts for two years. In 1976, President Videla, who rose to power by a military coup and ruled by decree, authorized executive decree number 390/76, which incorporated changes into law number 20.744 and renumbered many of the articles. The text ordered by executive decree number 390/76 is still the law of labor employment contracts today and this comment cites the decree as the source of the law. In addition, this comment cites directly to the congressional law when a law modified the text ordered by the executive decree.

6. Law No. 20.744, art. 23, text ordered by executive decree 390/76, May 13, 1976, [XXXVI-B] A.D.L.A. 1175, 1177.

7. Law No. 20.744, arts. 67 - 89, text ordered by executive decree 390/76, at 1180-82.

8. Law No. 24.013, art 153, December 5, 1991 [LI-D] A.D.L.A. 3873, 3903.

9. *See* Laura Luz Ojeda, *Dudas por el efecto de la reforma laboral [Doubts Over the Effects of Labor Reform]*, LA NACIÓN (Buenos Aires), September 4, 1998, <<http://www.lanacion.com.ar>>.

10. *See id.*

11. *See id.*

This comment will examine the criticisms of the 1976 Labor Contract Law and the 1998 Labor Reform Act, and evaluate whether the Reform Act will significantly alter the balance of power in Argentine labor relations.

The remainder of the introduction will describe the unique constitutional, historical, political and economic circumstances that have carried Argentina to this critical stage in labor relations. The comment will then examine the 1976 Labor Contract Law and indicate how the Labor Reform Act has modified the original regime. This comment will also utilize case law to illustrate how the country's labor laws are applied in practice. The comment will conclude with an analysis of how the changing labor market might be viewed by foreign investors.

### A. *Constitutional Origins*

The extraordinary scope of Argentine labor laws is rooted in the national constitution. Like most Latin American constitutions, but unlike that of the United States, the Argentine Constitution provides Argentines with the right to work. Article 14 of the Constitution provides that every inhabitant shall enjoy the right to work and engage in any lawful industry, as well as the right to associate for useful purposes.<sup>12</sup>

Article 14 takes the general "right to work" a major step further by enumerating specific rights guaranteed to each worker. The enumerated rights include: dignified working conditions, equality of labor, limited workdays, days off and paid vacations, just compensation, minimum wage, equal pay for equal work, access to the earnings of the business with control of production and contribution to management, protection against arbitrary discharge, stability in public employment, and free and democratic labor organization.<sup>13</sup> The enumeration of such labor-oriented rights in the Constitution undoubtedly encourages high expectations of labor.

### B. *Historical Roots*

Juan Domingo Perón was a military officer who was elected president of Argentina in 1946, after his participation in a 1943 Military coup.<sup>14</sup> Since the labor movement, and the General Labor Confederation (*Confederación General de Trabajo*, "CGT") in particular, were instrumental in his rise to power, Perón fashioned himself as a champion

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12. CONST. ARG., art. 14.

13. *Id.* at art. 14 bis.

14. See DAVID R. DECKER, THE POLITICAL, ECONOMIC AND LABOR CLIMATE OF ARGENTINA at 6-7, (Multinational Industrial Relations Series No. 4, 1983).

of workers' rights, to the chagrin of many of his fellow officers.<sup>15</sup> Although Perón's relationship with the labor movement was not always cordial, Perón did bring labor onto the national stage, where it would remain powerful for decades after his departure.<sup>16</sup>

However, the origins of the Argentine Labor movement predate Perón's presidency. Argentina is a nation of immigrants, most of whom immigrated from Italy and Spain in the nineteenth century.<sup>17</sup> More important to the Argentine labor movement however, are other immigrants from Northern Europe who carried with them one of the dominant ideologies of the working-class movement in Europe at that time: socialism.<sup>18</sup> The importation of this socio-economic theory has had profound effects on the labor debate in Argentina because the European-socialist approach to the labor market fundamentally differs from the American-free market approach.

Mariano Grondona, columnist for *La Nación*, a leading Argentine daily newspaper, aptly described the basic differences between the European and American approaches to the labor market:

In the United States labor system, labor is treated as any other good or service subject to the market laws of supply and demand. If the demand for labor increases, salaries and employment increase. If the demand decreases, then the opposite occurs. They hire and fire employees with complete liberty. This extreme flexibility of employment gives the American system its dizzying mobility . . . In the European system, employment is protected from economic swings for social reasons.<sup>19</sup>

Grondona also noted that Argentina began to embrace the European model under President Perón.<sup>20</sup> He concluded that while the American system may seem "inhuman," it has yielded a very high employment rate and high wages, causing a large migration of workers to the United States.<sup>21</sup>

Grondona's comments are evidence that the labor debate in Argentina is at least partly divided along the European-socialist and U.S.-capitalist ideologies; and under Perón's tutelage and legacy, the socialists have generally prevailed. However, the current realities of the

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15. *See id.*

16. *See id.* at 9.

17. *See id.* at 68.

18. *See id.*

19. Mariano Grondona, *Reforma o regresión laboral? [Labor Reform or Regression?]*, LA NACIÓN (Buenos Aires), September 6, 1998, <<http://www.lanacion.com.ar>>.

20. *See id.*

21. *Id.*

Argentine economy may have fundamentally altered that balance of power.

### C. *The Economic Reality*

The United Nations reported that in 1996 the Argentine unemployment rate was a staggering 17.2 percent, a dramatic increase from the 1988 rate of 6.3 percent.<sup>22</sup> This alarming statistic is tempered by the low inflation rate of 0.1 percent in 1996, and the stabilization of the Argentine Peso by fixing its value against the dollar.<sup>23</sup> Most Argentines would agree that the high unemployment rate is one of the most immediate and significant economic challenges facing the country. The specter of high unemployment has hung heavily over the labor reform debate and has fueled the intense emotions of its participants, as evidenced by the demonstrations in Buenos Aires in 1998.

However, the uncertain future sustainability of low inflation and the fixed exchange rate is of significant concern. During the 1980's, runaway inflation plagued Argentina; by 1990, the annual rate of inflation exceeded 1,300 percent.<sup>24</sup> In 1991, the Argentine National Congress passed the Convertibility Law, which fixed the exchange rate of the Argentine Peso to one peso per U.S. dollar. The Convertibility Law was remarkably successful in stabilizing the Argentine currency and the inflation rate by providing full foreign exchange backing of the monetary base.<sup>25</sup>

Recently, however, Argentines have noticed that several of their neighbors, most notably Brazil, have fallen into recessions and are experiencing currency devaluation.<sup>26</sup> Argentina is now concerned that the artificial rate of exchange will fall, subjecting the citizenry to a new round of hyperinflation.<sup>27</sup> Such fears have caused President Menem to consider adopting the U.S. dollar as the Argentine national currency.<sup>28</sup>

These grave concerns over inflation, the future of the exchange rate, and the fate of the economy in general, all serve as an impetus for labor reform. When people hear that poor economic times are on the horizon, their thoughts often focus on their own job security and eco-

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22. See ECONOMIC COMM'N FOR LATIN AMERICA AND THE CARIBBEAN, UNITED NATIONS, ECONOMIC SURVEY OF LATIN AMERICA AND THE CARIBBEAN 144 (1996-1997).

23. See *id.*

24. See José Antonio Ocampo and Robert Steiner, *Foreign Capital in Latin America: An Overview*, in FOREIGN CAPITAL IN LATIN AMERICA, 1, 17 (José Antonio Ocampo and Robert Steiner, eds., 1994).

25. See *id.*

26. See David Wessel et al., *Passing the Buck: Argentina Considers a Radical Peso Defense: Use Dollars Instead*, WALL ST. J., January 18, 1999, at A1.

27. See *id.*

28. See *id.*

nomic well-being. In a 1998 Gallup Poll, forty-eight percent of Argentines polled stated they "fear that they will lose their job this year."<sup>29</sup> Given such wide spread uncertainty, it comes as no surprise that thousands took to the streets when Congress debated labor reform.

The debate over labor reform also concerns foreign investors. With the recent downturn of several Latin American economies, foreign investors have been researching Latin American investment opportunities with a critical eye. Even before the labor reform, obligations that arose from labor contracts passed unchanged with the transfer of title of an Argentine business entity.<sup>30</sup> In other words, if a foreign business entity merges with or acquires an Argentine business, that foreign business is liable for all the labor obligations that existed at the time of transfer. Therefore, a foreign investor should take a hard look at those obligations before making a decision, especially with businesses involving large labor forces. The trepidation of Argentine employees and the frustrations of Argentine business persons and foreign investors are all factors which result in a confusing political debate over labor reform.

#### D. *The Political Debate*

Since there are so many sides to the debate over labor reform in Argentina, it was not surprising that Menem and his party were frustrated by their repeated attempts to obtain a quorum for a vote on labor reform. The Menem Administration and its party, the Peronista Justicialist Party, are the primary proponents of the legislation. The largest government opposition party, the Alliance Party, opposes the reform. The national labor unions are divided; the CGT has supported the Menem Administration, yet the Argentine Workers Office and Argentine Workers Movement have opposed the reform.<sup>31</sup> Argentine business leaders are also divided. The chaotic debate has led to much confusion, making it difficult for outsiders, as well as Argentines, to understand what is at stake. In a poll taken during the height of the debate, forty percent of the three hundred and seventy Argentine business persons polled in Buenos Aires admitted to knowing "very little" about the initiative.<sup>32</sup>

The confusion over the meaning of the proposed reforms, and the splintering of parties who are usually aligned on questions of labor, made it very difficult for Menem and the Peronistas to move the Labor

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29. *El 48% de la gente teme por su empleo [48% of the People Fear for Their Jobs]*, LA NACIÓN (Buenos Aires), January 10, 1999, <<http://www.lanacion.com.ar>>.

30. See Law No. 20.744, art. 225, text ordered by executive decree 390/76, at 1197-98.

31. See *Reforma laboral: otra vez sin debate*, *supra* note 2.

32. *Disidencias entre los empresarios [Differences Among Business Leaders]*, LA NACIÓN (Buenos Aires), September 4, 1998, <<http://www.lanacion.com.ar>>.

Reform Act through parliamentary procedure. In fact, it was only through unscrupulous legislative behavior that the Peronista Justicialist Party was able to gain approval for the Act.<sup>33</sup> Since the opposition did not wish to give the Peronistas a quorum, most of the opposing representatives did not take their seats the morning the reform was scheduled for debate and vote.<sup>34</sup> Once the quorum was obtained, the Justicialist Party immediately took a vote to advance the reform debate to the next item on the day's agenda.<sup>35</sup> The decision to move up the debate was voted on electronically in approximately twenty seconds.<sup>36</sup> The Justicialist Party then closed the debate on the reform in less than one minute, thereby opening the vote on the reform while some members of the opposition were absent.<sup>37</sup> After the passage of the Act, President Menem announced that it was a "spectacular and historic day."<sup>38</sup> Let us examine how this "historic day" will be viewed by the Argentine labor force, labor leaders, businessmen and foreign investors.

## II. THE ARGENTINE LABOR CONTRACT LAW AS MODIFIED BY THE 1998 LABOR REFORM ACT

In general, Argentine Labor Contract Law requires documentation of all labor relationships in a contract.<sup>39</sup> At the commencement of the employment relationship, there is a trial period when an employer may discharge an employee with or without cause without any liability.<sup>40</sup> If the employer discharges the employee after the trial period however, the employer must indemnify the discharged employee.<sup>41</sup>

Law No. 20.744 of the Labor Contract Law of 1976 outlines the regime governing employment contracts. While still in force today, the regime of Law No. 20.744 has been substantially revised by Law No. 25.013 (the Labor Reform Act), promulgated September 22, 1998. The Labor Reform Act eliminates several specific types of labor contracts and substantially alters the trial periods and system of indemnification. In addition, the Act greatly increases the collective bargaining power of

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33. See *El país atrasa: convierten en la ley laboral [The Nation is Set Back: The Labor Reform Becomes Law]*, DIARIO AMBITO FINANCIERO (Buenos Aires), September 3, 1998, <<http://www.ambitofinanciero.com>>.

34. See *id.* at 2.

35. See *id.*

36. See *id.*

37. See *id.*

38. *Menem está feliz por la reforma [Menem Is Happy Over Reform]*, CLARIN (Buenos Aires), September 4, 1998, <<http://www.clarin.com.ar>>.

39. See Law No. 20.744, art.21, text ordered by executive decree 390/76, at 1177.

40. See Law No. 25.013, art.3, September 22, 1998, [LVIII-D] A.D.L.A. 3888, 3889-90.

41. See generally Law No. 20.744, tit. 12, text ordered by executive decree 390/76, at 1198-1201.



the largest unions.<sup>42</sup>

These reforms will be of great interest to foreign investors, particularly those who plan to engage in an enterprise that requires a large Argentine labor force. Law No. 20.744 provides that the transferee of title to any business entity becomes the successor to the obligations that emerge under all the labor contracts existing at the time of transfer.<sup>43</sup> If, for any reason, an employee files a claim based on a labor contract against his employer, both the transferee *and* the transferor may be severally liable.<sup>44</sup> The employee may terminate the contract without liability however, if the entity changes its purpose or operation; or, if as a result of the transfer, the employee finds himself working in an entity that has less responsibility than before the transfer.<sup>45</sup>

Due to the complexities of Argentine labor law, foreign investors who merge with or acquire an Argentine business entity should inform themselves of the obligations that may arise under Argentine labor law. These obligations could lead to substantial liabilities for foreign investors, and should be considered when envisioning the future financial statement of contemplated enterprises. In addition, the enhanced power of the unions should be taken into account.

The following analysis will outline the traditional Argentine Labor Contract Law and highlight the changes brought about by the Labor Reform Law. Afterwards, this comment will consider the effects of labor reform on foreign investment.

### A. *The Argentine Labor Contract Law and the Reform*

#### 1. LABOR CONTRACTS IN GENERAL

Law No. 20.744 outlines an elaborate scheme which governs all labor contracts. A labor contract is required whenever "any person accomplishes acts or loans services which benefit another person."<sup>46</sup> It is unlawful to perform work without a contract. Despite this prohibition, an estimated four million Argentines are working without employment contracts.<sup>47</sup>

Courts will presume that a labor contract exists where acts or services are provided.<sup>48</sup> However, the presumption is rebuttable. For example, in *Martínez v. Radio América*, a journalist agreed to produce a

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42. Law No. 25.013, ch. 3, at 3891.

43. Law No. 20.744, art. 225, text ordered by executive decree 390/76, at 1197-98.

44. See Law No. 20.744, art. 228, text ordered by executive decree 390/76, at 1198.

45. See *id.*

46. Law No. 20.744, art. 21, text ordered by executive decree 390/76, at 1177.

47. See *La reforma laboral debuta en un mercado en crisis [Labor Reform Debuts in a Market in Crisis]*, CLARIN (Buenos Aires), September 4, 1998, <<http://www.clarin.com.ar>>.

48. See Law No. 20.744, art. 23, text ordered by executive decree 390/76, May 13, 1976,

program for a radio station and to find his own advertisers for the program.<sup>49</sup> When the relationship between the two parties ceased, the journalist claimed that because he was an employee, he was entitled to an indemnification from the radio station.<sup>50</sup> The National Labor Court did not agree. The court held that the facts of the case, such as the alleged employee's agreement to find his own advertisers and thus his own income, indicated that the journalist and the station had only a business or contractual relationship, and not a labor relationship.<sup>51</sup> This case illustrates the court's establishment of an outer limit on the definition of a labor contract, which is one barrier that the National Labor Courts have established for plaintiffs seeking indemnification.

## 2. TYPES OF LABOR CONTRACTS

Most labor contracts, including those that are unwritten and/or presumed, are termed "Indeterminate Contracts."<sup>52</sup> Indeterminate Contracts do not expire upon a particular date or event, but instead expire upon the occurrence of an unscheduled event, such as retirement, death, dissolution of the business or renunciation of the contract by one of the parties.<sup>53</sup> A "Determinate Contract" terminates upon the occurrence of a concrete event or date specifically written into the contract.<sup>54</sup>

When possible, many businesses avoid entering into Indeterminate Contracts since the termination of such contracts often results in large indemnification awards. Employers instead prefer to utilize a contract which expires upon a particular date or event, allowing the employer to release the employee at the agreed upon time without having to pay any indemnification. However, if an employer discharges an employee without cause under a Determinate Contract prior to the expiration of the contract, the employer is liable for the indemnification enumerated in Article 250 for Indeterminate Contracts, and also for damages suffered by the discharged employee that may be awarded by a civil court.<sup>55</sup>

### a. Trial Period

During the Trial Period, an employer may discharge an employee

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[XXIV-D] A.D.L.A. 3225; "Banchero, Italo v. Embotelladora Noroeste S.A.," CTrab. Tucumán [Labor Court of Tucumán Province] [1996-E] La Ley 455, 457.

49. "Martinez, Oviedo J. v. Radio America," CNTrab. [National Labor Court of Appeals] [1994-E] Derecho del Trabajo [Labor Law] 951, 952.

50. *See id.*

51. *See id.*

52. Law No. 20.744, art. 90, text ordered by executive decree 390/70, at 1182.

53. *See id.*

54. Law No. 20.744, art. 93-100, text ordered by executive decree 390/70, at 1182-83.

55. Law No. 20.744, art. 95, text ordered by executive decree 390/70, at 1183.

without cause and not risk paying any indemnification.<sup>56</sup> Under the original regime, the Trial Period for Indeterminate Contracts was the first three months of the contract, although collective bargaining agreements could extend this period up to six months.<sup>57</sup> An employer can not evade the intent of Labor Contract Law by contracting the same employee for more than one Trial Period.<sup>58</sup>

With the passage of the Labor Reform Act, the Trial Period for Indeterminate Contracts was reduced to thirty days, but may still be extended to six months by a collective bargaining agreement.<sup>59</sup> The shortening of this Trial Period is viewed as a loss for management. Previously, if a business owner saw an improvement in his business resulting in additional hiring needs, the owner might have hesitated to take on additional employees due to concerns over the permanency of the upswing. If it turned out that the improvement was only one part of a short business cycle, the employer could discharge the employee for any reason without indemnification. By shortening the Trial Period to thirty days, an employer will be more likely to “wait and see” if the upturn in business is permanent before hiring new workers.

#### b. Promotion Contracts

Prior to the passage of the Labor Reform Act, several types of “Promotion Contracts” were created by the Employment Law of 1991.<sup>60</sup> Promotion Contracts were specially designed to lower the potential costs and liabilities of hiring persons in certain social groups. Specifically, Promotion Contracts provided incentives to hire certain classes of workers through total or partial reductions of payroll taxes, and through the denial of indemnification claims for the discharge of such workers.<sup>61</sup> The Argentine Congress had approved Promotion Contracts for women, disabled persons and men over the age of forty-five.<sup>62</sup> The Labor Reform Act eliminated those special contracts, retaining Promotion Contracts for only internships and apprenticeships.<sup>63</sup>

An Apprenticeship Employment Contract may only be entered into by employees between the ages of fifteen and twenty-eight.<sup>64</sup> An

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56. See Law No. 25.013, art. 3, at 3888-90.

57. See *id.*

58. See *id.*

59. See *id.*

60. Law No. 24.013, at 3873.

61. See *Trabajo en negro y evasión fiscal [Black Market Labor and Fiscal Evasion]*, CLARÍN (Buenos Aires), September 6, 1998, <<http://www.clarin.com.ar>>.

62. See Ojeda, *supra* note 9.

63. See *id.*

64. See Law No. 20.744, art. 189, text ordered by executive decree 390/76, At 1193. Law No. 20.744 prohibits the employment of persons under the age of fifteen.

employer may not enter into an Apprenticeship Contract with a person who had previously worked for that specific employer.<sup>65</sup> Additionally, the number of Apprenticeship Contracts utilized by an employer may not exceed ten percent of the total number of Indeterminate Contracts.<sup>66</sup> The contract must be valid for at least three months, but no longer than one year.<sup>67</sup> An apprentice may not work more than forty hours per week.<sup>68</sup> The employer must give an apprentice thirty days notice before discharging him, or pay an indemnity of one-half the apprentice's monthly salary.<sup>69</sup> If the proper notice is given, the employer is not required to make an indemnification upon completion of the contract, even if a full-time position is not offered.<sup>70</sup> If the employer fails to fulfill the statutory requirements for an Apprenticeship Contract, the contract will be considered an Indeterminate Contract, which could lead to full indemnification for a discharged apprentice.<sup>71</sup>

The thirty day Trial Period for Indeterminate Contracts is actually considered to be a type of Promotion Contract because it permits an employer to take on an employee for thirty days without assuming the same risks that accompany an Indeterminate Contract.<sup>72</sup>

Article 2 of the Labor Reform Act permits an Internship Employment Contract where the employee is a student, and the primary purpose of employment is to train and complement the student's formal education.<sup>73</sup> The Act calls upon the Ministry of Labor and Social Security to establish the regulations that will govern Internship Contracts.<sup>74</sup>

### c. The Effects of Labor Reform on Promotion Contracts

Many observers believed that the original employment contract regime was too rigid and inflexible. In fact, many have termed the Labor Reform Act the "Flexibility Reform."<sup>75</sup> However, the elimination of Promotion Contracts for women, disabled persons and men over the age of forty has caused great consternation among many.

Raúl Lamacchia, a representative of a mercantile union, considers

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65. See Law No. 25.013, art. 1, at 3888-89.

66. See *id.*

67. See *id.*

68. See *id.*

69. See *id.*

70. See *id.*

71. See *id.*

72. See Ojeda, *supra* note 9.

73. See Law No. 25.013, art. 2, at 3889.

74. See *id.*

75. Mariano Hipólito Grandoli, *El nuevo régimen laboral [The New Labor Regime]*, LA NACIÓN (Buenos Aires), October 10, 1998, <<http://www.lanacion.com.ar>>.

those eliminations to be negative aspects of the reform.<sup>76</sup> Enrique Rodríguez, a former Labor Minister, pointed out that there are currently 1.2 million workers with Promotion Contracts; only 200,000 of these are for internships or apprenticeships, which will be unaffected by the reform.<sup>77</sup> Although the one million remaining will not be immediately affected since the Labor Reform Act is not retroactive, those workers will be unable to renew their special contracts once they expire.<sup>78</sup> At the expiration of their contracts, those workers will find themselves competing for standard Indeterminate Contracts. Since employers will be without the special incentives once provided by Promotion Contracts, those persons will probably lose their positions to younger, able-bodied male employees that some employers may find more competitive. Given the current high rate of unemployment, the competition will be keen for any new job opening, and older men, women and disabled persons will be without their customary advantage.

On the other hand, Mariano Hipólito Grandoli, a former labor court judge who is currently a professor at Austral University, claims that Promotion Contracts, originally adopted in 1991 to decrease the unemployment rate for such persons, failed to achieve their goal.<sup>79</sup> Professor Grandoli believes that the protectionist policy of Promotion Contracts increased the potential liability employers faced if they found it necessary to discharge such employees in the future.<sup>80</sup> He hypothesizes that the potential indemnification award outweighed governmental incentives to hire certain types of employees whom employers have traditionally found undesirable.<sup>81</sup>

### 3. COMPENSATION FOR LABOR

Law 20.744 also sets forth the compensation an employer must provide an employee. Besides obeying the minimum wage law, the employer must also provide all of the "Social Benefits" enumerated in Article 103 (a) prior to the commencement of the labor relationship. These Social Benefits include the following: access to the company dining room, reimbursement for lunch on workdays, uniforms, child care for the first six years of a child's life, and family medical expenses as approved by the employer.<sup>82</sup> If the compensation and reimbursements are in dispute, courts may determine a just amount, considering the

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76. See *Disidencias entre de los empresarios*, *supra* note 32.

77. See Ojeda, *supra* note 9.

78. See *id.*

79. See Grandoli, *supra* note 75.

80. See *id.*

81. See *id.*

82. Law No. 20.700, art. 1, September 25, 1996, [LVI-D] A.D.L.A. 4657, 4657-58.

employee's efforts and results in the workplace.<sup>83</sup>

The Labor Contract Law also mandates the payment of an "Annual Complementary Salary," also known as the "Thirteenth Salary."<sup>84</sup> This extra payment must be made to every employee and shall be the equivalent of one month's salary.<sup>85</sup> The Thirteenth Salary is paid in two installments, half in June and half in December.<sup>86</sup> If an employment relationship terminates prior to the payment of the Thirteenth Salary, the employer is obliged to pay the separating employee his *pro rata* share of the Thirteenth Salary.<sup>87</sup> The Labor Reform Act did not alter the basic compensation scheme.

#### 4. FEMALE EMPLOYEES

The Argentine Labor Contract Law guarantees to women forty-five days of maternity leave before and after giving birth, for a total of ninety days.<sup>88</sup> The mother may opt to take as little as thirty days prior to the birth, and use the remainder after the child is born.<sup>89</sup> The mother may also elect to terminate the employment contract and receive twenty-five percent of her annual salary as an indemnification.<sup>90</sup> If an employer discharges an expectant mother within six and one-half months prior to or after childbirth, the court will presume that the mother was discharged due to the pregnancy and order the employer to compensate the mother with one year's salary.<sup>91</sup>

#### 5. SUSPENSION OF CONTRACTUAL OBLIGATIONS

If an employee is the blameless victim of an unforeseen accident or illness, Law 20.744 requires the employer continue to compensate the employee for three or six months, depending on whether the employee had completed more or less than five years of service.<sup>92</sup> Although an employer may hire a replacement during the interim, the employer must maintain the position open for one year while awaiting the return of the employee.<sup>93</sup> If the employee does not return after one year, the employer may discharge the employee without paying indemnifi-

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83. See Law No. 20.744, art. 114, text ordered by executive decree 390/76, at 1184-85.

84. Law No. 20.744, art. 121, text ordered by executive decree 390/76, at 1185.

85. See *id.*

86. See Law No. 20.744, art. 122, text ordered by executive decree 390/76, at 1185.

87. See Law No. 20.744, art. 123, text ordered by executive decree 390/76, at 1185.

88. See Law No. 20.744, art. 177, text ordered by executive decree 390/76, at 1192.

89. See *id.*

90. See Law No. 20.744, art. 183 (b), text ordered by executive decree 390/76, at 1192-93.

91. See Law No. 20.744, art. 178, text ordered by executive decree 390/76, at 1192.

92. Law No. 20.744, art. 208, text ordered by executive decree 390/76, at 1195-96.

93. See Law No. 20.744, art. 211, text ordered by executive decree 390/76, at 1196.

cation.<sup>94</sup>

If after one year the accident or sickness continues to diminish the employee's ability to perform the work assigned under the original contract, the employer must assign the employee to duties that he or she is able to complete, without any reduction in pay.<sup>95</sup> If the employer is unable to reassign the employee, the employer must indemnify the employee for half of the amount calculated under the indemnification plan to be described later.<sup>96</sup> If the employer discharges the injured employee, the employer will pay the indemnification and the outstanding remuneration due to the employee for the remainder of the one year period, tolling from the time the employee's service was interrupted.<sup>97</sup> Although collective bargaining agreements have tried to limit the application of these articles, the National Labor Court of Appeals has thwarted attempts to do so.<sup>98</sup>

Where an employer seeks to suspend a worker for just cause, the employer may only do so a fixed period of time, and must be presented in writing to the employee.<sup>99</sup> Reasons for just cause include: discipline, *force majeure* and a reduction in business activity that is not attributable to the employer.<sup>100</sup> Such suspensions shall not exceed thirty days,<sup>101</sup> except in cases of *force majeure*, which shall not exceed seventy-five days.<sup>102</sup> If any such suspension exceeds ninety days, the worker is considered to be discharged, granting him or her the right to appropriate indemnification.<sup>103</sup>

## 6. TRANSFER OF THE LABOR CONTRACT

If title to a business entity transfers as the result of a merger or acquisition, the transferee must assume all of the labor obligations that existed at the time of transfer.<sup>104</sup> If a business is leased, the lessees will be liable for the obligations; however, both the transferor and the transferee are severally liable for any obligations outstanding at the time of

94. *See id.*

95. *See* Law No. 20.744, art. 212, text ordered by executive decree 390/70, at 1196.

96. *See id.*

97. *See* Law No. 20.744, art. 213, text ordered by executive decree 390/70, at 1196.

98. *See* "Torres, Benjamina Amanda v. Instituto de Servicios Sociales para el Personal Ferroviario," CNTrab. [National Labor Court of Appeals] [LI-B] Derecho del Trabajo [Labor Law] 2224, 2225.

99. *See* Law No. 20.744, art. 218, text ordered by executive decree 390/76, at 1197.

100. *See* Law No. 20.744, art. 219, text ordered by executive decree 390/76, at 1197.

101. *See* Law No. 20.744, art. 220, text ordered by executive decree 390/76, at 1197.

102. *See* Law No. 20.744, art. 221, text ordered by executive decree 390/76, at 1197.

103. *See* Law No. 20.744, art. 222, text ordered by executive decree 390/76, at 1197.

104. *See* Law No. 20.744, art. 225, text ordered by executive decree 390/76, at 1197-98.

transfer.<sup>105</sup> The National Labor Courts have liberally enforced these provisions so as to grant indemnification to improperly discharged employees.

For example, in *López v. Des Nogueira*, the defendant employers acquired the enterprise after an employee had been discharged without cause and without appropriate indemnification.<sup>106</sup> The court held that even though the current owners were not responsible for the discharge and lack of timely indemnification, the obligation transferred with the business and thus became the obligation of the defendants.<sup>107</sup>

However, in *Barbano v. Fernández*, the court did limit the joinder of defendants in a suit for unjust discharge without proper indemnification.<sup>108</sup> In that case, the plaintiff wanted to join a person who took the place of the owner as the on site supervisor of the business, without assuming any type of ownership in the business. The National Labor Court refused to join the supervisor and held that there must be some type of transfer of property by means of negotiation between the transferor and transferee before a labor obligation would be enforced against the new owner.<sup>109</sup>

These cases illustrate that where there is an arm's length negotiation for ownership of business property; the National Labor Courts will find that all labor obligations follow the business, regardless of the culpability of the defendant-owner. The following section will highlight the costs of assuming those obligations.

## 7. INDEMNIFICATION FOR THE TERMINATION OF A LABOR CONTRACT

### a. Article 245 Indemnification (Discharge Without Cause)

Neither party to a labor contract shall terminate the contract without warning.<sup>110</sup> Under the original regime, if the employee wanted to terminate the employment relationship, he or she had to notify the employer thirty days beforehand; if the employee did not, the employee had to indemnify the employer one month's salary.<sup>111</sup> On the other hand, the employer was required to give the employee one month's notice if the employee had less than five years of service to the company, and two

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105. See Law No. 20.744, art. 226, text ordered by executive decree 390/76, at 1198.

106. "Lopez, Plácido R.V. Des Noreguira, Adolfo," CNTrab. [National Labor Court of Appeals][1994-A] Derecho del Trabajo [Labor Law] 518, 519-20.

107. See *id.*

108. See "Barbano, Carlos A. v. Fernández, José L. et al.," CNTrab. [National Labor Court of Appeals] [1994-B] Derecho del Trabajo [Labor Law] 1744, 1745.

109. See *id.*

110. See Law No. 20.744, art. 231, text ordered by executive decree 390/70, at 1198.

111. See *id.*



months for more than five years of service.<sup>112</sup> If either the employer or the employee terminated the employment relationship with less than the required notice, the terminating party had to compensate the other the amount of wages that would have been paid during the remainder of the notification period.<sup>113</sup> If the parties “unequivocally and conclusively agree,” they may terminate the relationship at any time by mutual consent.<sup>114</sup>

These time periods have been revised by the Labor Reform Act. An employee now only needs to give fifteen days notice to his or her<sup>115</sup> employer. Also, the employer only needs to forewarn an employee with fifteen days notice if the employee has between thirty days and three months of service.<sup>116</sup> For an employee with less than five years but more than three months of service, the notice continues to be one month; for an employee with more than five years of service, the required notice is still two months.<sup>117</sup>

In either case, indemnification for lack of proper notice does not relieve the employer of any other indemnification that may be due to the employee for an unjust discharge.<sup>118</sup> In addition, the employer must grant the worker two hours of leave per day to seek other employment.<sup>119</sup>

All discharges are considered to be either for just cause or without just cause. If one party terminates the employment relationship, the court will determine whether there was just cause.<sup>120</sup> If the court determines that the discharge was without just cause, then Article 245 indemnification will apply, whether or not proper notification was given to the employee.<sup>121</sup> If an employee resigns, and the court determines that there was just cause for the resignation, it will be considered an “indirect discharge,” which entitles the employee to indemnification.<sup>122</sup>

The indemnification under Article 245 can be hefty. The payment will be one month’s salary for each year of service or for a three month fraction thereof, using the highest monthly salary earned during the last

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112. *See id.*

113. *See* Law No. 20.744, text ordered by executive decree 390/76, at 1198.

114. Law No. 20.744, art. 241, text ordered by executive decree 390/76, at 1199; *see also* “Di Salvo, Edo H. v. Somisa,” CNTrab. [National Labor Court of Appeals] [1994-B] *Derecho del Trabajo* [Labor Law] 1984, 1985.

115. *See* Law No. 25.013, art. 6, at 3890.

116. *See id.*

117. *See id.*

118. *See* Law No. 20.744, art. 236, text ordered by executive decree 390/76, at 1199.

119. *See* Law No. 20.744, art. 237, text ordered by executive decree 390/76, at 1199.

120. *See* Law No. 20.744, art. 242, text ordered by executive decree 390/76, at 1199.

121. *See* Law No. 24.013, art. 153, at 3903.

122. Law No. 20.744, art. 246, text ordered by executive decree 390/76, at 1200.

year of employment as the basis for calculation.<sup>123</sup> For example, if an employee has ten years of service and earned one thousand dollars per month during the last year of service, the proper indemnification would be ten thousand dollars. Even if the parties contract for a different indemnification amount, the minimum indemnification for discharge without just cause is two month's salary.<sup>124</sup>

The Labor Reform Act retained the formula for Article 245 indemnification, but added a ceiling for the base salary used to calculate the indemnification. The indemnification is now one-twelfth of the base monthly salary for each year of service.<sup>125</sup> In the example above, the indemnification would still be ten thousand dollars. However, there is now a cap on the indemnification. Under any contract, the base salary for indemnification can not exceed three month's salary of the salary contemplated in the appropriate collective bargaining agreement, regardless of the time of service. Therefore, the indemnification of a discharged employee's base salary is affected only if the employee's monthly salary is greater than three times the salary stipulated in a collective bargaining agreement for his particular occupation.

In addition, the Labor Reform Act provides a cause of action for a claim where there is a discharge motivated by discrimination on the basis of race, nationality, gender, sexual orientation, religion, or political or unionist ideology or opinion.<sup>126</sup> For such discriminatory discharges, the modified Article 245 indemnification will be increased by thirty percent.<sup>127</sup>

### 1. Legislative Indemnification Limits

The legislature has had the most obvious and significant impact on the indemnification amount. The legislature prescribed the basic rule that an employee discharged without just cause will receive one month's salary for each year of seniority, and that the base used for the calculation shall be the highest monthly salary received during the last year of service.<sup>128</sup> On its face, the rule seems to dictate the precise amount that an employee would receive. However, labor and management are still free to contract their own indemnification provisions. Therefore, Article 245 also states that a collective bargaining agreement cannot stipulate a base salary used for the indemnification calculation that is more than three times the average of the monthly salaries of the employees whose

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123. See Law No. 24.013, art. 153, at 3903.

124. See *id.*

125. See Law No. 25.013, art. 7, at 3890.

126. Law No. 25.013, art. 11, at 3891.

127. See *id.*

128. See *id.*

contracts are covered by the agreement.<sup>129</sup> The Labor and Social Security Ministry of the executive branch is responsible for determining the average monthly salary.<sup>130</sup> As for the lower limit, Article 245 states that in no case shall the total indemnification be less than two month's salary.<sup>131</sup>

Therefore, the National Congress has determined that every unjust discharge shall net at least two months' salary for the discharged employee. The Congress also set a ceiling for the base salary that can be used to calculate an indemnification award. However, these legislative limits only begin to narrow the range of indemnification that may be available to a discharged employee. The judiciary has also placed considerable limits on the size of an indemnification.

## 2. Judicial Indemnification Limits

The judicial branch has placed limits on indemnification in two different ways: by limiting what compensation can be included in the base salary, and by setting a floor on the indemnification amount that an employer can include in a labor contract.

First, the courts have had an impact on the indemnification amount by delineating what can and cannot be included in the monthly base salary used to calculate the indemnification. The courts have held that the following will not be included in the monthly base salary for the purpose of computing an indemnification: meals that are provided by the employer and are consumed outside of the workplace, the "thirteenth" monthly salary, any annual or quarterly bonuses, and any additional pay for temporary extra duties.<sup>132</sup>

Many discharged employees who have received an indemnification have brought suit against their employers claiming that the employer did not include certain bonuses in the base monthly figure used to calculate the indemnification. A common allegation is that the employer attempted to reduce his liability by dispersing a significant portion of the employee's salary throughout the year in order to lessen the monthly base amount. Given the long list of bonuses that are not included in the base salary, it appears that this tactic has worked well for management.<sup>133</sup>

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129. *See id.*

130. *See id.*

131. *See id.*

132. *See* "Hernández, Ester v. Sace," CNTrab. [National Labor Court of Appeals] [1994-B] Derecho del Trabajo [Labor Law] 1185, 1186; *see also* "Sosa, Antonio et al. v. Frigorífico Minguillón S.A.," CNTrab. [National Labor Court of Appeals] [1994-B] Derecho del Trabajo [Labor Law] 1196, 1197.

133. *See generally* "DeMarchi, Emilio O. v. Bank of America S.A.," CNTrab. [National Labor

In fact, the National Labor Courts strongly favor management on this point. In *Hernández v. Sace*, the plaintiff wanted to include his meal reimbursements and annual bonus in the monthly base salary used to calculate indemnification.<sup>134</sup> The court not only declined to do so, but also stated that the constitutional concept of “equal pay for equal work”<sup>135</sup> is not relevant to the valuation of the base salary.<sup>136</sup> This opened the door for employers to disperse an employee’s true monthly salary into bonuses and other “perks,” in order to lessen possible indemnification costs.<sup>137</sup>

As for the second limitation, labor has had success in creating a floor that a contract can set for the base salary used to calculate the indemnification. Plaintiff attorneys have established this floor by challenging the constitutionality of labor contracts that set a low base salary, such as the government prescribed minimum wage for that occupation, for the computation of an indemnification when the actual monthly salary may be much higher.

For example, in *Marianetti v. Bodegas and Viñedos López S.A.*, the plaintiff was a lawyer who had served for thirty-two years as a general administrator for farming businesses.<sup>138</sup> His employer terminated the labor contract and, in accordance with the contract, the employer used the federal monthly minimum wage, 1700 pesos, as the base salary to compute the employee’s indemnification.<sup>139</sup> The contract stated that three times the minimum wage, the statutory maximum, would be paid for each year of service<sup>140</sup>. Under this calculation, the employer paid 163,200 pesos. However, the monthly salary of the lawyer was actually 18,000 pesos. Using the Article 245 formula, the plaintiff could have received 576,000 pesos.<sup>141</sup>

In his effort to increase his indemnification despite the terms of the contract, Marianetti claimed that the establishment of a low base salary, as compared to his actual monthly salary, was unconstitutional because it deprived him of his right to be protected from arbitrary discharge.<sup>142</sup>

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Court of Appeals] [1994-A] Derecho del Trabajo [Labor Law] 955, 956, for the complete list of what may or may not be included in the base salary for the computation of an indemnification.

134. “Hernandez v. Sace” at 1185.

135. CONST. ARG., art 14 bis.

136. See “Hernández v. Sace” at 1186.

137. See generally “Hernández v. Sace.”

138. “Marianetti, Luis P. v. Bodegas and Viñedos López S.A.,” SC Mendoza [Supreme Court of Mendoza Province] [1996-E] La Ley 498, 500; see also “DeMarchi v. Bank of America S.A.” at 956.

139. See “Marianetti v. Bodegas and Viñedos López S.A.” at 500.

140. See *id.*

141. See *id.* at 501. At that time, the value of one Argentine Peso had already been set at one U.S. dollar.

142. See *id.* at 500.

Article 14 of the Argentine Constitution states that all persons shall be protected from arbitrary discharge.<sup>143</sup> Marianetti argued that the low base salary in his contract did not adequately protect him from arbitrary discharge since the resulting indemnification would be relatively low in relation to his true salary.<sup>144</sup> If Marianetti were to receive the federal statutory indemnification, his employer would have been more reluctant to fire him without cause.

The court ruled in favor of the plaintiff, but in a limited fashion. The court found that the Article 245 ceiling was constitutional in principle, and that the separation of powers principle precluded the judiciary from reviewing the average salary determined by the Labor Ministry.<sup>145</sup> The court stated that the figure was a “complex political and economic [question], reserved for the discretion of the Executive Power.”<sup>146</sup> However, the court then limited its ruling by holding that if the average salary was “absurd or arbitrary,” or had not been reasonably adjusted for inflation or the consumer price index, then the court could review and adjust the figure.<sup>147</sup>

Employing the doctrine provided by Antonio Vazquez Vialard,<sup>148</sup> the court held that where the base salary set by the government was unreasonable, the court would determine a more reasonable figure, rather than finding the government process or figure unconstitutional. In this case, the court did adjust the figure and awarded the plaintiff 38,400 pesos, in addition to the 163,200 pesos that he had already received.<sup>149</sup> Although the court did increase the size of the plaintiff’s award, the result was a far cry from the 576,000 pesos that could have been awarded under a literal interpretation of Article 245.

The dicta in the opinion contained more bad news for labor. The court insinuated that in future determinations on the constitutionality of the base salary in a labor contract, the court would not consider the true salary of the employee, the number of months the employee was short of retirement, nor the number of years the employee had worked in the business.<sup>150</sup> Instead the court would only consider whether the base salary determined by the government met the requirements of Article 116

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143. Constit. Arg., art. 14 bis.

144. See “Marianetti v. Bodegas and Viñedos López S.A.” at 500.

145. See *id.* at 508.

146. *Id.* at 507.

147. *Id.*

148. Antonio Vazquez Vialard, *Razonabilidad de los topes fijados a los fines de determinar el monto de las indemnizaciones que prescribe el Derecho del Trabajo* [The Rationality of Fixed Limits for the Determination of the Amount of Indemnification Prescribed by the Labor Law], [1996-E] La Ley 498.

149. See “Marianetti v. Bodegas and Viñedos López S.A.” at 509.

150. See *id.*

of the labor law: the salary must assure “proper subsistence, dignified living, education, clothing, humanitarian assistance . . .”<sup>151</sup> This dicta seems to imply that an amount close to the regulatory minimum wage will be supplanted for a contract’s stipulated base salary if the stipulated base salary is less than the minimum wage.

This case illustrates the power of unionization: a strong union can contract for a base salary three times the actual monthly salary of an employee, and since that is the legislatively prescribed upper limit, such a contract term would likely survive judicial scrutiny. However, a non-union employee, who is likely to have less bargaining power than his employer, may settle for a low base salary in his contract. As *Marianetti* indicates, a National Labor Court will not find the low base salary unconstitutional, and will likely adjust the amount only slightly above the minimum wage.

b. Article 247 Indemnification (Discharge Due to Loss of Business)

Article 247 of the original labor law provides a second type of indemnification: one-half the amount calculated under Article 245.<sup>152</sup> Article 247 applies where the employer or employee dies; however, indemnification upon the death of the employee does not extinguish any claim that the heirs may have under workers compensation, collective bargaining agreements, insurance or other contractual provisions.<sup>153</sup>

Remarkably, an Article 247 indemnification is also due upon the natural expiration of a labor contract with a fixed expiration date.<sup>154</sup> This is true even if the indemnification is not provided for in the contract. Prior to entering into such a contract, management must consider this cost as part of the total labor costs for the enterprise.

In the case of bankruptcy, the employer must pay an Article 247 indemnification if fault for the bankruptcy is not imputable to the employer.<sup>155</sup> If fault for the bankruptcy is imputed to the employer, the larger Article 245 indemnification is due.<sup>156</sup> The determination of imputability will be made by the court during bankruptcy proceedings.<sup>157</sup>

Under the Labor Reform Act, any failure to pay the indemnification

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151. *Id.* at 507.

152. Law No. 20.744, art. 247, text ordered by executive decree 390/76, at 1200.

153. Law No. 20.744, art. 248, text ordered by executive decree 390/76, at 1200.

154. Law No. 20.744, art. 250, text ordered by executive decree 390/76, at 1200.

155. See Law No. 24.522, art. 294, July 20, 1995, [LV-D] A.D.L.A. 4381, 4423. Law No. 24.522 is a bankruptcy law that modifies the labor law of 20.744.

156. See *id.*

157. See *id.*

will create the presumption of malice or recklessness.<sup>158</sup> The presumption automatically leads to the imposition of interest at two and a half times the official rate that will be levied upon the indemnification amount.<sup>159</sup>

The part of Article 247 that has spawned much litigation is the provision for special indemnification where there is a reduction in the demand for labor that is not attributable to the employer. Here, the temptation for the employer is to masquerade an unjust discharge as one driven by changes in the market economy. In addition, an employer may cite *force majeure* in order to obtain the reduced indemnification; however, the employer must observe a seventy-five day waiting period after the *force majeure* event before discharging an employee.<sup>160</sup>

For example, in *Sosa, et al. v. Frigorífico Minguillón S.A.*, a company discharged several employees and paid only Article 245 indemnification, claiming that an energy crisis caused a downturn in the firm's business.<sup>161</sup> The employer prevailed at trial, and on appeal the plaintiffs argued that their employer did not offer any proof in the trial court that there was a genuine energy crisis, or if there was, that it had affected the company.<sup>162</sup> The National Labor Court agreed and held that it is not sufficient to allege that the existence of a general crisis in the economy precipitated the lack of work; rather, the defendant employer must show that the enterprise was in a "critical state" that was not caused by its own conduct and that the employer had taken measures to mitigate the damage to the business.<sup>163</sup>

Carlos Pose, an author of labor law doctrine, has outlined the events that enable an employer to make an Article 247 dismissal for *force majeure*.<sup>164</sup> For example, Pose believes that the destruction of the real property of an enterprise by fire can be grounds for a *force majeure* dismissal in certain situations.<sup>165</sup> He argues that an employer could only discharge employees after a fire if the destruction made it impossible to carry on the business, and even then, the employer could only discharge the employees whose positions of employment were eliminated by the

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158. See Law No. 25.013, art. 9, at 3291.

159. See Law No. 20.744, art. 275, text ordered by executive decree 390/76, at 1203.

160. See Law No. 20.744, art. 221, text ordered by executive decree 390/76, at 1197.

161. "Sosa, Antonio, et al. v. Frigorífico Minguillón S.A." at 1197.

162. See *id.*

163. *Id.*

164. Carlos Pose, *El incendio del establecimiento fabril como factor legitimante de la aplicación de las previsiones del artículo 247 de la ley de contrato de trabajo* [*Destruction by Fire of the Factory Plant as a Legitimate Reason for the Application of article 247 of the Employment Contract Law*] [1994-B] *Derecho del Trabajo* [Labor Law] 2319, 2320.

165. See *id.*

fire.<sup>166</sup> Pose would not permit an employer to take advantage of a relatively small amount of destruction by making a wholesale discharge of most or all of his employees in order to take advantage of the fifty percent indemnification.<sup>167</sup>

In the case of *Gómez et al. v. Hisisa Argentina S.A.*, the court followed Pose's interpretation of the *force majeure* doctrine and determined that the enterprise had been totally destroyed, and that the employer could use the Article 247 indemnification.<sup>168</sup> However, the opinion did warn that it would not permit employers to abuse *force majeure* when the destruction was not total.<sup>169</sup>

Thus, the National Labor Courts have been careful not to allow businesses to abuse the Article 245 indemnification. According to the case law and doctrine, a business owner will only be able to use the lessened indemnification where the *force majeure* event is truly catastrophic or where the downturn in the economy that is cited by the defense as the reason for the discharge is truly the reason for the discharge. While a strict interpretation of *force majeure* and a requirement that a decrease in business activity is unattributable to the employer may appear to be fairer to a discharged employee, these interpretations are precisely what cause Argentine and foreign investors to hesitate before acquiring or increasing the size of their labor force. This hesitancy adversely affects unemployment.

### c. Reactions to Changes in the Indemnification Scheme

Lowering the indemnification, either by judicial or legislative means, is the focus of the debate over labor reform. Many believe that the Labor Reform Act did not go far enough to alleviate the disastrous rate of unemployment. Silvio Macchiavello, the first vice-president of the Argentine Chamber of Commerce, stated that "this law will not contribute to a decrease in the unemployment rate and will increase labor costs if it is not accompanied by tax reform."<sup>170</sup> Many economists have agreed that such measures will retard job growth and will foster a greater turnover rate of workers.<sup>171</sup> Additionally, Fernando de la Rúa, the newly elected President of Argentina, agrees stating "it is a fiction to say

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166. *See id.*

167. *See id.*

168. "Gómez, Juan C. et al. v. Hisisa Argentina S.A.," CNTrab. [National Labor Court of Appeals] [1994-B] *Derecho del Trabajo* [Labor Law] 2319, 2321.

169. *See id.*

170. *Disidencias entre los empresarios*, *supra* note 32.

171. *See* Ojeda, *supra* note 9.



that this law will resolve the unemployment problem.”<sup>172</sup> Even the Minister of Labor, Antonio Erman Gonzalez, admitted that “one cannot generate employment by law.”<sup>173</sup>

Mariano Grondona, columnist for *La Nación*, concurs. He points out that while the Argentine economy has grown at a fantastic rate - six percent annually from 1991 to 1998, the largest increase since the 1920's - unemployment remained between eighteen and thirteen percent, the highest in Argentine history. In Grondona's words, “the economy grew . . . [but] the employers did not employ.”<sup>174</sup>

In Grondona's opinion, the Argentine economy has inevitably become more capitalistic, yet has retained a European-style socialistic labor regime.<sup>175</sup> He believes that this is an “incoherent” state of existence that must be reconciled.<sup>176</sup> Noberto Sosa, a leader of the Argentine business Proeco, agrees stating that “a capitalist market and an inflexible [labor] regime produce high rates of unemployment, a high percentage of black market employment and a poor use of resources.”<sup>177</sup>

On the other hand, Antonio Erman Gonzales, Minister of Labor, praised the reform precisely because he believes it will open the labor market to the nation's youth through apprenticeship and internship contracts.<sup>178</sup>

To make matters more complicated, some believe that other market forces are the primary causes for high unemployment. In 1991, Argentina enacted the so-called “Convertibility Law,” which fixes the value of one peso to one dollar.<sup>179</sup> Eduardo Conesa, an economist, believes that this artificial increase in the value of the peso caused a corresponding artificial increase in the value of Argentine labor.<sup>180</sup> For example, if an Argentine laborer earned three hundred and fifty pesos per month prior to convertibility, that worker suddenly earned more than seven hundred pesos after the passage of the plan.<sup>181</sup> Conesa hypothesizes that the growth of labor costs in dollars caused Argentine businesses to reduce

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172. *El coro de la oposición [The Chorus of Opposition]*, CLARÍN (Buenos Aires), September 4, 1998, <<http://www.clarin.com.ar>>.

173. *Menem está feliz por la reforma*, *supra* note 38.

174. Grondona, *supra* note 19.

175. *See id.*

176. *Id.*

177. Gustavo Sencio, *Y el 1 a 1 Fue un Triunfo [And the 1 to 1 Was a Triumph]*, NEGOCIOS (Buenos Aires), June 1998, <<http://www.atlandia.com.ar>>.

178. *See* Ojeda, *supra* note 9.

179. *See* Ocampo, *supra* note 24.

180. *See* Eduardo Conesa, *La principal causa de desempleo en nuestro país radica en el tipo de cambio atrasado [The Principle Cause of Unemployment in Our Country Is Rooted in the Slowed Exchange Rate]*, EL CRONISTA (Buenos Aires), September 7, 1998, <<http://www.cronista.com.ar>>.

181. *See id.*

costs by lowering salaries and hiring fewer people.<sup>182</sup> It is his proposition that “if the cause is maintained, that is the convertibility, then the effect will be maintained, which is unemployment.”<sup>183</sup>

The leader of one of the largest labor unions opposes the measures to cut the indemnification. Silvio Macchiavello, of the Argentine Commerce Union (“CAC”), believes that such reforms should not be made unless accompanied by tax reform.<sup>184</sup> Although he did not elaborate, the probable reason for his union’s opposition is that any stagnation in job growth would also impede the growth of Argentina’s unions, thereby affecting their negotiating power.

A recently proposed revision to the Labor Reform Act would create a fund for indemnification. Businesses would pay a tax of 2.5 percent of their monthly payroll; the revenues from this tax would be deposited into a national fund providing indemnification to discharged employees when appropriate.<sup>185</sup> One critic of this new form of risk-spreading, Professor Grandoli, a former National Labor Court judge, has argued that: (1) The fund unjustly requires all employers to contribute to indemnification when it is only a few who have discharged employees without just cause; (2) The availability of such funds to satisfy the liabilities of employers will not provide an incentive for employers to refrain from discharging without cause; and (3), The fund may be unconstitutional.<sup>186</sup> Professor Grandoli believes the fund may be unconstitutional because a contribution of 2.5 percent will not provide a sufficient disincentive for employers to refrain from discharging employees without just cause, and the workers’ constitutional right to work will suffer.<sup>187</sup> The facts of *Marianetti* do not indicate whether a court would agree with Professor Grandoli.

One point that Professor Grandoli may have overlooked is that the fund will provide indemnification not only for employees who are discharged without just cause, but also for those who are discharged due to *force majeure* or reduced business through no fault of the employer. Some may consider the fund to be an appropriate way of spreading the risk of fluctuations in the economy to all businesses. Perhaps the fund should only be used for an Article 247 indemnification, leaving the liability for unjust cause indemnification to the culpable employer.

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182. *See id.*

183. *Id.*

184. *See Disidencias entre de los empresarios, supra* note 32.

185. *See Grandoli, supra* note 75.

186. *See id.*

187. *See id.*

B. *The Empowerment of Large Labor Unions Under the Labor Reform Act*

One of the most contentious aspects of the Labor Reform Act is that it greatly aggrandized the power of organized labor in Argentina. Article 14 (a) of the Argentine Constitution guarantees that labor unions shall have the following rights: to execute collective bargaining agreements, to resort to conciliation and arbitration, and to strike.<sup>188</sup> In addition, union representatives enjoy the guarantees necessary for the accomplishment of negotiations and stabilization of employment.<sup>189</sup> The Labor Reform Act gave teeth to these organized labor rights.

First, the Act provides for the creation of a Mediation and Arbitration Service, to be administered by the Ministry of Labor and Social Security.<sup>190</sup> The law requires that the Ministry consult the largest worker unions, specifically requiring consultation with the CGT,<sup>191</sup> the General Workers Confederation, which is the largest union in the country. Either party in a labor dispute may request the assistance of the Mediation and Arbitration Service.

Article 14 of the Act empowers the appropriate union with the largest membership to represent the workers in collective bargaining negotiations.<sup>192</sup> For example, if there is a strike by truck drivers, the largest truck driver's union will represent the strikers. Any union that has more than five hundred members engaged in similar occupations must include in its delegation a member nominated by the union and elected by its members.<sup>193</sup>

The reform specifically empowers the larger unions to negotiate the length of workdays, work weeks and vacations.<sup>194</sup> The Act also provides a hierarchy for multiple agreements over the same issue. If an agreement that is small in scope is followed by an agreement that is larger in scope and covers the same issue, then the former will prevail, so long as the same parties are involved.<sup>195</sup> After the first agreement expires, it will remain in force for one year unless the parties reach an understanding to have the agreement with the larger scope take effect.<sup>196</sup>

The Labor Reform Act also created the Commission for the Continuation of the Employment Contract Regime, which is charged with the

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188. CONST. ARG., art. 14 bis.

189. *See id.*

190. *See* Law No. 25.013, art. 13, at 3892.

191. *See id.*

192. Law No. 25.013, art. 14, at 3892.

193. *See id.*

194. *See* Law No. 25.013, art. 15, at 3892.

195. *See id.*

196. *See id.*

evaluation of collective bargaining agreements and with proposing modifications to such agreements in order to promote new job growth.<sup>197</sup> The Commission is comprised of six members: two representatives from government, two representatives from the CGT, and two representatives from the largest unions other than the CGT.<sup>198</sup>

Some Argentine business leaders see this empowerment of labor unions as a positive development. Francisco Macri, a leading Buenos Aires businessman, told *La Nación* that the reinforcement of the unions' bargaining rights will "promote the dialogue between business leaders and unions."<sup>199</sup> In his experience, this would be considered a positive development by foreign investors.<sup>200</sup>

Others, such as Mariano Grondona, have taken a more skeptical view. Grondona believes that there are two types of workers in Argentina: those who are protected by the CGT, and those who are not.<sup>201</sup> Grondona hints that those who are covered by the umbrella of the CGT will disproportionately benefit from the increased union power under the Labor Reform Act.<sup>202</sup> He asserts that the combined effect of increasing the power of certain unions and the annulment of Promotion Contracts will force workers back "into the streets."<sup>203</sup>

Perhaps the comments of Daniel Funes de Rioja, the legal advisor to the Argentine Industrial Union, best explain the unions' contradictory opinions on the Labor Reform Act. Funes believes that the limitation of Promotion Contracts to internships and apprenticeships will impede the access of women, the handicapped and older men to the labor market.<sup>204</sup> However, he does not doubt that the reform will increase the power of the unions and will preserve many of jobs and rights that union workers now have.<sup>205</sup>

In short, different unions fare differently under the Labor Reform Act. Clearly, the CGT walks away from the reform with more solidified bargaining power than it had in the past. This means that CGT workers will be able to bargain for more favorable contract terms, such as a higher base salary for the indemnification computation. As noted by the business persons who spoke with *La Nación*, some business leaders see the enhanced regulation of union power as a positive development

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197. Law No. 25.013, art. 18, at 3892.

198. *See id.*

199. *Disidencias entre de los empresarios, supra* note 32.

200. *See id.*

201. *See* Grondona, *supra* note 19.

202. *See id.*

203. *Id.*

204. *See* Ojeda, *supra* note 9.

205. *See id.*

because it will reduce the number of unions with which management must negotiate and it will provide a framework for those negotiations.

However, none of these developments provide any assistance for non-union workers or workers belonging to smaller unions. In fact, the enhanced power of the CGT and other large unions may be viewed as a serious setback for such workers. With its powerful bargaining position, the CGT could easily secure most of an enterprise's budget designated for worker compensation for its own workers, and leave little for non-union workers. Even worse for the non-unionist, the CGT could insist that an enterprise completely refrain from hiring non-union workers. The enhanced power of only the largest unions will make it more difficult for a non-unionist to obtain and secure employment. In addition, with the elimination of most Promotion Contracts, the only hope for certain classes of workers, such as women, older men and disabled persons, is that they become members of one of the large unions.

### III. THE POSSIBLE EFFECTS OF LABOR REFORM ON FOREIGN INVESTMENT

The Labor Reform Act affects not only the internal economic balance of power in Argentina, but it also has repercussions on how foreign investors view business opportunities in Argentina. From 1980 to 1992, net foreign investment in Argentina grew from 739 million dollars per year to 2.4 billion dollars per year.<sup>206</sup> Much of that increase is attributable to the State Reform Law, which encouraged the privatization of state enterprises with foreign capital, and the Economic Emergency Law, which mandated equal treatment for domestic and foreign capital expenditures.<sup>207</sup> Many observers have asked how this growth in direct foreign investment will be affected by the Labor Reform Act. Of course, even the most adventurous economist would hesitate to make a specific estimate, but there are many organizations and persons who have been predicting trends that may soon develop.

By passing the Labor Reform Act, Argentina has only fulfilled one of its promises to the International Monetary Fund ("IMF").<sup>208</sup> The IMF's objectives in Argentina are to encourage the restoration of a sound balance of payments, as well as creating price stability and increasing economic growth.<sup>209</sup> Specifically, the IMF requested that

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206. See FOREIGN CAPITAL IN LATIN AMERICA, *supra* note 24, at 10.

207. See *id.* at 9.

208. See Andrea Centeno, *El gobierno festeja con euforia la flexibilización [The Government Euphorically Celebrates Flexibilization]*, LA NACIÓN (Buenos Aires), September 4, 1998, <<http://www.lanacion.com.ar>>.

209. See LUIS MANZETTI, THE INTERNATIONAL MONETARY FUND AND ECONOMIC STABILIZATION - THE ARGENTINE CASE, 17 (1991).

Argentina increase the length of the Trial Period and extend the terms of existing collective bargaining agreements where the parties are unable to renew the agreements.<sup>210</sup> The IMF indicated that it would approve the transfer of funds for the upcoming fiscal quarter since the most important macroeconomic objectives had been met.<sup>211</sup> Teresa Ter Minassian of the IMF warned, however, that the Labor Reform Act was not as extensive as the IMF had hoped, and added that the organization would be watching closely how the reform affects, or fails to affect, the labor market in Argentina.<sup>212</sup> Considering the recent difficulties faced by nearly all of Latin America's economies, it may be difficult to assess the merits of labor reform since it will make its "debut in a market in crisis."<sup>213</sup>

It is important to note that the debut of labor reform will not occur in a vacuum. The Argentine Investment Foundation points out that any labor reform in Argentina will also debut in a market undergoing regionalization.<sup>214</sup> Mercosur is a South American free trade organization made up of Argentina, Brazil, Paraguay and Uruguay. Since Argentine labor costs are considered to be about thirty percent greater than those of Brazil, the free trade market initiated by Mercosur may severely limit any possible decreases in unemployment that might have been delivered by the Labor Reform Act.<sup>215</sup>

On the other hand, Mercosur may provide a unique comparative advantage for some Argentine laborers. Since Argentina has a reputation for having some of the most highly educated and skilled workers in Latin America, more South and North American businesses may locate in Argentina if their businesses require more highly skilled labor.<sup>216</sup>

In an interview with *Negocios*, an Argentine business periodical, Manuel Sacerdote, the Argentine president of BankBoston, revealed his displeasure with the labor reform. He termed the reform a "retrogression" since he believes that the reform is neither beneficial for those who are currently working nor for those who are presently unemployed.<sup>217</sup> In

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210. See *La reforma laboral debuta en un mercado en crisis*, supra note 47.

211. See Jorge Rosales, *El FMI aprobará las metas que el Gobierno planteó para el semestre* [The IMF Will Approve the Goals Set by the Government for the Semester], LA NACIÓN (Buenos Aires), September 5, 1998, <<http://www.lanacion.com.ar>>.

212. See *id.*

213. *La reforma laboral debuta en un mercado en crisis*, supra note 47.

214. See FUNDACIÓN INVERTIR ARGENTINA [ARGENTINE INVESTMENT FOUNDATION], *The Labor Economy* (visited Aug. 20, 1999) <<http://www.invertir.com>>. The Argentine Investment Foundation is a private organization formed by CEOs of leading Argentine enterprises and top government officials.

215. See *id.*

216. See *id.*

217. See *Sacerdote Habla de Todo* (Sacerdote Speaking on Everything), NEGOCIOS (Buenos Aires), May, 1998, <<http://www.attantida.com.ar>>.

particular, Sacerdote believes that the elimination of the majority of Promotion Contracts will take away many of the advantages that the previous labor regime offered to businesses.<sup>218</sup> In his opinion, elimination of those contracts means that employers will decline to employ a substantial number of previously employable persons, which will in turn raise the cost of doing business in Argentina.<sup>219</sup> The loss of Promotion Contracts means that the rules that apply for young male workers will also apply for female, older male and disabled employees. This will undoubtedly raise the estimated labor cost for any business venture, thus discouraging foreign investment.

Privatization is another curious aspect of the foreign investment and labor problem. With the liberalization of the economy, many privatizations have occurred in Argentina in recent years, and many of the buyers have been foreign investors. In 1997 alone, 752 million dollars of the direct foreign investment in Argentina entered the country through the purchase of state-owned companies.<sup>220</sup> There will be many more privatizations in the future, including Banco de la Nación, the largest bank in Argentina.<sup>221</sup> Massive layoffs have followed many of these privatizations since many state-owned entities had far more personnel than necessary. For example, the privatization of a state railroad system resulted in a reduction of the workforce from 130,000 to 20,000.<sup>222</sup>

A bloated bureaucracy was probably not the only reason for the layoffs that followed privatizations; undoubtedly, the future liability of having so many employees that could potentially recoup indemnification caused the purchasers of the privatized entities to lay off more personnel earlier, rather than later. When these privatizations took place, the labor contracts which the purchasers inherited were governed by the original employment contract regime. Under that regime, each employee could be awarded an indemnity of one month salary for each year of service. Therefore, the purchasers had an incentive to lay off as many of the newly acquired employees as they possibly could, and to do so as soon as possible after the transfer of title. If there was a shortfall in the left over labor, the investor could simply require his retained employees to work overtime. This may be preferable to an investor since the hiring of

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218. *See id.*

219. *See id.*

220. *See id.*

221. *See* MINISTRY OF THE ECONOMY, WORKS AND PUBLIC SERVICES, *El Fondo Monetaria concluye la consulta del artículo IV con Argentina* [*The Monetary Fund Concludes art. IV Consultations with Argentina*], ARGENTINE ECONOMIC UPDATE, Bulletin No. 5, May 1998 <<http://www.mecon.ar>>.

222. *See The Labor Economy, supra* note 214.

each new employee will carry with it the potential for indemnification later.

As stated earlier, it will be difficult to assess the effectiveness of the Labor Reform Act since it will not debut in a vacuum. Instead, observers will have to carve out other economic effects, most notably the recent drop in the stock markets of nearly every Latin American country, in order to fairly assess the merits of the reform. However, it is probably safe to assume the flexibilization of the labor market will make Argentine privatizations more attractive to foreign investors.

#### IV. CONCLUSION

The Labor Reform Act of 1998 has made a variety of changes to the Labor Contract Law. Although the Trial Period was shortened to thirty days, a collective bargaining agreement may still permit up to six months. The shortened standard period favors workers and is unwelcomed by management. Of course, the ability to lengthen the Trial Period is still a useful tool that the larger unions may use at the bargaining table. In addition, the large unions will also have the ability to negotiate for an enlargement of the indemnification base salary to three month's salary. As seen in *Marianetti*, however, a non-union worker will probably be unable to get anything more than minimum wage for his base salary. The elimination of Promotion Contracts for women, older men and disabled persons puts those workers at a great disadvantage if they are not members of a large union.

For many, the status of Argentine labor law is "incoherent" because it is in the middle stages of an evolution from a European-socialist model to an American-free market model. The latest development in this "incoherent" state has produced clear winners and clear losers. The winners are the CGT and other large unions, and the losers are the non-union workers, particularly women, older men and disabled persons. The predicament of Argentine business owners and foreign investors is not so clear. While their causes may have been forwarded somewhat, their dreams of an unrestrained labor market remain unfulfilled.

PAUL KEENAN