
CHAMBERS GLOBAL PRACTICE GUIDES

Employment 2022

Definitive global law guides offering comparative analysis from top-ranked lawyers

Brazil: Trends & Developments

Aline Fidelis, Isabela do Val, Valentina Eluf and Thiago Garcia Taul & Chequer Advogados in association with Mayer Brown

Trends and Developments

Contributed by:

Aline Fidelis, Isabela do Val, Valentina Eluf and Thiago Garcia

Tauil & Chequer Advogados in association with Mayer Brown see p.8

COVID-19 and the Transition to New Forms of Remote Working

During the COVID-19 pandemic, the world witnessed a complete change in social dynamics, marked by restrictions on free movement and justified by the efforts of government and non-government organisations to suppress the spread of the coronavirus. The implemented restrictions involved measures from complete lockdown to strict health and safety protocols for public/shared places.

Labour relationships were severely impacted and employers across the world were compelled to establish new employment dynamics that required the performance of labour activities outside of the office, which was made possible through the use of technology. The sudden imposition of public health restrictions forced employers to rapidly implement remote working procedure that, up till then, had been introduced slowly and carefully.

Two years after the beginning of the COVID-19 pandemic, it is possible to verify that even though the adaptation process had been challenging for many companies and workers, remote work has also proven itself to be useful and beneficial to both. Consequently, even though public health restrictions have been almost completely lifted, new forms of remote work are being implemented and tested by companies around the globe according to the new social dynamics imposed by the pandemic.

Thus, the expression “anywhere office” has been commonly used to refer to the work regime in

which employees may work from their homes, offices or any other space. This expression is bound to become part of many companies’ permanent internal policies as it establishes more flexible workdays, decreases commuting hours, reduces general workplace expenses (the savings on central business district office space alone are often considerable), and provides flexibility for employees to perform the same work from a location of their choosing. This new mode of working, however, remains only partially regulated by Brazilian legislation, leaving legal professionals looking to the laws implemented by other countries for some guidance.

Under the new social dynamics, remote work regimes have proved to be a way of attracting and retaining talent due to the fact that it enables employees to work from locations far from their physical workplaces, which may include other cities and even different countries.

The Anywhere Office: Remote Work Regulation under Brazilian Labour Law

Remote work may be classified as work predominantly performed out of the company’s premises through the use of technology. Essentially, it tends to provide for a more flexible workday for employees and a decrease in direct employer supervision regarding the labour activities that may be executed at several locations, which include the employee’s home or co-working spaces.

It differs from in-office activities due to the non-existence of direct personal control and regular

Contributed by: Aline Fidelis, Isabela do Val, Valentina Eluf and Thiago Garcia, Tauil & Chequer Advogados in association with Mayer Brown

face-to-face interaction, which generally allows for the adoption of more flexible working hours.

From a legal perspective, Brazilian labour law provides for parameters that combine the flexibility that this working system provides as well the protection of employees' labour rights that companies are required to comply with in order to adopt an "anywhere office" system.

The Brazilian Labour Reform and the regulation of remote work

Despite the fact that remote work has increased during the COVID-19 pandemic, the regulation of remote work under Brazilian labour law dates from significantly before the pandemic. Law No 13,467 of 2017, commonly known as the Brazilian Labour Reform, introduced the legal parameters for remote work employment agreements into the Brazilian Labour Code.

As per the provisions of Article 75-B of the Brazilian Labour Code, remote work is considered to be the execution of services predominantly outside of the employer's premises, via the use of information and communication technologies. The sole paragraph of the aforementioned Article establishes that employee attendance at an employer's premises for the execution of specific activities does not render the remote work regime characterisation false.

Due to the remote performance of the work, the Brazilian Labour Reform included Item III of Article 62 of the Brazilian Labour Code, to provide that employees working under remote work regimes are exempted from the work schedule regulations set forth in the Chapter II of the Brazilian Labour Code. This means that these employees were generally not subject to time tracking, did not have a fixed daily shift, did not have their rests and breaks tracked and were not entitled to overtime payment.

Regarding this provision, there were two different positions adopted by the labour courts:

- The first position followed the letter of the law and understood that employees under remote work regime were not entitled to overtime whatsoever.
- The second position, however, understood the Article 62, III of the Brazilian Labour Code to be not absolute considering that Article 7, Item XIII of the Federal Constitution provides for a regular work schedule of eight hours a day. In this sense, employees would be entitled to overtime if it was demonstrated that it was possible to keep track of their working hours and that they actually worked past their contracted hours.

In order for a remote work employment agreement to be valid, this labour regime must be stipulated by a written employment agreement that provides for the relevant regime and species the activities that the employee shall execute.

The agreement must contain provisions regarding which party will have responsibility for the acquisition, maintenance and supply of the technological tools and infrastructure required and appropriate for the execution of remote work as well as regarding the reimbursement of expenses eventually incurred by the employee. Despite the fact that there is no explicit obligation for the employer to be responsible for such expenses, there are other provisions included prior to the Brazilian Labour Reform that state that the employer must bear the risks of the activity (ie, bear expenses) and has the duty to provide a healthy workplace (ie, grant adequate and ergonomic tools).

Regarding health and safety matters related to remote work, the Brazilian Labour Code stipulates that it is up to the employer to instruct employees regarding the precautions to be tak-

BRAZIL TRENDS AND DEVELOPMENTS

Contributed by: Aline Fidelis, Isabela do Val, Valentina Eluf and Thiago Garcia, Tauil & Chequer Advogados in association with Mayer Brown

en during execution of work in order to avoid work accidents and work-related injuries. It is also necessary that the employee sign a term of responsibility committing to follow the instructions provided by the employer.

Arising from an employer's duty to ensure a healthy workplace, it is the employer's duty to inspect and ensure full compliance with ergonomics and health and safety measures accordingly to the Ordinances issued by Ministry of Labour at the company's premises. When it comes to the execution of such duty in a remote work regime, however, the matter is not simply resolved. An individual's home is treated as inviolable by the Federal Constitution and therefore an employer, even if it wanted to, could not verify whether the employee is in compliance with labour regulations nor prevent potential work-related injuries.

This matter is not yet regulated by Brazilian labour laws but in Portugal, for instance, Article 170 item II of the Labour Code expressly provides the possibility to inspect the employee's residence, determining, however, that it "must only have as its purpose the control of the work activity, as well as the work tools and can only be carried out between 9am and 7pm, with the assistance of the employee or a person designated by them".

The remote work regime may also be modified to a regular on-site regime provided that the modification is agreed by mutual consent of employer and employee and registered via an amendment to the employment agreement. The employer may also require the modification of the work regime, but a transitional period of 15 days upon notification and an amendment to the employment agreement are required.

Law No 14,442 of 2022: new perspectives on remote work regulation

On 2 September 2022, the Provisory Act No 1,108 of 2022 was converted into Law No 14,442. Among other provisions, it established new rules on remote work modifying articles of the Brazilian Labour Code. As of the issuance of the Provisory Act, which was subsequently converted into ordinary law, employees in remote work regime can attend the employer's premises to perform specific tasks, even if on a regular basis, without the voiding of the remote work regime, which was previously defined as work performed predominantly outside of an employer's premises. Thus, the new rule provides for legal parameters related to a "hybrid work system".

The new law also stipulates new rules on employees' workdays and regarding the control of working hours in the context of remote work regimes. Under this regulation, only employees hired under a remote work regime to provide services on demand are exempt from the rules related to the duration of work and workdays of Chapter II of the Brazilian Labour Code. In light of the fact that these employees are hired to perform specific activities and tasks, it is understood that they are able to manage their workdays according to their routine and duties.

The exemption for the control of working hours, however, is still applicable for remote work employees who are hired via a regular workday regime. In this case, the employer must proceed with the control of the employees' workday remotely, which means that these employees are entitled to the regular rules related to the workday (ie, payment for overtime work and rest breaks).

Law No 14,442 of 2022, also provides that the time spent by the employee using the technological and digital equipment, infrastructure and

Contributed by: Aline Fidelis, Isabela do Val, Valentina Eluf and Thiago Garcia, Tauil & Chequer Advogados in association with Mayer Brown

work tools destined to enable the rendering of services under the remote work regime that are not included in the employee's work shift will not be considered working hours nor on-call regime, unless there is a provision providing for such in an individual or collective bargaining agreement. This provision imposes the assumption that no overtime would be due if the employee continues to use the corporate notebook after the end of their shift, for example. However, the labour courts could grant overtime requests in this scenario if the employee is able to produce evidence that they were actually rendering services for the employer after the end of the shift.

It also authorises employees in remote work regime to carry out their activities in a location other than the previously agreed place of work, including abroad. Also, the adoption of remote work regime for interns and apprentices has become a legally foreseen possibility.

Finally, it establishes that employers must prioritise the allocation of remote work regime for employees with disabilities and those who have children of up to four years of age.

Internal policies for work from home regimes in Brazil

In the context of the COVID-19 pandemic, social distancing rules required employers to adapt their workforce dynamics to a scenario in which services were provided remotely. Thus, temporary or permanent work from home policies were adopted by companies from different industries in Brazil.

Home office

The "home office" regime is a labour regime in which the employee temporarily executes labour activities from home in a context in which the employment agreement also provides for a regular on-site workdays.

Internal rules regarding the home office regime may be stipulated and regulated by companies through internal policies along with amendments to individual employment agreements. The rules regarding the home office system may provide for the period in which the system is to be adopted, the company positions that are eligible for the temporary remote provision of services, the use of company equipment at home, the reimbursement of expenses incurred by the employee and the payment of transport vouchers during the relevant period, among other provisions.

Although the home office system differs from the remote regime regulated by the Brazilian Labour Code, it is possible to use the provisions provided therein as parameters for the execution of the system, especially regarding employer instructions on health and safety at work.

The transition to the home office system must also observe reasonable term.

Hybrid work

The hybrid work system is a regime of work in which services are executed by the employee predominantly at the employer's premises but with flexibility for remote work provisions. It can be stipulated in the context of a regular employment agreement or in the context of remote work employment agreement, considering that the attendance of remote work employees at the employer's premises, even on a regular basis, does not result in the voiding of the remote work regime.

Internal policies and individual agreements may provide for rules referring to the specific days of the week in which the employees can execute labour activities outside of an employer's premises as well as the positions that are compatible with the regime. Other provisions mentioned in the *Home office* section above may also be stipulated.

Contributed by: Aline Fidelis, Isabela do Val, Valentina Eluf and Thiago Garcia, Tauil & Chequer Advogados in association with Mayer Brown

Transnational Remote Work

In a scenario in which economic activities are increasingly globalised, more and more Brazilian and multinational companies seek to hire employees who are based in different countries to provide services under a transnational remote work regime, which refers to the execution of labour in a country other than the one in which the employing company is based with the support of information and communication technology.

In this scenario, it is always important to verify the applicable labour law in accordance with the circumstances of the case.

Brazilian-based companies hiring employees to execute work from abroad

Brazilian-based companies are allowed to hire Brazilian and foreign national employees to provide remote work from different jurisdictions. In this case, the territoriality principle must be applied to the employment relationship – which means that a worker is entitled to the labour rights regarding social protection and work accidents applicable to the country where they execute their labour activities – as provided by the Convention on Private International Law, also known as the Bustamante Code, that was ratified by Brazil in 1929.

From a Brazilian labour standpoint, however, the location where the employee is hired is also important for the definition of the applicable labour law. This is because Law No 7,064, of 1982, stipulates that employees hired in Brazil and then transferred to work in a different country are entitled to Brazilian labour law if they provide for better conditions than those of the country to which they have been transferred, as well as the specific rules provided by Law No 7,064, of 1982. Also, employees hired by a Brazilian-based company to provide services from abroad are also deemed as transferred employee for the

purposes of Law No 7,064, of 1982, except in case of transitory services for periods of less than 90 days.

It is important to note that provisions related to transferred employees are applicable regardless the nationality of the transferred employees because the relevant factor to be considered is the place where they were hired by the Brazilian company.

Digital nomads in Brazil: migratory regulations of foreign nationals executing remote work in Brazil for foreign companies

Brazilian migratory authorities have recently taken a step forward on the regulation of international employment activities in Brazilian territory. In September 2021, the National Immigration Council, an agency of the Ministry of Justice, issued Normative Resolution (NR) No 45, which provides for the issuance of a temporary visa and residence permit for foreign digital nomads – expats who execute remote labour activities with the use of technology for foreign companies.

NR No 45 provides that the digital nomads that hold this kind of visa are allowed to stay in Brazil for an initial period of one year, a period which may be extended for an additional 12 months.

The status of digital nomad is proved upon presentation of (i) a term signed by the applicant declaring that they are capable of executing remote labour activities with the appropriate technology; (ii) an employment or services agreement that provides proof of the legal bond entered into with the foreign company; and (iii) proof of subsistence means paid by foreign entity in a monthly amount equal or superior to USD1,500 or bank funds in the minimum amount of USD18,000.

The request for the relevant visa shall follow the procedures and requirements provided by NR

Contributed by: Aline Fidelis, Isabela do Val, Valentina Eluf and Thiago Garcia,
Tauil & Chequer Advogados in association with Mayer Brown

No 45. Foreign nationals may also apply for the relevant visa while they are in Brazilian territory if they meet the requirement provided by the relevant resolution.

NR No 45 also stipulates that foreign visitors are allowed to carry out labour activities as digital nomads while they are in Brazil in accordance with their nationalities and rules related to the periods of stay and to the expedition of the visitor visa.

Final Comments

Technological progress and globalisation have both contributed to a continuous change in labour dynamics due to the interconnectivity of modern society, allowing for remote work regimes to be progressively adopted by employees worldwide.

In Brazil, it is possible to verify that an increase in the adoption of work systems that include the execution of services from outside of employer premises through the use of technology are accompanied by advances in the regulation of these work systems. In this scenario, it is of utmost importance that employers and companies seek the appropriate legal support prior to adopting remote work systems in order to assess the best market practices and comply with Brazilian labour regulations.

BRAZIL TRENDS AND DEVELOPMENTS

Contributed by: Aline Fidelis, Isabela do Val, Valentina Eluf and Thiago Garcia, Tauil & Chequer Advogados in association with Mayer Brown

Tauil & Chequer Advogados in association with Mayer Brown is a full-service Brazilian law firm which draws on its in-depth local knowledge and leading global platform to advise organisations with multi-jurisdictional operations. Its specialised employment and benefits team provides legal advice to national and international companies on a wide range of strategic matters in Brazil including employment litigation, labour advisory and global mobility cases. The team is

composed of a diverse group that values an inclusive, collaborative and creative environment, which allows attorneys to come up with efficient and innovative results. The team consists of Aline Fidelis, partner and head of the practice, and 22 members. The team is continually growing and its law clerks are deemed to be the basis and the future of Tauil & Chequer Advogados' labour and employment practice.

Authors



Aline Fidelis is the partner in charge of the employment and benefits practice group at Tauil & Chequer Advogados in association with Mayer Brown. She has extensive experience in

strategic labour litigation and advisory cases, with over 20 years representing leading clients hailing from varied sectors. Her experience includes the development and review of company policies, incentive plans and profit-sharing plans; strategically representing clients in collective negotiations, meetings and mediations; acting in collective bargaining and strike issues, enforcement actions and prohibitory injunctions; and advising on the hiring of foreigners to work in Brazil and of Brazilians to work abroad.



Isabela do Val is an associate in the employment and benefits practice at Tauil & Chequer Advogados in association with Mayer Brown LLP. With over seven years of experience

working in the labour area, Isabela has experience with union relations advisory, as well as strategic labour and union litigation and administrative labour procedures. She has multidisciplinary experience, working in labour compliance investigations, due diligence in corporate operations and compensation arrangements for executives. She also has specific experience with union law, working in collective bargaining and union negotiations in general, developing union relations and contributing to the preparation of profit sharing agreements.

Contributed by: Aline Fidelis, Isabela do Val, Valentina Eluf and Thiago Garcia,
Tauil & Chequer Advogados in association with Mayer Brown



Valentina Eluf is an associate of the employment and benefits practice of Tauil & Chequer Advogados in association with Mayer Brown in the São Paulo office. She is especially engaged

on complex litigation matters carried out before Brazilian labour courts as well as administrative procedures of the Labour Public Prosecution Office and labour authorities related to national and multinational companies of a variety of industries and sectors. Her experience also includes labour advisory on multiple matters, negotiations of collective bargaining agreements and assistance in large corporate transactions.



Thiago Garcia is a law clerk of the employment and benefits practice of Tauil & Chequer Advogados in association with Mayer Brown in the Rio de Janeiro office. His experience

already includes labour advisory to national and multinational companies of multiple sectors of the economy, draft and analysis of employment contracts and internal policies, and assistance on global mobility matters. He has also been engaged on complex labour claims and administrative labour procedures and assisted on corporate transactions and union negotiations. Thiago has also acted as a university monitor in classes on labour law and sociology.

Tauil & Chequer Advogados in association with Mayer Brown

Av. Pres. Juscelino Kubitschek, 1455
6° floor - Vila Nova Conceição
04543-011
São Paulo - SP
Brazil

Tel: +55 11 2504 4210
Email: tauilchequer@mayerbrown.com
Web: www.tauilchequer.com.br

TAUIL | CHEQUER
MAYER | BROWN

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com