

BASIC BRAZILIAN LABOUR AND EMPLOYMENT RIGHTS AND ENTITLEMENTS

*A complimentary overview provided by Montgomery & Associados
(Updated as of September 2020 taking into account the legislation in force at such time)*

1. INTRODUCTION - EMPLOYMENT RELATIONSHIPS

1.1. The basic rules governing labour and employment relationships in Brazil are set out in the Federal Constitution and in the Brazilian Consolidation of Labour Laws (*Consolidação das Leis do Trabalho* – “CLT”).

1.2. Brazil’s labour and employment legislation is supplemented by other federal, state, and/or municipal statutes, social security norms, court decisions, administrative regulations and collective bargaining agreements (“CBAs”).

1.3. Pursuant to Article 3 of the CLT, an **employee** is defined as an individual who renders services on a regular basis, under subordination (i.e. subject to direct oversight) and dependency to his/her employer, against receipt of salary.

1.4. It follows from the foregoing that if any individual renders services in Brazil under a relationship in which the above-mentioned requirements are satisfied, he/she will be considered an employee and, therefore, be entitled to labour rights and entitlements that cannot be waived, even if the prior arrangement between the parties provided otherwise. Furthermore, regardless of the place of hiring, origin of the agreement or of the company, if the services are rendered in Brazil, Brazilian law will apply. If the services are rendered in multiple countries including Brazil throughout a single employment relationship, Brazilian case law determines that the most favourable legislation shall apply.

1.5. In turn, an **employer** is a company, entity or individual, who/which assuming all the economic risks of its activities, hires, pays a salary, directs, coordinates and oversees the services rendered by the employee(s).

1.6. The employment relationship is construed by the execution of a written or verbal employment agreement entered into between the employer and the employee. Although not mandatory, a written employment agreement is recommended to provide certain terms and conditions not specifically provided for by Brazil’s labour and employment legislation.

1.7. As far as duration is concerned, an employment agreement can be entered into: (i) for an indefinite term, which is the most common format in Brazil; or (ii) for a fixed term, allowed only in specific situations provided by law.

1.8. Prior to the employment agreement, the parties involved in the intended employment relationship can also execute an offer letter, containing the main aspects of the negotiation that preceded their relationship. Although commonly used by foreign companies, it is important to mention that the offer letter is not a mandatory document for a Brazilian employment relationship.

1.9. Tax and social security contributions due over the employee's entitlements and remuneration are mandatorily paid by his/her employer. Effectively, such payments can only be made by an entity incorporated in Brazil, which must be enrolled with the Federal Taxpayers' Registry for Corporate Entities ("CNPJ") and registered with other employment-related entities (e.g. the National Social Security Institute – "INSS", the Ministry of Economy, the Secretariat of Labour and Employment, the Brazilian Federal Savings Bank – "CEF" etc.). Due to such scenario, it is not possible to hire an individual as a fully-fledged employee without having a corporate entity duly incorporated and registered in Brazil.

Changes to the employment agreement

1.10. The CLT provides that any amendment to an employment agreement is only permitted by mutual consent and provided that such amendment is not detrimental to the employee. Changes that are detrimental, even if carried out with the employee's consent, exposes the employer to future judicial discussions.

1.11. Notwithstanding, the CLT allows free stipulation of clauses in the employment agreement and negotiation of specific and determined rights between the employer and employees with a university degree and monthly salary in excess of twice the cap of the social security benefits (BRL12,202.12 in 2020 - the amount is adjusted on an annual basis).

Change of ownership and withdrawal of a shareholder

1.12. As a general rule, changes in ownership of a business, regardless of the type of business transaction, cannot impact employment relationships and vested rights. In this regard, the buyer, new owner or new controlling party must continue to comply with the provisions contained in employment agreements in effect at the time of the business transaction.

1.13. The successor is fully liable for all past liabilities of the succeeded company unless there is evidence of fraud in the transfer, in which case the succeeded company will be jointly and severally liable.

1.14. As far as the withdrawal of a shareholder from a company is concerned, the CLT contemplates a limitation of his/her secondary liability vis-à-vis labour proceedings filed within two (2) years of the registration of the Amendment to the Articles of Association with the competent company registry, respecting the benefit of order. However, if there is evidence of fraud, the liability shall be joint and several.

Economic/corporate group

1.15. Under the CLT, a corporate group consists of the confluence of two or more companies (including foreign companies) under common control or management, with a connection of interests, joint economic activities and shareholder identity.

1.16. Companies belonging to the same economic group are deemed to be jointly and severally liable for the obligations that any of them may have towards the employee working in Brazil, regardless of whether the company has ever had any direct relationship with such employee or not.

Transferring expatriates to work in Brazil

1.17. There are several types of visas and residence permits in Brazil, among which we can enumerate, e.g: visit visas (for tourism and business purposes), work visa, student visa, investor visa etc.

1.18. The foreign employee holding a tourist/visit visa is prohibited from formally working in Brazil and can only perform tourism activities and participate in meetings, sign contracts and research the Brazilian market.

1.19. Upon a foreign national being assigned to work in Brazil, a two-tier process must be observed to obtain such type of visa: first, a residence permit must be obtained from the Ministry of Justice and Public Security, after which the foreigner must then apply himself/herself for the corresponding visa to be issued at the Brazilian Consulate overseas.

1.20. Work visas may require an employment relationship with the Brazilian entity or not, depending on which type of work will be performed in Brazil.

1.21. Executives, officers and managers may obtain legal residence in Brazil due to minimum investments being made in a Brazilian entity, either new or already existing.

1.22. Beyond the visa/residence permit, there are other legal requirements in order to legalize the immigration status of a foreign national in Brazil:

- (i) Registration of the foreign national with the Federal Police to obtain his/her Brazilian Identity Card for Foreigners (“RNM”);
- (ii) Enrolment with the Individual Taxpayers’ Registry (“CPF”); and
- (iii) Obtaining his/her Employment Booklet (“CTPS”), as the case may be.

2. OUTSOURCING ACTIVITIES IN BRAZIL

2.1. Foreign companies that do not have a Brazilian company or subsidiary incorporated and still need to render services or perform activities in Brazil and Brazilian companies that does not wish or have the ability to perform all of their business activities in-house (“contracting party”) can outsource part or all of their activities to a third-party company (“vendor” or “service provider”).

2.2. The third-party entity will be engaged under an outsourcing agreement, to render the services set out therein, with the staff and the structure it deems appropriate, even if subject to the contracting party’s guidelines and overall directions.

2.3. Brazilian employment law recently underwent deep changes within the federal government’s reform projects. In this regard, the legislation pertaining to outsourcing was amended both in March¹ and November 2017, when the Brazilian Labour Law Reform became effective².

¹ Law No. 13,429/2017 amended Law No. 6,019/1974, which governs temporary and outsourced work.

² Law No. 13,467/2017, which amended several aspects of the CLT and other labour and employment-related laws.

2.4. Until then, it was only possible in Brazil to outsource ancillary activities, i.e. activities not directly related to the company's core business, such as property security, cleaning services, call center services, etc.

2.5. As from the implementation of the Brazilian Labour Law Reform, outsourcing the activities directly related to a company's core business is now legally authorized and, following several judicial discussions relating to the constitutionality of such authorization, confirmed by the Brazilian Supreme Court ("STF"), in August 2018.

2.6. The STF's decision has broken years of court decisions that deemed illegal to outsource a company's core business activities³ and that had determined the outsourced employees to be recognized as employees of the contracting party.

2.7. The new legal system in place now authorizes companies to outsource any of their activities, provided that the requirements of engagement set forth in Law No. 6,019/1974 are satisfied.

2.8. Outsourcing activities can be cost-efficient and result in services being performed by professionals who are experts in their fields, potentially generating a streamlined production, however, such model entails triggers risks and consequences exposing the contracting party to: (i) secondary liability over the vendor's non-compliance with labour and employment laws, as well as social security obligations; (ii) joint and several liability over the vendor's non-compliance with workplace health, hygiene and safety regulations; and (iii) the risk of the outsourcing structure being deemed fraudulent, and therefore, null and void, with the outsourced employees being recognized as employees of the contracting party.

3. HIRING PROCEDURES

3.1. Before the employee effectively starts to render services to a company, he/she has to undergo a number of hiring routines, namely:

- (i) Submission of personal documentation, such as CPF, ID (civil identity card), birth/marriage certificate, birth certificate from offspring, university diplomas and other educational/professional documentation, bank information etc., among others that may be requested by the employer itself or by the payroll processing company;
- (ii) Medical examination;
- (iii) Annotation of the CTPS by the employer;
- (iv) Negotiation and execution of a written employment agreement and relevant attachments (annex, policies, receipts etc.), although, as mentioned, a written agreement is not mandatory by law;
- (v) Execution of consent terms to collect and treat personal data, if and when necessary, pursuant to the General Data Protection Law ("LGPD" - Law No. 13,709/2018)

³ Pursuant to Precedent No. 331 of the Superior Labour Court.

3.2. When an employee is hired by a company in Brazil, he/she will be mandatorily enrolled with the Brazilian General Social Security Regime, therefore a percentage of the salary will be subject to a monthly discount to be directed to the federal autarchy responsible for social security in Brazil, namely, the INSS. The contribution to the INSS is bivalent, i.e, both employer and employee must contribute on a monthly basis until the employee is entitled to retirement.

3.3. The CTPS is issued by the Brazilian Ministry of Economy and is a personal document that belongs to the employee. All information, such as employer's name, date of hire, remuneration, job title, salary increases, vacation periods, exemption from working hour control and union dues must be duly annotated.

3.4. The annotation of the above-mentioned information is mandatory and must occur within 5 business days, and, after annotation, the employer must return the CTPS to the employee within 48 hours, under penalty of administrative fines by the labour and employment authorities being imposed.

3.5. The CTPS serves as an identity document for the employee since it contains personal data, as well as the registration of past employment agreements and is deemed evidence of time of service for social security purposes. The Brazilian Ministry of Economy recently launched the electronic version of the CTPS, which shall gradually replace the physical document.

4. TYPES OF EMPLOYMENT AGREEMENTS

Probationary employment agreement

4.1. Employment agreements may be executed providing for a probation determined period (known in Portuguese as "prazo de experiência") of up to 90 (ninety) days.

4.2. If the parties decide to continue the employment relationship, the agreement will automatically convert into an agreement for an indefinite period of time.

4.3. The repercussions of terminating a probationary agreement are less severe for both employer and employee, for which reason such probation period is commonly ascertained for new hires. The maximum term of the probation period may vary according to the Collective Bargaining Agreement of each category, but never exceeds the above-mentioned 90-day term.

Fixed-term employment agreement

4.4. The CLT allows for employers to hire employees for a fixed term only under specific and predetermined situations and for up to 2 years:

- (i) For services whose nature justifies the predetermination of a term;
- (ii) Transitional business activities;
- (iii) Probationary period (as per item 4 above).

Employment agreement for an indefinite period

4.5. Such agreement is considered as the general rule in Brazil, since one of the main principles governing Brazilian Labour Law is the Principle of the Continuance of the Employment Relationship, i.e, an employment relationship between employer and employee is expected to continue in effect.

4.6. This type of agreement usually results from a previous probationary employment agreement in which both employer and employee desired to continue the employment relationship indefinitely.

4.7. The main financial repercussions of terminating this type of agreement without cause is the payment of a fine corresponding to 40% to the employee of all FGTS deposits and the obligation of a prior notice of 30 days.

Temporary employment agreements

4.8. This type of agreement is not regulated by the CLT, but by specific legislation – Law No. 6,019/1974 (as altered by the Brazilian Labour Law Reform). The temporary employment agreement is valid for up to 180 days, extendable for 90 days. The purpose of such agreement is to meet a transitory need for staff replacement, or either due to overwhelming demand. However, the most common cases are for replacement of employees on maternity leave.

4.9. It is important to emphasize that companies cannot directly hire an employee under this model, since it is mandatory for an intermediary entity - called “temporary staffing company” to be involved, which will allocate an employee to render services to the contracting party. Therefore, the employee’s relationship is with the temporary staffing company, and not with the contracting company.

Intermittent employment agreement

4.10. Also known as “zero hour contracts”, this type of agreement involves non-continuous work. The activity is performed under alternation of periods of service and inactivity.

4.11. The activities must be determined in hours, days or months, regardless of the type of activity of the employee and the employer. The agreement must be written and must provide for the form of payment.

4.12. During the period in which the worker is inactive he/she will not be available to the company, which has to formally and expressly invite him/her to work again for a new period of activity. The employee can therefore work for other companies concomitantly.

Part-time employment agreement

4.13. The part-time employment agreement is valid when working hours do not exceed 30 hours of work per week without the possibility of overtime, or do not exceed 26 hours per week, with a possibility of 6 weekly hours of overtime.

4.14. The part-time agreement must be in writing and must indicate the normal working hours per day and week in comparison to full-time work, in order to calculate the proportional salary in comparison to the full-time salary. Therefore, unless otherwise expressly stipulated, it is assumed that the employee will be providing services for the regular workload of up to 8 hours per day, 44 hours per week and 220 hours per month.

Independent contractor

4.15. Known commonly in Brazil as “PJ” as a reference to the engagement of an individual who has his/her own corporate entity (“*pessoa jurídica*”) – although the model also applies when the service provider acts as individual without a corporate entity - this type of agreement, at first, does not establish an employment relationship between the company and the worker.

4.16. In this type of agreement, the independent contractor can render services of any nature to the contracting party without the status of a fully-fledged employee, provided such services are rendered without any subordination (i.e., with full autonomy and independence).

4.17. The independent contractor agreement is one of the most common causes of judicial claims before Brazilian Labour Courts, due to fact that several companies unduly use such model to camouflage an actual employment relationship.

Trainees/Internships

4.18. This agreement is not covered by the CLT and is not considered by law as an employment relationship. An internship is regulated by a specific law - Law No. 11,788/2008 - which regulates the specificities of this activity. The scope of this agreement is to strengthen the skills and knowledge the trainee/intern is obtaining at school (college, technical education, high school etc.), by giving the required tools for the trainee/intern to apply them from a real world perspective.

4.19. Internships are governed by a tri-partite agreement entered into by the student, the company and the educational institution. The company engaging interns has to report back on the intern’s activities to the educational institution every six (6) months.

4.20. The student can work up to 30 hours per week and is entitled to a 30-day vacation once the first year of internship has been concluded, which should preferably be taken during his/her school vacation. The internship agreement cannot exceed 2 years, after which the agreement is terminated, or the student is formally engaged as a fully-fledged employee.

Non-employee corporate officer

4.21. A non-employed officer is considered to be an individual vested in a managerial position, elected at the General Shareholders' Meeting or appointed in the company’s Articles of Association and has effective managerial activities, decision-making powers and effectively participates in the day-to-day running of the business without any subordination. The non-employee corporate officer does not participate in the risk of the business, unless he/she is also a shareholder of the entity.

4.22. The non-employed officer is not covered by the CLT, since this is considered to be a civil relationship between the individual and the company. Thus, there is no payment of salary, but rather of *pro labore*. His/her role, authority, activities and responsibilities shall be governed by the company's Bylaws or Articles of Association, by the Civil Code, Law of Corporations and potentially by an individual service agreement providing for the specificities of such relationship, especially those regarding which the company prefers to maintain certain secrecy (since the corporate documents become public once registered).

4.23. It is important to point out that a statutory officer with no decision-making power, limited managerial authority and under hierarchical subordination shall be registered as an employee statutory officer, under an employment agreement governed by the CLT.

5. SALARY AND ENTITLEMENTS

5.1. In addition to any entitlement provided by the applicable CBA or stipulated in the employee's employment agreement, in accordance with Brazil's labour and employment legislation, employees are entitled to certain rights, such as:

- (i) Minimum wage and prohibition of salary reduction: the Brazilian Federal Constitution provides for minimum work standards, including a minimum wage defined by the Federal Government each year⁴ and the prohibition of reduction of an employee's salary, except under collective bargaining in very extraordinary circumstances.
- (ii) Annual mandatory salary increase: in a percentage usually contemplated by the CBA executed by and between the respective employer's and employee's unions - whether or not they are affiliated to such unions;
- (iii) Annual Christmas bonus (commonly referred to as the 13th salary): an additional annual payment equal to an employee's monthly compensation;
- (iv) Vacation: an annual 30-day vacation (which can be split in up to 3 periods of time), coupled with a bonus equal to 1/3 of the employee's monthly compensation. The total vacation pay accrues 133.33% of the employee's monthly salary, coupled with the average (1/12) of all salary variable amounts paid (e.g. overtime, commission etc.);
- (v) Severance fund ("FGTS"): an amount to be monthly funded by the employer corresponding to 8% of the employee's monthly compensation, deposited into a special bank account maintained in the name of the employee at the CEF;
- (vi) Transportation voucher: the employer shall be liable for the total cost of transportation vouchers exceeding 6% of the employees' monthly salary;

⁴ State laws, laws related to specific employees' categories and CBAs can provide for higher minimum wages.

- (vii) 15-day paid sick leave: the employer shall be liable for the payment of the first 15 days of sick leave. Thereafter, if necessary, the leave shall be extended for a term to be determined by the INSS, which shall be responsible for the payment of the employee's salaries (in the form of social security benefits);
- (viii) Minimum of 120-day maternity leave and 5-day paternity leave: female employees are entitled to, at least, 120-day maternity leave periods following the birth date, to be paid by the employer; and male employees are entitled to a minimum 5-day paternity leave period⁵ (the CBA may eventually grant longer periods);
- (ix) Hazardous working premium: 30% premium on the employees' base salary for those working under dangerous conditions;
- (x) Unhealthy working premium: a 10%, 20% or 40% (depending on the severity of the exposure) premium on the regional minimum wage for employees working under unhealthy conditions;
- (xi) Temporary transfer allowance: a 25% additional payment to the employees' monthly salary for those transferred temporarily, provided the transfer triggered change of the employee's domicile;
- (xii) Dismissal indemnification (FGTS indemnification): severance fund indemnity - in the event of dismissal without cause, the employee is entitled to receive a payment corresponding to 40% over the balance of deposits made during the employment relationship;
- (xiii) Overtime: overtime payment paid for any work carried out outside the employees' regular workload. Any overtime is paid with an additional overtime premium.
- (xiv) Night shift hour reduction: every 52 minutes and 30 seconds of work conducted after 10:00pm and before 05:00am corresponds to a full 60 minutes of work;
- (xv) Night shift premium: 20% additional premium over the hours worked on the night shift (after 10:00pm and before 05:00am);
- (xvi) Reduced work shifts: 6-hour shifts for certain employee categories, such as bank employees, typists, telephone operators etc.; and
- (xvii) Weekly paid rest: at least one day for rest every week, preferably on Sundays. Certain employee categories are entitled to different rules regarding the mandatory Sunday rest;

⁵ Exceptions may apply, such as longer periods for companies participating in the "Program Citizen Company"; male employees that are the only parent responsible for the newborn; foster parents etc.

- (xviii) Justified absence from work without salary discount: in the event of a legitimate reason (such as medical emergency, medical appointment, accompanying a relative to the hospital, military or public duties, blood donation etc.), employers cannot discount the missed day/hours from the employee's salary due to the absence from work;
- (xix) INSS: Every salary-related payment is subject to **social security contributions** paid to the INSS. As a general rule, Brazilian employers must pay around 25.8% over the total amount of the company's payroll to the INSS⁶. Such rate varies according to the company's core business activities and level of risk in the activities performed, being subject to surcharge in the event of work-related accidents.
- (xx) Family allowance: for employees earning a monthly salary lower than BRL1,425.56 (amount valid for 2020 - the amount is adjusted on a yearly basis) and with offspring with less than 14 years of age, the companies shall pay an allowance of BRL48.62 for each son/daughter per month. Companies may discount the amounts paid as Family Allowance from the social security contribution as per item "xix".

6. WORKING HOURS AND MEAL BREAK

6.1. Regular working hours are limited to 8 hours per day and 44 hours per week. Certain occupations and professional categories may provide for fewer daily and weekly workload.

6.2. Pursuant to the CLT, the 8-hour working day may be extended up to 2 hours per day for work performed during business days (Monday through Saturday) and any overtime is paid with an additional overtime premium.

6.3. As a general rule, the additional overtime fee must be paid with a rate equivalent to an additional minimum premium of 50% over the regular hour's value. For work performed on Sundays and holidays, the additional overtime premium is generally equivalent to 100%.

6.4. However, a higher overtime rate can be applied, whether as a result of specific laws related to specific categories, the applicable CBA, employment agreement or as a result of the company's practices.

6.5. It is important to note that some job positions, commonly known as "exempt positions" are not subject to working hour control and, therefore, not entitled to payment of overtime. The exempt positions are provided by clauses I, II and III of Article 62 of the CLT, namely; (i) **fiduciary positions** (such as managers, directors and officers with autonomy and decision-making power), (ii) **external employees** (employees working outside of the company's premises with it being impossible to track their working hours) and (iii) **employees working remotely** (usually from home).

⁶ Some specific business activities are subject to a contribution over gross revenue in lieu of the regular employer's social security contribution, at least, until December 2020 (*Desoneração da Folha de Pagamento*). Furthermore, companies under the simplified tax regime are subject to different form and rates of taxation.

6.6. Finally, the company must grant a break for rest and meal whenever the working period exceeds 4 hours, which will be of 15 minutes for a working period of up to 6 hours and of 1 to 2 hours for a working period exceeding 6 hours. Such break is not included within the daily workload.

7. VARIABLE COMPENSATION AND BENEFITS

7.1. In addition to the monthly salary, employees may be entitled or eligible to variable compensation. The possibilities of variable compensation are extensive and each company may design its own compensation structure combining fixed salary and one or more types of variable compensation, such as commissions, bonus, premiums, Profit or Result Sharing Plan (“PLR”), Stock Option etc.

7.2. Each type of variable compensation has its own advantages and disadvantages from the multitude of possible points of view: attraction and retention of valuable professionals, competitive market differentials for executives, overall costs, tax and social security repercussions, repercussions in all other salary-related entitlements etc. The review and choice of the most suitable compensation package is conducted on a case-by-case scenario and will depend on the company, the business and the employees.

7.3. Some of the most common types of variable compensation are:

- a) “Commission”: a percentage of a sale or production that is measured in either units or Brazilian *Reais* of revenue and is considered to have a salary-related nature. That having been said, please note that commission deriving from sales concluded by the employee must be paid even after termination of the employment relationship as contemplated by Article 466 of the CLT.
- b) “Bonus”: an incentive paid when an individual meets performance criterion against a specific goal, which can be combined with the employer’s global goals and performance.
- c) “Prizes”: discretionary incentives paid upon the employee(s) outstanding performance, exceeding the normally expected within the regular activities being performed. The new definition was introduced by the Brazilian Labour Law Reform and it is very vague, there not yet being sufficient judicial decisions issued on the matter to ascertain the variables of such definition, either by the Labour Courts or by the Tax Authorities.

7.4. It is important to note that benefits like bonuses and prizes, which are not mandatory by law or CBA, but rather extended by the employer on a discretionary basis, may become a vested right for the employee when paid repeatedly, in which case they will be considered to have a salary nature and be reflected in all salary entitlements, such as weekly paid rest, vacation pay *plus* vacation bonus, Christmas bonus, FGTS, prior notice etc.

- d) “Profit or Result Sharing Plan”: a type of bonus plan, provided by Law No. 10,101/2000 and, unless expressly contemplated by the applicable CBA, is not mandatory. The plan that will regulate the criteria, goals and payment of PLR must be negotiated by and between the company, the employees’ Union and an employees’ internal committee. Employees with a college degree earning more than BRL12,202.12 (in 2020 - the amount is adjusted on a yearly basis) can negotiate the PLR individually directly with the employer. If the legal requirements of the plan are met, the payments will not be deemed as salary, will not be subjected to social security contributions and will be taxed according to a differentiated withholding income tax chart.

7.5. The employer may also grant its employees benefits in addition to those provided by law. Such benefits can either be provided on a discretionary basis or stipulated in the applicable CBA. The benefits extended by the employer to its employees on a discretionary basis will become a vested right to the employee when paid repeatedly and cannot be reduced or suppressed.

7.6. The benefits that are more often provided by companies in Brazil are, for instance: discretionary bonus; health insurance plan; life insurance plan; meal voucher and private pension plan (the latter usually for employees earning, at least, more than 4 times the minimum wage).

7.7. Please note that depending on the benefit provided by the employee, a different legal and tax perspective must be considered and respected.

8. RELEVANT CONTRACTUAL PROVISIONS

8.1. Although a written employment agreement is not mandatory by law, it is extremely advisable to engage employees under a comprehensive written employment agreement, especially for higher ranked positions. In addition to all the basic provisions relevant to basic compensation, place of work, daily/weekly workload or the exemption of working hour control (as mentioned in Section 5 above) etc., there are several terms and conditions that are only valid if expressly provided for in a written employment agreement.

8.2. For example, a written agreement is required for allocating an employee under a remote work regime; the temporary or definitive transfer of an employee (not occupant of a fiduciary position) is only possible if authorized in the employment agreement or upon express consent; the discount from an employee’s salary of amounts for damages is only possible if authorized in the employment agreement etc.

8.3. Moreover, some provisions are extremely relevant for the employer’s protection and, depending on the job position, for the health of the relationship. Although the range of contractual provisions is extensive and depends on the business and on each company’s specificities and policies, some of the main provisions that ought to be noted are:

- (i) Intellectual property/inventions and breakthroughs
- (ii) Authorization of use of image and personal data treatment under the LGPD
- (iii) Compliance and anticorruption rules

- (iv) Possibility of monitoring the employee's professional equipment and communication
- (v) Confidentiality
- (vi) Non-solicitation and non-compete
- (vii) Authorization of arbitration as method of conflict resolution

9. COLLECTIVE BARGAINING AGREEMENTS AND UNION FEES

9.1. All employees and employers in Brazil are considered to be represented, respectively, by employer and employee unions, defined based on the corporate purpose of the company, employer's core activity and territory.

9.2. The union's representation is restricted to its territory which must, at least, correspond to a municipality. The rules agreed under CBAs are binding to all employers and employees in such territory, whether affiliated to the respective union or not.

9.3. CBAs can be negotiated for a maximum period of two (2) years. However, the economic clauses (i.e. salary increase and minimum wage of the category) are usually negotiated for a 12-month period.

9.4. In this regard it is important to reinforce that the annual salary increase/adjustment will apply on behalf of all employees, regardless they are unionized or not, and regardless the company has participated in the negotiations with the union or not.

9.5. The affiliation of an employee to the respective Union is not mandatory and, for that reason, salary discounts related to the payment of Union fees can only be effected upon the employee's express and written consent.

10. TERMINATION OF THE EMPLOYMENT AGREEMENT

10.1. An employment agreement can be terminated in the following scenarios:

- (i) when the employee voluntarily resigns;
- (ii) when the employee is dismissed by the employer *with* or *without* cause;
- (iii) by constructive or indirect dismissal;
- (iv) upon the expiry of a fixed term agreement (e.g. termination by expiry of the probation period);
- (v) by mass or collective dismissal;
- (vi) by mutual agreement.

10.2. The dismissal of an employee with cause can only be carried out by the employer in the situations contemplated by Article 482 of the CLT. Such situations are quite extreme (such as theft⁷) and require not only hard evidence to support such termination but also must be immediately implemented upon any such situations arising.

⁷ It is important to mention that performance issues do not constitute cause for a termination with cause.

10.3. By terminating an employee with cause, the employee's statutory severance package will comprise payment of:

- (i) the balance of the current monthly salary due at termination date;
- (ii) vacation pay *plus* vacation bonus (corresponding to an additional 1/3 over the total amount due);

10.4. The termination without cause requires the employee being provided by the employer with a minimum 30-day prior notice, which can be either worked (up to the limit of 30 days) or indemnified. The Brazilian Law No. 12,506/2011 also affords employees an additional 3 days per year of service, limited to a total of 90 days, for termination payment purposes.

10.5. A constructive or indirect dismissal can only be carried out by the employer in the situations contemplated by Article 483 of the CLT, which basically imply in the employer bad conduct towards the employee. Such termination requires immediate implementation upon incidence of any of the situations provided by law.

10.6. In the event of termination without cause and by constructive or indirect dismissal, the employee's statutory severance package will comprise payment of:

- (i) prior notice (estimated as above mentioned);
- (ii) the balance of the current monthly salary due at termination date;
- (iii) pro-rated Christmas bonus (13th salary);
- (iv) vacation pay *plus* vacation bonus (corresponding to an additional 1/3 over the total amount due);
- (v) FGTS *plus* dismissal indemnification of forty percent (40%) of the employee's FGTS balance at CEF being due to the employee;
- (vi) other payments and/or fringe benefits specified in the respective employment agreements, CBA and/or company policies.

10.7. When terminating an employee without cause, the company will also have to observe the existence of employees benefiting from job tenures/stability, such as maternity stability, union leader, pre-retirement etc. This aspect is very important since, in some cases, these employees cannot be terminated without cause and/or shall have the stability period indemnified by the employer.

10.8. The termination by mutual agreement implies on the payment of the same severance package due in a termination without cause **except** in what concerns the payment of the indemnified prior notice and of the indemnification of the employee's FGTS balance, which shall be due by half of the total amount.

10.9. In the event of any of the above-mentioned situations, a notice of termination must be given in writing to the employee to be terminated and must be signed by the employer and by the employee.

11. LEGAL QUOTA OF APPRENTICES AND DISABLED PERSONNEL

11.1. Brazilian legislation provides that companies are obliged to hire a certain number of apprentices and disabled workers. Employers are obliged to hire a number of apprentices equivalent to, at least, 5% of the job positions existing in the company that requires specific professional qualification. Moreover, companies with more than 100 employees must hire disabled workers in a proportion varying from 2% to 5%, according to the total number of employees.

12. DISPUTE RESOLUTION

12.1. The labour and employment legal system in Brazil is divided into the judicial and the administrative branches.

12.2. The judicial legal system comprises the following courts: (i) Labour Courts of cities; (ii) Regional Labour Court of Appeals of a State or a group of States - TRT; (iii) the Superior Labour Court of Appeals located in Brasília (the federal capital) - TST; and (iv) the Supreme Federal Court for judgment of constitutional issues - STF. The judicial legal system is that responsible for the judgment of individual labour proceedings and of collective or class actions filed by unions or the Public Prosecutor's Office.

12.3. In addition to the above-mentioned traditional forms of dispute resolution, the judicial legal system also brings the possibility of adopting arbitration as the form of dispute resolution chosen in employment agreements, when there is express consent from the parties and the employee's monthly salary is equal to or higher than twice the cap of the social security benefits (this amount is adjusted yearly and is equal to BRL12,202.12 in 2020, considering the cap of social security benefits of BRL6,101.06).

12.4. Extrajudicial settlements/compromise agreements are also admitted provided they are duly homologated by a competent Labour Court (the law refers to the Conciliation and Judgment Boards) and executed with both parties being assisted by their own counsel.

12.5. Employees have up to **2 years** as from the termination of their alleged or formally recognized employment relationship to take legal action against their former employer claiming for unpaid labour rights in respect of a period of up to **5 years** prior to the filing of a labour proceeding.

12.6. Within the administrative legal system, all companies are subject to assessments by the Labour and Employment Secretariat (member of the Ministry of Economy) and by the Public Prosecutor's Office in respect of administrative labour proceedings regarding non-compliance with the labour legislation, immigration assessments, collection of FGTS etc.

13. LAW No. 14,020/2020 – “EMERGENCY JOB AND INCOME PRESERVATION PROGRAM” – MEASURES TO DEAL WITH THE STATE OF PUBLIC CALAMITY DUE TO THE COVID-19 PANDEMIC

13.1. Due to coronavirus pandemic, the Brazilian Government has enacted special legislation aiming to protect jobs and income.

13.2. On April 1st 2020, the Brazilian Government issued Provisional Measure No. 936/2020 (MP 936), which contemplated special conditions for employers to avoid dismissing employees due to the mandatory quarantine imposed by the Covid-19 pandemic. Since Brazilian law demands that provisional measures be converted into federal law within 90 days, such measure was converted into Law No. 14,020/2020 on 7th July 2020 (regulated by Federal Decree No 10,422/2020 on 14th July 2020.)

13.3. Such legislation introduced two important measures, namely:

Temporary salary and working hour reduction

13.4. Law No. 14,020/2020 allows employers to reduce their employees' contractual working hours and, in the same proportion, the amount of salary, provided the employee's hourly salary is maintained, and provided employees expressly consent with such reductions, either individually or collectively.

13.5. Employees agreeing with reducing their working hours and salary will receive an emergency monetary compensation from the government.

13.6. A written agreement is necessary and must be executed at least 2 days in advance. The reduction of working hours and salary must be exclusively at levels of 25%, 50% or 70% (different rates may apply through collective negotiation with the competent union).

13.7. With Law No. 14,020/2020, a limit was created for companies with recorded gross revenue in 2019 of at least BRL4.8 million. For these companies, working hour and salary reduction, of 50% and 70%, can only be agreed individually with employees with a university degree and monthly salary in excess of twice the cap of the social security benefits, or by employees with salaries of up to BRL2,090.00 (equivalent to two minimum wages in 2020).

13.8. If the employer's gross revenue was less than BRL4.8 million in the 2019 calendar year, working hour and salary reduction of 50% and 70% may apply to employees with a monthly salary equal to or less than BRL3,135.00, and to those employees with a university degree and monthly salary in excess of twice the cap of the social security benefits can join the program by individual written agreement.

13.9. If the employee does not satisfy the above-mentioned requirements (both for companies with gross revenue in 2019 greater than BRL 4.8 million and for those that were below this limit), it is possible to enter into an agreement for reduction of 50% and 70% provided that this agreement does not result in a reduction of the monthly amount previously received by the employee, adding to this calculation: the reduced salary, the value of the Emergency Benefit paid by the government and a monthly compensatory aid paid by the company.

13.10. The reinstatement of regular working hours and salary must be implemented 2 days as from the cessation of the public calamity, the term provided for in the agreement or the employer's communication of the anticipated cessation of the reduction.

13.11. The maximum validity of such agreement to reduce salary and working hours is 120 (one hundred and twenty) days.

Temporary suspension of employment agreement

13.12. As far as the suspension of the employment agreement is concerned, the validity of such measure can be up to 120 (one hundred and twenty) days, as provided for in Decree No. 10,422/2020. Employees will also be entitled to receive the Emergency Aid paid by the government.

13.13. Such Decree also provided that the suspension periods may occur in a fractional or successive manner, provided that each suspension period corresponds to at least 10 days. In the wording of Law No. 14,020/2020, the suspension could even occur in a fractional manner, but with a minimum duration of 30 (thirty) days.

13.14. During the period of suspension of the employment agreement, the employer must maintain the concession of all benefits usually granted due to the employee, such as health insurance, meal voucher, etc.

13.15. If there is any type of work performed by the employee to the employer during the employment agreement suspension agreement, even if partially and/or through remote work, the suspension of the employment agreement will not be confirmed, and the employer should immediately pay all compensation amounts due to the employee, plus the respective social charges (social security, FGTS, etc.).

13.16. If the company recorded gross revenues above BRL4.8 million in 2019, it can only implement the suspension of the employment agreement for its employees if it effects payment of a monthly compensatory aid corresponding to at least 30% of the employee's salary amount, which will be due during the employment agreement suspension period.

13.17. Reinstatement of the employment agreement must occur within 2 days as from the cessation of the public calamity, the term provided for in the agreement or the employer's communication.

We hope that the above is of assistance and remain at your disposal should you need any further information.

With kind regards,

MONTGOMERY & ASSOCIADOS