DISPATCH NO. 44 - BRAZIL

EMPLOYEES HIRED IN BRAZIL AND WORKING FROM HOME FOR THE WHOLE WORLD

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INTRODUCTION

The spread of digital technologies started an increase in the number of employees working from home. Considering this trend, the objective in this essay is to address the new labor regulations concerning teleworking in Brazil by focusing on employees that have been hired in the country, to work from their homes in Brazil, nevertheless for employers abroad.

In this respect, the analysis revolves around labor regulation on teleworking in Brazil and the recent changes introduced in the Brazilian normative order by Provisional Measure N# 1,108, which has been in force since March 25th, 2022 and awaits to be ratified, amended, or revoked by the National Congress as prescribed by the Constitution of the Federative Republic of Brazil of 1998 (CF)[1]

Before entering into the subject in this essay, it must be noted that the competence to legislate on labor and employment relations in Brazil lies with the Federal Union[2]; and labor related matters in the country are based on a constitutional pillar and also organized on an infra-constitutional pillar.

From a constitutional perspective, CF defined that work is a social right in Brazil (Article 6 CF). In addition, CF defined that the Brazilian economic order is grounded in the appraisal of human labor and free initiative, and the

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1. CONSTITUIÇÃO FEDERAL [hereinafter C.F.] [CONSTITUTION] art. 62 (Braz.).

2. Brazil is a federative republic composed by the Federal Union, 26 States, the Federal District and 5,570 Municipalities. A formal and analytical Constitution has been in force since 1998. Among other topics, the Federal Constitution defines the competences of the Union, States and Municipalities to legislate.

constitution aims to guarantee to every person a dignified existence, according to the dictates of social justice (Article 170 CF)[3]

The infra-constitutional perspective on employment relations operates through laws that govern specific issues. One of these laws is the Consolidation of Labor Laws of 1943, as amended over the years (CLT),[4] which is the law applicable to the topic addressed in this essay and that has been changed by Provisional Measure 1,180.

I. TELEWORKING UP TO THE BEGINNING OF THE COVID-19 PANDEMIC

The legal regime for teleworking was formally and legally instituted in Brazil with articles 75-A to 75-F of CLT in November 2017, when the CLT was substantially reformed.[5] The law defined telework or work from home as the provision of services *predominantly* outside the employer's premises, with the use of information and communication technologies that, due to their nature, do not constitute outside work[6]

Among the legal requirements for the execution of telework was the need to formalize in a written labor agreement established by and between employer and employee[7] The context of remote work in Latin America was not very different from that in Brazil. The few countries that were regulating teleworking – e.g. Colombia[8], Peru[9] and Venezuela[10] – also required formal, written agreements for this type of work.

The changes that were added to the Brazilian legal framework in 2017 were condemned by the District Attorneys, Labor Unions, and a number of individuals arguing that the law was reducing employees' rights and benefits, and subjecting them to dangerous and unsafe work hours and routines, among other things.

At the time, due to the legal uncertainties linked to the labor reform, the number of employees working on a teleworking regime in Brazil was minimal. However, the pandemic has produced changes in the regulations on employment relations. The global health crisis has forced many employees to work from their homes.

3. Promoting social justice is one of the fundamental goals of the Federative Republic of Brazil, according to article 3 of CF.

4. Consolidação das Leis do Trabalho [Decreto-Lei No 5.452, de 1 de maio de, 1943] (Braz.).

5. Lei No 13.467 de 13 de julho de 2017 (Braz.)

6. Outside work means the external activity/service that does not allow for work hours control (Article 62, I of CLT). The legal concept of "does not allow" is constantly challenged on Brazilian Courts by former employees, Labor Unions and District Attorney, especially due to advances in technology.

7. Art. 75-B of CLT. The previous concept was defined by Lei No 13.467 de 13 de julho de 2017 (Braz.). Basically, labor agreements in Brazil should include provisions related to the equipment necessary for work from home, reimbursement of expenses, and health and safety guidelines.

8. Ley 1221 de 2008 (Colom.); Decreto 884 de 2012 (Colom.).

9. Ley No 30036, de 15 de mayo de 2013 (Peru).

10. *Ley Orgánica del Trabajo* [Decreto 8938] (Venz.).

In this scenario, employers have begun to assess whether they could force people to work from their homes, and this has accelerated the remote work movement. The legal debate on teleworking has gained attention, including the debates on whether specific regulations on the matter are necessary.

The context of remote work in Latin America has also changed. Chile,[11] Argentina[12] and Mexico[13] have changed their labor laws to regulate on the topic. Specifically in Brazil, which is the focus of this essay, and due to the circumstances imposed by the Covid-19 crisis, the Federal Government understood that teleworking merits urgent debate and that it is necessary to establish greater legal certainty on the matter[14] Thus, a Provisional Measure amending the telework legislation in Brazil was issued at the end of March 2022.

II. PROVISIONAL MEASURE 1,108 (MARCH 25TH, 2022)

A Provisional Measure is an act by the President of the Federative Republic of Brazil that has an explicit deadline for ratification, amendment, or revocation by the Brazilian Congress. However, a Provisional Measure remains in force as it is, and has effects in the world of facts, until it has been assessed by the Congress.

Among the changes introduced by Provisional Measure 1,108 is the redefinition of the legal concept, according to which telework (or remote work): (1) no longer needs to be carried out *preponderantly* in the employer's premises; and, 2) that regular attendance in the employer's premises does not de-characterize this labor or type of hiring (new Article 75-B of CLT).

This Provisional Measure has established that remote work can be carried out (1) within a defined daily working period, or (2) based on production or tasks. This division is new (Article 75-B, §2º of CLT).

In the former article (62, III of CLT), all telework was exempt from control of the daily working period. The Provisional Measure has changed that, as it defined that the employer does not need to control the employee's

11. *Código del Trabajo* (art. 22). In 2020, Ley No 21,220 modified the code (152 quarter-G - 152 quarter-O) (Chile).

12. Before Covid-19, there were no legal provisions in Argentina under which an employer could require employees to work from home, despite the possibility of work from home being agreed between the parties at any time before or during the employment relationship. This rule changed and a new regulation was approved under Ley No 27,555 de 30 de Julio de 2020 (Arg.).

13. When the pandemic started, teleworking was not regulated in Mexico. It was regulated by the Decree of January 11th, 2021, which reformed article 311, and chapter XII of the *Código Federal del Trabajo* (Federal Labor Law) was added on matters of remote work.

14. Historically, Brazil is a very litigious country. In 2021 the number of lawsuits ongoing in Brazilian Labor Courts was 4.5 million cases. *Conselho Nacional da Justiça* [National Council of Justice], in https://www.cnj.jus.br/wp-content/uploads/2021/11/relatorio-justica-em-numeros2021-221121.pdf.

work hours in the case of the remote work being carried out based on production or tasks.

As the law does not mention anything about all other employees who are teleworking - who are not hired based on production or tasks -, some jurists understand that employers should implement a control of work hours for employees that were not hired based on production or tasks. This interpretation will certainly be challenged in Courts, and it is not possible to anticipate what the decision may be.

The Provisional Measure also favors negotiations, and collective and individual bargains, thus maintaining the initial rule approved in 2017 that the change from face-to-face to telework regimes must follow contractual settlement between the parties[15]

Moreover, a paragraph was added to the law (Article 75-B, §4th of CLT) to clarify that the telework or remote work regime is not to be confused or equated with the occupation of telemarketing or teleservice operators. The legislation also authorized telework or remote work for interns[16] and apprentices[17] (Article 75-B, §6th of CLT).

An additional prescription in the new rule is that an employer must give priority to employees with disabilities, and to employees with children or children under judicial custody of up to four years of age, in the allocation of vacancies for activities that can be carried out through telecommuting or remote work (Article 75-F of CLT).

Another novelty is the definition of how the employment contract shall be regulated for an employee hired in Brazil who chooses to carry out telework outside the national territory. The legal provision that was added in Brazilian labor law (Article 75-B, §8th of CLT) defined that the Brazilian legislation will be applied to the employment contract of the employee hired in Brazil who performs telework outside the national territory.

Nevertheless, the rule clarified that: (i) legal provisions must be followed which apply to the situation of workers hired or transferred to provide services abroad;[18] and (ii) the negotiation stipulated between the parties must prevail in face of the new law.

In short, the Provisional Measure changed three articles that had been in force since 2017 and introduced twelve new regulations into Brazilian labor

15. This is the prevalence of negotiated terms over what is legislated on. The constitutionality of the rule of the prevalence of the negotiated terms over the legislated matter is being challenged and the Brazilian Supreme Court ("STF") is expected to rule on the matter by the end of 2022 (Topic 1,046-STF).

16. Student internships are regulated by Lei No 11.788 de 25 de setembro de 2008 (Braz.)

17. In Brazil, there is a law (N# 10.097/2000) aimed at regulating apprenticeship programs, which encourages private companies to hire young apprentices, offering them their first job opportunity, thus promoting professional training and insertion in the labor market.

18. Lei No 7.064, de 6 de dezembro de 1982 (Braz.).

law, including the novelty of employees hired in Brazil who are working from home for an employer based abroad.

III. EMPLOYEES HIRED IN BRAZIL WORKING FROM HOME FOR THE WHOLE WORLD

The debate that is raised in this essay is if there are legal reasons for this change in the labor law on the employment contract of an employee hired in Brazil who chooses to carry out telework outside the national territory, or if the law that had been in effect was enough to address such cases.

To inform this debate, it is important to clarify that less than 18% of the Brazilian population has completed higher education, and less than 5% of Brazilians earn more than the ceiling for social security benefits[19] Therefore, we can assume that a Brazilian employee who will work from home for a foreign employer is privileged: probably someone with a high level of education, who speaks a foreign language, and who will have a remuneration that is different from the standards on the market.

These privileged workers will probably be legally defined in Brazil as an *"employee with individual bargaining capacity" (called in Brazil as "hipersuficiente")*, that is a category of employees are those presumed capable of negotiating and entering into certain valid employment-related contracts directly with their employer without any intervention of the Unions.

The concept of *"employee with individual bargaining capacity"* was introduced on Brazilian labor system in 2017. According to Brazilian labor law (Article 444, single paragraph of CLT)[20] to be deemed an "*employee with individual bargaining capacity",* the employee: (1) must have a college degree and (2) have to earn a monthly salary that is at least twice the maximum payout amount of Brazilian social security retirement, i.e., 14,174.00BRL for 2022, which is approximately 3,000.00USD per month, or 40,000.00USD per year.

In other words, the "*employee with individual bargaining capacity"* differ from other workers by virtue of having ample freedom to agree on their working conditions with their employers, with no need for unions or the State to intervene. This designation of "*employee with individual bargaining*

19. Brazilian Institute of Geography and Statistics ("IBGE"), *Pesquisa Nacional por Amostra de Domicílios* - PNAD *contínua* 2012-2021, at https://www.ibge.gov.br/estatisticas/todos-os-produtos-estatisticas.html.

20. Art. 444 of CLT - Contractual labor relations may be subject to free stipulation by the interested parties on anything that does not contravene labor protection provisions, the collective agreements that apply to them, or the decisions of competent authorities.
Single paragraph. The free stipulation referred to in the *caput* of this article applies to the cases provided for in art. 611-A of this Consolidation, with the same legal effectiveness and preponderance over collective instruments, in the case of an employee with a higher education degree and who receives a monthly salary equal to or greater than twice the maximum limit of the benefits of the General Social Security System.

capacity" gives much more flexibility to the employer and employee, since the parties can negotiate and agree on terms that are different from the applicable Collective Bargaining Agreement.

The idea behind the law is that the "*employee with individual bargaining capacity"* is someone who do not need a labor union protection. Much less the intervention of the Sate. Thus, while the "*employee with individual bargaining capacity"* has this ample freedom to negotiate the labor conditions of its work with the employer, all other employees - who do not fit in this privileged category - have their individual rights to bargain limited by and dependent on labor unions and for the applicable collective bargaining agreement.

Eventually, this provision states that the "*employee with individual bargaining capacity"* is free to stipulate working conditions with his or her employer as the employee sees fit, even if they are contrary to the law, and even contrary to collective bargaining agreements[21] However, that freedom is not unlimited. The limit to the rights is provided exhaustively in art. 611-B of CLT, and it is part of the so-called "*minimum labour conditions*"[22]

The Brazilian labor doctrine presents the idea of a "*minimum labour conditions"* when it explains the difference between unavailable social rights and social rights that are subject to transaction and waiver within the scope of the work and employment relationship.

The "*minimum labour conditions"* aims to guarantee a minimum standard of human dignity to each individual. These are the minimum necessary conditions that a worker needs to have. It refers to the minimum level of individual and social rights, that is guaranteed to the worker and that cannot be suppressed.

The rationale underlying this doctrine of the "*minimum labour conditions"* are: (1) work is the result of capitalism, and (2) social rights are the brakes on predatory capitalism. Therefore, the State must intervene in employment relationships to guarantee that employees will have what is minimally necessary to live with dignity, thus ensuring the social value of work and preserving the dignity of the human being.

In other words, what is supported by this doctrine is that all decent work must be effectively protected by Labor Law and once work is understood as a fundamental right, it must be interpreted in the light of the Principle of

21. Art. 611-A of the CLT indicates the *exemplary* hypotheses that can be directly negotiated by the employees with individual bargaining capacity (*hipersuficiente*) with his employer, among others: a) Position of trust; b) Non control of daily hours; c) Work hours; d) Change of holidays; e) Arbitration clauses; d) Remuneration for productivity or personal performance; e) Meritocratic Awards; f) Participation in profits or results; etc.

22. The "*minimum labour conditions*" (called in Brazil as "*patamar civilizatório mínimo*") deals with the rights of absolute unavailability by compelling laws, provided for in cogent norms. These are rights that are unavailable (cannot be derogated from).

Human Dignity, since such a principle is the core foundation of the Democratic State of Law (in the end of the day: the aiming of this doctrine is guarantee the reduction of social inequalities, from which poverty, social exclusion and slavery arise).

As explained before, the law did not create restrictions for "*employees with individual bargaining capacity"* to negotiate rights and duties directly with their employers. The most qualified worker, having completed higher education, is in a better position to negotiate working conditions than a less qualified worker (all others that are not deemed *employee with individual bargaining capacity"*), who cannot be left at risk without legal and labor union coverage.

Whereas the reduction of social inequality is a goal that has been incorporated normatively by the Brazilian Federal Constitution, in different contexts, to justify State intervention in favor of workers that does not have individual bargaining capacity and, due to the fact that employees hired in Brazil to work from their home for a foreign company around the world are deemed an *"employee with individual bargaining capacity"*: what is the legal reason then for the change introduced by the Provisional Measure concerning employees hired in Brazil who are working from home for any other country around the world? Is this legal provision reducing social inequality? Whose rights does this measure aim to preserve?

FINAL CONSIDERATIONS

The pandemic crisis has started changes in regulations on employment relations and accelerated the remote work movement, especially in large urban centers with internet access. Two years after the start of the pandemic crisis, the challenge that employers now face has changed from forcing employees to work from home to having them return to the workplace. People who have adapted so well to remote work do not want to return to their employer's premises.

Teleworking is under debate all over the world. In this Dispatch, we have focused on the new Brazilian regulation on telework issued as Provisional Measure 1108, particularly the case of employees who are hired in Brazil, to work in their home in Brazil, for a company abroad. However, a critical and provocative question has been raised: what is the reason and interest for the State to regulate on the matter from a labor perspective?

This debate transcends Brazil and could be studied in all countries around the world as the theme seems to involve State intervention, economic freedom, theory of law and individual and social rights.