Machado Meyer

THE BRAZILIAN LABOR REFORM

IN ACCORDANCE WITH LAW Nº 13,467/2017, AS AMENDED BY PROVISIONAL MEASURE Nº 808/2017

(The underline text reflects the main changes implemented by the Provisional Measure Nº 808/2017)

November 16th, 2017

CONTENT

IN THE BUSINESS

1

- Change in the definition of the Economic Group concept (art. 2nd, paragraph 2nd and 3rd).
- Limitation of the withdrawing partner's labor liability (art. 10-A).
- Labor liability in the succession of employers (art. 448-A).
- Rules regarding the disregard of the legal entity (art. 855-A):
  - Based on the new rules provided in the Brazilian Code of Civil Procedure;
  - Exception: procedure for challenging the decision granted in the Incident, as per provided in the Brazilian Code of Civil Procedure.

IN THE EMPLOYMENT AGREEMENTS AND OTHER TYPES OF HIRING

2

- Intermittent Employment Agreement (art. 443, paragraph 3rd)*:
  - Hour Value: not below the minimum wage or the amount due to other employees who develop the same activities (art. 452-A);
  - Request of the employer: 3 business days in advance and must appoint the working shift to be accomplished (art. 452, paragraph 1st);
  - Answer of the employee: **24 hours**, with the assumption that silence will constitute his refusal **(art. 452-A, paragraph 2nd, amended by PM Nº 808/2017);**
  - **Indemnification in case of non-compliance of the agreement be defined in the employment agreement (art. 452-B, item IV, included by PM No 808/2017);**
  - **If the intermittent worker is not called to work by the employer within 1 year, the intermittent employment agreement will be considered automatically terminated (art. 452-D, included by PM Nº 808/2017);**
  - **Regular employees cannot be terminated and be re-hired as intermittent employees by the same employer within 18 months after the termination of their employment agreement. This restriction will remain valid up to December 31, 2020 (art. 452-G, included by PM Nº 808/2017).**

IN THE EMPLOYMENT AGREEMENTS AND OTHER TYPES OF HIRING

2

- Independent Contractor Service Agreement **(article 442-B, amended by PM Nº 808/2017):**
  - The hiring of independent contractors, provided that all legal formalities are fulfilled (and that the independent contractor works with autonomy and no subordination), without exclusivity, continuously or not, does not implicate in the existence of an employment relationship.
  - **If the independent contractor is not allowed to render services for other companies due to an exclusivity clause, the independent contractor shall be considered as an employee of the contracting company.**
- Outsourcing Agreement (Federal Law nº 6.019/74).
  - Express possibility of outsourcing the contracting company's main activity;
  - When and as long as the services are rendered within the contracting company's premises, outsourced employees of the services provider company are entitled to (i) the same conditions related to meals, transportation, medical care existing in the contracting company's premises or the place designated by it, and training, when required for the services, and (ii) adequate hygienic, health and safety working conditions in the workplace;
  - Employees terminated cannot render services to the same contracting company as an outsourced employee (or partner) of a services provider company within 18 months following his/her termination.

IN THE EMPLOYMENT AGREEMENTS AND OTHER TYPES OF HIRING

2

- Mitigation of the concept that the employee is the weaker party in the employment relationship:
  - **Limits:** employees holding a graduation degree and who are entitled to a monthly salary corresponding to, at least, BRL 11,062.62*.
  - **Possibilities:**
    i. free negotiation of the rights provided under article 611-A; and
    ii. arbitration clause (art. 507-A).

- Vacation (art. 134):
  - Split of the vacation period: possible, within 3 periods, provided that the employee grants authorization and that one period corresponds, at least, to 14 business days and the remaining periods correspond to 5 business days.
  - The beginning of the vacation period cannot occur:
    i. on a weekly resting day; or
    ii. 2 days before a given holiday.

(*) This amount will be adjusted annually based on the maximum cap of Social Security benefits.

IN THE EMPLOYMENT AGREEMENTS AND OTHER TYPES OF HIRING

2

- The following is not considered as part of the employee's salary, even if paid on a regular basis **(art. 457, as amended by PM Nº 808/2017) :**
  - Allowances, **subject to the limit of 50% of the monthly remuneration;**
  - Meal voucher, being forbidden its payment in cash;
  - Travelling expenses;
  - Bonus (benefits granted by the employers as a result of the employees' achievements that are beyond expectations**, and provided that not paid more than twice a year**); and
  - Additional allowance (the so-called "abonos"); and
  - Medical assistance insurance, regardless its type and coverage (art. 458, paragraph 5th).
- **The payments described above will be subject to income tax and other taxes, except if expressly regulated otherwise.**

IN THE EMPLOYMENT AGREEMENTS AND OTHER TYPES OF HIRING

2

- **New rules regarding the equal-pay-for-equal-work principle (art. 461):**
  - Requirement that the activities are developed within the same business site;
  - In addition to the requirement that the compared employees cannot have more than a 2 years difference in the same function, the difference in the length of service between them cannot exceed 4 years;
  - It is forbidden the appointment of a remote comparable employee for purposes of equal pay for equal work, regardless the fact that such employee has been successful in a labor lawsuit (the so-called "waterfall equal-pay-for-equal-work principle");
  - Sex or ethnics discrimination will result in the payment of a fine in favor of the employee, in the amount corresponding to BRL 2,765.65*.
- **Regardless of the length of service in a trustworthy position, the additional pay as a result of this position will not be incorporated into the employment agreement and, therefore, can be suppressed as soon as the employee returns to his/her original position (art. 468).**

(*) This amount will be adjusted annually based on the maximum cap of Social Security benefits.

IN THE EMPLOYMENT AGREEMENTS AND OTHER TYPES OF HIRING

2

- Unhealthy work conditions for Women (art. 391-A)*:
  - Maximum level: forbidden throughout the pregnancy period;
  - Middle or Minimum level: possible, **as long as the employee voluntarily presents a medical certificate by her physician that authorizes her to work under such circumstances (art. 394-A, paragraph 2nd, amended by PM No 808/2017);**
- Unhealthy work conditions during the breastfeeding period: possible, unless there is a medical exam requesting the absence of the employee from the working environment throughout the breastfeeding period;
- Definition by the employer in relation to the clothing of the employees, being allowed the inclusion of the company's brand or of the partner companies' brand and other identification items (art. 456-A).
  - The employees will be in charge of their own hygiene, unless it is required different procedures or products when compared to regular clothing.

IN THE WORKING SHIFTS

3

- Companies are no longer required to keep track of the employees' shifts in the following situations where the employees – by their own choice – decide to return or remain within the company's premises (art. 4th, paragraph 2nd):
  - Personal protection in case of a unsafety situation in the public premises/spaces;
  - Personal protection in case of bad weather conditions;
  - To develop personal activities, such as:
    i. recreation;
    ii. eating;
    iii. personal hygiene; and
    iv. change of clothes or uniforms.
- It is also not part of the employees' daily shifts the time spent between his/her house and the effective place where the employee will develop his/her activity, regardless the type of transportation (art. 58, paragraph 2nd).

IN THE WORKING SHIFTS

3

- Part-time work (art. 58-A):
  - Up to 30 hours per week, **being forbidden** the overtime;
  - Up to 26 hours per week, **being possible** the existence of 6 additional hours which:
    i. might be offset up to the following week; or
    ii. might be paid in the following month, with the additional pay.

- Home office (art. 75-A):
  - Work mainly developed outside the employer's premises;
  - Not possible to keep track of the employee's daily working shifts and, therefore, the employee is not entitled to the payment of overtime (art. 62, III);
  - Costs with devices and infrastructure: settled in the contract (art. 75-D).

IN THE WORKING SHIFTS

3

- Offset of the working shifts: possible to be agreed with the employee by the execution of an written (or tacit) individual agreement, provided that the offset occurs within the same month (art. 59, paragraph 6th).
- Bank of Hours: possible to be agreed with the employee by the execution of a written individual agreement, provided that the offsetting of hours occurs within 6 months at most (art. 59, paragraph 5th).
- Shift of 12×36: **only possible to be adjusted through collective agreements with the labor union, except within the health sector, in which it may be individually negotiated (art. 59-A, §2º, included by PM No 808/2017);**
- Regular overtime work by the employee does not impact the agreement for offsetting of hours or the Bank of Hours system (art. 59-B).
- The suppression of the lunch break: payment of the time suppressed, which payment will have an indemnification nature (art. 71, paragraph 4th).

IN THE WORKING SHIFTS

3

- **The following provisions have been revoked in relation to work shifts:**
  - Obligation to communicate the Ministry of Labor and Employment in case the employee exceeds the limit of 2 overtime hours/day (former art. 61, paragraph 1st, BLC);
  - Obligation of granting a 15' minute break for female employees between the end of the work shift and the beginning of the overtime period (former art. 384, BLC);
  - The part-time employees are not allowed to work overtime (former art. 59, paragraph 4th, BLC);
  - Micro and small enterprises can adjust the average of *in itinere* hours spent, through collective agreement (former art. 58, paragraph 3rd, BLC).

IN THE UNION RELATIONS

4

- Extinction of the mandatory Union's Contributions (former article 601 e following, BLC).
- The collection of the Union's Contributions (Union Dues) is subject to the express authorization by the employees (art. 545, BLC).
- Representation of the employees within the company (art. 510-A):
  - Election of a commission in each company with more than 200 employees;
  - Function: represent the employees aiming at promoting the direct communication with the employer, among others (art. 510-B);
  - The members of the commission cannot be arbitrarily terminated (i.e. only due to disciplinary, technical, economic or financial reasons) and are tenured from their application to the function up to 1 year after the end of the term (art. 510-D, paragraph 3rd).
  - **The work commission cannot replace the labor union in the defense of the rights and interests of the employees before judicial or administrative courts and within collective bargaining agreements (art. 510-E, amended by PM Nº 808/2017).**

IN THE UNION RELATIONS

4

- **Express provision stating that the Collective Agreements are not valid after the end of their terms (art. 614, paragraph 3rd).**
- **Collective negotiation will rank senior to the law in relation to the following matters, among others (art. 611-A):**
  - Working shifts, including lunch break, which must correspond to, at least, 30 minutes*;
  - Identification of positions that are considered trustworthy and not entitled to overtime payment;
  - Home office, on-call regime, and intermittent work;
  - Different types of keeping track of the employees' working shifts;
  - Level of unhealthy work condition;
  - Incentive bonus to be paid in goods and services;
  - Profit sharing agreement of the company.
- **The labor rights listed in the Brazilian Federal Constitution cannot be object of negotiation, either for reduction or suppression (art. 611-B).**

IN THE UNION RELATIONS

4

- Principle of the minimum intervention in the Collective wish:
  - The review of collective agreements by labor courts will be limited to analysis of the essentials elements of the agreement (art. 611-A, paragraph 1st);
  - It is not required the execution of reciprocal counterparts (art. 611-A, paragraph 3rd);
  - In case there is a compensatory clause, such clause may be considered null and void in a judicial decision rendered in an annulment action (art. 611-A, paragraph 4th);
  - Unions are required to participate in judicial claims aiming at declaring clauses of collective agreements null and void, **not being possible their appreciation within individual labor lawsuits (art. 611, paragraph 5th, amended by PM No. 808/2017).**

IN THE TERMINATION OF THE EMPLOYMENT RELATIONSHIPS

5

- Unnecessary to ratify the termination's paper work before the employees' labor union, even in cases when employees have been employed for more than 1 year (art. 477).
- Sole term of 10 days for the payment of severance fees and for the delivery of the documents that evidence the termination of the employment relationship to the authorities (art. 477, paragraph 6t^{h}).
- New type of termination: agreement between employee and employer (art. 484-A).
- New provision for termination for cause: Loss of the employee's qualification or of the legal requirements for him/her to carry on the professional activities due to willful misconduct. (art. 482, "m")

IN THE TERMINATION OF THE EMPLOYMENT RELATIONSHIPS

5

- No more differences between an individual or a collective dismissal, no longer being required the execution of collective agreements with the Unions and/or their prior approval (art. 477-A).
- Voluntary Dismissal Plan: employees waive all employment rights, unless agreed otherwise (art. 477-B).
- Employees are allowed to annually waive all employment rights related to the past year before the Union, being forbidden to file a lawsuit in the future asking for the payment of the waived rights (art. 507-B).
- Ratification by the Judge of out-of-court agreements (art. 855-B and following).

IN THE JUDICIARY POWER

6

- Limitation of the judicial activism in the sense that Courts' Precedents and Courts' understandings (art. 8th):
  - Cannot limit rights already provided under the law; or
  - Create obligations that are not provided under the law.
- Analysis of the collective agreement and of the collective covenant is limited to the compliance with essential elements of the agreement.
- Establishment of criteria and objective conditions for the update of Precedents issued by Brazilian Labor Courts (art. 702).

IN THE MORAL DAMAGE COMPENSATION

7

- Rights that, if violated, will entitle employees to claim for damages:
  - Private Individual: Violation of **ethnicity, age, nationality,** honor, image, intimacy, freedom of action, self-esteem, **gender, sexual orientation,** health, recreation and physical integrity (**art. 223-C, amended by PM No 808/2017).**
  - Legal Entity: Violation of image, brand, name, company's trade secrets and the confidentiality of the written communications (art. 223-D).
- Criteria for the establishment of the nature of the offense and indemnification amounts (art. 223-G):
  - Intensity of the suffering or humiliation (section II);
  - Personal and Social Reflexes of the action or omission (section IV);
  - Extension and length of the effects of the offense (section V);
  - Level of intention or of negligent act or omission (section VII);
  - Social and economic situation of the affected Parties (section XI).

IN THE MORAL DAMAGE COMPENSATION

7

- Maximum amounts for the indemnifications **(art. 223-G, paragraph 1st, amended by PM No 808/2017):**

NATURE OF THE OFENSE	AMOUNT
Minor	Up to R$16,593.93*
Medium	Up to R$27,656.55*
Serious	Up to R$110,626.20*
Extremely Serious	Up to R$276,565.50*

- Regardless the number of offenses, the accumulation of amounts is not allowed.
- In case of reincidence of any of the parties, the amount can be doubled **(art. 223-G, paragraph 3rd, amended by PM No 808/2017).**
- **The limits established are not applicable in case of moral indemnification due to death (art. 223-G, paragraph 5th, amended by PM No 808/2017).**

*This amount will be adjusted annually based on the maximum cap of Social Security benefits.

IN THE LABOR LAWSUITS

8

- The judicial deadlines will be calculated considering only business days, being allowed their extension (art. 775).
- The Company's representative can be any individual, not necessarily a regular employee of the company (art. 843, paragraph 3rd).
- Liability for the procedural damages caused (art. 793-A and following):
  - Hypothesis: malicious prosecution by the Parties or witnesses that change or omit the facts;
  - Amounts:
    i. fine, between 1% to 10% of the updated amount involved in the case;
    ii. indemnification to be paid to the other party due to the loss incurred;
    iii. payment of the attorney's fees and all expenses.

IN THE LABOR LAWSUITS

8

- Limitation to the beneficiaries of the gratuity: salary equal or lower than BRL 2,212,52* (art. 790, paragraph 3rd).
- Court's expert fees (art. 790-B):
  - The defeated party is liable for the payment;
  - The Judge cannot request for its payment in advance (art. 790-B, paragraph 3rd), or fix it beyond the limit provided by the CSJT (art. 790-B, paragraph 1st).
- Defeated party's expenses (art. 791-A):
  - Rate: between the minimum 5% and the maximum 15%;
  - Basis for the calculation: amount indicated in the enforcement phase, economic benefit or updated amount of the lawsuit;
  - Due in the counterclaim and in a reciprocal way in case of the partial granting of the lawsuit, being forbidden the offsetting of the amounts.

(*) This amount will be adjusted annually based on the maximum cap of Social Security benefits.

IN THE LABOR LAWSUITS

8

- Judicial Appeal Bond (art. 899):
  - The amount was reduced by half for non-profit entities, domestic employers, micro and small enterprises (MEI and MPE);
  - Parties granted with the gratuity, philanthropic entities and companies under judicial recovery are now legally exempt from the collection of the Appeal bond;
  - It may be replaced by a letter of bank guarantee or judicial guarantee insurance.
- Economic, political, social or legal relevance of the matter as a prerequisite for the admissibility of the appeal submitted to the Supreme Labor Court (article 896-A, CLT).
- The "Taxa Referencial" (TR) was once again set as the index for the updating of credits resulting from a judicial award.

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