Labour Relations
Brazil

1. INTRODUCTION

In Brazil, the employment relationship is informal; the document does not have to be official to be lawfully existent.

The employment agreement does not necessarily have a form to be executed. It may as well be a verbal agreement, as long as there is an agreement between the parties. It should be stressed that an agreement may be made even implicitly, as it is sufficient when services are provided on continuous basis. If the employer is not opposed towards the provision of services by the employee and makes use of the employee's services and pays them a salary, an implicit employment agreement is evidenced.

Such agreement may be changed by mutual consent and as long as no prejudice is caused to the employee, under the penalty that the clause violating this guarantee is considered null and that, consequently, the termination of the agreement is caused due to just cause on the party that changed the employment agreement.

It is recommended that the employment agreement always be made in writing, with well worded clauses, simply and clearly, with all obligations, rights and duties of the employee and the employer respectively.

2. THE DIFFERENT TYPES OF EMPLOYMENT CONTRACTS AND THEIR TERMINATION

2.1 THE OPEN-ENDED EMPLOYMENT CONTRACT

In Brazil, the most common labor contract is the employment agreement for undetermined time. When the parties do not mention anything concerning the term, it is assumed that the agreement is for undetermined time, which is used in most cases. The employment agreement for undetermined time is however not an eternal agreement, but only one that has a duration in time.

The agreement for undetermined time has no legal provision for being terminated, so this depends on the will of the employer and the employee.

There are some cases that generate provisional stability for the employee and prevent the termination of the agreement without just cause, for example, pregnancy, illness, labor union leader, and so forth.
Just cause, force majeure, reciprocal guilt, compulsory retirement, indirect dismissal (just cause motivated by the employer), the death of the employee or the employer, the temporary standstill of the work motivated by an act of the legal entity concerning internal public law are reasons for termination of the agreement.

The dismissal of foreign employees shall precede the dismissal of Brazilian employees that exercise an analogue function, in the event of lack or stoppage of work.

2.2 THE FIXED-TERM EMPLOYMENT CONTRACT

This is an employment agreement whose validity depends on the prefixed term or on the execution of specified services provision. This is the exception of the employment agreements and shall follow specific provisions contained in the law. It may be made verbally, but it is recommended that it be in writing. It may not be for more than two years.

The employment agreement for determined time is only valid if it is a: (a) service whose nature or transitory character justifies the predetermination of the term; (b) business activities of transitory character or; (c) probationary employment agreement.

The end of the contract for determined time may be measured according to the number of days, weeks, months or years or in relation to a certain specific service as the conclusion of works or, if possible, forecast of when the approximate end of an event will occur.

The agreements for determined time are considered in the following situations: harvest, professional athlete, artist, foreign technician, based on projects, and apprenticeship.

After the expiry of the agreement for determined time, the same employee may only be hired again for determined time after 6 months, unless the expiry depends on the execution of specialised services or on the occurrence of certain events. This is what happens with employees of guesthouses or hotels that need an increased number of employees only in certain periods of the year, such as holidays and long weekends. There is also the possibility of successive renewal of such contracts.

There is no early notice for the termination of the agreements for determined time, as the parties know beforehand when the agreement will end. The same rule applies to the indemnification of 40% of the unemployment fund (FGTS), as the employee is not dismissed on the date the agreement ends, but the agreement ends due to the elapsing of the term.

In employment agreements for determined time, the employer does not have to observe the employment guarantee even if for example, the employee gets pregnant during the validity of the employment contract, as the parties knew from the beginning that the employment agreement would end on the last day, as agreed upon. On this day, the employment contract shall end.

In the event that the employee is dismissed before the final date of the agreement, the employer shall pay them half the remuneration to which they would be entitled until the end of the agreement as indemnification.
The special conditions, such as the agreement for determined time, are to be recorded in the Labour and Pension Fund Booklet of the employee.

2.3 TEMPORARY EMPLOYMENT CONTRACT

The hiring of temporary workers is only justified in exceptional cases where regular and permanent staff need to be replaced transitorily or due to extraordinary increase in the workload. It shall be incumbent upon the employer to prove the conditions that justify the temporary hiring in the moment of any supervision or labour suit.

This way of hiring shall not be made directly, but by intermediation of a company specialized on temporary labour. For the hiring of a temporary worker, it is necessary to have an agreement between the service-receiving company and the temporary labour company, it must be in writing, and such agreement shall expressly contain the justifying reason for the demand of temporary labour, as well as the amount of remuneration and service provision, whereby the portions of salaries and social encumbrances shall be clearly itemized. Such agreement may not exceed three months, unless authorized by the local body of the Labor and Employment Ministry — MTE and as long as the total period of temporary labor does not exceed six months.

2.4 SPECIAL EMPLOYMENT CONTRACTS

The **apprenticeship agreement** is a special employment agreement, made in writing and for a determined time, in which the employer undertakes to provide methodological technical-professional education to the youth of over fourteen and under eighteen years, enrolled in an apprenticeship program, and such education shall be compatible with his physical, moral and psychological development, and in which the apprentice undertakes to carry out the necessary tasks for such education with devotion and diligence.

The establishments of any nature are obliged to employ and enroll in the courses of the National Apprenticeship Services a number of apprentices between 5% and 15% of workers employed in each establishment, whose functions require a professional education; The following conditions shall be observed: (a) the apprentice shall be aged between 14 and 18 years; (b) the employers shall register the apprentice in apprenticeship programs, offered by the National Apprenticeship Services (SENAI, SENAC, SENAT) or by other entities qualified for the methodological technical-professional education; (c) in the event that the apprentice has not yet concluded basic school education, they shall obligatorily be enrolled and go to school.

The company shall therefore, make the apprenticeship agreement in writing, which shall contain the signature of the responsible person for the apprentice, and, as a general rule, have a duration corresponding to the course, but may not exceed the period of two years.

The validity of the apprenticeship agreement is not only binding to the record in the Labor and Pension Fund Booklet, but also to the registration with and frequency of the apprentice at school (if they have not yet concluded the basic school education), and to the enrolment in an apprenticeship program developed under the supervision of an entity qualified in methodological technical-professional education.

The apprenticeship agreement may be terminated at the end of its term or when the apprentice reaches 18 years of age, or also with anticipation in the following cases: (a) insufficient performance or lack of adaptation of the apprentice; (b) serious disciplinary misconduct; (c) unjustified absence at school which causes repetition of the school year; or (d) upon request by the apprentice. If any of these conditions are met, then the indemnification equivalent to 50% of the remuneration to which the employee would be entitled until the end of the agreement shall not be due.

The **probationary employment agreement** is a part of the agreement for determined time. The purpose of the probationary employment agreement is that the employer can get to know the abilities and the character of the employee and the employee can get to know the norms of the company. Therefore, it is a contract of mutual assessment.

The probationary employment agreement is still an employment agreement for determined time. Thus, it is necessary to make the records in the CTPS of the employee regarding said contract, which provides the worker all the rights and obligations in connection with the abovementioned agreement.

The maximum term for the probationary employment agreement is 90 days. If this term is exceeded, the agreement shall be in force as if it was an agreement for undetermined time, i.e. the duration will be transformed regardless of the will of the parties.

The probationary employment agreement may be extended, but only once. It is not possible to extend a probationary employment agreement of 90 days for another 90 days, as the maximum of 90 days would be exceeded. It is however possible to hire for 30 days and extend for another 60 days, or for 20 days and extend it for another 70 days, or for 45 days and extend it for another 45 days. In these cases, the maximum term that is 90 calendar days shall be observed and also only one extension may be made.

If the employee fulfils the probationary period and leaves the company, the employer may not request a new probationary period when hiring them for the same function, as they were already tested.

It is not possible to enter into a probationary employment agreement after the end of a temporary employment agreement, as the employee was already tested.

2.5 OUTSOURCING

Besides the options appointed, there is the possibility of outsourcing employees, in a largely used procedure to modernize operations and reduce costs, which constitutes of transferring to third parties some of the company's work that has been done by its own employees.

In this sense, for a secure outsourcing process, one should observe the following procedures: (a) existence of autonomy, inexistence of hierarchic subordination, no economic dependence of the service providers- which means that the third party should not be exclusively at the company's disposal, respecting orders and hours; (b) the service providers company should not have all its revenues coming from the hiring company; (c) the employee should not be sent away and re-hired through a company as a service provider because the labor courts might recognize a working bond; (d) the economic and technical independence of the third party and its capacity and suitability, plus the hiring of ex-employees should be avoided; (e) the prorogation of contract should be carefully analyzed and the service provider shall not be treated as an employee; (f) there should be a follow up that the third party will collect taxes and contributions that is obligated; (g) the geographical location of the services provider company should not be the same of the hiring one; and (h) the hiring company can still be responsible for damages caused by the service provider and for the payment of taxes and social contributions if not collected by the third party.

In outsourcing, it is important to observe that the company can still be considered the direct employer if the characteristics of a labor relation are present, such as continuity, personhood, subordination and burden. Another important aspect to observe is the fact that if one of the companies on the outsourcing relation is dependent on the other, this dependence will result in subordination between them and the labor claims will have the working bond recognized. Also, the recognition of the working bond occur in cases of same economic group between the

company that hires the services and the services providers, which happens when the employee and the hiring company are quota holders or shareholders in the service providers company.

3. SOCIAL CONTRIBUTIONS AND THE DIFFERENT KINDS OF BENEFITS IN BRAZIL

3.1 THE STATE PENSION SCHEME

The purpose of the Pension Fund is to ensure to its beneficiaries indispensable maintenance means, for the reason of physical handicaps, old age, total employment years, involuntary unemployment, family encumbrances and imprisonment or death of those from whom they depend economically.

Organized in the form of a general system of contributive character and with mandatory association, the Pension Fund covers in this way:

- covering of disability, handicap, death and old age;
- maternity protection and protection especially for pregnant women;
- protection for the worker in situations of involuntary unemployment;
- family salary and imprisonment assistance for the economically dependent of the insured with low income;
- bereavement benefits of the insured, whether man or woman, to the spouse or companion and dependents.

With relation to the pension organization, the following principles and guidelines shall always be observed:

- universality of participation in the pension funds, by means of contribution;
- amount of the monthly income from the benefits, base salary substitutes or work earnings of the insured, not below the minimum salary;
- calculation of the benefits considering the inflation adjusted base salaries;
- conservation of the real value of the benefits;
- optional complementary pension, calculated by additional contribution.

The Social Security (INSS) is financed by the entire society directly, and indirectly by means of resources coming from the budget of the Federal Government, the Federal States, the Federal District (city of Brasília), the Municipalities, and the social contributions shall be shared by the employee and employer.

The employee suffers the direct discount of the pension contribution, which is deducted from the salary by the employer at the aliquots of 8.00%, 9.00% or 11.00% on the monthly salary base, in non-cumulative form, whereby the table in force shall be observed and the contribution cap shall be respected.

The employer discounts and recollects the contribution of the employees for the security funds and is obliged to contribute on the amount of the payroll, in the following fashion: (a) 20% on the salary of the employees (22.5% for the financial sector); (b) 1%, 2% or 3% on the salary of the employees, in accordance with the risk level of the company's activity; (c) 12%, 9% or 6% exclusively on the salary of the employee, whose exercised activity causes the granting of a special pension at 15, 20 or 25 years of contribution.

3.2 THE UNEMPLOYMENT BENEFITS SYSTEM

This is a benefit granted to the employees dismissed without just cause who prove that: (a) they were employees during at least 6 months in the past 36 months prior to the date of dismissal from which the request for unemployment insurance originated; (b) do not enjoy any pension benefits for continuous work, as foreseen in the Regulation of the Pension Fund Benefits, with the exception of the insurance against accidents and the bereavement benefits; (c) do not have own income of any kind sufficient for the maintenance of their families.

It is granted for a variable period between 3 to 5 months, depending on the duration of the terminated employment agreement. The amount shall be calculated in accordance with the table in force, but shall always be lower than the last monthly remuneration received by the employee.

The unemployment insurance shall be suspended: (a) in the event of admission to a new job; (b) when receiving some benefits of the Pension Fund; (c) when fraud is proved; (d) upon death; (e) when refusing a new job.

4. FOREIGNERS WORKING IN BRAZIL – TRANSFERS OF UNDERTAKINGS

4.1 FOREIGNERS WORKING IN BRAZIL

In Brazil the companies that carry out public services under concession or that exercise industrial or commercial activities are obliged to have in their staff, when composed of three or more employees, a proportion of Brazilians of 2/3. Such proportion includes the natives and nationalized as well as the Portuguese in the event of reciprocity treatment in favor of the Brazilians. Considered equal to Brazilians are those foreigners that, when residing in the country for over 10 years, have a Brazilian spouse or child.

The proportionality is not applicable to civil companies and to companies that exercise rural activities, as long as they are in an agricultural zone, dedicate themselves to the processing or transformation of products of the region and to extractive industrial activities, except for mining.

Some jurists argue that this proportionality among Brazilians and foreigners no longer exists since the effectiveness of the Federal Constitution of 1988.

The foreigners that live in border regions may exercise remunerated activities on the Brazilian national territory without Labor and Pension Fund Booklet, whereby it is sufficient that they have an identification document issued by the Federal Police.

Foreigners that have a courtesy, official or diplomatic visa do not need to obtain a Labor and Pension Fund Booklet, but may only exercise remunerated activities linked to the foreign State, organization or international or intergovernmental agency for which they are in Brazil, or of the Brazilian entity or government, by means of an international instrument pursuant to a treaty with the other government that deals with the issue (art. 104 of Law 11 6.815/80). Brazilian labor legislation is not applicable to any of those visas.

Foreign professionals who have a permanent visa may be hired as employees in Brazil and shall be treated equal to a Brazilian employee, and their employment agreements are governed by the

norms contained in the Brazilian legislation, whereby it is actually unlawful to make any distinction between Brazilians and foreigners related to their nationality.

The employers may not hire foreign employees with temporary, tourist or transit visas, as they may not exercise a remunerated activity in the country, and the only exception are the foreigners admitted temporarily under an employment agreement.

4.2. TRANSFERS OF UNDERTAKINGS

With relation to the transfer of the working place, this is authorized by the Brazilian legislation under the following circumstances: (a) as long as this does not necessarily require the moving of the employee's domicile; (b) of employees as confidants; (c) due to an explicit or implicit clause of the agreement; (d) due to the shutting down of the establishment where the employee works; (e) provisional situation.

As for the change of the employment agreement with relation to the employer, it should be clarified that any change in the ownership or legal structure of the company shall neither affect the employment agreements nor the rights acquired by its employees.
The events of termination due to just cause are foreseen in the law and shall be rigorously observed under the penalty that the termination is considered void.

Brazilian legislation sets forth that the party (employer or employee) wishing to terminate the employment agreement for undetermined time shall give early notice to the other party of its decision at least thirty days in advance, except in the case of an agreement between the parties or the Unions, whatever is more beneficial to the worker. If the termination has been made by the employer, the employee's normal working schedule shall be reduced by two hours daily during the period of the early notice, and the worker may also opt for being absent, with justification, for seven subsequent days as a substitution for the two daily hours' reduction, in order to look for a new job. The period of the early notice may be worked or indemnified.

In the event of unjustified termination of the employment agreement for undetermined time on the part of the employer, the employer is obliged to pay a fine in the amount of 40% on the balance of the account linked to the FGTS - Fundo de Garantia por Tempo de Serviço (Unemployment Fund) of the employee. In Brazil, the employer is obliged to make monthly deposits being the equivalent of 8.0% of the salary for the FGTS on the account of the employee. Such account belongs to the employee and may be used in accordance with legal provisions. The fine shall not be due in the events of termination upon request to be dismissed and just cause by the employee.

The termination of employment agreements with a duration of more than one year need to be approved by the Labor Union or the Regional Labor Office (*Delegacia Regional do Trabalho*).

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