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Employment 2021

Brazil

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Law and Practice

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1. INTRODUCTION

1.1 Main Changes in the Past Year

Law No 14,112/2020, enacted 24 December 2020, amended the Bankruptcy Law (11,101/2005) with respect to employment by:

- expanding the concepts of non-configuration of labour succession when the acquiring company assumes the labour debts of the acquired company;
- determining the fulfilment of the dispositions established by Article 50 of the Civil Code, which deals with the piercing of the corporate veil, determining that it is necessary to prove the abuse of a legal personality, through misuse of purpose or patrimonial confusion; and
- allowing labour credits to be subject to the extrajudicial recovery procedure, which was previously prohibited.

Technical notes issued by the Labour Public Prosecutor's Office created a group to indicate guidelines for employers, companies or public and private entities nationwide to adopt the necessary health surveillance measures to prevent the expansion or intensification of the COVID-19 pandemic. Even though such technical notes are not considered law, the Public Prosecutor's Office is filing several class actions against employers aimed at obliging them to follow a substantial number of requirements related to workers' health and safety, as well as requesting the payment of fines and indemnification for damages. As the referred-to class actions were filed recently, decisions have not yet been rendered.

The Regional Labour Court of Appeals of São Paulo (the largest court in Brazil) confirmed the validity of a dismissal for cause of a cleaning assistant who did not want to be vaccinated against COVID-19. The professional worked in a hospital and refused the immunisation, argu-

ing that her private interest should prevail over the collective interest. The court unanimously disagreed, stating that without immunisation, she would put at risk the health of co-workers and patients at the hospital. It is relevant that in February 2021, the Public Prosecutor's Office issued a technical note that workers who refused to take the COVID-19 vaccine and did not present documented medical reasons for doing so could be dismissed for cause.

1.2 COVID-19 Crisis

In 2020, the Brazilian government enacted emergency labour measures to be applied by employers during the COVID-19 pandemic.

Initially, according to Provisional Measure No 936/2020, the Brazilian government allowed employers to propose a proportional reduction of hours and salaries (25%, 50% or 70%) for a period of up to 90 days or the suspension of the employment agreement for up to 60 days, which could be divided into two periods of 30 days each. No collective bargaining agreement with the labour union is required with respect to employees who earn either BRL3,135.00 or less per month or more than BRL12,202.12 per month and have a university degree. Except for the case of a 25% reduction, a collective bargaining agreement with the labour union is required with respect to employees who earn between BRL3,135.00 and BRL12,202.12 per month.

On 9 April 2020, the Brazilian government started paying an emergency assistance, also known as the "coronavoucher", in the amount of BRL600.00 (or BRL1,200.00 for women who are single parents) per month for a period of three months. Eligible beneficiaries were those who do not have formal employment, do not benefit from other social protection programmes, have a monthly individual income of not more than BRL522.20 or monthly family income of

not more than BRL3,135.00, declared income in 2018 of not more than BRL28,559.70, and exercise activities as an individual microbusiness (MEI), freelancer, or informal worker.

The term of the emergency measure established by Provisional Measure No 936/2020 was extended by Law No 14,020/20 and Measures No 10,422/2020, 10,470/2020 and 10,517/2020. The period of reduction of hours and salaries as well as the suspension of the employment agreement may be applied for up to 240 days during the pandemic period. The period of the measures previously applied by the employers shall be considered up to a limit of 240 days.

Additionally, by Interministerial Ordinance No 16,655/2020, the Brazilian government allowed employers to rehire former employees within 90 days of the termination of the employment agreement if the same terms and conditions of the previous employment agreement are maintained.

In 2021, the Brazilian government enacted Provisional Measures No 1,045/2021 and 1,046/2021, which, respectively, established rules for:

- the proportional reduction of working hours and wages, as well as the possibility of temporary suspension of the employment agreement; and
- labour measures that may be adopted by employers, such as teleworking, early individual vacations, collective vacations, taking advantage of and bringing forward holidays, banking of hours, suspension of administrative requirements in occupational safety and health, and deferral of payment of the Severance Fund (FGTS).

The referred-to measures are very similar to those enacted last year.

Both measures are effective for 120 days from the date of their publication in the Official Gazette (28 April 2021) and it is difficult to foresee if such measures will be converted into laws or be succeeded by new/similar provisional measures.

Law No 14,151/2021 determines that, without prejudice to their remuneration, pregnant employees must be prevented from face-to-face work activities during the pandemic period and may continue developing their activities remotely/in a home office regime.

2. TERMS OF EMPLOYMENT

2.1 Status of Employee

There is no distinction between blue-collar and white-collar workers in the legislation and it is correct to say that Labour Courts have a protective bias towards employees, regardless of their seniority.

However, with the changes implemented by the so-called Labour Reform (Law No 13,467/2017), employees with a college degree and monthly salary of at least BRL12,900.00 are considered as “hypersufficient” and, consequently, may negotiate directly with the employer broader terms and conditions and their employment agreement will prevail over the law and the applicable collective bargaining agreements with respect to certain matters (eg, working hours, banking of hours agreement, bonuses, profit-sharing plans, salary increase, and the possibility of implementing arbitration clauses for conflict resolution).

Employees who occupy fiduciary positions (eg, managers, directors and officers) also have a distinct treatment by the legislation. To be exempt from working time control and thus not entitled to overtime, such individuals must have effective managerial powers, including the preroga-

tive to hire/dismiss and take disciplinary actions against employees, and differentiated compensation (at least 40% higher than the compensation payable to those employees not considered as occupying a fiduciary position).

2.2 Contractual Relationship

In Brazil, substance/reality will always prevail over form. Therefore, a written agreement is not required to evidence employment, since it can result from verbal arrangements or implied circumstances.

The Brazilian Consolidation of Labour Laws (*Consolidação das Leis do Trabalho*, or CLT) and other regulations provide for employment conditions all at the minimum, leaving to written employment agreements specific matters such as any form of special compensation, fringe benefits, confidentiality, and non-compete covenants.

The admission of an employee requires only the filling out of certain blank spaces in the employee's Employment Booklet (*Carteira de Trabalho*, or CTPS, similar to a passport), to identify the employer, the date of admission, salary (generally per month), and function to be discharged by the employee. Similar annotations should be made on the company's internal books/registers.

If any of the provisions of the employment agreement is considered illegal, void, or unenforceable by any court of competent jurisdiction, such provision is usually deemed to have no force and effect. The illegality or unenforceability of such provision does not impair the enforceability of any other provision of the agreement.

Employment agreements are generally in force for an indefinite term. However, the legislation also foresees very specific situations when the parties can execute an individual employment contract for a defined/fixed term, namely:

- services whose nature or timeframe justifies setting forth a term;
- transitory business activities; and
- trial period labour agreements (probation).

Employers have the burden of proof of the circumstances that authorise the execution of the employment agreement for a definite/fixed term. Otherwise, the employment relationship will be governed under indefinite-term employment contract rules, which are generally more favourable to the employee.

The fixed-term employment contract may be renewed once. However, the total length of the relationship on a fixed-term basis may not exceed two years. If more than one renewal is made, the employer would most likely be construed as mischaracterising the form of hiring.

2.3 Working Hours

The Federal Constitution establishes that employees are limited to working eight hours per day and 44 hours per week, unless an agreement regarding compensation for worked hours is negotiated or overtime is paid with an increment of at least 50%. If employees perform their duties on their weekly paid resting day and/or holidays, they will be entitled to receive overtime with an increment of 100%, but higher percentages might be established by the relevant collective bargaining agreement.

The above-mentioned number of hours could be reduced depending on the activities developed by the employee or if their profession is regulated by a specific law (eg, lawyers, engineers, telemarketing/call centre workers) but it should be noted that overtime cannot be a regularly scheduled event since it should be considered as resulting from "extraordinary" duties or activities.

Night shift hours are reduced (every 52 minutes and 30 seconds of work performed after 10pm and before 5am is considered equal to a full 60 minutes of work) and shall be paid with a night shift premium. In accordance with Brazilian labour law, such premium should be of at least 20% of the employee's salary (base salary, overtime premium and other salary entitlements). However, collective bargaining agreements might establish higher percentages.

Every establishment with more than 20 employees is required to implement mechanical, manual or electronic working hours control. Only employees occupying fiduciary positions or external workers are exempt from registering their working hours, and, thus, are not entitled to overtime and night shift pay or reduced work shifts.

External employees (including teleworkers) are those who permanently perform their activities externally, in relation to which the employer is unable to effectively control their working hours. Therefore, the mere fact that employees have external activities is not sufficient to classify them as exempt, if the employer may put in place software and/or mechanisms and procedures that register their working hours (eg, timesheets, need to return to the office after external meetings, having determined clock-in or clock-out hours to follow external activities that result in their effective working hours being impossible to control).

With the changes introduced by the Labour Reform, employers are allowed to establish/negotiate a bank of hours by means of an individual written agreement entered into between the company and its employees. The overtime compensation for such type of bank of working hours shall occur within six months, otherwise the employer will have to pay the respective hours with the applicable additional percentage.

It is possible to establish that the compensation of hours shall occur within a period of up to 12 months, but in this case the bank of working hours must be negotiated with the labour union. If the overtime hours are not compensated within such negotiated period, the additional payment will also be due.

Part-Time Work

Article 58-A of the CLT establishes the terms, conditions and requirements related to part-time work. This is a special employment status, in which a certain number of hours can be distributed among the working days or during specific days previously established by the employer and employee.

International Labour Organization Convention No 175 qualifies as part-time employees those who weekly work fewer hours than full-time employees but do the same work at the same establishment. The salary in this case will be calculated proportionally and this proportion shall not be, in any event, inferior to the base salary of full-time work.

Such employment agreement (i) cannot exceed the limit of 30 working hours per week, and (ii) if the employer and employee set a limit of 26 working hours per week, overtime is allowed up to the limit of six hours per week.

After the changes implemented by the Labour Reform, the CLT guarantees the right to take vacation in the same proportion as regular/full-time employees, also permitting the conversion of a third of the vacation period into compensation.

2.4 Compensation

Employees are entitled to compensation, which may include fixed and variable portions. In any event, the employee must receive at least the minimum wage (either determined by law or by

the applicable collective bargaining agreement), which is annually adjusted. The current national minimum wage is BRL1,100.00, but certain professions (eg, lawyers, doctors, engineers) are regulated by specific laws that might establish distinct minimum pay.

The concept of salary under Brazilian labour law includes not only the fixed amount contracted (“base salary”), but also commissions, rewards, premiums, bonuses or fringe benefits – such as rental and car allowances, and leisure dues – as long as they are granted on a regular basis and are not indispensable for the employee to perform their activities (ie, a “working tool”). If such benefits are contractually provided, their salary nature will also be characterised, regardless of their periodicity.

These amounts should therefore also be taken into consideration when calculating the employee’s statutory labour rights, such as weekly day off, vacation, Christmas bonus, FGTS, and other payments.

Compensation may not be reduced by the employer, although the law permits a temporary reduction if a specific collective bargaining agreement is entered into with the respective labour union. As a general rule, any benefit or condition agreed to by the parties or unilaterally extended by the employer becomes a vested right and cannot be reduced, regardless of any previously agreed term or condition in this regard.

Employees who render the same services (despite their title) for the same employer in the same metropolitan area are entitled to the same salary and working conditions (which include similar variable compensation schemes). Employees may nevertheless end up receiving different compensation packages, in accord-

ance with overtime/night shift hours performed, or targets achieved.

In Brazil, employees are also entitled to an annual Christmas bonus (commonly referred to as a 13th salary), which is equivalent to the employee’s monthly compensation.

Brazilian employers may also provide variable compensation to their employees, in addition to their base salary. Such variable compensation can be based on individual or collective (eg, company) performance/targets/goals, and it generally takes the form of stock option plans, bonuses or commission payments.

When a company creates a variable compensation plan, it has some flexibility and discretion in determining to whom the plan shall be offered (eg, to all employees or only certain individuals), the rules for payment (eg, related to sales or other goals and/or targets) and the periodicity of the payments.

2.5 Other Terms of Employment

Brazilian employees are entitled to an annual 30-day paid vacation period, coupled with a bonus equal to a third of the employee’s monthly compensation.

The total vacation pay equals 133.33% of the employee’s monthly salary (including both the contractual amount and an average of other entitlements paid (eg, overtime, night shift premium)). Vacation is only due after 12 months of service (ie, the hiring anniversary), considered a vesting period.

The employer is responsible for choosing the best period in which an employee may take vacation according to the need of the business. In other words, the resting period is granted on a discretionary basis (there are some exceptions; for instance, if the employee is a student or if

members of a family work for the same company).

With the employee's consent, the vacation period may be split in up to three periods, if one of the periods corresponds to a minimum of 14 calendar days and the other two periods to a minimum of five calendar days each. Restrictions for employees younger than 18 and older than 50 are excluded. Vacation may not start in the two-day period prior to holidays or the employee's weekly day off.

Labour legislation allows employees to convert a third of the vacation period into compensation. The employer is obliged to accept such request by an employee and pay the corresponding amount; that is, an employee is entitled to take the remaining vacation period (20 days) and receive the amount related to the conversion of a third of the vacation period (ten days).

In accordance with the Federal Constitution and Article 473 of the CLT, employees are entitled to paid leaves, a summary of which is presented below (longer periods, exceptional leave rules and/or additional benefits can be created by the applicable collective bargaining agreement):

- marriage leave of three days;
- paternity leave of five days;
- female employees are entitled to 120 days of paid maternity leave; employers may extend such leave for another 60 days by entering a special programme created by Law No 11,770/2008;
- up to three days, in every 12 months of work, in the case of duly proven preventative cancer exams; and
- a 15-day paid sick leave (days in excess of this period will be supported by the Brazilian Social Security Institute, or INSS).

Brazilian legislation is silent as regards confidentiality and non-disparagement requirements. However, the law recognises an implied obligation not to disclose confidential information or trade secrets to which an employee is privy during the employment relationship. The breaching of this obligation is considered a reason for dismissal with cause, even if not explicit in the employment agreement, as well as a ground for civil (substantial damages) and/or criminal measures to be taken against the professional. This obligation remains in force after the termination of the employment relationship.

3. RESTRICTIVE COVENANTS

3.1 Non-competition Clauses

There is no legislation in Brazil regulating non-compete covenants in employment contracts or termination agreements. Although their enforceability is still under debate, precedents rendered by Labour Courts accepting such covenants require that:

- the non-compete period must be limited, and a reasonable maximum period of limitation is two years; should the period be reduced, the chances of enforcing the same increase;
- a reasonable territorial limitation for the enforcement of the clause must be established, not resulting in a total impediment to the employee working; and
- the indemnification must be paid to compensate the employee's reduction in employment – usually, the indemnification corresponds to 70% to 100% of the employee's last monthly salary.

It is recommended that non-compete clauses provide a pre-established penalty or amount for duly proven damages, to be paid by the employee in the event of non-compliance. Even

if such provisions are included in employment agreements, the courts may permit an employee to work for a competitor, simply enforcing the penalty stipulated in the non-compete clause (usually based on the constitutional freedom of work principle).

3.2 Non-solicitation Clauses – Enforceability/Standards

Non-soliciting clauses are usually not enforceable by Brazilian Labour Courts, unless the employer is able to prove that the employee used confidential information to solicit other employees or clients/customers (which would be a criminal offence as per the Brazilian Industrial Property Code). Even if the non-soliciting obligations are considered enforceable, it is unlikely that Brazilian Labour Courts will grant injunctions to suspend or prevent the rendering of services; they may instead impose material damages arising from the former employee's failure to comply with such obligations.

Such damages are difficult to estimate, as they will likely be based upon proven effective damage to the former employer, which is usually a difficult matter of evidence.

Consequently, an alternative is to reinforce the employee confidentiality obligations, instead of relying on the possible enforceability of post-employment non-soliciting obligations.

4. DATA PRIVACY LAW

4.1 General Overview

The Brazilian General Data Protection Law (Federal Law No 13,709/2018, or LGPD) came into force on 18 September 2020. Largely influenced by the European General Data Protection Regulation (GDPR) and in line with many of its provisions, the LGPD prescribes rules for the processing of personal data of individuals, defining

cases in which such data may legitimately be used by third parties and establishing mechanisms to protect data subjects against inappropriate and excessive uses.

The LGPD applies to the processing of personal data carried out by individuals and public or private legal entities, and aims to protect the fundamental rights of freedom and privacy and the free development of the personality of natural persons.

Unlike the GDPR, the LGPD does not provide express rules for the processing of personal data in employment relationships. However, the impact of the Law is unquestionable, due to the fact that the processing of employees' personal data is essential for employers' activities and development.

Therefore, companies should observe the LGPD provisions at all stages of the employment relationship: from recruitment to health and salary information processing activities, to post-contract data storing. The technical and organisational measures to be adopted by companies for their compliance with said law includes, above all, a new governance structure focused on privacy by design, which directly implies that employees are responsible for complying with those corporate rules, including their obligation to act according to the company's privacy policies, data retention policies and any security measures.

It is important to note that although the LGPD is a recent law, according to the authors' research, there are already more than 120 labour lawsuits filed by employees based on violation of data subjects' rights or principles prescribed by the LGPD.

The LGPD's principles are set out in Article 6 and must be observed for any data processing activity:

- purpose;
- adequacy;
- necessity;
- free access;
- data quality;
- transparency;
- security;
- prevention;
- non-discrimination; and
- accountability.

Moreover, any activity performed by companies must be justified according to the legal bases provided by Article 7 (personal data) or 11 (sensitive data).

Given the particularities of the labour environment, the legal bases most used to legitimise personal data processing for purposes related to employment relationships are:

- compliance with a legal or regulatory obligation imposed on the controller;
- performance of a contract or preliminary procedures relating to a contract to which the data subject is party, at the data subject's request;
- regular exercise of rights in the course of judicial, administrative or arbitration proceedings; and
- legitimate interests of the controller or third parties.

The requirements for processing sensitive data are more restrictive and the legal bases for the processing of this special category of data are set out in Article 11, including:

- consent from the data subject (that must be freely given, informed and unambiguous);

- compliance with a legal or regulatory obligation imposed on the controller; and
- regular exercise of rights, including in contracts and in the course of judicial, administrative or arbitration proceedings.

Despite the provisions regarding "consent" as a valid legal basis, employers should only rely on this condition in exceptional situations, since the hierarchical power that permeates employment relationships may jeopardise the freedom to consent.

If agents violate the LGPD causing economic or non-economic damages to others, they will be liable for redressing such damages. It is therefore crucial for companies to internally organise measures and establish obligations as well as responsibilities so that employees comply with the corporate privacy rules, thereby mitigating risks for the company.

5. FOREIGN WORKERS

5.1 Limitations on the Use of Foreign Workers

In Brazil, foreign workers who perform remunerated services in the local labour market must hold residence permits based on formal applications filed exclusively by Brazilian legal entities before Brazilian immigration authorities.

There are different types of residence permits depending on the reasons behind each expatriation process (eg, employment agreement, transference of technology, statutory officer), with different requisites under Federal Law No 13,445/2017 (the so-called New Migration Law), Decree No 9,199/2017 and normative resolutions of the National Immigration Council. The relevant visa/residence permit is issued by a Brazilian consulate abroad in favour of a foreign citizen, pursuant to authorisation by the Ministry of Justice.

Normative Resolution No 02/2017 deals with the residence permit for those who plan to work in Brazil with an employment agreement with a Brazilian legal entity. The foreign professional who holds this type of residence will only be allowed to work for the Brazilian legal entity that requested/sponsored their work permit. The term of such residence permit is up to two years. Prior to the residence permit's expiry, it is possible to apply for its extension before the Ministry of Justice, provided that all requirements set forth by the authorities are complied with.

For purposes of obtaining such residence permit (based on the employment relationship), the foreign professional must evidence their academic qualification and professional experience compatible with the activity that will be performed in Brazil, by means of diplomas, certificates, or statements of the institutions where they studied and carried out their professional activities. Such documents must be notarised and apostilled to be valid in Brazil.

The Brazilian legal entity, in its turn, must satisfy the following requirements:

- it is a regular legal entity duly established in Brazil;
- it complies with the provisions of the CLT with respect to the obligation of having at least two thirds of its employees Brazilian and maintaining in the same proportion the total of the salaries paid to foreigners and Brazilians;
- the activities to be performed by the foreign professional are compatible with the corporate purposes of the entity; and
- the need to hire foreign manpower instead of Brazilian professionals is duly justified.

5.2 Registration Requirements

Once the foreign professional enters the Brazilian territory bearing the respective residence

permit/visa, they must appear at the Federal Police within 30 days for the purpose of issuing their identification card.

The foreign professional shall also be enrolled with the Federal Revenue Service to obtain their Individual Taxpayer Registry (CPF), which allows the professional to open a bank account in Brazil and to fulfil their tax obligations in Brazil.

The issuance of an Employment Booklet (CTPS) is also mandatory. The main conditions of the employment agreement must be duly transcribed in such booklet.

6. COLLECTIVE RELATIONS

6.1 Status/Role of Unions

In Brazil, labour unions are regulated by the Federal Constitution and by the CLT. Article 8 of the Federal Constitution grants employees the freedom to organise unions, allowing such entities to commence legal proceedings on behalf of their members individually as well as on behalf of the entire category of workers. The main requirement in this case is that the union must be composed of members who have a solidarity of interests, who perform similar work or are in a similar position.

Labour unions are organised following the core business activities of a company. In principle, all workers of the same economic sector are represented by the same union. For example, all employees of cleaning services companies in the city of São Paulo are represented by the Union of the Workers in Cleaning Services of São Paulo. The same understanding applies to companies, since the association representing a given company shall be that of its core activity.

The following rights were granted by the Federal Constitution.

- Union exclusivity – only one labour union has representation rights within each city or state. It is not possible to organise more than one entity for the same category at the same level (city, state and country).
- Prohibition of governmental intervention – labour unions in Brazil are also protected, at least formally, from governmental interference.
- Agency in lawsuits – the labour union may act as an agent/proxy for all employees under its representation and is allowed to file either administrative measures or lawsuits (class, group, or collective actions) concerning collective rights or commonly held rights of those employees. Decisions obtained in such suits are mandatory and applicable to all represented employees. The labour union may also bring a judicial claim when rights guaranteed in the respective collective bargaining agreement or law are not being respected by employers.

Brazilian labour unions must comply with a hierarchical system composed of unions, federations (a group of unions) and confederations (a group of federations). The main objective of this hierarchical system is to provide employers and employees with a wider and more efficient protection of interests.

It should be noted that the Brazilian union system is based on obtaining a consensus between social agents and preventing conflicts. Labour unions are therefore focused on:

- negotiating collective bargaining agreements;
- providing assistance to their members, especially in legal, safety and health matters; and
- assisting the federal government in finding solutions to labour and employment issues.

6.2 Employee Representative Bodies

As mentioned above, employees are enrolled with a labour union by force of law. The union represents all workers of a professional category, regardless of whether they want or agree with such representation.

If a category does not have a union in a determined city, the workers of such category may create a union by following all legal requirements and procedures, starting with a public notice that an assembly of workers of that category will take place with the intention of creating a labour union (usually organised in the form of a civil partnership). The recognition of such entities is a prerogative of the federal government, which maintains a union register.

The administration of the union will be conducted by a board of directors, composed of not more than seven and no fewer than three members, and of a legal audit committee composed of three members. Such board of directors shall elect the president of the union (from amongst its members).

Elections for the renewal of the board of directors and legal audit committee must take place between 30 and 60 days before the end of the term of those in office.

An employee elected to occupy any administrative or representative position in the union cannot be barred from exercising their functions in the union and may not be transferred to a place or task that may make it difficult or impossible for them to comply with their obligations related to their position at the union.

According to Article 11 of the Federal Constitution, companies with more than 200 employees must elect an employee who will be responsible for direct negotiations with their employer. With the changes implemented by the Labour Reform,

the CLT provides that such committee members' term of office shall be of one year and they cannot be dismissed without cause, from their registration as candidates until the election or one year after the end of their term in office (in the event that they are elected). They may be dismissed under technical, disciplinary, economic or financial grounds, although such will likely be challenged and must be proved by the employer through clear and objective evidence. The number of members of such committee varies depending on the employer's headcount, as follows:

- 200 to 3,000 employees – three members;
- 3,000 to 5,000 employees – five members; and
- over 5,000 employees – seven members.

6.3 Collective Bargaining Agreements

In Brazil, collective bargaining is used to supplement the terms and conditions set out in an employment agreement entered into between employers and employees. The terms and conditions established by collective bargaining agreements (CBAs) or conventions are applicable to all members of both economic and professional categories that have signed them, regardless of whether they are associates of their relevant labour union.

According to legislation, doctrine and court precedents, collective bargaining is governed by the following principles:

- impossibility of refusal (no labour union may refuse the collective bargaining option whenever it is proposed);
- dispute settlement (this is the main goal to be achieved in the negotiation procedure);
- loyalty and good faith;
- information (the parties must provide the necessary information);

- legitimacy (labour unions that represent the involved categories are the only legitimate parties to the negotiation);
- autonomy/independence (the parties are free to define their rights and obligations); and
- duty of peace (the parties may not perform acts of violence or trigger strikes during the negotiation procedure).

Every year, the employees' and employers' labour unions shall enter into a collective negotiation and execute a CBA setting forth provisions applicable to their categories.

CBAs generally set forth the rate for the worker category's salary adjustment, as well as other labour rights that are more beneficial to the employees than provided in the CLT.

There are two types of agreements that can be signed by labour unions: collective agreement and collective convention.

A collective agreement is the normative agreement under which a labour union and a given employer establish labour conditions that must be applied to that company. Huge domestic/multinational companies might use it to establish different/particular rules, which are not applicable to the whole sector.

A collective convention is a normative agreement under which one or more labour unions and employers' associations/unions establish labour conditions that must be applied to the respective categories. The convention is valid for all companies in the industry or sector represented by the union. Collective conventions are typically viewed as setting the base standard for an industry.

The terms and benefits granted in the CBAs will only apply to employees during the term that the agreement is in force. Such instruments are typically valid for one or two years.

After the changes implemented by the Labour Reform, benefits and working conditions set forth by specific collective conventions will prevail over legislation and collective agreements whenever related to:

- working hours (limited by the constitutional dispositions in this regard);
- bank of hours offsetting agreement;
- meal and resting periods (limited to a minimum of a 30-minute break for a shift of six hours or more);
- career plans;
- positions of trust;
- working hours registry;
- health hazard level framing; and
- profit sharing plans, among others.

The CLT expressly prevents CBAs from suppressing or reducing benefits or work conditions such as:

- employee registration procedures;
- deposits to the FGTS;
- national minimum wage;
- Christmas bonus;
- night shift premiums;
- weekly paid day off;
- minimum overtime premium;
- minimum vacation days paid based on 133% of the employees' remuneration;
- minimum maternity and paternity leave; and
- minimum prior notice.

7. TERMINATION OF EMPLOYMENT

7.1 Grounds for Termination

An employment agreement may be terminated for cause or without cause by the employer or employee.

Termination without cause need not be justified by the employer. The employer shall give a written notice to the employee and pay the mandatory severances in accordance with Brazilian labour law. The employee may also terminate the employment contract and give a written notice to the employer.

Judicial labour claims in Brazil are very common and may be triggered by emotion. The employment termination should be conducted with courtesy, respect and gratitude for all services rendered. Normally, labour claims are filed by former employees when termination is made without respect, courtesy and gratitude.

To prevent litigation, market practice, mainly among multinationals, offers benefits in addition to mandatory severances. Termination packages usually involve outplacement and coaching services, extension of a medical plan from two to six months after termination (for employees and family), and a special gratuity payment that varies according to several factors (eg, length of employment, performance, dedication).

Termination for cause may result from the breach by the employee of obligations assumed during the employment relationship (established by law, internal policies and code of conduct, etc) or the bad behaviour of the employee.

The employer may terminate the employment contract with cause as soon as the employer confirms and obtains evidence that the employee has committed a misconduct.

In Brazil, labour claims commonly arise with the aim of reversing a dismissal with cause to a dismissal without cause.

The employee may also terminate the employment contract for cause when the employer does not comply with the legislation and the terms

and conditions of the employment agreement (eg, lack of payment of salaries, FGTS, benefits).

7.2 Notice Periods/Severance

In the case of termination without cause by the employer or employee, a written 30-day notice period is required.

In the case of termination without cause by the employer, the employer may request the employee to work during the notice period and, in this case, the employee may choose to work two fewer hours per day or one week less. The best practice in Brazil is the payment of indemnity in lieu of notice.

When the employee resigns, the employer may require the employee to work during the notice period or discount from the mandatory severance payment the amount corresponding to the unworked notice period. If the employee proves that they have received and accepted an offer for a new job, the employer is not allowed to require the employee to work during the notice period but is allowed by law to discount the corresponding one-month salary from the mandatory severance payments.

In the case of termination without cause by the employer, the employee is entitled to the payment of an indemnity for prior notice, corresponding to 30 days of salary plus three days of salary per year worked (limited to 90 days).

The employee will also be entitled to the payment of an accrued 13th salary, vacations and a third of a vacation bonus over the indemnity for prior notice.

The FGTS and its indemnification of 40% will be also calculated over the indemnity for prior notice.

Severance must be paid within ten days after termination under penalty of a fine corresponding to one salary, which reverts to the employee.

The termination of the employment contract must be registered in the Employment Booklet, and the correspondent form for the employee to withdraw the FGTS and obtain unemployment insurance must be delivered to the employee.

7.3 Dismissal For (Serious) Cause (Summary Dismissal)

The breach by the employee of obligations assumed during the employment relationship or bad behaviour may result in the termination with cause of the employment contract.

The employment contract may be terminated with cause for the following reasons:

- misconduct;
- misbehaviour;
- habitual business by the employee without the employer's authorisation and when it represents competition to the employer or is harmful to work;
- criminal condemnation with the final decision issued and if the execution of the penalty was not suspended;
- negligence in the performance of functions/duties;
- excessive use of alcohol in the workplace;
- disclosure of the employer's trade secret;
- act of indiscipline or insubordination;
- abandonment of work;
- an intentional act by the employee that injures the honour and fame of anyone or a physical offence under the same conditions, except in the case of the employee's self-defence or defence of a third party;
- an intentional act by the employee that injures the honour and fame of the employer or its superiors, except in the case of the employee's self-defence or defence of a third party;

- gambling;
- losing the professional qualification necessary to perform work due to the employee's fault;
- being involved in actions against national security, as duly evidenced through an administrative proceeding; and
- sexual harassment.

In the case of termination with cause, notice is not required. There are no mandatory severance payments. Only salary balance and expired vacation and its bonus of a third is due to the employee. The employee will not be entitled to the penalty of 40% of the FGTS or a 13th salary.

7.4 Termination Agreements

In Brazil there is no extrajudicial document (eg, an employment termination agreement) that guarantees a full release from an employment contract. A formal agreement may be helpful to prevent litigation, but, in principle, only a settlement in a Labour Court, ratified by a judge, guarantees a full release.

With the Labour Reform in 2017, there is the possibility of submitting an out-of-court settlement agreement to a Labour Court for judicial ratification, in order to provide legal certainty to this agreement. To file the request of ratification, the parties must be represented by different attorneys and a hearing is required for the formal approval of the terms of the agreement.

To date, there is no consensus regarding the acceptance of full release clauses, which are usually stipulated in these agreements. Normally, the Labour Court recognises the full release only for the object of the agreement. There is an expectation that the Superior Labour Court will standardise the understanding regarding the matter.

With the Labour Reform, the employer and employee may also terminate an employment

agreement by mutual consent. In this case, the employee will be entitled to withdraw 80% of the amount of the FGTS deposited and the employer will be allowed to reduce the payment of the indemnification over the penalty of the FGTS to 20% and decrease the notice period payment by half. However, the employee cannot be forced to execute the mutual agreement.

7.5 Protected Employees

Some employees may acquire the right to stability at work and may only be terminated with cause. The main types of stability at work result from the following events:

- pregnancy – stability until five months after the child's birth;
- election as a union director – one year's stability after the term of the respective mandate;
- election as a member of the internal accidents prevention commission (CIPA) – one year's stability after the term of the respective mandate;
- accident at work – one year's stability after the term of the benefit granted by the INSS; and
- disease acquired at work – one year's stability after the term of the benefit granted by the INSS.

With the Labour Reform, employers with more than 200 employees must allow employees to elect representatives, who will be entitled to stability at work for the term of their mandates (12 months) and for the next 12 months.

For these categories of employees, termination of the employment contract is only possible with cause. In this case, a proceeding may be filed by the employer before the Labour Court for recognition of the misconduct of the employee and valid dismissal with cause.

If the employee resigns, the termination of the employment contract will be possible through the assistance of the employees' union representative at the Ministry of Labour or at the Labour Court. The employee who has stability at work cannot waive the labour guarantee. The termination will be valid only if in compliance with the labour laws.

8. EMPLOYMENT DISPUTES

8.1 Wrongful Dismissal Claims

An individual who believes/understands that the termination of the employment contract resulted from a discriminatory act caused by the employer may file a labour claim before the Labour Court to challenge the dismissal and require reinstatement to work; reinstatement of medical insurance, if applicable; as well as the payment of indemnities (moral and material damages).

In such labour claim, the employee must prove that the employer acted with a specific illegal motivation. The Labour Court may, in some cases, issue an injunction before the final decision, determining that the employer reinstate the employee at work and reinstate the medical insurance under a fixed penalty – normally per day – if the employer does not comply with the terms and conditions imposed by the decision.

8.2 Anti-discrimination Issues

According to Brazilian legislation, denying or preventing someone's employment because of race is a crime. Additionally, the Brazilian Federal Constitution forbids racial discrimination and discrimination based on gender, race or age.

Sexual harassment is also a crime and may be considered a violation of the employment contract by the employer, thereby giving employees

legal cause to terminate the employment contract with cause.

The Labour Public Prosecutor's Office, the Ministry of Labour and the unions are authorised to file labour proceedings and judicial claims regarding discrimination, specifically claiming the payment of damages for pain and suffering sought by employees in cases of discrimination.

The Public Prosecutor's Office can start an investigation on an anonymous tip and ask for the employer to file documents and clarifications, as well as notify employees to provide statements.

As a result of the investigation, the Public Prosecutor's Office may enter into an agreement with the employer in which the employer undertakes to:

- provide educational meetings/seminars with instructions to its employees to avoid any kind of conduct that may represent violation of the law regarding anti-discrimination; and
- pay damages ("collective moral damages", which would be allocated to a public fund indicated by the Public Prosecutor's Office – eg, funds dedicated to hospitals, public schools).

The amount of "collective moral damages" may vary according to the number of employees and the equity capital of the employer.

If the employer does not accept the proposal by the Public Prosecutor's Office to settle, the Public Prosecutor's Office may file a class action before the Labour Court to compel the employer to provide the applicable measures in accordance with legislation to avoid/mitigate the practice of any kind of discrimination at the workplace, and to pay the collective moral damages (in the latter event, in higher amounts than those

proposed during the above-mentioned potential settlement).

The Ministry of Labour can also initiate an investigation. In this case, an infraction notice can be issued by the Ministry of Labour against the employer, which may result, after due process, in a penalty.

The individual may also file a labour lawsuit against the employer before the Labour Courts. The plaintiff has the burden of proof in any allegation of discrimination caused by the employer or its representative.

The unions may also file collective claims alleging the existence of misconduct by the employer regarding discriminatory acts against employees.

If such discriminatory conduct is proved, the employer will probably be required to:

- provide measures to avoid any kind of conduct that may represent violation of the law regarding anti-discrimination; and
- pay damages (“moral damages”).

The employer may also try to settle with the plaintiff and commit to adopting internal measures to avoid/mitigate any kind of discrimination against employees.

Employees may file labour claims until the second anniversary of the termination of their employment contracts (dismissal date), to claim labour rights related to the five-year period immediately preceding the filing date of the claim.

9. DISPUTE RESOLUTION

9.1 Judicial Procedures

There are Arbitration Chambers for cases in which employment contracts establish an arbi-

tration clause. The employees’ union may also file class actions against the employer before the Labour Court to request compliance with labour legislation in favour of a group of employees.

9.2 Alternative Dispute Resolution

Since the Labour Reform, employment contracts may establish an arbitration clause if requested by the employee or with the express agreement of the employee. Normally, the clause is established with C-level employees, considering that the law allows the arbitration clause when the employee is considered “hypersufficient”.

Prior to the Labour Reform, some employment terminations were submitted to arbitration, but the Superior Labour Court did not recognise the validity of settlements entered into between the employee and employer before the Arbitration Chamber.

9.3 Awarding Attorney's Fees

Since the Labour Reform, the plaintiff may also be obliged to pay attorney’s fees in favour of the other party if all the requests made by the plaintiff in the labour claim are denied or partially granted.

The attorney’s fees may vary from the minimum of 5% to the maximum of 15%. The amount will be calculated considering the result of the economic benefit or the updated amount of the labour claim.

If the plaintiff is a beneficiary of free justice and proves that they cannot afford such payment, the Labour Court may dismiss such payment or suspend the execution for a period of two years after the final decision, finally extinguishing the execution of the attorney’s fees.

Felsberg Advogados is a full-service law firm founded in 1970 and defined by its ability to combine experience, tradition and excellence with efficient, fast and focused service, offering innovative solutions in a constantly changing world. The Labour and Employment practice is well known in the market, with a solid track record regarding individual and collective disputes, strikes, dismissals and collective bargaining negotiations. The department offers a competitive edge to clients as it can navigate

comfortably through very complex Brazilian labour laws and regulations, with a practical approach to the demands of clients. The firm specialises in offering solutions that contribute to excellence in business performance and align workers with strategic business objectives, suggesting legal alternatives that afford greater flexibility in labour relations, underscoring negotiation and the adoption of measures that preserve a company's economic interest.

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