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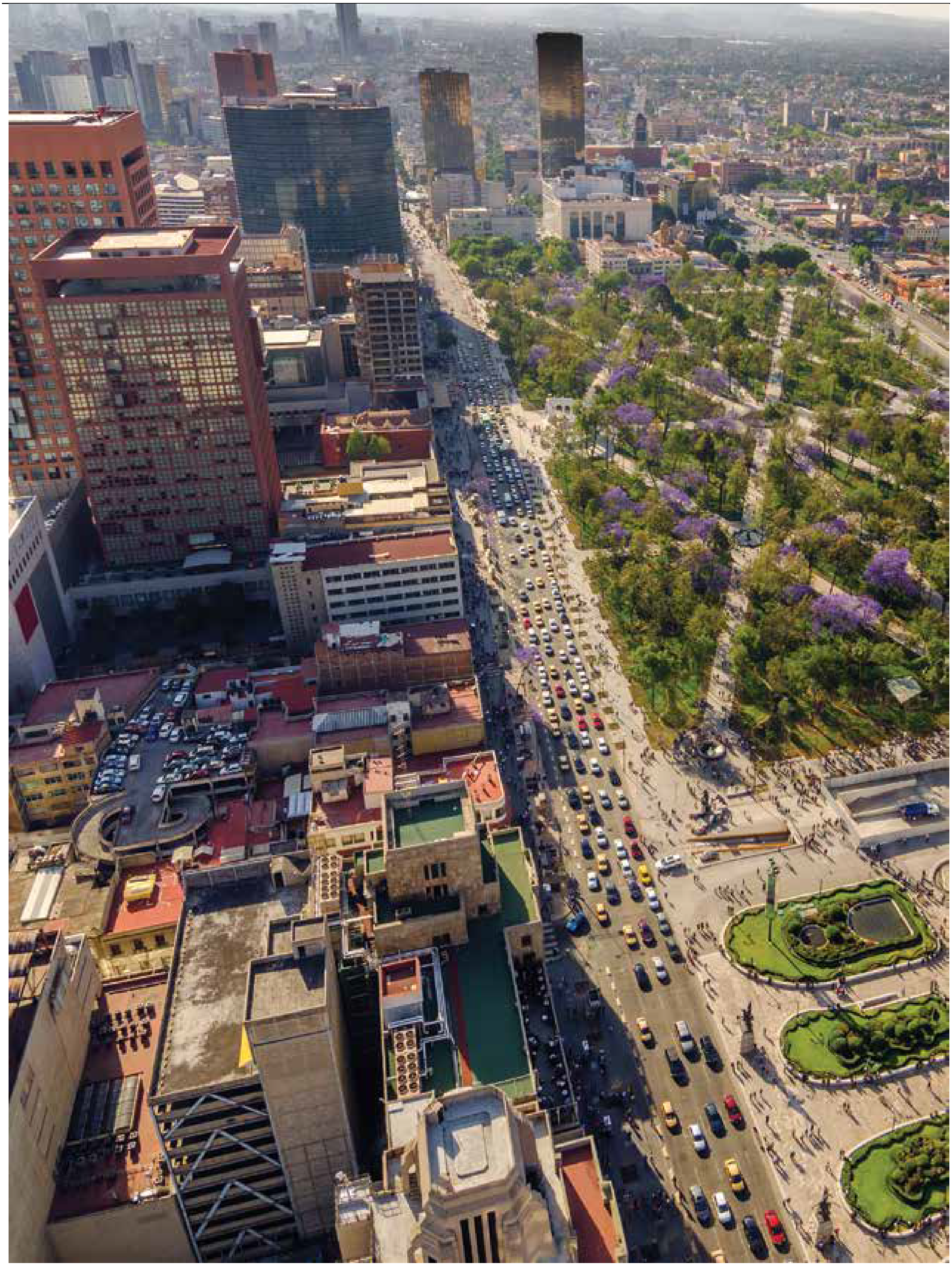
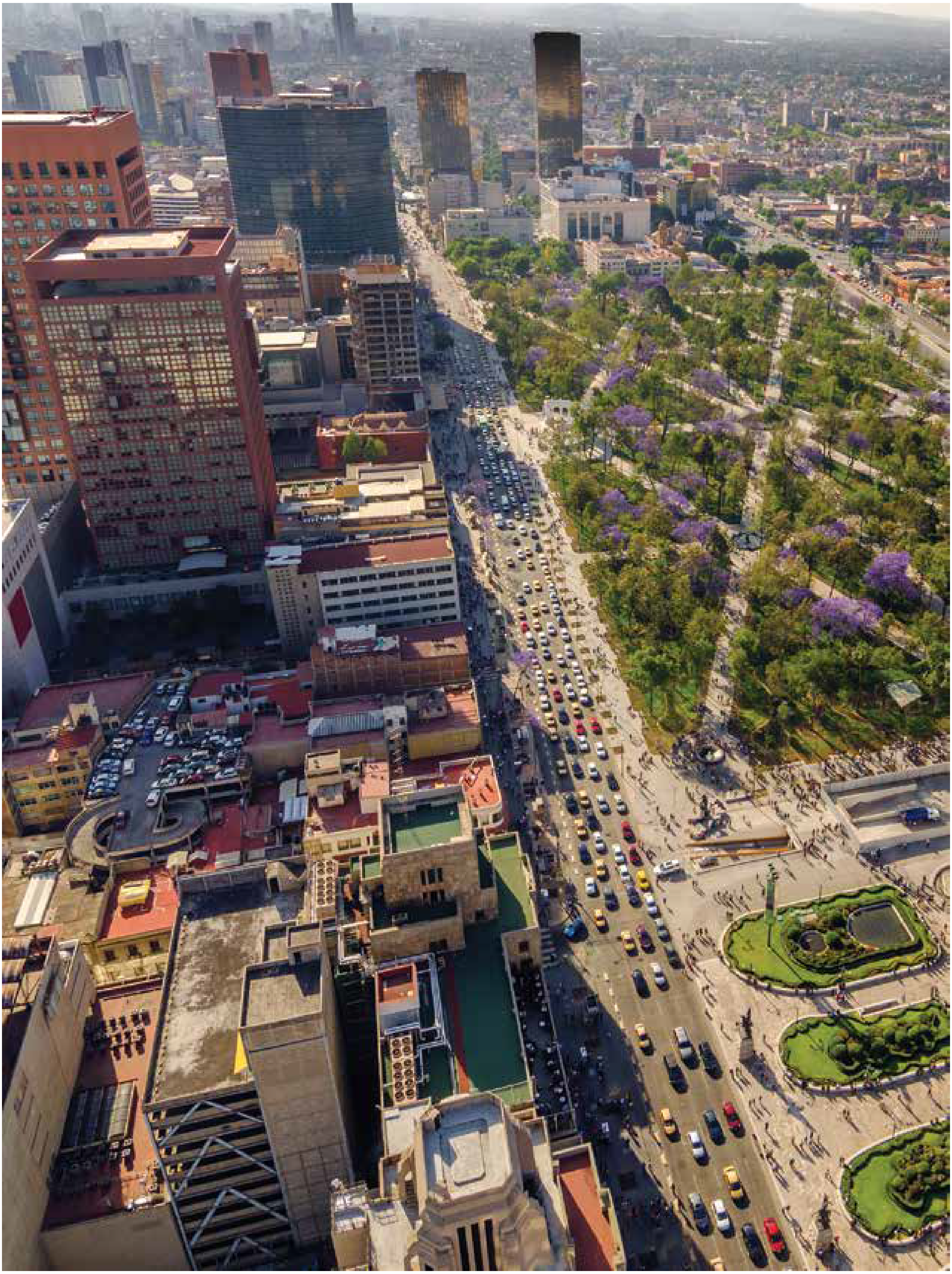
Important Considerations When Employing Foreign Nationals in Mexico

Employment and Labor





Globalization and macroeconomics have made immigration an expanding, ongoing phenomenon throughout Latin American countries. Mexico has become a host for foreign nationals who are assigned by their employers to work on Mexican soil, in part, due to the investment growth in past years.

Despite the increasing need to hire foreign nationals in Mexico, the Federal Labor Law (FLL), which regulates employment in Mexico, has not kept up with the times. The FLL continues to require that at least 90 percent of any employer's workforce be Mexican nationals (with the exception of general managers), thereby limiting the hiring of foreign workers only to 10 percent per employer.

Companies contemplating transfering employees to work as expatriates in Mexico should become familiar with various aspects of Mexico's legal system which may impact the employer's ability to employ non-Mexican nationals to work in Mexico or may create liabilities for the employer.

Expatriates protected under the law

At a constitutional level, Mexican nationals and foreigners are regarded as equal under the law. As such, all the statutory rights and benefits afforded to Mexican workers under the FLL and Mexico's Social Security Law (SSL) are also extended to non-Mexican nationals. Likewise, the FLL and SSL are quite protective of workers' rights and apply to all employment in Mexico, regardless of where the employment agreement is executed, any choice of law provision in the employment or secondment agreement, the nationalities of the employer or the employee, or the place where the salary is paid.

Risks of creating a joint employment relationship

When a non-Mexican parent company assigns an employee to work as an expatriate at a subsidiary in Mexico, the employer should be aware that, under the FLL, both companies may be deemed to be joint employers and that the expatriate may be considered an employee of the Mexican subsidiary. This is because, under the FLL, an employment relationship is presumed to exist whenever an individual performs a personal service in Mexico for a legal entity or an individual, in a subordinated relationship, in exchange for compensation regardless of whether an employment agreement releases the Mexican subsidiary of any employment-related liability.

If the employment status is challenged, the labor courts limit their analysis to whether the expatriate performed personal service in Mexico, under the authority or supervision of another person at the subsidiary, in exchange for compensation. If these elements exist, the labor courts will likely find that the non-Mexican parent company and the Mexican subsidiary entered a joint employment relationship and are, therefore, jointly liable for any employment-related obligation owed to the expatriate.

Strategies to avoid risks

Given the protections afforded under Mexico's employment laws, employers should carefully strategize any employee transfer to Mexico as an expatriate, to avoid unanticipated problems for the employer (or its parent company). The following are possible approaches to help minimize risk of liability:

1. **Termination of employment relationship with parent company**
   This strategy requires that the parent company terminate the employment relationship with

the expatriate before he or she starts working in Mexico. Such termination should comply with the laws of the parent-company's country and the laws applicable to that employment relationship. The employer should also fully document its compliance with such laws and procedures. The next step would be for the expatriate to enter into an employment agreement with the Mexican subsidiary. The employment agreement should identify the full amount of salary and benefits to be paid to the expatriate. As an incentive for the expatriate to become an employee of the Mexican subsidiary, the seniority that the expatriate acquired while working for the parent company should be preserved and rewarded as part of the compensation package.

2. **Mirror payroll**
   A second strategy is to implement what is known as a "mirror payroll" in which the parent company and the Mexican subsidiary enter into a secondment agreement, whereby the Mexican subsidiary agrees to hire the expatriate for a certain period of time, pay his or her salary, and continue to provide the expatriate all employment-related benefits at the same level that he or she was receiving when employed by the parent company. As the entity obligated under the contract to pay for the salary, the Mexican subsidiary is required to bear the cost of wages and benefits. However the funds may be deposited by the parent company directly into the expatriate's bank account. In such cases, the Mexican subsidiary will reimburse the parent company for the full amount paid out to the expatriate. The second stage for this strategy is for the Mexican subsidiary and the expatriate to enter into an employment agreement that would be compliant with and fully enforceable under Mexico's laws. As such, the Mexican subsidiary will be required to register the expatriate with the social security system as it would when employing any worker. It should be noted that, under this arrangement, the parent company and the expatriate suspend their employment relationship during the time the expatriate is seconded to the Mexican subsidiary.
3. **Split contract**
   The split contract strategy consists of entering into three different agreements and generally is used when both companies will make payments to the expatriate. These agreements will define the nature of the relationships between all of the parties involved: the parent company, the expatriate and the Mexican entity. The agreements needed are as follows:
   1. Disruption contract: This agreement is entered by and between the parent company and the Mexican subsidiary, through which the parent company allows the subsidiary to hire the expatriate, and the subsidiary assumes the obligation to pay a transfer fee to the parent company.
   2. Suspension agreement: This agreement is executed between the expatriate and the parent company to freeze – rather than terminate – the employment relationship.
   3. Employment agreement: The expatriate and the subsidiary enter into an employment agreement that is compliant with and fully enforceable under Mexico's laws. Such agreement should clearly establish the date that the employment relationship will commence with the subsidiary, as well as the total salary and fringe benefits. This strategy limits the benefits paid directly by the Mexican subsidiary and helps build the argument that the parent company is not liable as a joint employer under the FLL. It further divests the labor courts of any jurisdiction over the parent company should the expatriate attempt to sue the parent company under Mexico's laws for any claims arising from the work that he or she performed in Mexico.

Immigration strategy

Determining what labor strategy is most appropriate for the company is the very first step. The next step is to focus on the work permit visa required for every foreign worker prior to rendering services in

Mexico. The lack of a work visa may result in penalties for the expatriate, up to and including removal from the country, even if the expatriate's rights under Mexico's labor laws remain intact.

The timeframe for the work visa process varies among local immigration offices, but on average could take anywhere from four to eight weeks to obtain the authorization notice, which would allow the worker to enter Mexico under a work visa. All the work visas should be sponsored by a Mexican entity in their capacity as an employer.

Conclusion

A common question asked is: "What is the best strategy?" The answer is simple: It depends on the circumstances of each case. While for many organizations the mirror payroll and split contract alternatives may be the most practical, these strategies pose inherent risks for the entities involved, which are beyond the scope of this discussion. Making the final call on what will be the best strategy (and a sound business decision) for a company should be based on a careful analysis of all of the circumstances of the parent company, the Mexican subsidiary and the employee (including consequences for all three parties under the relevant tax laws).

ABOUT THE AUTHOR

Monica Schiaffino is a shareholder in Littler's Mexico City and Monterrey, Mexico offices. She is a skilled labor lawyer and experienced employment litigator, and has published extensively and spoken on a range of important labor and employment issues. Schiaffino has also been named one of Mexico's leading lawyers.

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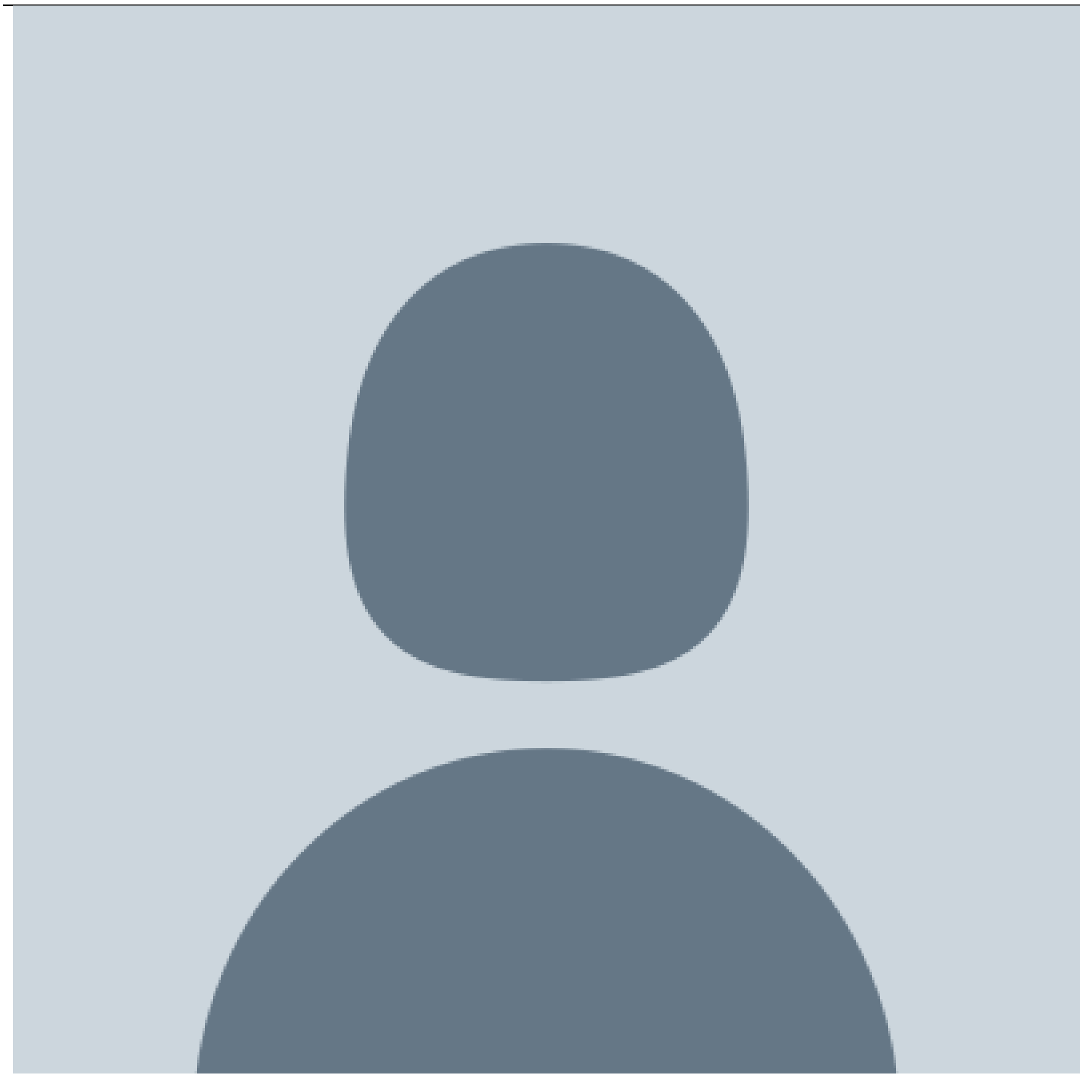

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