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The International Comparative Legal Guide to:

Employment & Labour Law 2016

6th Edition

A practical cross-border insight into employment and labour law

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Employment & Labour Law*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of labour and employment laws and regulations.

It is divided into two main sections:

Two general chapters. These chapters examine issues when structuring international employment arrangements for multi-national companies and global employment standards and corporate social responsibility.

Country question and answer chapters. These provide a broad overview of common issues in labour and employment laws and regulations in 43 jurisdictions.

All chapters are written by leading labour and employment lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Elizabeth Slattery and Jo Broadbent of Hogan Lovells International LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Chapter 8

Brazil

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The main source of employment law in Brazil is the "Consolidation of Labour Laws" known as the "Labour Code". The Labour Code was enacted on 1 May 1943 and has been subject to many changes, amendments and adaptations since then, including amendments provided by the Federal Constitution enacted on 5 October 1988.

That said, employment relations in Brazil are regulated, mainly, by the following sources:

- Law-Decree 5.452/1943 – Labour Code;
- Articles 6, 7 and 8 of the Federal Constitution;
- Law 605/1949 – regulates weekend pay;
- Law 3.207/1957 – regulates payment of commissions to salesmen;
- Law 4.090/1962 – regulates the payment of the 13th salary (Christmas bonus);
- Law 5.811/1972 – regulates employment contracts of workers in the oil sector (offshore);
- Law 5.889/1973 – regulates employment contracts of workers in rural areas;
- Law 6.019/1974 – regulates hiring of temporary workers;
- Law 6.919/1981 – regulates the Severance Fund (FGTS), to be paid to members of the Executive Board of the company;
- Law 7.064/1982 – regulates expatriation and repatriation of residents in Brazil and the hiring of any foreign workers;
- Law 7.418/1985 – regulates payment of workers' transportation costs, residence-workplace-residence;
- Law 7.783/1989 – regulates workers' right to strikes;
- Law 8.036/1990 – regulates the Severance Fund (FGTS) to be paid to terminated workers;
- Law 9.029/1995 – prohibits discrimination in the work place;
- Law 9.279/1996 – regulates workers' invention rights;
- Law 10.101/2000 – regulates profit/results-sharing schemes;
- Law 11.770/2008 – regulates maternity leave;
- Ordinance MT 03.214/1978 – sets forth norms related to labour health and safety issues that are regulated by 36 different Ordinances issued by the Ministry of Labour;
- there are several other laws regulating certain professions, such as physicians, engineers, etc.; and
- the content of Collective Bargaining Agreements.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The workers that are protected under the law are, as a general rule:

- pregnant employees;
- workers suffering from labour-related illnesses and some specific diseases not labour-related;
- workers who are directors of Workers Unions;
- workers that are elected as representatives of the group of workers in the internal Cooperative of Credit of the company, if any; and
- workers that are elected as representatives of the group of workers in the Labour Accident Prevention Committee.

Please note that Collective Bargaining Agreements can add other types of workers that would also be protected. For example, some agreements protect workers that are close to their retirement (12–36 months) and those workers that have one year before they have to enlist for military service.

Basically, the Labour Code distinguishes workers subject to a work journey control from those not subject to such control (high-level workers, e.g., directors, heads of department, mid-level management and field workers).

Even though high-level workers are under a more flexible regulation, all workers are equally protected under the labour legislation; taking into account the particulars of their respective agreements as follows are:

- workers paid on a monthly salary;
- workers paid by the hour;
- workers hired for an undetermined term; and
- workers hired for a determined term.

Determined-term labour contracts are an exception and only valid for:

- a period of experience of up to 90 days; or
- up to two years if the services to be rendered or the activities of the company are of transitory nature that could justify the fixed term.

Determined-term labour contracts for less than two years may be renewed once, provided that the total duration does not extend for more than two years.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

No. In Brazil, facts will prevail over form. Oral agreements, however, are very rare. It is always highly recommended that written agreements are executed.

Note that, independent from the existence of a written contract, employees must have the employment registered in the official Labour Booklet (*Carteira de Trabalho*) which is an official document. This document will indicate the employer, date of hiring, job, salary and date of termination. Employers that do not observe this are subject to fines by the Ministry of Labour.

1.4 Are any terms implied into contracts of employment?

Labour rights in Brazil are extensively regulated in the law and any contract of employment, whether in writing or not, imply all the labour rights provided for in the law. Contracts of employment include not only the labour contract itself but also any and all regulations, policies and plans applicable to workers and issued by the company, and collective agreements. (Please see also the answer to question 1.5 below.)

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes. The following minimum terms and conditions must be observed:

- Legal Minimum Wage or the Minimum as negotiated in Collective Bargaining Agreements;
- 30-day vacation with payment of vacation additional pay (1/3 of the salary);
- maximum work hours – eight per day, up to 44 per week;
- Severance Fund (FGTS);
- 13th salary;
- overtime limited to two hours per day (only for workers subject to a work journey control). Overtime is paid with an additional 50%; and
- pre-notice for termination (30 to 90 days) (please see the answer to question 6.1 below).

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective bargaining agreements in Brazil (executed between Workers Unions and Employers Unions), as a general rule, take place at industry level, and refer in general to wages, tenure, overtime, outsourcing, social benefits and procedures for the election of members of the Labour Accident Prevention Committee. There may be agreements applicable to one specific employer (executed between Workers Unions on one side and one or more specific companies on the other side); usually they will relate to specific issues related to the companies involved and their norms can only change the rules of the collective bargaining executed between Unions, if more favourable to the workers.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

There are Trade Unions that represent workers and Trade Unions that represent employers of the same industry. Trade Unions' rights and responsibilities in Brazil are regulated by Article 8 of the Federal Constitution and by Article 511 to 539 of the Labour Code.

Trade Union recognition requires:

- the association of one third of the companies of the same industry (employers) or one third of the workers of the same industry;
- mandate of three years for the respective Board of Directors;
- that the president must be a Brazilian citizen, born in Brazil. Other representatives need to be Brazilian citizens but can be naturalised foreigners;
- mandatory registration of the Union before the Ministry of Labour; and
- the territory covered by any given Union may be Municipal, State, Regional or Federal. However, only one Union can be recognised in one specific territory for a specific industry.

Note that, as summarised above, the general rule is that the Union represents an industry and the exceptions are the Regulated Professions (there are close to 60 – for example, engineers, nurses, chemists, lawyers, accountants, etc.); these professionals are represented by their specific Unions.

2.2 What rights do trade unions have?

Unions have the following rights:

- to represent employers or workers of a specific industry before the executive, the judiciary and the legislative bodies;
- to negotiate and execute Collective Bargaining Agreements; and
- to collect fees from the employers or from the workers they represent.

It is important to point out that Collective Bargaining Agreements will impact all employers and all employees of each industry or each regulated profession, as the case may be, in each specific territory, whether or not they are unionised.

2.3 Are there any rules governing a trade union's right to take industrial action?

Yes, Law 7.783/1989 regulates workers' rights to take industrial action and imposes some formal requirements to be complied with by the Workers Unions before they take action.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

No. As mentioned above, employees and employers are represented by their respective Unions. Works Councils may be negotiated in the collective bargaining, and their scope, rights and obligations will vary from case to case. The closest bodies to Works Councils as provided by the law are, for instance: Labour Accident Prevention Committees; and Employee Committees that may be elected from time to time to negotiate profit sharing agreements. Representatives of employees are elected by the employees.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

A Works Council will only have co-determination rights if it is created or recognised by the company with such powers.

2.6 How do the rights of trade unions and works councils interact?

Please see the answer to question 2.5 above.

2.7 Are employees entitled to representation at board level?

Although not mandatory, bylaws of corporations may provide for the participation of employees in the Board of Directors (Administrative Council), in which case the members will be chosen in a direct election by the group of employees together with their respective Workers Union.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes. Brazilian Law strictly prohibits discrimination in relation to salaries, exercise of any function and/or hiring/termination criteria based on gender, age, race, civil status, sexual orientation or disability.

3.2 What types of discrimination are unlawful and in what circumstances?

Please see the answer to question 3.1 above.

3.3 Are there any defences to a discrimination claim?

Employers and the alleged offender have the right of defence in any discrimination claim.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Discrimination rights (as well as any other rights) will be enforced in a Court of Law. Employer and employees may settle claims at any time before or during the processing of the claim.

3.5 What remedies are available to employees in successful discrimination claims?

- Reintegration to the job with payment of all salaries since the unfair termination, or payment in double of all salaries since the unfair termination.
- Granting of equal conditions of employment if related to unequal treatment.
- Moral damages (pain and suffering).

3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

No, atypical workers in Brazil have the same protection as regular workers.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Maternity leave lasts for 120 days and it may start, at the employees' discretion, at any day during the last month of pregnancy. This period may be extended for an additional 60 days, under the terms of Law 11.170/2008, if an employee and employer agree and, in case the extension is agreed, the employer will have the right to a tax benefit equal to the amount of the salary of the employee during this extension period.

It is important to keep in mind that the maternity leave term may also be extended by Collective Bargaining Agreements.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

It is important to point out that employees in Brazil have job tenure from the date of conception until five (5) months after the delivery of the child. That is, assuming that the employee started her leave 28 days before the birth and returned to work 120 days after (90 days after the birth), she will still have two (2) months of job tenure.

It is important to keep in mind that this period may be extended by Collective Bargaining Agreements.

4.3 What rights does a woman have upon her return to work from maternity leave?

She has the right to the remainder of the job tenure period. She may also have right to take breaks for breastfeeding (please see the answer to question 4.6 below).

4.4 Do fathers have the right to take paternity leave?

Yes. Fathers have a paternity leave of five (5) days.

It is important to keep in mind that the paternity leave term may also be extended by Collective Bargaining Agreements.

4.5 Are there any other parental leave rights that employers have to observe?

The same rights of maternity leave apply for cases of adoption. Other rights will only apply if they are included in Collective Bargaining Agreements.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

Not under the law, except in the case of breastfeeding. Until a child reaches six (6) months of age, the mother shall have two half-hour intermissions during the day to breastfeed. Under doctors' recommendation, this period of six (6) months may be extended. Other rights will only apply if they are included in Collective Bargaining Agreements.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

In general, in the case of a share sale, the labour contracts remain linked to the employer's business. In the case of a sale of assets, related employees may be transferred if the purchaser desires and the employees agree. In this case, the purchaser will assume all past labour liabilities.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

Sales of businesses have no effect on Collective Bargaining Agreements. All employees will maintain all their rights, including time of service to that company, which will continue without interruption in connection to any benefits that may be based on time of service.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

No. Labour legislation does not provide for any information and/or consultation rights on a business sale.

5.4 Can employees be dismissed in connection with a business sale?

Yes. Labour Law, as a general rule, does not impose any restriction on the termination of employees with no need to justify the decision, except those with rights of temporary job tenure mentioned in question 1.2 above, and if a collective dismissal is characterised (see the answer to question 6.9 below).

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

No. Any change to labour agreements needs to have the consent of the employee. Any change that is considered unfavourable to the employee, even with the employee's consent, will be deemed null and void by the labour courts.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Termination of employment in Brazil, in general, requires a pre-notice of 30 days during the first year of the contract. After the first year, the pre-notice period is increased by three days per year, up to the limit of 90 days. In some cases, depending on Collective Bargaining Agreements, pre-notice for some employees (after a determined age, for instance), may require longer pre-notices.

A pre-notice period, however, can be either worked or indemnified. If the employee is required to work during the pre-notice period, he/she will have their daily work journey reduced by two hours.

Note that if the employee resigns, he/she is required to give pre-notice of 30 days to the employer, or *in lieu* of the pre-notice, the employee should pay the employer an amount equal to the monthly salary.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

No. Labour Courts have ruled against this practice.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

In general, employees have no protection against dismissal. (Please see the response to question 6.4.) A dismissed employee is the one that has been notified that he/she has been dismissed for cause or without cause.

No consent from any third party is required for dismissing an employee.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

The only protection against dismissal applies to cases of employees that have temporary job tenure. The protection is usually related to:

- pregnant employees;
- workers suffering from labour-related illnesses and some specific diseases not labour-related;
- workers who are directors of Workers Unions;
- workers that are elected as representatives of the group of workers in the internal Cooperative of Credit of the company, if any; and
- workers that are elected as representatives of the group of workers in the Labour Accident Prevention Committee.

(Please see also the answer to question 1.2 above.)

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Outside of the mentioned exceptions (see the answer to question 6.4 above), and provided that a "*mass dismissal*" is not characterised (see the answer to question 6.9 below), there are no limits on any private employer to dismiss employees, be it for individual reasons or business-related reasons.

A dismissed employee, without cause, in general, has the right to receive the following compensation:

- pre-notice (30 to 90 days salary);
- proportional salary for the days worked after last payment;
- proportional 13th salary (1/12 per month from January to December);
- proportional vacation pay (1/12 per month counting from their last vacation);
- proportional vacation bonus (1/12 per month counting from their last vacation);

- authorisation to withdraw the Severance Fund (8 per cent of the salary deposited every month during the life of the labour agreement); and
- penalty equal to 40 per cent of the total amount deposited in the mentioned Severance Fund.

Please note that the pre-notice term is counted as the work period for all effects of the law and included in the calculation basis for all labour rights.

An employee dismissed for just cause will only be entitled to receive a proportion of the 13th salary and vacation pay, and will not have the right to withdraw the Severance Fund or to receive the 40 per cent penalty.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

Specific procedures for individual dismissals are:

- without cause:
  - employer gives notice of the termination and pays the termination rights within 10 calendar days from the delivery of the notice;
  - employer and employee must submit the termination forms to the Ministry of Labour or to the Workers Union for homologation if the employee has worked for a period greater than one year; and
- with just cause:
  - the same as above, plus a detailed description in writing of the reasons for the just cause dismissal, and in most cases, Workers Unions refuse to homologate the termination.

Note that in the case of employees who are directors of the Workers Union, the dismissal for just cause must be preceded by a judiciary investigation of the facts.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

A dismissed employee can file claims related to any and all labour rights before a Labour Justice Court.

It is important to point out that the claims must observe the statute of limitation as follows:

- claims have to be filed up to five (5) years after the labour right was allegedly breached; and
- up to two (2) years after the termination of the labour agreement whatever the reason, whichever comes first.

As labour claims are usually based on facts arising from the day-to-day relationship between the parties, remedies for a successful claim will vary from case-to-case.

6.8 Can employers settle claims before or after they are initiated?

Yes. However, this needs to be carefully studied, on a case-by-case basis, as out-of-court settlements in labour-related complaints can always be re-discussed in court.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

No, unless it is a "*mass dismissal*". If this is the case, although the legislation does not require any formality, the Superior Labour Court has consistently required that "*mass dismissal*" be negotiated with the Workers Union. It is important to note, also, that there is no firm indication from any decision (or from the doctrine) of what would be considered a "*mass dismissal*" (5, 10, 20 per cent or more of the labour force).

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

The Labour Court precedents require that the Workers Union participate in the mass dismissals procedures in order to seek, by means of negotiation, additional benefits to the targeted employees. If the employer fails to comply with this requirement, the Workers Union may file a specific complaint before the local Labour Court aiming to annul the dismissals and reinstate the employees' labour contracts, plus indemnification.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The most common restrictive covenants are related to non-compete and confidentiality.

7.2 When are restrictive covenants enforceable and for what period?

They would be considered enforceable, in principle, in relation to employees whose functions give them access to proprietary information. There is no specific period defined in the law. For confidentiality, the usual term is five (5) years after the termination. For non-compete, in general terms, the courts consider that it would be reasonable if restricted to a specific market segment (competitive products) and if enforceable for up to two (2) years.

7.3 Do employees have to be provided with financial compensation in return for covenants?

Yes. If the non-compete covenant restricts the former employee from finding a suitable job, the company must pay him/her at least an amount equal to his/her monthly salary for every month the restriction applies. The confidentiality covenant does not generate compensation by law.

7.4 How are restrictive covenants enforced?

As violations of restrictive covenants may configure a criminal offence and/or a civil illicit, companies may submit the case to a Criminal or a Civil Court including requests for injunctions, if necessary. In some specific cases, the Labour Courts may be considered concurrently competent for judging the complaint.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Due to restrictions on prospective employees' background checks, data protection rights may affect employment relationships, as Item

X of Article 5 of the Federal Constitution, in general terms, protects people's privacy and intimacy.

The transfer of employee data to other countries is not specifically regulated in Brazil. The data privacy legislation in Brazil is generically regulated by Item X of Article 5 of the Constitution referring rights to privacy and intimacy. A specific Bill of Law is being processed in the Senate as Law Project 181/2014.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, in principle, all the documents and information held by the employer related to the employee are considered data belonging to both parties. As a consequence, the employee can file an injunction to request the exhibition of such data from the employer, demonstrating that it is necessary for him or her to exercise labour rights. The employer cannot refuse to provide data contained in any legal registry forms or other information if the employee proves its existence.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Although there is no express reference to this type of pre-employment check, Brazilian Labour Courts have consistently decided that it would only be acceptable in the cases where the law requires it (e.g. police force), or in cases where the performance of the function would reasonably require such check (e.g. treasury positions, workers involved in the transportation of valuables or providing private security services).

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Yes. However, for the employer to exercise their right to do so, it is absolutely mandatory that the employers make it absolutely clear, in writing to the employees, the company policies on the use of the company's means of communication and its legal nature of work tools, and that employee communications through these means will be monitored by the employer.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Employers can control (block) the use of social media in the workplace. The employer cannot control the use of social media outside of the workplace. However, employees will always be responsible for any damages that their use of social media may cause to their employers.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Employment-related complaints are under the jurisdiction of the Labour Justice.

The Labour Justice is a sub-set of the Federal Court System and it is composed of:

- First Instance Courts composed by a single judge.
- Regional Courts of Appeal composed by several chambers (the number of judges and chambers may vary from region to region), each one with three (3) judges for ordinary appeals, and special composition chambers for collective labour claims, writs of *mandamus*, rescissory action, etc.
- The Superior Labour Court composed by 27 justices and eight chambers, each one with three (3) judges for special appeals, and special composition chambers with a higher number of justices for specific appeals from collective labour claims, individual labour claims, and for writs of *mandamus*, rescissory action, etc.

Cases that involve Constitutional Issues can be appealed to the Supreme Court.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

There is no mandatory previous conciliation out of court. In the labour system, however, the courts must try to lead the parties to conciliation before the presentation of the defence and in the beginning of any other hearing in the first instance.

Employees do not have to pay any fees to submit a claim. However, if the employee loses the case, he or she may be required to pay court fees.

9.3 How long do employment-related complaints typically take to be decided?

Employment-related complaints typically take around one year in the first instance.

9.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Yes. All decisions may be subject to appeal. Appeals to the Regional Court of Appeals will take about one year to be judged. Appeals to the Superior Labour Court may take another 18 months.

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