Labour & Employment

Contributing editors
Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek

2018

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Labour & Employment 2018

Contributing editors

Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek

Morgan Lewis & Bockius LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in May 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2006
Thirteenth edition
ISBN 978-1-78915-038-4

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Labour & Employment 2018

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Labour & Employment*, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Argentina, Canada, Colombia, Costa Rica, Ireland, Hong Kong, Nigeria, Peru and the Philippines.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek of Morgan Lewis & Bockius LLP, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
May 2018

Brazil

Thiago Ramos Barbosa and André Blotta Laza
Machado Associados Advogados e Consultores

Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The Federal Constitution and the Consolidation of Labour Laws are the main statutes and regulations regarding labour and employment in Brazil. In addition, other mandatory labour and employment rules may be also established by collective bargaining conventions (between employees' unions and employers' unions) and collective bargaining agreements (between an employer and the employees' unions). Moreover, Laws 8,212/1991 and 8,213/1991 and Federal Decree 3,048/1999 cover the main regulations regarding social security obligations relating to employment. Visas and work permits are governed by normative resolutions issued by the Ministry of Labour.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Federal Constitution ensures human dignity and welfare for every citizen, regardless of nationality, race, gender, colour or age and prohibits any other kind of discrimination, establishing that federal laws shall regulate the enforcement of such constitutional guarantees and the relevant penalties in cases of violation.

In this sense, Law 7,716/1989 states that it is a crime to deny or prevent employment in a private company due to race, colour, ethnicity or religion. This law also defines as a crime the practice of certain conducts due to racial or colour discrimination or prejudice related to origin, nationality or ethnicity such as:

- not supplying work tools or equipment to an employee in the same condition as to other workers;
- preventing an employee from enjoying a job promotion or a professional benefit; or
- treating an employee differently in the workplace and in terms of the salary amount.

In addition, Law 10,741/2013 prohibits discrimination and age limitation of elderly people on the admission to any job, defining the following conducts as crime:

- denying employment or work; or
- taking ownership of or diverting assets, earnings, pension or any other income of the elderly.

Law 12,984/2014 defines as a crime the following discriminatory conduct against HIV-positive people because of their condition:

- denying them employment or work;
- removing or dismissing them from work and employment;
- segregating them in the workplace; and
- disclosing the condition of the patient carrying HIV to offend his or her dignity.

Laws 7,853/1989 and 13,146/2015 guarantee to persons with disabilities the right to the work of their own free choice, and acceptance, in an accessible and inclusive environment, in equal opportunities with other persons, including equal remuneration for the same type of work. Further, they are guaranteed the participation and access to courses, training, continuing education, career plans, promotions, bonuses and professional incentives offered by the employer. Any restriction or discrimination on grounds of disability, including during recruitment, selection, admission, periodic medical examinations, permanence on the job, professional growth and rehabilitation, as well as requirement of full capacity is forbidden. These laws also define as crimes the practice, inducement or incitement of discrimination of persons because of their disability; and taking ownership of or diverting assets, earnings, pension or any other income of the persons with disability.

The use of advertisement or any other means to recruit employees requiring specific race, ethnic appearance profiles, or any kind of discrimination not related to professional experience is also forbidden.

The Criminal Code states that sexual harassment is a crime, characterised when someone holding a hierarchically superior status harasses another person to gain advantage or sexual favours because of their work, position or role.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Ministry of Labour is the primary government agency responsible for the enforcement of labour and employment statutes and regulations.

The Labour Prosecution Office, in turn, is an independent entity responsible for supervising compliance with labour laws and respect for social and collective or homogeneous individual rights. This entity has jurisdiction to start and develop investigations into the breach of labour rights and, where violation is verified, it notifies the offender to execute an out-of-court settlement by means of which the offender undertakes to cease the practice of labour and employment irregularity. If the offender fails to comply, settlement can be executed before the labour courts. If the offender refuses to execute the out-of-court settlement, the Labour Prosecution Office may file a civil class action requesting the labour courts to ensure the enforcement of employment statutes and regulations.

Further, the Federal Revenue Service is the primary government agency responsible for the enforcement of social security statutes and regulations regarding taxes on compensation for work, while the National Institute of Social Security oversees social security benefits.

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Federal Constitution states that the election of an employee representative council or committee is allowed in companies with more than 200 employees. The House of Representatives ratified the Workers' Representatives Convention 135, of the International Labour Organization, which also grants protection to employee representatives elected or appointed by employees' unions or elected by workers in a company, who are commonly called plant committees. The Consolidation of Labour Laws obliges employers to set up internal committees for accident prevention, formed by representatives of both employees and employer, aimed at the prevention of work-related accidents and sickness. Employees elected as union officers can also be considered as employees' representatives in the workplace. Further, Law 13,467/2017, in force as of 11 November 2017, provides that companies

with more than 200 employees must keep an employee committee formed by three to seven members (depending on the company's workforce) to represent all employees before the company's governance. Employees appointed to the committee will enjoy a one-year term and will be entitled to a job guarantee as of the application up to one year after the end of the term.

The establishment of workers' committees stimulates permanent negotiation between employees and employers in the workplace, but it does not exclude negotiations between the relevant unions representing the employees. Regarding unions in Brazil, in each territorial base, which corresponds to at least one city, there may be a single union representing the employees in each specific work category, which comprises employees under the same work conditions while developing their tasks in the same or similar economic activities and a single employers' union, which represents companies with economic interests in common that result from the development of identical or similar activities.

The state is prevented from intervening in the unions' organisation. The negotiation between employees' unions and employers' unions generally results in conventions that establish specific labour rights pertaining to the relevant category.

Employees' unions and companies may also directly negotiate specific rules and work conditions by executing a collective bargaining agreement.

5 What are their powers?

Employees appointed to councils or committees and those employees elected as union officers are entitled to freely conduct their mandates and meetings. They may also inform employees about the agendas, programs, list of claims, and all related labour subjects; additionally, employers can neither prevent them from convening meetings during working hours nor from distributing union advertisements in the workplace.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

There are no specific restrictions on background checking of applicants, provided that the privacy, private life, honour and image of people are respected. Inspections by authorities or labour claims may be filed by applicants for indemnification due to alleged moral or material damages, regardless of whether the background check is conducted by the future employer or by a third party, mainly when such background check leads to dismissal or to prevention of the hiring of an applicant.

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Law 9,029/95 prohibits the requirement of certificates or medical examinations to prove infertility or pregnancy as a condition for hiring an applicant.

Nonetheless, it is mandatory that all employees submit to a medical examination prior to their admission to confirm that the professional is sufficiently healthy to perform the required job duties. The applicant cannot refuse to submit to such prior examination. Regular examinations and examinations upon termination to ensure the employee is sufficiently healthy to work are also mandatory.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There is no specific legislation restricting or prohibiting the submission of applicants to drug and alcohol tests. However, case law interprets such practice as illegal because it interferes with the applicant's intimate and private life. Thus, the understanding is that employers are not allowed to refuse to hire an applicant who does not submit to such test.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Discrimination against any people or group is prohibited. Nevertheless, companies with 100 or more employees are obliged to hire disabled workers or those submitted to professional rehabilitation after work-related accidents, as follows:

Employees in the company	Minimum percentage of disabled workers or those submitted to professional rehabilitation
100 to 200	2
201 to 500	3
501 to 1,000	4
Over 1,000	5

Different treatment also applies to the hiring of apprentices. The apprenticeship is a hiring regime that, in addition to the theory taught in courses, grants professional and technical training to people between 14 and 24 years old. Companies are also obliged to hire a certain number of apprentices, the quota varying from 5 to 15 per cent of the number of workers who perform roles that demand professional training.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

The employment relationship must be recorded in the relevant employee's record book, including information on the hiring date, compensation and special conditions to which the employment contract is subject. Written employment contracts are mandatory for temporary, fixed-term, part-time and zero-hour employments only, but are highly advisable in case of managerial positions and employees that handle confidential information or develop products or inventions. Nonetheless, the parties usually execute an additional written employment contract detailing other work terms and conditions not established by law or by collective bargaining conventions and collective bargaining agreements.

11 To what extent are fixed-term employment contracts permissible?

The maximum period of duration for fixed-term employment contracts is two years. If the employment contract is fixed for a period of less than two years it can be renewed only once (except those executed for two years with foreign employees, which are non-renewable – see question 15), provided that both periods together do not exceed two years, otherwise the employment contract is converted into an indefinite-term one. Fixed-term employment contracts are allowed in the case of essential services owing to a temporary demand for activities in the company or in the case of temporary services or if their nature justifies the fixed term.

12 What is the maximum probationary period permitted by law?

The maximum length of a probationary period is 90 days according to the law. Should this period be shorter than 90 days, the employer may extend it once if both periods together do not exceed 90 days. If the employment contract continues after the probationary period, including due to job tenure, it is automatically converted into an indefinite-term contract.

13 What are the primary factors that distinguish an independent contractor from an employee?

According to the Consolidation of Labour Laws, the employee is a specific individual who is paid for the habitual rendering of services developed under subordination to the employer; for example, the employer has the power to direct the business and the employment relationship, and thus control, inspect and penalise the employee. Independent contractors, in turn, are solely responsible for their business and do not render services under such subordination to the engaging party, as the latter just aims at the result of the contract. Independent contractors may also allocate other professionals, including their own employees and other independent contractors, to comply with their contract, which does not apply to employees.

Law 13,467/2017 and Provisional Measure 808/2017 as of November 2017 introduced changes to distinguish independent contractors from employees. In this sense, exclusivity clauses in contracts with independent contractors are expressly prohibited but they are authorised to provide services to other clients engaged in the same economic activity as the hiring party. Furthermore, an independent

contractor's provision of services to a sole client and exercise of activity related to the client's business does not typify, per se, the employment relationship between the parties.

14 Is there any legislation governing temporary staffing through recruitment agencies?

Law 6,019/1974, recently amended by Law 13,429/2017, governs the temporary work performed by individuals to urban companies (hiring parties), and is allowed in two situations: to meet the temporary need to replace regular and permanent employees in the company (for example, in the case of vacation and sick leave) or to deal with extraordinary increase of activities (for example, at certain times of the year, such as during the holiday season).

The temporary employment contract is necessarily written and can be executed for 108 days, consecutive or not, extendable for a further 90 days if the preliminary conditions that led to the temporary staffing hiring are still in force.

Although temporary employment agencies are responsible for paying and assisting the temporary workers hired by them with respect to their rights and obligations, hiring parties must provide temporary workers with the same health and safety work conditions already granted to regular employees, as well as the same medical and meal assistance, provided that the temporary work is performed within the hiring party's offices or plant.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

For each foreign employee the employer must hire two Brazilian employees. This is the 'two-thirds rule' established by the Consolidation of Labour Laws, which is also required in relation to the proportionality of compensation to be paid to foreign and Brazilian employees.

Law 13,445/2017 (in force as of 22 November 2017), known as the Migration Law, revoked Law 6,815/1980 (Statute of the Foreigner), as well as Law 818/1949 (which governs nationality and political rights), and established new rules on migratory policy in Brazil, including the rights and duties of migrants and visitors to Brazil, the entry and stay of foreigners, and the rules for the protection of Brazilians abroad. Decree 9,199/2017 was edited to regulate and detail the provisions set out by the Migration Law.

The Migration Law extinguished the permanent visa, increased the cases for granting temporary visas (for example, work visas and investors' visas) and created the residence permit, which can be requested by a foreigner who, for example, requires to be deemed a resident in Brazil for working or investing purposes. The permanent visa applies, among others, in the following situations:

- foreign investors wishing to reside in Brazil; and
- foreigners who wish to hold office as officers of Brazilian companies.

The Brazilian National Immigration Council released 23 ordinances after the Migration Law came into force to standardise the administrative proceedings regarding the granting of visas and permits for the purposes of residence, work (considering employees, investors, managers, etc), technical assistance and technical support, among others.

Among the many types of visas and work permits, the most applied-for visa is the temporary permit granted for foreign professionals who aim at working in the country with or without a job offer. If no job offers are issued, the work permit will be granted in the following cases:

- technical assistance or technology transfer services;
- professional training provided by a foreign company´s subsidiary or by a Brazilian company;
- professional internship; or
- auditing or advising services for more than 90 days.

In such cases, the length of the visa is up to one year and its extension will be conditioned upon specific ordinances to be released by the Ministry of Labour.

In cases where foreign professionals are sponsored by a Brazilian company by means of a job offer or an employment contract, the length of the visa is up to two years, extendable for the same period upon the employer's justification. This visa is available for employees that are transferred from one corporate entity in another jurisdiction to a related entity in Brazil.

The Migration Law introduced the possibility of a visa for summer work, which can be granted to foreign professionals and provided that he or she is native to a country that grants the same benefit to Brazilian professionals.

Officers and administrators that do not qualify as employees may apply for permanent visas, which are approved when the company evidences an investment, duly registered with the Central Bank of Brazil, of an amount of at least 600,000 reais for each professional, or an investment of at least 150,000 reais per professional provided that the Brazilian company undertakes to create at least 10 new jobs within two years following its incorporation in Brazil or the concession of the permanent visa to the foreign administrators or officers.

Another possibility is the granting of a permanent visa to foreign individuals investing in Brazilian companies. In such cases, each foreign investor must provide evidence that he or she has already made capital contributions, duly registered with the Central Bank of Brazil, to a new or an existing Brazilian company, of an amount not lower than 500,000 reais. Exceptionally, the Immigration Council can authorise, at its sole discretion, the granting of a permanent visa even if the capital contribution is lower than 500,000 reais but higher than 150,000 reais, provided that the investment is in innovation, basic and applied research or for scientific and technological purposes. Finally, visas issued before the Migration Law comes into force will remain in force until their expiration date.

16 Are spouses of authorised workers entitled to work?

Spouses and other family members of foreign employees with temporary visas must apply for their own visas and work permit to be able to legally work in Brazil. Foreign family members of foreign workers with permanent visas are entitled to work in Brazil.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

To employ foreign workers, the employer must obtain a visa and work permit and not exceed the limit of foreign workers in the company (see question 15). The visa and work permit application is analysed by the National Immigration Council, which is formed by personnel from the Ministry of Labour and the Ministry of Justice and verifies the compliance with the legal requirements for each kind of visa and work permit.

The admission of foreign workers that does not fulfil the legal requirements subjects the company to fines imposed by the Brazilian immigration authorities, and the illegal foreign worker may be deported by the federal police.

18 Is a labour market test required as a precursor to a short- or long-term visa?

There is no labour market test required for employers to demonstrate that local workers are not willing to take on, or not qualified for, the job position offered to the foreign worker. However, if the company applies for a visa to hire a foreign worker based on an employment contract, it shall demonstrate that this professional has special qualifications and work experience to develop his or her activities in Brazil by presenting degrees, certificates and declarations, as required by the National Immigration Council.

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The working hour limits defined by law are mandatory. The maximum working hours are 44 hours per week and eight hours per day. Some worker categories have a lower limit of working hours per day (eg, bank workers, workers in hazardous activities).

Breaks for rest during the working hours should be according to the following parameters: a 15-minute break if the working hours exceed four hours, but do not exceed six hours; and a break of at least one hour if the working hours exceed six hours. Employees are also entitled to a rest of at least 11 hours between two work shifts.

Specific rules regarding working hours may be also established by collective bargaining conventions or collective bargaining agreements.

20 What categories of workers are entitled to overtime pay and how is it calculated?

All categories of employees are entitled to overtime pay, except for employees who perform external activities that are incompatible with the employer's control of working hours, employees who work from home and holders of trust positions, because they are not subject to the control of their working hours by their employers.

The minimum overtime pay is an additional allowance of 50 per cent over the normal compensation, but this percentage may be higher because of rules established by collective bargaining conventions and collective bargaining agreements, mainly in the case of work on Sundays and holidays.

21 Can employees contractually waive the right to overtime pay?

Employees cannot waive the right to overtime pay, and waivers regarding any type of payment, including overtime, may be interpreted as invalid by courts in the case of a lawsuit filed by the employees or by the union representing them. Employers, however, may negotiate with the union representing the employees, or individually with employees who hold a college degree and receive a monthly salary higher than twice the highest social benefit provided by the Social Security (currently around 11,200 reais) for the establishment of time banks to credit the employees' overtime hours for days off instead of paying them.

22 Is there any legislation establishing the right to annual vacation and holidays?

Employees are entitled to a 30-day vacation, which must be compensated with the payment of the normal monthly salary (including the average of variable salaries, such as commission), plus a bonus corresponding to one-third of such payment. The vacation payment must be made up to the second day preceding the beginning of the vacation period.

A vacation must be granted by the employer within a year after 12 months of work; otherwise, besides the vacation, the relevant compensation shall be doubled as a penalty for the employer.

Employees are entitled to split the 30-day period into three blocks, provided that one of them is of at least 14 days and the other two are of at least five days each. Employees are also entitled to convert 10 days of their vacation into working days, and for such period, the employee is entitled to receive the compensation related to the working days plus the vacation payment (including the one-third bonus).

Regarding holidays, the law establishes the national holidays on which employees shall not work. State and municipal laws may also establish other holidays.

23 Is there any legislation establishing the right to sick leave or sick pay?

The legislation ensures the right to sick leave to the employee under medical recommendation, in which case the employment contract is suspended and cannot be terminated. The employer pays the first 15 days of sick leave and the National Institute of Social Security pays the remaining days as a social security benefit. There is no limit for sick leave.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The employee is entitled to a paid leave of absence in the following circumstances:

- maternity leave: 120 days, which can start up to 28 days before the delivery (the employee's compensation is paid by the National Institute of Social Security); companies may extend the maternity leave to 180 days if specific tax requirements are met;
- legal abortion: two weeks;
- paternity leave: five days after the birth; companies may extend the leave to 20 days if specific tax requirements are met;
- adoption leave: 120 days for female employees, five days for male employees;
- death of certain specific relatives: two days;
- marriage: three days;
- accompanying pregnant wife or partner on medical appointments or exams: two days;
- accompanying son or daughter under six on medical appointments: one day per year;
- voluntary blood donation: one day per year;
- university access tests: on the dates of tests;
- leave to perform military or public service, where the employer continues to pay the salary during the initial 90 days of the leave;
- participation in court proceedings, when required by the authorities; and
- union officers: whenever it is necessary to meet the duties related to their mandate.

Collective bargaining conventions or collective bargaining agreements may also provide for other paid leave.

25 What employee benefits are prescribed by law?

The main rights prescribed by law are the following:

- national minimum wage (currently 954 reais per month);
- overtime payment of at least 50 per cent on the normal compensation;
- reduced night shift hours that are also paid with an additional compensation of 20 per cent on the normal hourly salary;
- a weekly rest day, preferably on Sunday;
- Christmas bonus, also called 13th salary, which is equivalent to one-twelfth of the salary multiplied by the months of work during the year, paid in two instalments, one up to 30 November and the other up to 20 December;
- 30 vacation days per year of work, paid with a bonus equivalent to one-third of the salary in addition to the salary of the relevant period;
- profit or results-sharing programmes if negotiated with the relevant labour union or individually in specific cases;
- justified work absences;
- additional compensation of 30 per cent over the base salary in the case of work under certain activities that involve risk, such as contact with flammable or explosive substances under a strong risk condition; contact with radioactive substances or ionising radiation; in the electric power segment; and subject to risk conditions in a permanent and intermittent manner;
- additional compensation in the case of unhealthy working conditions equal to 10, 20 or 40 per cent of the national minimum wage;
- unemployment severance fund equivalent to 8 per cent of the monthly compensation, which is deposited in an official individual bank account for each employee, who can withdraw the accrued funds in certain circumstances established by law, such as in the case of retirement or dismissal without cause;
- minimum notice period for termination by the employer of at least 30 days plus three days per year of work, limited to a maximum of 90 days, or the employer may provide pay in lieu of notice;
- fine paid by the employer of 50 per cent on the balance of the unemployment severance fund deposited during the employment contract in the case of dismissal without cause (40 per cent fine reverting to the employee and 10 per cent fine paid as an extraordinary social contribution);
- family bonus, per child under 14 years old, of 45 reais (for employees with a monthly salary of up to 877.67 reais), and of 31.71 reais (for employees with a monthly salary of between 877.68 and 1,319.18 reais); the payment is made by the employer, who is then reimbursed by the National Institute of Social Security; and
- public transportation vouchers for the employee's journey to and from work paid by the employer, who has the right to discount up to 6 per cent of the relevant cost from the employee's monthly salary.

Other benefits may be mandatory by the application of collective bargaining conventions or collective bargaining agreements.

26 Are there any special rules relating to part-time or fixed-term employees?

The work shift of part-time jobs is limited to 30 hours per week, in which no overtime is allowed, or 26 hours per week plus six hours of overtime (totalling 32 hours), and the relevant salary must be proportional to the full-time job salary.

Part-time employees' vacation has the same length and conditions of indefinite-term employees.

Fixed-term contracts are only allowed in a few cases (see question 11) and the maximum length for them is two years. They may be renewed only once if the maximum period of two years is respected, otherwise, they are converted into indefinite-term contracts. The main specific rule relating to fixed-term contracts is that in the case of earlier termination by the employer, the employee is entitled to receive an indemnification corresponding to 50 per cent of the compensation that would be due up to the end of the term, and no prior notice period is applicable. If the earlier termination is caused by the employee, the employer is entitled to be indemnified for the relevant losses, but the amount is limited to that which would be due to the employee if applicable.

27 Must employers publish information on pay or other details about employees or the general workforce?

Employers must only inform the authorities about monthly payments, hiring, termination, working tools, work leave, etc, in specific and official electronic systems for tax purposes.

Post-employment restrictive covenants

28 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

There is no specific legislation regulating these covenants. Case law interprets that non-compete clauses are considered valid and enforceable when employees are reasonably indemnified for the non-compete period, which is usually up to 24 months and may only refer to the roles and territory established in the employment contract that was terminated. Post-termination non-solicitation and non-dealing covenants are in general terms accepted as valid and enforceable if they are reasonable.

29 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Yes, employers must indemnify former employees in cases of post-termination covenants not to compete. At least 50 per cent of the employee's last monthly salary per month of non-competition has been accepted in case law as reasonable consideration for such restrictions.

Liability for acts of employees

30 In which circumstances may an employer be held liable for the acts or conduct of its employees?

The Civil Code states that the employer is liable for all acts of its employees during work, regardless of their guilt. Nonetheless, the employer is allowed to sue the employee for an indemnification corresponding to the damages.

The Consolidation of Labour Laws also allows the employer to discount from the employee's salary the amounts corresponding to damages caused by the employee due to malice or if this condition is established by the employment contract.

Taxation of employees

31 What employment-related taxes are prescribed by law?

Generally, the employer is liable for the following employment-related taxes:

- social security contribution at the rate of 20 per cent on the monthly salary paid to professionals (individuals, employees or independent contractors) or up to 4.5 per cent levied on the company's gross revenue for some specific sectors;
- social security contribution at a variable rate of 1 per cent to 3 per cent to fund work-related accident benefits and special retirement over the monthly salary, according to the activities performed by the company, that can be reduced by half or doubled according to the quantity, frequency and cost of social security benefits due to work-related accidents;
- social security contribution at a variable rate of 6 per cent, 9 per cent or 12 per cent over the monthly salary received by employees entitled to special retirement benefits due to the performance of activities under harmful conditions;
- contributions levied at variable rates of up to 5.8 per cent for social services provided by rural, industrial, services and trade associations; and
- unemployment severance fund at the rate of 8 per cent over the monthly salary.

The employee, in turn, is liable for the following employment-related taxes (withholding by the employer):

- income tax at progressive rates over the monthly salary higher than 1,903.99 reais, varying from 7.5 per cent to 27.5 per cent (applicable for withholding income tax and annual income tax, the first being a prepayment of the second); and
- 8 to 11 per cent social security contributions over the monthly salary according to the following progressive taxable basis:

Taxable basis – remuneration	Rate (percentage)
Up to 1,693.72 reais	8
1,693.73 to 2,822.90 reais	9
2,822.91 to 5,645.80 reais (maximum of taxable basis for social security contributions)	11

Employee-created IP

32 Is there any legislation addressing the parties' rights with respect to employee inventions?

Employee inventions are the employer's property if they are developed due to an employment contract related to research or invention activities, or if these activities result from the nature of the services rendered. The compensation for the invention developed is limited to the employee's salary, unless other compensation is agreed by the parties.

33 Is there any legislation protecting trade secrets and other confidential business information?

In general, the protection of trade secrets and other confidential business information is provided for in the Federal Constitution, which ensures the free initiative and exercise of economic activity, and Law 9,279/1996, which fights unfair competition, states that the following conduct committed by an employee, partner or administrator of the company impaired is a crime:

- publishing, by any means, false statements to the detriment of competition, in order to take advantage;
- providing or disclosing false information about a competitor, in order to take advantage;
- using fraudulent means to divert, to its own advantage or of a third party, the clients of others;
- using an advertising slogan or a sign of a third party, or imitating them so as to cause confusion between products or establishments;
- unduly using the trade name, establishment title, or emblem of third parties, or selling, displaying or offering for sale or having in stock a product with such references;
- replacing with its own name or company name products of third parties, of their name or business name, without their consent;
- using a reward or distinction not obtained by it as a means of propaganda;
- selling or displaying, or offering for sale, in the container or packaging of third parties, an adulterated or counterfeit product, or using it to negotiate with a product of the same type, even if not adulterated or counterfeit, if the fact does not constitute a more serious crime;
- giving or promising money or another product to a competitor's employee, so that such employee, violating his or her employment duty, is providing an advantage;
- receiving money or another product, or accepting the promise of pay or reward, to, in violating of the employment's duty, provide advantage to the employer's competitor;
- disclosing, exploiting or using, without authorisation, confidential knowledge, information or data that may be used in the industry, trade or service provision, excluding those that are publicly known or that are obvious for an expert in the matter, to which it had access upon a contractual or employment relationship, even after the termination of the agreement;

- disclosing, exploiting or using, without authorisation, trade knowledge or information obtained by illegal means or to which it had access by means of fraud;
- selling, displaying or offering a product for sale, declaring it to be the subject of a deposited or granted patent, or registered industrial design, when it is not, or mentioning, in advertising or commercial paper, as filed or patented, or registered, without it so being; and
- disclosing, exploiting or using, without authorisation, test results or other data not disclosed, the preparation of which involved considerable effort and that have been presented to government entities as a condition for approving the marketing of products.

Thus, the legislation guarantees the confidentiality and secrecy of all documents, memoranda, drawings, diagrams, lists, computer programs and other items that may contain business secrets.

Data protection

34 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Although there is no specific law related to the protection of employee privacy and personal data, the Federal Constitution ensures the inviolability of intimacy, private life, honour and image of all citizens. In this sense, employers shall keep employees' personal data confidential, and they may be disclosed only upon a judicial decision. With regard to employees under 18 (minors), the collection and treatment of their personnel data shall be made upon the provision of a notice (if collected offline) or upon express consent (if collected online). In any case, the minor shall be duly represented to validate the notice or consent.

Business transfers

35 Is there any legislation to protect employees in the event of a business transfer?

The Consolidation of Labour Laws establishes that no modification of the company's structure shall affect the employee's rights. Therefore, employment contracts remain effective in the case of sale or acquisition of shares or quotas. The same principle is extended where the sale of assets represents a business transfer.

As per Law 13,467/2017, outsourcing is considered licit and can be agreed upon activities related, or not, to the core business of the company provided that some conditions and requirements are met.

Termination of employment

36 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Employees may be dismissed with or without cause, depending on the case. The first case does not trigger the obligation to pay the fine over the unemployment severance fund and no prior notice is required (see question 25). The causes are expressly defined by the Consolidation of Labour Laws as:

- acts of dishonesty;
- intemperance of conduct (related to inappropriate sexual behaviour) or misconduct;
- habitual trading without the employer's permission (during working hours) or when it is considered an act of competition with the employer or it is harmful to the business;
- final criminal condemnation (if the execution of the penalty is not suspended);
- negligent performance on duty;
- drunkenness in the workplace;
- breach of the company's secrets;
- lack of discipline or insubordination;
- job abandonment;
- physical violence or acts against someone's honour or name during work, except in the case of self-defence or defence of third parties; and
- customary gambling in the workplace.

Update and trends

Still aiming at enhancing the country's economic and social agendas after a recession process triggered from 2012–2013 and which resulted in former President Dilma Rousseff's impeachment, the current government was able to approve some bills of law in 2017 to reform labour legislation in order to boost the country's economic activities, despite huge mass protests and legal disputes that have not yet finished.

In this sense, Law 13,429/2017, Law 13,467/2017 and Provisional Measure 808/2017 deeply changed the labour system by increasing the power of negotiation between employees and employers, and between employees' unions and employers for more flexible working conditions, especially related to hiring and termination processes, as well as exempting taxation and labour impacts over some compensation elements and allowing free and full process of outsourcing.

Conversely, the federal government failed to approve significant changes in the social security legislation that would be essential to limit public spending on pensions and social benefits, mostly because of massive opposition from public service workers, the unions, media and even political parties, the latter afraid that an unpopular action could jeopardise their candidates' chances of winning the 2018 executive and legislative elections.

The economic scenario is still uncertain and a definite recovery will depend on the political environment after the next president's election at the end of 2018.

37 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Yes, if the termination is without cause. The notice period must be proportional to the length of the employment contract, provided that the minimum period for the notice to be given prior to the effective date of termination is 30 days plus three days for each year of service rendered to the same employer, limited to a maximum of 90 days. The employer may provide pay in lieu of notice.

38 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Dismissal without notice is acceptable, but the employer shall provide payment in lieu of notice (see questions 25, 26, 36 and 37).

39 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Yes, in cases of dismissal without cause for indefinite-term employment contracts, the employee is entitled to receive an indemnification corresponding to 40 per cent of the balance of deposits made by the employer on the employee's unemployment severance fund account (an additional 10 per cent fine is paid by the employer to the government as tax). This indemnification is not due in the case of dismissal with cause.

Regarding zero-hour contracts, the following amounts will become payable upon termination of the employment contract without cause:

- half the notice period, which will be mandatorily paid and calculated based on the average of the amounts paid to employee;
- an indemnification corresponding to 20 per cent of the balance of deposits made by the employer on the employee's unemployment severance fund account (an additional 10 per cent fine is also paid by the employer to the government as tax); and
- all other labour charges related to indefinite-term contracts.

Upon any kind of termination, the employee is entitled to receive the balance of the monthly salary and accrued vacation.

40 Are there any procedural requirements for dismissing an employee?

Termination payments must be made within 10 days after the termination in any case, and a medical examination may be required.

41 In what circumstances are employees protected from dismissal?

In general terms, employees are protected from dismissal without cause during the following periods:

- 12 months after sick leave due to work-related accidents;
- pregnancy up to five months after the birth;
- from the candidature up to one year after the mandate for members of internal committees for accident prevention, union officers and members of conciliation commissions representing employees; and
- other cases established by collective bargaining agreements, which usually prevent dismissals in the case of employees that are about to retire or have just returned from vacation.

42 Are there special rules for mass terminations or collective dismissals?

As of the validity of Law 13,467/2017, employers are expressly exempted from negotiating the terms of a mass termination or collective dismissal with the relevant unions.

43 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Class or collective actions in defence of workers are allowed by the legislation. Employees are generally represented by labour unions or by the Labour Prosecution Office.

44 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

No, employees are free to retire whenever they have complied with the requirements established by the social security legislation. The earning of retirement pensions does not prevent the retired from continuing to work as employees. Law 13,183/2015 states that, up to 30 December 2018, male employees are entitled to retire when the total sum of their years of work and age corresponds to 95 (eg, 35 years of work plus 60 years of age). For female employees, the sum required is 85 (eg, 30 years of work plus 55 years of age).

Dispute resolution

45 May the parties agree to private arbitration of employment disputes?

As of the validity of Law 13,467/2017, employees who earn a monthly compensation higher than twice the amount of the highest social benefit provided by the Social Security (currently around 11,200 reais) may enter into a covenant or expressly agree upon an arbitration clause to solve any disputes arising from the employment contract. For other cases, private arbitration is not valid to settle individual employment disputes. The Consolidation of Labour Laws, however, provides the possibility of the establishment of conciliation commissions by trade unions and companies to settle private employment disputes. For the resolution of disputes arising from collective bargaining between employees' and employers' unions, the Federal Constitution allows them to use arbitration.

46 May an employee agree to waive statutory and contractual rights to potential employment claims?

Owing to the principle that the employee's rights cannot be waived, waivers may always be challenged before the labour courts.

47 What are the limitation periods for bringing employment claims?

The statute of limitations for labour claims is two years from the termination of the employment relationship, provided that the labour claims comprise rights related to the past five years counted from the filing date.

MACHADO ASSOCIADOS

Thiago Ramos Barbosa **tbarbosa@machadoassociados.com.br**
André Blotta Laza **alaza@machadoassociados.com.br**

Av Brig Faria Lima 1656
11th Floor
01451-918 São Paulo
Brazil

Tel: +55 11 3819 4855
Fax: +55 11 3819 5322
www.machadoassociados.com.br

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-78915-038-4