MONTGOMERY & ASSOCIADOS

MONTGOMERY SOCIEDADE DE ADVOGADOS

THE IMPACT OF THE BRAZILIAN LABOUR LAW REFORM ON THE DAY-TO-DAY OF COMPANIES AND THEIR COLLABORATORS

Moderator: Neil Montgomery
neil.montgomery@montgomery.adv.br

Speaker: Drielle Amate
drielle.amate@montgomery.adv.br

São Paulo, 24th November 2017

INTRODUCTION

1. Published on 13th July 2017, Law No. 13,467/2017 significantly changes several provisions of the Consolidation of Labour Laws ("CLT"), having a direct impact on the substantive law aspects of labour and employment relations and on the procedural aspects of labour claims, which is the reason why it became known as the "Labour Law Reform".

2. The new labour law became effective on **11th November 2017**, and as part of its contents was amended by **Provisional Measure No. 808/2017**, which became effective when published on 14th November 2017. Such Provisional Measure need to be converted into law within a maximum period of 120 days, under penalty of its effects lapsing.

SUBSTANTIVE LAW ASPECTS

IMPACT ON BUSINESS

1. **Corporate Group:** change of the definition of Corporate Group to include the need for evidencing the *communion of interests and joint economic activities*, in addition to the former requirement established by Case Law of *shareholder identity.*

2. **Withdrawing Shareholder**: limitation of subsidiary liability of the withdrawing shareholder to labour lawsuits filed within two years of the registration of the corporate change, respecting the benefit of order. If there is evidence of fraud, the liability shall be joint and several.

3. **Business Succession**: liability in relation to labour obligations will stick to the successor, unless there is evidence of fraud in the transfer, in which case the succeeded company will be jointly and severally liable.

EMPLOYMENT AGREEMENTS

1. **Relativization of Employee Hyposufficiency:** permits the free stipulation of clauses in the employment agreement and negotiation of specific and determined rights (contemplated in article 611-A) between company and employee with a university degree and monthly salary higher than BRL 11,062.62 (twice the ceiling of Social Security benefits).

Examples:

- working hours
- time bank
- 30 minute´ break
- Unemployment Insurance Program
- position and salary plans
- including fiduciary positions
- working remotely
- on call duty
- intermittent work
- remuneration based on productivity/performance
- workday registration methodology
- vacation changes
- degree of unhealthy working conditions
- incentive awards
- profit sharing programs
- arbitration clause

EMPLOYMENT AGREEMENTS

2. **Intermittent Employment Agreement:** that in which the rendering of services is not continuous, although subordination is maintained.

- Exception: Airline employees, who will continue to be governed by a specific law.
- Employee may be remunerated for the period worked, shift or daily payment and with proportional payment for vacation, weekly remunerated rest periods, FGTS, social security contribution payments and 13th salary.
- The intermittent employment agreement must establish the value of the working hour and must be established in a way that cannot be less than the minimum hourly wage or paid to other employees who perform the same function.
- The employee must be called with at least 3 calendar days in advance and will have 1 business day to respond to the call (refusal does not disfigure subordination).
- In the period of inactivity, the employee may provide services to third parties.
- Provisional Measure No. 808/2017 revokes the 50% fine imposed in case of noncompliance after acceptance of the call, by either party.
- The intermittent employment agreement will be considered to have terminated if the employee is not called for duty during the period of one year.
- Upon the termination of the intermittent employment agreement without cause, the employee will receive the severance pay based on the average of the amounts received during the life of the intermittent employment agreement, plus the FGTS and the prior notice (mandatory in the indemnified form) will be due by half and the other funds in full.
- Until 31th December 2020, an employee who was terminated under an employment agreement entered into for an indefinite term cannot provide services to the same employer under an intermittent employment agreement for a term of 18 months.

EMPLOYMENT AGREEMENTS

3. **Working Remotely/Home Office:** work performed outside the premises of the employer and with the use of information and communication technologies.

- The Labour Law Reform provides specific regulations for working remotely.
- This type of methodology may be established by means of a written employment agreement, with the activities that will be performed by the employee being specified theirein;
- The contract should also establish the responsibility for the acquisition, maintenance and supply of equipment, in addition to the necessary infrastructure and expense reimbursement rules;
- Attendance at the employer's premises to perform specific activities that require the presence of the employee does not disfigure the remote working regime;
- It is possible to change the presential regime to working remotely and vice versa, by contractual amendment (there being a guaranteed minimum transition period of 15 days);
- The employer must instruct employees in an explicit and ostentatious manner in relation to care that must be taken to avoid occupational accidents and illnesses;
- Employees working remotely are exempt from working hour control and will not be entitled to overtime payments.

EMPLOYMENT AGREEMENTS

4. **Independent Contractor**: This is a new legal provision, introduced by article 442-B of CLT, whereby the hiring of an independent contractor, provided all legal formalities and requirements are satisfied, whether continuously or not, excludes employment status (tax, corporate, accounting).

- Provisional Measure No. 808/2017 amended the original wording of article 442-B and prohibited the inclusion of an exclusivity clause in such type od contract.

- In any event, the fact that the independent contractor provides services to only one service taker does not characterize the relationship as being one of employment.

- It is important to mention that drivers, commercial agents, real estate agents, partners, and workers of other professional categories regulated by specific laws engaged in activities that are compatible with an independent contractor relationship, provided they comply with the requirements of the caption of article 442-B, will not be deemed employees.

WORKING HOURS

1. **Availability of Employee**: The following events will no longer be considered as the employee being available to the employer and, therefore, computed as a working day:

- When the employee voluntarily stays at the premises of the employer to await improvement of climatic conditions and safety on public roads (protests).
- During the period in which the employee performs private activities, such as::
  - Rest,
  - Meals (legal work break not included),
  - Religious practice,
  - Study,
  - Social activities,
  - Personal hygiene, and
  - Uniform change (when there is no obligation to change at the company).

WORKING HOURS

2. **Hours *in itinere***: The Labour Law Reform excludes payment of hours spent in the displacement between home and workplace, even if transportation is provided by the employer. Accordingly, such hours known as *in itinere* will no longer be computed in the work day because such time will not be regarded as time when employee is available to the employer.

3. **Part-time Work**: The current part-time work regime extends to up to 25 hours a week, with overtime not being permitted. The new law provides for two alternatives:

   (i) working of up to 26 hours a week with the possibility of 6 overtime hours per week (remunerated by a 50% premium); and

   (ii) working of up to 30 hours a week, without the possibility of overtime.

WORKING HOURS

4. **12 x 36 Shifts:** The 12x36-hour shifts (12 of work followed by 36 hours of rest) have now been incorporated into law, and can now be implemented for all categories of employees, by collective bargaining agreements (the possibility of being implemented by means of individual employment agreements having been revoked by Provisional Measure No. 808/2017).

- Provisional Measure No. 808/2017 introduced an exception for those working in the health sector, for which the 12hx36h shift can also be implemented by individual agreement.

- The new legislation also provides that the monthly remuneration will include weekly paid rest and rest on public holidays.

4. **Work Breaks**: May be reduced to 30 minutes by negotiation.

- Ultimate suppression of work break and respective payment of overtime is considered as indemnification and should remunerate only the time effectively suppressed, at a 50% premium.

WORKING HOURS

6. **Time bank**: Under the time bank methodology, any overtime done by the employee is not remunerated but rather accounted for to be converted into rest by adopting a set-off system.

- With the Labour Reform, **the "time bank" can be negotiated directly and individually (by written agreement) with the employee**, collective bargaining no longer being mandatory, provided that set-off occurs within six-months.
- Individual set-off of working hours may be established by written or tacit agreement.

7. **Overtime – Labour Ministry Autorization:** The need to communicate overtime to the competent authority is dispensed.

EMPLOYMENT/HR ROUTINES

1. **Vacation period fractioning:** The new law now permits splitting vacation in up to 3 tranches, with the employee's consent, whereby one of the tranches cannot be less than 14 days and any of the other periods not less than 5 days.

2. **Fine per employee without registration:** Such fine used to be a minimum wage and now is BRL 3,000.00 (to be adjusted annually). Such amount is doubled upon recurrence.

3. **Pregnant woman working in unhealthy environment:** Automatic leave in cases of exposure to maximum degree of unhealthiness and permitted leave depending on medical certificate in case of exposure to unhealthy working conditions of medium or minimum degree.

- Breastfeeding period: the leave period is conditioned to medical certificate for any degree of exposure.

- If the maintenance of the pregnant/nursing woman at work is incompatible, she will be referred to the INSS to receive maternity allowance.

EMPLOYMENT/HR ROUTINES

4. **Salary nature payments:** Salary includes the stipulated fixed amount, legal and function gratuities and commission paid by the employer.

- Amounts paid out as cost allowances (limited to 50% of the monthly remuneration) do not form part of an employee's salary, including meal allowance (payment in cash is prohibited), travel costs, prizes and allowances.

- The Law, amended by Provisional Measure No. 808/2017, introduced the concept of "prize": *money paid by liberality of the employer in the form of goods, services or cash to the employee, because he/she had extraordinary performance in the exercise of his/her activities.*

- Tips do not constitute the employer's own revenue, are destined for workers and are to be distributed according to the criteria defined in collective bargaining agreements. For monitoring and inspection purposes, companies with more than 60 employees will constitute an employee commission.

EMPLOYMENT/HR ROUTINES

5. **Salary parity**: Changes have been introduced to the requirements and time criteria. Contemporaneity has become a requirement, in order to avoid "chain pay parity" or remote paradigm indication. The difference in length of service for the same employer cannot exceed 4 years and, in the same role, 2 years.

   - A fine will be imposed if that the lower salary was paid due to gender or ethnic discrimination, in the amount of 50% of the INSS ceiling (currently BRL 2,765.00).

   - Excludes the possibility of pay parity when the company's positions are organized in a career plan or internal policy, governing positions and salaries, with mandatory collective negotiations and regulations of such document with governmental bodies now being dispensed.

6. **Fiduciary positions:** the premium for the exercise of a fiduciary position shall not be incorporated into salary and the employee is not assured the maintenance of this payment if and when the exercise of the fiduciary position ceases, regardless of the time duration of this condition.

7. **Termination with cause**: Article 482 of the CLT had been emended to include as an event of termination with cause motivated by the loss of the qualification or legal requirement for the exercise of the function, as a result of the intentional action of the employee.

EMPLOYMENT/HR ROUTINES

8. **Employment agreement termination:** the homologation at the Union (or Ministry of Labour) is **no** longer necessary (and many Unions are no longer officially sanctioning terminations up to and including 11th November 2017), however, the obligation of payment of severance within 10 days, regardless of the form of prior notice, has been maintained.

8.1. Employment Agreement Termination by Mutual Agreement: This is a legal innovation, whereby the termination of the employment agreement is conducted by mutual agreement between the parties. In this case, the indemnified prior notice and the FGTS fine will be halved, the right to the other severance payments remaining in full (balance of salary, pro-rated vacation, pro-rated 13th salary). The employee may withdraw 80% of the amount deposited in the FGTS account and will not be eligible for unemployment insurance.

9. **Annual Release:** Possibility of executing the term of annual release of labour obligations at employee union. Such term must expressly indicate the monthly obligations that have been complied with in relation to which the employee will give release.

COLLECTIVE RIGHTS

1. **Prevalence of collective labour negotiations over the law:** The negotiation between companies and workers, represented by their unions by entering into collective bargaining agreements, will prevail over the law in some specific points (article 611-A).

- Principle of Minimal Intervention in the Autonomy of Collective Will.

- Examples: (same matters of individual negotiation of employees with higher education degrees and with monthly salary above BRL11,062.62): working hours; time bank; 30 minutes' break; Unemployment Insurance Program; position and salary plans, including fiduciary positions; working remotely; on call duty; intermittent work; remuneration based on productivity/performance; workday registration methodology; change of public holidays; degree of unhealthy working conditions; incentive awards; profit sharing programs; arbitration clause.

- The law also identifies several issues that **cannot** be the object of collective negotiation, referring mainly to issues of public policy, examples: minimum salary, FGTS, unemployment insurance program, 13th salary, inability to reduce salaries, night work premium, weekly remunerated rest periods, minimum premium of 50% for overtime, vacation, maternity / paternity leave of absence, labour market protection for women, prior notice, equal rights between employees and single worker (debatable forecast), freedom of professional association and need for prior authorization to discount union contributions, among others.

COLLECTIVE RIGHTS

2. **Mass Dismissals:** Mass layoffs and dismissals are put on a par with individual terminations and prior negotiation with employee unions is no longer required.

3. **Voluntary Resignation Program (PDV):** The law now expressly contemplates such type of programs, which require always collective negotiation. Unless otherwise stated, employees adhering to the program will give the employer full release in relation to these employment relationships.

4. **Employee Representatives Commission (Works Council):** Companies with over 200 employees may have a commission of employee representatives (Works Council), elected by the employees and with a number of members proportional to the number of employees, to represent the latter in direct dialogue with the employer.

   - The elected members of such commission will have temporary job terms during and for one year after these mandate, save in the event of termination for technical, economic or financial disciplinary reason.

   - Provisional Measure No. 808/2017 expressly provides that the employees' representatives committee (Works Council), will not replace the function of Unions (article 510 – E).

COLLECTIVE RIGHTS

5. **Union Contribution:** payment becomes optional and the discount from payroll may occur only with prior express consent by each employee. The employer's contribution, also paid by the employer, is optional.

6. **Ultrativity of Collective Instruments:** maximum term of 2 years for collective bargaining agreements, the production of automatic effects after that period being prohibited (which was quite common in the period of renegotiation of collective instruments).

5. **Prevalence of the Company-specific CBAs prevailing over Category generic CBAs,** regardless of which rule is most favorable.

PROCEDURAL LAW ASPECTS

SOURCES OF LABOUR LAW

1. **Precedents:** Precedents and statements issued by the Superior Labour Court may not restrict rights provided by law or create obligations that are not clearly defined by law.

2. **Collective Bargaining Agreements**: Labour Courts may revise collective negotiations exclusively for the purpose of confirming that formalities have been satisfied (in the form of the Civil Code, i.e., agents' capacity, lawful, possible, and determined purpose and form not prohibited by law) → Principle of Minimal Intervention in the Autonomy of Collective Will.

MORAL AND EXISTENTIAL DAMAGES

Non-property damages arising from the employment relationship, in favor of the employee or employer, will be regulated exclusively by the CLT, which indicates the protected assets inherent to the individual and the corporate entity.

- Protected assets inherent to the corporate entity: image, trademark, name, business secret and correspondence secrecy.

- Certain criteria were established for the assessment of the claim and for the determination of the amount of indemnification (doubled in case of recurrence between identical parties). With the issuance of Provisional Measure No. 808/2017, the indemnification for moral damages is no longer monetized by of employee's salary and starts to be based on the ceiling of the benefits of the General Social Security System (currently BRL 5,531.31), for moral damages arising from death, the limits of indemnification established by law shall not be applied, the judge having discretion to establish the amount deemed tax.

LABOUR HEARINGS

- **Company Representative:** Can be any person appointed by the company, whether employed or not.

- ***In abstencia***: Shall cease to produce effect, especially confession, when:

  (i) upon having plurality of claimants, any of them file a statement of defence;
  (ii) the dispute relates to unwaivable rights;
  (iii) the application is not accompanied by an instrument considered indispensable by law;
  (iv) the allegations made by the claimant are improbable or contradictory to the evidence in the case file.
  (v) "In abstencia" will not be decreed if absent the claimant, his/her lawyer attends the hearing.

ENFORCEMENT OF LAW No. 13,467/2017

- Article 2 of Provisional Measure No. 808/2017, provides that Law No. 13.467/2017 will be applied in full to onegoing employment agreements.

STATUTE OF LIMITATION DURING ENFORCEMENT PHASE

- Becomes admissible when the claimant no longer advances the enforcement process unjustifiably for more than 2 years.

ARBITRATION CLAUSE

Legal innovation that introduces the possibility of adopting arbitration as the form of dispute resolution in employment agreements where there is express consent by the parties and the employee's monthly salary in equal to or higher than BRL 11,062.62.

HOMOLOGATION OF EXTRAJUDICIAL SETTLEMENT / COMPROMISE AGREEMENTS

Extrajudicial settlement / compromise agreements are now admitted provided they are duly homologated by a competent Labour Court (the law refers to Conciliation and Judgment Boards).

DISREGARD OF LEGAL ENTITY

This possibility has been confirmed, as set out in Brazilian Code of Civil Procedure.

PROCEDURAL DEADLINES

They will be counted in business days, in the form of the Brazilian Code of Civil Procedure.

COURT COSTS

A ceiling has been established for collection, in the amount of 4 times the maximum limit of Social Security benefits (currently, BRL 22,125.00).

LAWYERS' FEES

- Introduction of lawyers' fees payable by defeated party, between 5% and 15% of the value of liquidated judgment.

EXPERT FEES

- Advanced fees are prohibited.
- Will be due even by the defeated party enjoying the benefits of free justice.

DEPOSITS/PAYMENTS

1. **Security:** Judicial security bonds are now acceptable.

2. **Appeal Deposit:** Money deposits can be replaced by a bank letter of guarantee or by a surety bond.

3. **Reduction by half of the Appeal Deposit:** Non-profit entities, domestic employers, individual microentrepreneurs, microenterprise and small business.

As mentioned, the Law may suffer potential changes (including the non-conversion of Provisional Measure No. 808/2017 into law) which may impact the current wording of the Law and this presentation.

This presentation contains only a general information of a purely educational nature.

Neil Montgomery
neil.montgomery@montgomery.adv.br
Direct Tel.: +55 11 4096 4008 Fax: +55 11 4096 4040

Nationality: British / Brazilian

Education: University of São Paulo, School of Law, Master's Degree in International Law (2002)
University of São Paulo, School of Law, LL.B. (1996)

Practice Areas:
Head of British & Commonwealth Desk
Corporate Finance (including M&A and Joint Ventures)
Competition / Antitrust Law
Contracts (international and domestic)
Cross-border litigation (including Mediation and Arbitration)
Labour and Employment Law
Shipping and Aviation
Insurance and Reinsurance
Media and Entertainment (especially gambling law)
Intellectual Property

Languages: English, Portuguese, Spanish and working knowledge of French

Drielle Amate
drielle.amate@montgomery.adv.br
Direct Tel.: +55 11 4096 4009 Fax: +55 11 4096 4040

Nationality: Brazilian

Education:
Fundação Getúlio Vargas – FGV, Specialist degree in Corporate Law (2016)
Fundação Getúlio Vargas – FGV – Executive Education Program in Legal English (2013)
Pontifícia Universidade Católica de São Paulo – PUC – School of Law, LL.B. (2009)

Practice Areas: Individual and Collective Labour and Employment Law (consulting and litigation)
Permission and Benefits

Languages: English and Portuguese

- Aviation
- Litigation (incluiding Arbitration and Mediation)
- Contracts
- Environmental Law
- Banking and Financial Law
- Criminal Corporate Law
- Public Law
- Corporate Law (including M&A and joint ventures)
- Labour and Employment Law
- Tax and Customs Law
- Media and Entertainment (including Gaming and Betting)
- Immigration
- Real Estate
- Insolvency and Restructuring
- Investimentos estrangeiros no Brasil
- Intellectual Property
- Trade Finance

MONTGOMERY & ASSOCIADOS

MONTGOMERY SOCIEDADE DE ADVOGADOS

São Paulo
Rua Gomes de Carvalho, 1306, 3º andar
Vila Olímpia
Tel.: +55 11 4096 4000
www.montgomery.adv.br