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NEWSLETTER

SONDERAUSGABE: ARBEITSRECHTSREFORM

Deutsch-Brasilianische Industrie- und Handelskammer
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Vorbemerkungen

Das Gesetz 13467 hat das Thema in drei Artikeln des brasilianischen Arbeitsgesetzes CLT behandelt. Der erste bezieht sich auf die Einführung des Punktes III des Artikels 62 des CLT, der die Mitarbeiter im Außendienst, in Vertrauenspositionen und, ab Inkrafttreten des neuen Gesetzes, die Telemitarbeiter von den Vorschriften des Kapitels über die Arbeitszeit ausnimmt. Der zweite bezieht sich auf die Einführung der Artikel 75-A bis E, die die Erbringung der Leistungen in Form der Telearbeit regeln. Der dritte bezieht sich auf die Einführung des Artikels 611-A, der in seinem Punkt VIII erlaubt, dass der Unternehmens- und Verbandstarifvertrag, soweit er Regelungen über die Telearbeit vorsieht, vor dem Gesetz Vorrang hat.

Zunächst ist darauf hinzuweisen, dass die Telearbeit, die durch Verabschiedung des Gesetzes 12551/2011, durch den der Wortlaut des Artikels 6 des CLT geändert wurde, von der brasilianischen Rechtsordnung als wichtige Realität anerkannt wurde, den Erlass einer spezifischen Norm als effektives Instrument der Anerkennung der Gleichstellung mit den traditionellen Formen der Erbringung von Arbeitsleistungen rechtfertigte.

Durch die Regelung war das Thema nicht erschöpfend behandelt worden. Andere, relevante rechtliche Aspekte tauchten mit dem zunehmenden Einsatz dieser Modalität der Beschäftigung und Personalverwaltung auf, was zwischen den Parteien des Beschäftigungsverhältnisses, zu Streitigkeiten führte, die mit den neuen Vorschriften, über die es in diesem Artikel gehen wird, geklärt und/oder gelöst werden und die den Parteien ein Minimum an Rechtssicherheit verschaffen.

Arbeitszeit

Viele Kritiker sind der Auffassung, dass die in Punkt II vorgesehene Ausnahme die Telearbeit dem Außendienst gleichstellt, andere sind der Ansicht, dass diese Rechtsvorschrift das Arbeitsverhältnis beeinträchtigt und beim Telemitarbeiter zu langen und anstrengenden Arbeitszeiten führt.

Der Telemitarbeiter ist kein Außendienstler, es ist nicht unterwegs, sondern arbeitet in dem von ihm gewählten Umfeld im Innendienst zu Hause, was für ihn bequemer und komfortabler ist. Die Telearbeit ähnelt in keiner Hinsicht der Arbeit des Mitarbeiters im Außendienst, was Artikel 75-B ausdrücklich festhält.

Was die vermeintliche Beeinträchtigung der Beziehung und den Exzess der Arbeitszeit angeht, so vergessen die Gegner dieser Arbeitsform: i) dass sich der Arbeiter den Arbeitsweg erspart, der insbesondere in den großen Städten dazu führt, dass er längere von zu Hause abwesend ist, ii) dass der Arbeiter seine Arbeitszeit bei dieser Art der Beschäftigung seine Zeit selbst einteilen, im Laufe der Arbeitszeit persönliche und berufliche Verpflichtungen in Einklang bringen und seiner Familie und/oder seinen Interessen, wie Freizeit, Ausbildung, Sport, Religion und so andere Aktivitäten des Privatlebens mehr Zeit widmen kann, iii) dass der Arbeitgeber die tatsächliche Arbeitszeit des Mitarbeiters eben wegen der Vermischung der persönlichen und beruflichen Aktivitäten im Laufe des Arbeitstages nicht kontrollieren kann, wodurch sich der Telemitarbeiter in einer Ausnahmesituation befindet, die ihn von typischen, vom CLT geschützt Arbeitnehmern unterscheidet.

Ähnlich wie bei den übrigen, von Artikel 62 des CLT behandelten Fällen gilt auch hier, dass die Ausnahmeregelungen nur dann greifen, wenn die der Telearbeit inhärenten Bedingungen vorliegen. Ist dies nicht der Fall, geltem die Bestimmungen des Kapitel über die Arbeitszeitdauer und der betreffende Mitarbeiter hat Anspruch auf den darin vorgesehenen Schutz.

Regelung der Telearbeit

Artikel 75-B definiert als Telearbeit „... die überwiegende Erbringung von Leistungen außerhalb der Räumlichkeiten des Arbeitgebers unter Nutzung von Informations- und Kommunikationstechnologien, die aufgrund ihrer Art keine Leistungen im Außendienst darstellen".

Im einzigen Absatz der genannten Bestimmung wird der ausdrückliche Vorbehalt gemacht, dass „durch das Erscheinen in den Räumlichkeiten des Arbeitgebers für die Entfaltung spezifischer Aktivitäten, die die Anwesenheit des Arbeitnehmers in den Räumlichkeiten des Arbeitgebers erfordern, die Einordnung der Tätigkeit als Telearbeit nicht beeinträchtigt wird ".

Als Ausnahme von Artikel 443 CLT verlangt Artikel 75-C die Formalisierung der Telearbeit durch einen individuellen Arbeitsvertrag.

Auch für den Wechsel von anwesenheitspflichtiger Tätigkeit zur Telearbeit und umgekehrt gelten die in Artikel 75-C, Absätzen 1 und 2 vorgesehenen Ausnahmeformalitäten.

Um die Telearbeit entfalten zu können, benötigt der Arbeiter die dafür erforderliche Struktur. Artikel 75-D verlangt, dass die Parteien die betreffenden Bedingungen in einem schriftlichen Vertrag festlegen müssen.

Anders als die Gegner dieser Arbeitsnorm meinen, sieht sich der Arbeiter weder mit Zusatzkosten für die Entfaltung seiner Tätigkeit zu Hause oder an einem von ihm gewählten Ort oder dem Risiko des Geschäfts ausgesetzt, die vom Arbeitgeber getragen werden. Die Parteien können und werden dies sicher auch tun, individuell oder durch tarifvertragliche Vorschriften die Bedingungen für die Entfaltung der Tätigkeit festlegen.

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Was die Regelung der Telearbeit durch Tarifvertrag angeht, so garantiert Artikel 611-A, dass der Unternehmens- oder Verbandstarifvertrag, soweit er Regelungen über die Telearbeit enthält, Vorrang vor dem Gesetz hat.

Sind die vertraglichen Vorschriften festgelegt und optiert der Arbeitgeber dafür, die technologischen Mittel bereit zu stellen, damit der Arbeiter seine Tätigkeit entfalten kann, was nach unserer Erfahrung in den meisten fällen geschieht, insbesondere deshalb, weil die Notwendigkeit besteht, dass diese Mittel unter anderem mit den Betriebssystemen des Unternehmens kompatibel sind, ist dies angesichts des einzigen Absatzes des Artikels 75-D, der den Inhalt der unter Punkt I des Artikels 458 CLT eingefügten Vorschrift ratifiziert, nicht Teil des Gehalts des Mitarbeiters.

Last but not least verlangt Artikel 75-E vom Arbeitgeber, dass er die Telearbeiter ausdrücklich und ostensiv auf die Vorsichtsmaßnahmen hinweist, die er ergreifen muss, um Berufskrankheiten und Arbeitsunfälle zu vermeiden. Der Mitarbeiter muss gemäß einzigem Absatz dieses Artikels eine Haftungserklärung unterschreiben und sich verpflichten, den Anweisungen des Arbeitgebers nachzukommen“.

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Social Security Consequences of the Labour Reform in Brazil

Although most of the recent labour reform to be implemented by Law 13,467/2017 as of November 11, 2017, changes the Consolidation of Labour Laws, the so-called “CLT”, which is the main labour legislation in Brazil ruling the contractual relationship between employers and employees, the new law also brings important modifications that directly and indirectly impact the social security contributions on the compensation for work.

The first impact arising from Law 13,467/2017 on the social security system is related to the employees’ costs with health or dental care paid as a benefit. Although the current CLT already states that such amounts are not considered as salary for any purpose (such as for paid vacation, overtime and Christmas bonus, the so-called 13th salary), the labour reform included paragraph 5 on Article 458 of the CLT to detail that medical or dental care expenditures, including reimbursement of expenses with medicines, glasses, orthopaedic devices, prostheses, orthoses, medical and hospital expenses and similar ones, even if granted in different types of plans and coverage, are not part of the employee’s salary for any purpose and are not subject to social security contributions. Article 28, paragraph 9, item “q” of Law 8,212/1991, which is the law ruling the social security contributions for employers and workers, was changed accordingly.

Therefore, while according to the current social security law the employer must grant the same type of health and dental plans and coverage to all employees and administrators to avoid that such costs be considered as tax basis for social security contributions, once the labour reform is in force all the employers’ cost with health or dental care will be exempt from social security contributions, no matter how many workers are eligible to such benefits or how each one is benefited. Considering that nowadays there are many employers facing notices of violation issued by the Federal Revenue Service with charges of social contributions on these costs, plus interest and fines, these changes will be extremely favourable, not only because they will allow that the employers claim for the cancellation of such levies, but mainly to motivate employers to offer more health and dental care benefits to their workers in a scenario where the Brazilian public health system unfortunately is far from being protective and effective.

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One related matter, however, may continue triggering employer's concerns. Their costs with benefits for employees' dependents are neither addressed by Law 8,212/1991, nor by the labour reform. Thus, although in our opinion the law is clear enough to exempt the employers' costs with health and dental insurance from social contributions, some companies have already faced notices of violations and relevant levies due to the peculiar tax authorities' interpretation that only costs with employees would be comprised by the exemptive law.

Another important modification brought by the labour reform concerning social security system is related to the following payments that will not be considered as part of the salaries for labour or social security purposes, even when they are customary, and regardless of their amounts:

a) expense allowances (usually applicable in case of relocations);

b) food allowances, such as meal vouchers (except for payments in cash);

c) work travel allowances (currently the payment is limited to 50% of the em ployee's salary, otherwise the whole amount is considered salary and basis for social contributions);

d) performance award and bonuses.

Finally, the labour reform also changed paragraph 2 of Article 58 of the CLT, which currently establishes that the time spent by the employee in commuting is not considered work time, unless the employees use transportation provided by the employer because they live in places difficult to reach and without public transportation. With the new Law 13.467/2017, besides stating that the time for commuting will not be considered work time, the new CLT will also reinforce that the employees will not be at the employer's disposal while they are going back and forth from home to work.

In our opinion, however, this will be also an important change in respect to social security benefits, because nowadays commuting accidents in Brazil are considered as work accidents in accordance with Law 8,212/1991, regardless of the fact that the employees are not working or at the employers' disposal. Thus, once a commuting accident occurs nowadays and the employee receives any social security benefits due to such work-related accident, the employer is prevented from dismissing the employee without cause for 12 months as of the date when the worker returns to work. Besides, the employer must continue paying the employee's unemployment severance fund (which corresponds to 8% of the employee's monthly salary) during a sick leave triggered by a commuting accident. Finally, the law forces the employer to issue a formal work accident communication to the National Institute of Social Security within one day as of a commuting accident and the employer's failure to do so triggers fines imposed by the authorities.

Thus, in our opinion, art. 21, IV, "d" of Law 8,213/1991, which is the social security law currently considering commuting accidents as work-related accidents, will be incompatible with the new paragraph 2 of article 58 of the CLT. This situation may be interpreted as a revocation of the first wording by the second, and thus be used by employers to try to obtain judicial decisions against that social security law.

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eSocial and the Brazilian Labor Reform

The Law 13,467/2017 amended the Consolidation of Labor Laws (CLT), approved by the Decree-Law 5,452/1943, beside the Laws 6,019/1974 (Temporary Working and Service Agreements), 8,036/1990 (FGTS) and 8,212/1991 (Social Security Funding Plan), adjusting the current legislation to the new labor relations.

The overhaul of Brazil's labor laws brought remarkable changes in several aspects of labor relations in Brazil, such as **(i)** economic groups; **(ii)** former partner responsibilities; **(iii)** employment relationship; **(iv)** itinere hours (the time employees take from home to their place of work); **(v)** home office; **(vi)** succession of employers; **(vii)** salaries; **(viii)** salary equalization; **(ix)** termination of working contract; **(x)** outsourcing and other topics about contract modalities, women's work, extra patrimonial damages, procedures of the labor claims, among other issues.

In addition to the Labor Reform, Brazilian companies will also have to face a new challenge in the beginning of next year, the eSocial.

All Brazilian companies are required to implement this new ancillary obligation called eSocial. It is a project developed by the Brazilian Federal Government to be part of the SPED system (Public System for Digital Bookkeeping) and was created to receive, store and monitor the labor, social security and tax practices of Brazilian employers.

The Brazilian Federal Government aimed at developing a system which will integrate a number of automated environments administered by Government bodies. Broadly speaking, the purpose of eSocial is to provide a singular platform by which Government agencies can access and cross-check data received from a number of different systems.

Among the main effects of this new obligation, as standardization of data collection and integration of ERP systems, it would be possible to stress out the following topics:

- Integration upgrade between authorities;
- Adjust and share all tax and accounting information under one pattern;
- Bring new labor and social security responsibilities to each respective authority;
- Bring all existing ancillary obligations to one pattern;
- The ability of identifying labor, social security and tax exposures in a faster way;
- Upgrade the authorities supervision ability;
- Faster data consistency checking.

Considering all those topics, one of the most important effects of eSocial is the promptness identification of non-compliance practices and a significant improvement of the authorities monitoring and inspection capacity. What is expected from eSocial is that authorities will cross check massive data and will be able to identify inconsistences, exposing companies to risks that were not identifiable before eSocial implementation.

Moreover, the eSocial will also reflect all the changes brought by the Labor Reform and for this reason, there will be the need for a greater investment in change management.

In order to be in compliance with eSocial and with the new rules brought by the Labor Reform companies are also seeking and investing in specialized consulting support with focus on eSocial and labor and social security practices.

Currently, one of the biggest concerns of Brazilian companies is the eSocial Manual. It happens that the last version, numbered 2.3, does not consider all the changes of the Labor Reform. As an example of the gap presented by the last version of the Manual we can mention the remote work (also known as "home office") details.

In Brazil, when employees perform their actives out of the workplace with support of technology (normally employees use their own home to work), in activities that are not considered external work, it is considered home office.

It occurs that employers are required to disclose any remote work information into employees working contracts and provide the details of their activities. When it comes to pre-existing employment contracts there is the need to amend them, but as long as there is mutual agreement between employer and employee.

Moreover, in cases of change from remote work to regular work provided in the workplace, there is a guarantee of a transition period of 15 days and the need for a working contract amendment.

There are also other details to be observed in terms of remote work, such as the acquisition, support or supply of technological equipment and the necessary infrastructure of it. Not only that, but also the reimbursement of the expenses incurred by the employee shall be disclosed in a written contract and are not to be considered as part of employee's salary.

All in all, the current version of the eSocial Manual does not provide all those details and due to that fact Brazilian companies need to be aware of the possibility of changes in the next few weeks.

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Wirtschaftliche Gruppe vor dem Hintergrund der Arbeitsrechtsreform

In Brasilien werden derzeit die Arbeitsrechtsbeziehungen durch die Konsolidierung der Arbeitsgesetze (CLT), Gesetzesverordnung Nr. 5452 vom 01/05/1943, geregelt. Vor kurzem wurde das Gesetz Nr. 13.467 vom 13/07/2017, Arbeitsrechtsreform genannt, verabschiedet. Dieses wird am 11/11/2017 in Kraft treten.

Die Arbeitsrechtsreform wird viele Änderungen mit sich bringen. Ihr Hauptziel ist es, mehr Rechtssicherheit für die unternehmerischen Tätigkeiten und die Arbeitsbeziehungen zu bringen. Ein wichtiger Punkt ist dabei die Definition und Begrenzung des Begriffs der wirtschaftlichen Gruppe.

Artikel 2 der CLT regelt nicht speziell den Begriff der wirtschaftlichen Gruppe. Diese Regelung erfolgt speziell im Aktiengesetz. Leider haben die Arbeitsrichter den Begriff der wirtschaftlichen Gruppe so weit ausgelegt, dass dies zum Erlass von subjektiven Entscheidungen führte, die nicht mit der Rechtssicherheit eines demokratischen Rechtsstaates vereinbar sind.

Diese Entscheidungen verzerren die wahre Bedeutung der wirtschaftlichen Gruppe und missachten die Notwendigkeit des Nachweises der gemeinsamen Verwaltung und Kontrolle eines Unternehmens in Bezug auf die anderen Unternehmen. Bis zum Erlass des neuen Gesetzes war die bloße Verbindung der Unternehmen, sei es durch gemeinsamen Gesellschafter oder durch Gesellschaftszweck, ausreichend für die Charakterisierung als wirtschaftliche Gruppe.

Die Arbeitsrechtsreform ändert den Wortlaut des Artikel 2 der CLT und stellt neue Parameter für die Auslegung der wirtschaftlichen Gruppe auf. Die gesamtschuldnerische Haftung der wirtschaftlichen Gruppe wurde beibehalten, aber die bloße Koordination zwischen den Unternehmen wird für ihre Charakterisierung nicht mehr ausreichen. Mit dem Inkrafttreten des neuen Gesetzes wird das Vorliegen der folgenden Bedingungen notwendig sein: Nachweis der Integration der Interessen, der effektiven Bündelung der Interessen und gemeinsamen Handlungen der Unternehmen, welche Mitglieder der Gruppe sind.

Das neue Gesetz schließt auch die Möglichkeit der Charakterisierung einer wirtschaftlichen Gruppe bei bloßer Gesellschafteridentität innerhalb der Unternehmen aus. Dies spiegelt das Verständnis des Obersten Arbeitsgerichts („Tribunal Superior de Trabalho“) wieder, welches bereits anerkannt hatte, dass das für die Charakterisierung einer wirtschaftlichen Gruppe das bloße Vorhandensein eines gemeinsamen Gesellschafters nicht ausreichend ist.

Die Änderungen zielen darauf ab, das wiederholt vorkommende Durcheinander bei den arbeitsrechtlichen Vollstreckungen zu vermeiden, wenn eine Vielzahl von Unternehmen durch unangemessene Entscheidungen dadurch geschädigt werden, dass sie sehr oft ebenfalls Pfändungen von Bankkonten und Vermögensgütern unterliegen, nur weil sie einen gemeinsamen Gesellschafter mit der Hauptvollstreckungsschuldnerin (Arbeitgeberin) haben. Sehr oft verhindern diese gerichtlichen Vollstreckungsmassnahmen die Fortsetzung der Aktivitäten der Unternehmen auf dem Markt.

Es gibt zwei weitere wichtige Themen in Bezug auf die Arbeitsrechtsreform, die mit der Frage der wirtschaftlichen Gruppe verbunden sind, und zwar: der aus der Gesellschaft ausscheidende Gesellschafter und die Durchgriffshaftung. Das neue Gesetz bestimmt, dass der ausscheidende Gesellschafter subsidiär für die arbeitsrechtlichen Verpflichtungen der Gesellschaft in Bezug auf den Zeitraum, in welchem er Gesellschafter war, haftet, vorausgesetzt, dass die Klagen innerhalb von zwei Jahren nach der Registrierung der Gesellschaftsvertragsänderung eingereicht werden. Das Gesetz legt die Rangreihenfolge fest, welche beachtet werden muss, und zwar: **a)** das schuldende Unternehmen; **b)** die aktuellen Gesellschafter; **c)** der ausgeschiedene Gesellschafter.

Es gibt in dieser Hinsicht einen Fortschritt, da aktuell die Arbeitsrichter die gleichzeitige Vollstreckung aller möglicherweise haftbaren Personen bestimmen, ohne irgendeine Rangreihenfolge oder den Zeitpunkt des Ausscheidens des Gesellschafters aus der Gesellschaft zu beachten. Neu ist auch, dass der ausscheidende Gesellschafter nur dann gemeinschaftlich haftet, wenn Betrug bei der Gesellschaftsvertragsänderung nachgewiesen wird.

Im Hinblick auf die Durchgriffshaftung hatte das Oberste Arbeitsgericht den Beschluss 203/2016 über die Anwendbarkeit der neuen Zivilprozessordnung (NCPC) auf den Arbeitsgerichtsprozess erlassen und bestimmt, dass für die Durchgriffshaftung die Anforderungen des Artikel 133 und folgende des NCPC erfüllt werden müssen. Die Anwendung der erwähnten Bestimmungen stieß auf den Widerstand der Arbeitsrichter.

Das neue Arbeitsgesetz fordert nunmehr, wie auch in der Zivilprozessordnung vorgesehen, die Eröffnung eines Zwischenverfahrens zur Entscheidung über die Anwendung der Durchgriffshaftung. Dieses Zwischenverfahren supendiert den Prozess und garantiert den Beklagten die Ausübung der umfassenden Verteidigung und den Anspruch auf rechtliches Gehör.

Mit dem Inkrafttreten des neuen Arbeitsgesetzes ist eine signifikante Änderung bei der Auslegung der wirtschaftlichen Gruppe und grössere Vorsicht bei der Anwendung des Instituts der Durchgriffshaftung zu erwarten. Es ist zu hoffen, dass in Zukunft schwer nachzuvollziehende Entscheidungen wie die Anerkennung einer wirtschaftlichen Gruppe zwischen Franchisenehmern und Franchisegebern oder bei Unternehmen, die Teil „derselben Lieferkette“ sind, vermieden werden.

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Labor Reform and Tax Consequences

The Brazilian Labor legislation has significant modifications sanctioned by the President on July 13, 2017 after a long discussion and process in the National Congress, aiming to remodel labor rights. These changes brought consequences for several areas of law, among them tax law.

The Union Dues obligation is not mandatory anymore, its levy became optional for employees. This change will reduce the tax burden for employees and employers, since both shares of union dues allocated to them must be conditioned to the prior and express authorization of the participants of a particular economic or professional category.

The previous rule, union due was calculated based on the equivalent of one day´s salary being withheld directly from the employee's paycheck. On the other side, the employer's share of the union dues are based on the company's net equity.

Another tax consequence of the reform is the change in the concept of salary. From the moment it comes into force, salary will be set as only the value corresponding to the consideration of the service provided by the employee excluding payments and reimbursements of aids, premiums and allowances, even if these payments are received in a regular basis.

In this sense, those amounts received by the employee will no longer be included in the labor and social security tax basis, reducing the amount due of INSS (Instituto Nacional de Seguridade Social) and FGTS (Fundo de Garantia do Tempo do Serviço). The change aims to increase the remuneration of civil servants by exempting these additional funds from costs.

In addition, as part of this modernization, the Federal Government also sanctioned Law 13.429/2017, comprising new changes for outsourcing of end activity.

According to the Federal Government, this measure aims to provide dynamism and efficiency to companies reducing the tax burden for the companies directly impacting the final price of the product or service. However, a Direct Unconstitutionality Action has already been filed in the Federal Supreme Court. According to the Office of the Attorney General, the possibility of hiring outsourced employees for essential functions of the companies violates the constitutional system of employment, the constitutional social function of contractors and the equality principle.

The Federal Government expressed that those changes were established to adapt the currently labor relations and also to reduce the tax burden of the Brazilian employers and increase salary of employees to guarantee more rights and employment in the future.

BRAZIL LABOR REFORM: HIGHLIGHTS ON COMPENSATION

On July 13, 2017, President Michel Temer enacted Law n. 13467, known as "Labor Reform", which amends several provisions of Brazil Labor Code (Consolidação das Leis do Trabalho – CLT) and other relevant labor legislation.

Government expects that the Labor Reform will help Brazil boost growth and facilitate the recovery of the country economy. It is expected to foster the creation of jobs, encourage companies to pay higher bonuses and grant more benefits to employees. According to government officials, the intention is to inject more money into the economy, even if that leads to a loss in public revenue streams.

After November 11, 2017, when the Law will have entered into force, companies will be able to reduce the payroll costs by implementing new rules for salary and compensation.

Bonuses or premiums granted to high performance employees, even when regularly granted by the employer, as well as some allowances (e.g.: travel costs, food vouchers not paid in cash, medical and dental plans or treatments, etc.) will no longer be considered as part of the employee's salary. With the reform these benefits and payments will not impact the calculation of other wage payments such as the unemployment fund (Fundo de Garantia por Tempo de Serviço - FGTS), 13th salaries (Christmas bonuses) and vacation. They will not be subject to social security contributions either.

In addition, the right for equal pay will be limited to employees who work at the same business establishment, in case they perform the same activities with a difference in seniority of less than (i) two years in the same job position and (ii) four years of work in the company. Currently, to be entitled to equal pay employees shall perform the same activities of others that work in the same city or same metropolitan area and the difference in seniority between them shall be of less than two years in the job position (without reference to the time of work in the company).

Currently, career plans require prior approval of the Ministry of Labor in order to have validity, as stated in the first item of Precedent n. 6 of Superior Labor Court (Tribunal Superior do Trabalho). However, after the reform, the approval will no longer be needed, which means that labor claims on the matter are expected to have grounds only in the event of non-compliance with the applicable career plan.

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Another relevant aspect of the law refers to the gratification paid due to the employee's job position (gratificação de função), which is currently regulated by Precedent n. 372 of Superior Labor Court. The Precedent prevents the suppression of such gratification when granted for more than ten years. After the reform, the gratification may be suppressed at any time, upon the employee ceased to hold the position that gave basis for the extra payment, without specification of a period.

One of the most important changes of the Labor Reform is the possibility that agreements entered between companies and labor Unions shall always prevail over the law when they regulate some specific aspects of the labor relationship. In the case of compensation matters, for instance, companies may negotiate the following legal provisions, among others: **(i)** career plans and the classification of positions of trust; **(ii)** compensation for productivity, including tips earned by employees and bonuses for individual performance; **(iii)** incentive awards in goods or services granted by incentive programs; and **(iv)** profit sharing plans.

It is also relevant to mention that, despite being applicable for the ongoing employment agreements, some of those new provisions shall demand the inclusion of amendments to the respective contractual instrument in order to prove the employees' consent and mitigate the risk of annulment by Labor Courts.

Finally, some of the changes brought by the Labor Reform may be challenged under the argument that they conflict with the Federal Constitution, which expressly forbids changes that harm vested rights. Therefore, we recommend a critical analysis of the new rules and a detailed assessment of each situation for a consistent and safe application of the law.

* Autor der Publikation ***So geht´s im Internationalen Steuerrecht Brasiliens (zu)***

Reform des Arbeitsrechts - Internationale Aspekte

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Die Reform des Arbeitsrechts befasst sich nicht mit Fragen der internationalen Zuständigkeit, des anwendbaren Rechts oder der Anerkennung von ausländischen Entscheidungen in arbeitsrechtlichen Streitigkeiten - den klassischen Bereichen des Internationalen Privatrechts im weiteren Sinne (Zu diesen Fragen, insbesondere auch mit Bezug auf das individuelle Arbeitsrecht, vgl. Beat W. Rechsteiner, *Direito internacional privado, teoria e prática*, 19. Aufl., São Paulo, Saraiva, 2017).

Jedoch ist in diesem Zusammenhang zu erwähnen, dass das Gesetz Nr. 13.467, vom 13-7-2017, im Bereich des individuellen Arbeitsrechts neu die Schiedsgerichtsbarkeit zulässt (Art. 507-A), wenn die gesetzlichen Voraussetzungen dafür im Einzelfall vorliegen.

Bisher wurde die Schiedsgerichtsbarkeit auf dem Gebiet des individuellen Arbeitsrechts grundsätzlich abgelehnt. Ebenfalls wurde eine beschränkte Zulassung anlässlich der letzten Revision des Gesetzes über die Schiedsgerichtsbarkeit (Lei Nr. 13.129, vom 26-5-2015) durch ein Veto des Präsidenten verhindert (Bekanntmachung Nr. 162, vom 26-5-2015). Die Absicht war es, die Schiedsgerichtsbarkeit zuzulassen, wenn es sich um eine Führungskraft eines Unternehmens handelte und diese sich mit der Einsetzung eines Schiedsgerichts ausdrücklich einverstanden erklärte oder selbst dazu die Initiative ergriff (Vgl. den mit dem Veto belegten §4, Art. 4, des zu ändernden Gesetzes Nr. 9.307, vom 23-9-1996).

Das neue Gesetz bestimmt nun, es dürfe eine Schiedsklausel (*cláusula compromissória*) nach den Regeln des Gesetzes über die Schiedsgerichtsbarkeit (Lei Nr. 9.307, vom 23-9-1996) vereinbart werden, wenn die Initiative hierzu vom Arbeitnehmer ausgehe oder er sich damit ausdrücklich einverstanden erkläre. Allerdings muss dessen Gehalt mehr als das Zweifache der höchstmöglichen staatlichen Sozialversicherungsansprüche (*Benefícios do Regime Geral de Previdência Social*) betragen, derzeit R$ 11.063,00, damit die Zuständigkeit eines Schiedsgerichts begründet werden kann (Art. 507-A des Gesetzes Nr. 13.467, vom 13-7-2017). Welche Ansprüche genau aus dem individuellen Arbeitsverhältnis ein Schiedsgericht beurteilen kann, wird im Gesetz aber nicht gesagt. Diese Frage wird durch die Rechtsprechung geklärt werden müssen. Nach dem Gesetz über die Schiedsgerichtsbarkeit sind vermögensrechtliche Streitigkeiten schiedsfähig, über welche die Parteien verfügen können (Art. 1, §1, Lei Nr. 9.307, vom 23-9-1996, "*relativos a direitos patrimoniais*").

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In Fällen mit internationaler Beziehung kann es vor allem bei Führungskräften im Interesse beider Parteien liegen, allfällige Streitigkeiten durch ein Schiedsgericht beurteilen zu lassen. Hier besteht nicht das Schutzbedürfnis des Arbeitsrechts wie bei einem gewöhnlichen Arbeitsverhältnis. Allerdings wird auch hier die Rechtsprechung klären müssen, welche Rechtsansprüche es genau beurteilen kann und ob gegebenenfalls wie weit ein ausländisches Recht von den Parteien gewählt werden kann.

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"Brazilian Labor Law Review" - Legal provisions x Collective Agreements

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On July 13th, 2017, the Brazilian President sanctioned Federal Law 13.467, which reflects the so-called "Brazilian Labor Law Review", changing provisions of the Brazilian Labor Code (so-called CLT) and of Laws 6019/74, 8036/90 and 8212/91.

One of the main points of the reform comprises the provisions that set out that Collective Bargaining Agreements (negotiated between company's association and workers' union and valid for the entire economic category of a certain location) and Collective Agreements (negotiated by companies directly with the workers' union, and valid only to the involved companies' employees) will prevail over the rules established by law, when their object comprises the following topics:

- Employees' working schedules.
- Overtime Offsetting with rest hours.
- Meal breaks, which will be of at least 30 minutes for those who work more than 6 hours per day.
- Employment Insurance Program (as provided by Federal Law 13.189/2015).
- Jobs and Titles Plans, as well as agreements that appoint who is considered as holding a trust position.
- Internal policies.
- Employees' representation by internal committees.
- Home office, stand-by hours and intermittent work.
- Remuneration based on productivity and individual performance.
- Procedures for registering employees' working hours.
- Exchange of holidays.
- Health hazard degree.
- Extension of working hours in health hazardous environment, without prior authorization from the Labor Ministry.
- Premiums granted on incentive programs.
- Profit sharing/ results' participation plans.

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In addition to the above, a very relevant change sets out that the conditions of Collective Agreements will prevail over those provided in Collective Bargaining Agreements.

Please note that the rule applied by our labor courts until now was that the provisions of Collective instruments of any nature would only be valid if they were more favorable to the employees than those provided by law or, in the event of Collective Agreements, would be valid if more beneficial than Collective Bargaining Agreements.

The amendments to the Labor Code also provide that, when analyzing possible conflicts involving the collective instruments mentioned above, the labor judges must consider the presence of the "essential elements of the legal negotiations" (namely, capable parties, form provided or not prohibited by law and licit object).

In view of the above, the same amendment to the Labor Code lists what could be considered as an illicit object of such agreements.

Among such illicit objects, we may list the suppression or reduction of certain rights, such as **(i)** minimum wage, **(ii)** compensation for nighttime work greater than daytime work, **(iii)** weekly paid rest, **(iv)** overtime compensation at least 50% greater than regular work, **(v)** number of vacation days, **(vi)** health and safety regulations, **(vii)** Unemployment Savings Fund ("FGTS"), **(viii)** 13th salary, **(ix)** unemployment insurance, **(x)** family allowance, **(xi)** maternity leave of 120 days, **(xii)** prior notice period proportional to the length of service, **(xiii)** union contributions charged from employees; among others.

An initial analysis of the amendments leads us to the conclusion that companies will now have greater legal protection to enforce collective instruments that reflect their needs and reality, reducing the chances of being surprised by a court's decision annulling an Agreement legally held with the worker's union.

Notwithstanding, it is important to remember that the concepts of acquired rights provided by the Labor Code have not been revoked, and several points of the labor reform are still subject of discussion and controversies; there are rumors that the law will undergo new amendments.

In view of that, the word of order now is "be cautious" and wait until November 11, 2017- when the amendments become in effect - to take relevant decisions based on the new law.

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A new modality to hire employees

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The Labor Reform (Law No. 13.467/2017, which amends the Consolidation of Labor Laws – CLT), sanctioned by the President of the Republic, Michel Temer on July 13, 2017, will come into force in mid-November 2017, bringing several new points affecting both the employers and the employees.

Among the innovations, there is a new type of hiring employees, called "intermittent work", similar to the "Zero Hours" contracts, adopted in some European countries. In this type of hiring, the employee will only provide services when called by the employer, receiving remuneration only for the hours actually worked.

The intermittent work, which so far did not exist in the Brazilian legal system, is characterized by the non-continuous work, that is, with the alternation of periods of service provision and inactivity.

In practice, the employer and the employee enter into an employment contract and the professional will be available to the company until he/she is "called" for a particular job. In this case, the services will be provided for the period to be agreed upon.

The legislation does not define the minimum hours to be worked on an intermittent basis, so that hiring can occur, for instance, for the provision of services for five (5) hours per week or for five (5) hours per month.

The flexibility of the hours of work allowed in the intermittent employment contract, however, should comply to the limitation of the working hours provided in the Federal Constitution and should be applied to other employment contracts, that is, forty-four (44) weekly hours and two hundred twenty (220) monthly hours.

However, no consideration shall be due by the employer to the employee for the periods of inactivity, so that the employee can provide services to other employers in those periods.

In addition, this type of hiring is allowed irrespective of the business of the employee (except for the aeronauts) and must be formalized by written employment contract, establishing the compensation amount per working hour.

Since it is a modality of hiring work, the employment relationship is characterized. The basic difference between the traditional and the intermittent employment contract lies in the fact that, in the first case, the employee has fixed remuneration paid in a monthly basis. In the second case, in turn, the value of the employee's compensation per hour is fixed and he/she will receive the amount corresponding to the time actually worked.

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For instance, an employee who has entered into an intermittent employment contract with a commercial establishment and has been called to work for six (6) hours per day, for three days during the month, at the end of that specific service period, he/she will be entitled to receive a remuneration for the effectively worked hours. The remuneration will be calculated based on the compensation value per hour established in the employment contract, multiplied by the hours actually worked.

Along with the remuneration, the employee shall be paid the labor rights below, the amounts of which will be calculated in proportion to the period of that specific service provision:

√ proportional vacation with one-third increase;

√ proportional Christmas salary;

√ paid weekly rest;

√ social security contributions and FGTS (Unemployment Compensation Fund).

In practice, the companies may enter into a written contract with an employee, who will be at their disposal until he/she is called to work, which must occur at least three (03) days in advance.

Considering the recent publication of the Labor Reform, opinions are still divided on the regulation of intermittent work and the effective incentive that this type of hiring will bring to the Brazilian economy.

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Despite the fact that many Brazilian companies outsource part of their activities already for many years, such outsourcing practices have only this year been regulated by Law N. 13.429/2017 (**"Outsourcing Law"**) of March 30, 2017.

Until then, there was no specific legislation dealing with outsourcing. Rather, there was only sparse case law which was consolidated by Precedent 331 of the Brazilian Superior Labor Court. Precedent 331 determined that outsourcing was only allowed for activities which are not related to the company's main activities and which are considered as "secondary", such as e.g. cleaning, maintenance and security.

The Outsourcing Law changed the limitations imposed by Precedent 331. Companies may now retain services of specialized companies even if they affect core activities. Hence, any part of the business of a company can now be outsourced to a specialized third party service provider provided that the outsourced services are specific and clearly determined.

However, while outsourcing is now allowed, the Law does not exempt employers from its current responsibilities under outsourcing arrangements nor does outsourcing per se allow that Brazilian labor laws are not fully complied with, including any circumventions of legal protections of employees aiming at frustrating Brazilian labor laws.

The Outsourcing Law defines the services providers (**"Service Provider"**) as private legal entities whose purpose is to provide certain and specific services in favor of an individual or legal entity (**"Client"**).

A Service Provider must be properly registered with the Board of Commerce and the Corporate Taxpayers' Register (CNPJ). Further, a Service Provider must have a corporate capital which is compatible with the number of employees (e.g., companies with up to ten employees must evidence a minimum capital of ten thousand Reais (BRL 10,000.00)).

Parties may agree freely whether the contracted services are rendered at the Client's facilities or elsewhere.

A regular outsourcing practice does not establish an employment relationship between the workers or partners of the Service Provider and the respective Client, irrespective of their industry. However, the Client is not allowed to allocate outsourced employees to activities other than those which are expressly agreed upon in the respective outsourcing contract with the Service Provider.

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The Service Provider is the sole responsible for hiring, paying and managing the contracts of their employees.

Nonetheless, the Client will always remain ***secondarily liable*** for all labor obligations relative to the period in which outsourced services are provided. Moreover, the Client must ensure full compliance with occupational health, safety and cleanliness regulation for employees rendering the outsourced services regardless of whether such services are rendered at its facilities or at a previously agreed location.

The Outsourcing Law also protects outsourced employees against a different treatment compared to direct employees of the Client. In this regard, the Client may extend the same medical and emergency assistance and meals offered to its employees, available at the Client's facilities, to the employees of the Contractor.

In cases of irregularities in outsourcing, the Client may be subject to ordinary labor and/or social Security Agency inspections and further notice by the Ministry of Labour, including even investigative procedures and public civil actions by the Labour Prosecutor's Office.

In Brazil, an employment relationship is construed depending on the actual conditions under which the services are rendered. Facts will always prevail over form. Thus, even in case of legal outsourcing and irrespective of any written agreement stating otherwise, Brazilian Labor Authorities may acknowledge the existence of an employment relationship between an outsourced employee and the Client if all requirements for recognition of an employment relationship are met, which are: **(i)** services are rendered personally (i.e. they cannot be replaced by other individuals); **(ii)** work on habitual basis (i.e. there is a pre-established routine to be observed by the employee. S/He is not free to observe her/his own schedule of work); **(iii)** work under direct subordination of the Client; and **(iv)** services are rendered upon compensation.

In conclusion, considering the potential liabilities and risks that may arise from outsourcing, whenever outsourcing of an activity is considered, a (future) Client should always ensure beforehand that:

- Service Provider is a specialized company, properly incorporated and permitted to render the services in question.
- Contracted services (to be rendered by the Service Provider) are specific and clearly determined.
- Outsourced employees rendering the services are properly hired by the Service Provider who is responsible not only to register such individuals as its employees but in particular also to pay their respective remuneration and collect social security contribution and other taxes due. The Client should therefore insist that the Service Provider regularly provides documentation evidencing full compliance with all its obligations towards its employees.
- Service Provider adopts and observes good labour/employment practices and that Client has the contractual right to inspect and/or control full compliance of such practices by the Service Provider
- Service Provider has the competence and financial capacity to support all due labour/employment obligations.

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Brazilian Labor Reform – Flexibility in the allocation of Working Time

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One of the major obstacles for investors and entrepreneurs in Brazil has been recently addressed by a substantial reform, which may have major impact on Brazilian economy and labor market.

As has been widely reported, a significant Labor reform (sanctioned by Brazilian President Michel Temer and enacted, on July 13th, 2017, by Law # 13.467/2017) amends several provisions of Brazilian Labor Rules. It will come into force in 120 days of its publication, that is, on November 13th, 2017.

Basically the reform aims to make the Brazilian labor market more competitive and flexible, reduce the uncertainties and the unpredictability of the labor courts' decisions and allows more bargaining rights and autonomy between employers and employees.

Among other changes, the overhaul introduced to Brazilian Labor Law (the so-called Consolidation of Labor Law – CLT) new regulations which granted more flexibility to the companies to allocate more efficiently employees effective working hours, overtime, breaks and vacations.

A controversial topic addressed by the law refers to the effective working hours which employees remain or not at employer's disposal. Under the law, the following circumstances shall not be considered as effective service time and, therefore, not entitled to overtime payments:

(i) The time that an employee remains at the employer's premises in order to remain safe or avoid adverse conditions.

(ii) Any time spent to undertake personal activities relating to religious practices, resting, leisure, eating, personal hygiene and uniform changes.

(iii) The time spent by the employee to commute to the workplace, even if the employer provides the transportation, will not be considered working hours.

Still regarding working shifts, another relevant change implemented refers to part-time work. Pursuant to the new rules implemented, the maximum limit of 25 hours per week in part-time contracts was extended to:

(i) 30 hours per week, without the possibility of working additional hours; or

(ii) 26 hours per week, with the possibility to work six (6) additional hours per week of overtime.

With regards to the breaks for rest and meals, even considering Brazilian labor law states that for those who work more than six (6) hours, there will be a break for lunch and rest of minimum one (1) hour, it was permitted by an agreement with the Union or Collective bargaining agreement that the hour break is reduced to thirty (30) minutes.

Finally, vacation periods also received more flexibility, as they will be allowed to be split into three (3) periods, one of which must be for a minimum period of fourteen (14) calendar days, and the other two (2) remaining periods must be of at least five (5) calendar days.

Controversial since its beginning, especially considering whether or not some labor rights could be object of negotiation, either for reduction or suppression, there are many open questions concerning how Brazilian Labor Courts will interpret the new provisions implemented.

Therefore, it is difficult to evaluate with precision the economic impacts and relevant effects on performance of Brazilian labor market. However, the government expects that the measures taken will modernize and simplify work relations, seeking to improve productivity and to bring down country's unemployment rate.

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