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Labor Spotlight

WHAT DOES YOUR COMPANY NEED TO KNOW?

"Labor Spotlight" is a monthly newsletter prepared by our Employment and Benefits team, addressing the main themes for companies with business in Brazil regarding labor, social security and global mobility issues.

If you would like to know more about the subjects listed below, please contact our team.

Enjoy your reading!

SUMMARY

Brazil's Federal Supreme Court (STF) and the trial on dismissal without cause

In March, Brazil's Federal Supreme Court (STF) is expected to resume its judgment on lawsuits ADI 1.625 and ADC 39, which deal with Convention n.º158 of the International Labor Organization (ILO) on Termination of Employment, which has generated major discussions in the labor sphere, regarding its impact on the possibility of dismissal without cause. ADI 1.625 has been awaiting a final decision for more than 25 years and may finally have an outcome in 2023.

In a brief summary, in 1995 Brazil ratified ILO Convention n.º 158 ; however, this convention was denounced in 1996 by then President of the Republic, Fernando Henrique Cardoso, by means of Decree 2,100/1996, which determined that the referred convention would cease to be effective in Brazil as of November 20, 1997.

What is under discussion is the validity of the convention's denunciation by an unilateral act of the President, without the approval of the National Congress (whether or not this approval was necessary). ADI 1.625 was filed in 1997 to request the declaration of unconstitutionality of Decree n.º 2.100/1996, and, among the votes collected so far, the majority converges towards the declaration of unconstitutionality of the presidential decree. On the other hand, ADC n.º 39 was filed in 2015 requesting the declaration of the constitutionality of said decree, with the majority, so far, converging towards the dismissal of this action. That is, both judgments are currently moving towards a declaration of unconstitutionality regarding the denunciation of ILO Convention n.º 158.

Bearing in mind that ILO Convention n.º 158 regulates the protection against arbitrary dismissal, what has generated the most discussion is the claim that its reintroduction into the Brazilian legal system would imply the prohibition of dismissal without cause by employers, which, however, would not be the case.

ILO Convention n.º 158 states, in its article 4, that "*The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service*".

It is important to note that the convention sets parameters for dismissal without cause, i.e., it does not prohibit this type of dismissal, although it does contain provisions that may restrict the situations and the way in which dismissal without cause can be applied. Furthermore, it is relevant to point out that the existence of a justifiable reason for dismissal is something different from the just cause (serious fault) already used in the labor sphere. What the ILO Convention n.º 158 seeks to avoid are dismissals without any justification, by total arbitrariness of the employer.

Furthermore, there is also the discussion surrounding the applicability of ILO Convention n.º 158 being conditioned or not to the publication of a complementary law, according to the provision of art. 7, item I, of the Federal Constitution of 1988.

In any case, the hypothesis of reintroducing ILO Convention n.º 158 into the Brazilian legal system does not necessarily mean that the impact on the labor contracts in effect will be immediate, since there should be a modulation of the effects of the decision rendered on the matter.

The forecast is that the judgment of ADI 1.625 and ADC 39 will be resumed as of March 22, 2023.

New obligations in eSocial regarding labor lawsuits as of April 01, 2023

Joint Ordinance MTP/RFB/ME n.º 33/2022, approved the version S-1.1 of the layout and the Guidance Manual of the Simplified System of Digital Bookkeeping of Social Security, Labor and Tax Obligations (eSocial), with events related to labor lawsuits, whose entry was extended to April 1, 2023.

In this update, the following events related to labor lawsuits should be highlighted: S-2500 Labor Lawsuit, S-2501 Information about Taxes Due to Labor Lawsuit, S-3500 Exclusion of Events - Labor Lawsuit and S-5501 Consolidated Information about Taxes Due to Labor Lawsuit.

Event S-2500 Labor Lawsuit

Event S-2500 is for recording information deriving from labor proceedings before the Labor Courts and from agreements entered into in the scope of the Prior Conciliation Commissions - CCP and Interunion Centers - Ninter. Every declarant which, in these proceedings, is required to recognize or change information regarding employment relationships or to collect FGTS and social contributions, must report this event.

Relevant Clarifications

- Information regarding employment relationships, as well as the calculation bases for the collection of the Unemployment Guarantee Fund (FGTS) and social security contributions must be submitted, and the deadline for sending the information is the 15th of the month following the date of:
  a. The final and unappealable decision rendered in the labor lawsuit;
  b. The ratification of the judicial agreement;
  c. The final and unappealable decision homologating the liquidation calculations of the sentence;
  d. From the execution of the agreement in the CCP or in the Ninter.

  Note: This deadline can be anticipated for the purposes of fulfilling obligations resulting from the judicial decision.
- The following information must be provided in this event, regardless of the period covered by the decisions/agreements: a) labor lawsuits whose decisions became final and unappealable on April 1, 2023 and onwards; b) judicial agreements homologated as of this same date; c) lawsuits with unappealable decision homologating the liquidation calculations as of this same date, even if the sentence has become final and unappealable on an earlier date; and d) agreements in the scope of CCP or Ninter entered into on this date as well;
- This event must not be used to provide information about proceedings of workers bound to the RGPS or RPPS, under the competence of the Common or Federal Justice;
- Whoever is responsible for the payment of the conviction must include the information in the system, even if it is not the employer, as in the case of secondary or joint liability.

Event S-2501 Information about Taxes Due to Labor Lawsuit

Event S-2501 must be used to inform the individual income tax and social security contribution amounts, including those intended for third parties, levied on the tax bases stated in sentencing decisions and homologation of agreements issued in the lawsuits informed in event S-2500, with a due date up to the 15th day of the month subsequent to the payment stated in the decision/agreement. This event should not be submitted if there is no social security contribution or income tax to be paid. A S-2501 event should be submitted for each labor lawsuit, regardless of the number of workers included as parties, noting that, in case of payment in installments, each paid installment should have an S-2501 event.

Event S-3500 Exclusion of Events - Labor Lawsuit

As for the labor process event exclusion (S-3500), it will only be used to cancel an event S-2500 or S-2501 that was wrongly submitted.

Event S-5501 Consolidated Information about Taxes Due to Labor Lawsuit

Regarding the consolidated information of taxes resulting from the process (S-5501), this is a return from the eSocial National Environment for event S-2501, in order to show to the declarant, based on the transmitted information, the calculated taxes.

Deadlines

The eSocial S-1.1 version was implemented on January 1, 2023, but the Labor Lawsuits events will only be available for submission as of April 1, 2023, at which time the companies must observe the due deadlines, under penalty of labor, social security, and tax inspections and fines.

New values for fines for non-compliance with the quota for People with Disabilities and Social Security rehabilitated people

The new values for administrative fines for non-compliance with the legal quota for people with disabilities and rehabilitated people are already in effect, according to the MPS/MF Interministerial Ordinance No. 26/2023.

In 2023, the administrative fines will have a minimum value of R$ 3,100.06 and a maximum value of R$ 310,004.70, per infraction recorded by the Ministry of Labor and Social Security (there is no limit to the number of Infraction Notices).

As a reminder, companies with 100 or more employees are required to hire a percentage of 2% to 5% of employees with disabilities or employees rehabilitated by the INSS, according to the total number of employees registered in the national territory (including the head office and branches). Additionally, the companies must also observe the rule of previous replacement of these employees: another person with disability or rehabilitated professional must be hired before the dismissal, in the event of: (i) dismissal without cause in an undetermined-term contract or (ii) termination of a fixed-term contract of more than 90 days, under penalty of an Infraction Notice and application of a fine observing the same parameters above.

It is also important to consider that the companies' obligation is not limited to hiring people with disabilities and rehabilitated workers from the INSS. It is also necessary that they make efforts and develop actions for the effective inclusion of these professionals in the work environment, under penalty of being fined for discriminatory practices, which can generate the imposition of an administrative fine of ten times the value of the highest salary paid by the employer, which can be increased by 50% in case of recurrence, in addition to a possible prohibition to obtain loans or financing from official financial institutions.

An administrative fine issued by the Ministry of Labor and Social Security may be forwarded to the Labor Prosecutor's Office, which is not bound to these specific amounts, that is, it may seek the application of even higher fines, sometimes on a monthly or even daily basis.

Therefore, we highlight the importance of monitoring employee headcount and evidence of good social inclusion practices, in order to ensure compliance with the legal standards regarding the quota of people with disabilities and rehabilitated people and avoid labor liabilities, including image damages, due to the social nature of this legal quota.

NR-04 (SESMT) Update

Decree n.º 2.318/2022 conferred a new wording to Regulatory Norm n.º 04 (NR-04), which establishes the objectives, competence, and dimensioning of the Specialized Occupational Safety and Medicine Services (SESMT), in force since November 2022. We highlight the main points:

(a) Modalities and attributions of the SESMT

The SESMT, whose purpose is to promote health and protect the worker's integrity, is compulsory for public and private organizations, according to the degree of risk of the economic activities and the number of workers per establishment.

New modalities for the SESMT were created: individual, regionalized, state and shared, which will be defined by the number of establishments and the classification in the Annex II of the NR-04, where it is possible to scale the number of SESMT members according to the number of workers.

The attributions were also updated, so that it will be up to the SESMT members to elaborate a work plan and monitor goals, indicators, and results of safety and health at work; as well as to immediately propose the interruption of activities and the adoption of corrective and/or control measures when they observe conditions or work situations that are associated to serious and imminent risks to the workers' safety or health.

b) Possibility of outsourcing SESMT members

Among the most relevant aspects of the Ordinance, the normative extinction of the provision about the need for SESMT members to be company employees was the one with the greatest repercussion.

With this change, companies could comply with NR-04 by creating the SESMT through outsourcing the obligatory members.

Although the lawfulness of outsourcing has been materialized since the effectiveness of Law n.º 13,429/2017, the previous wording of NR-04 still established that the members of the SESMT should be company employees, so the amendment promoted by Ordinance No. 2,318/2022 guaranteed greater legal certainty for employers who intend to outsource such services.

c) Updating of risk levels and sizing

According to article 3 of the ordinance, the degrees of risk included in Annex I of NR-04 must be updated every five years, based on companies' accident indicators.

The first update, however, will take place within two years from the publication of the decree, that is, until December 8, 2024.

Furthermore, the dimensioning must consider the highest degree of risk between the main economic activity, that is, the one included in the company's CNAE, and the establishment's preponderant economic activity, the one with the highest number of employees.

There was also a forecast of alteration in the SESMT sizing due to the increase in the number of employees resulting from fixed term hirings, which should remain during the period of the increase.

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