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New Guidelines on Service Outsourcing and Temporary Work

On Wednesday, March 3rd, 2017, the Brazilian Chamber of Deputies approved the main text of Draft Law no. 4,302 from 1998, which discusses service outsourcing and temporary work. The draft, which was presented by the Executive Branch in 1998, is still pending presidential sanction, so it can enter into force.

Nowadays, in the absence of specific legislation on service outsourcing, Labor Courts have been ruling the matter, especially through Precedent no. 331 from the Superior Labor Court, which restricts service outsourcing to three specific situations: temporary workers service agreements, security and cleaning, as long as these are non-core activities, meaning, activities that are not essential to the development of the company's corporate object.

Regarding service outsourcing, there is provision of its use for both private companies and public administration companies, as well as the subcontracting of employees for the performance of services. The sanction of the Draft Law will also imply the permission, for the he company receiving services, to extend some benefits to outsourced workers (that are granted to actual employees), risk-free from the characterization of employment relationship, such as medical and outpatient assistance and offering them the same meal that is served to employees.

According to the free enterprise principle, and as for the distinction between core-activity and non-core activity, the National Congress understands that such conception reveals itself to be an obstacle and sustains that "any regulation must be exempt from this kind of explanation, and a full authorization should be granted to companies, regarding the contracting of services that are linked to its activity, in a broad perspective, focusing on clarity and maximum enforcement of the free enterprise".

Said authorization, however, should not be confused with the possibility to hire workers as legal entities, since the presence of the employment relationship requirements (service performed by a private individual, the personal nature of the work, rewarding, non-eventuality and subordination) will imply a labor fraud.

In addition, it must be highlighted that the company receiving the services shall be subsidiarily liable for all the labor and social security obligations that are guaranteed by the law, for the duration of the period during which the worker is under its directive power.

Furthermore, the company receiving the services is responsible for ensuring health, safety and hygiene conditions for the workers, when the services are executed in the company's installations, or at a place that has been determined by said company. This means to say that, even under the terms of the new regulations, the company receiving the services shall be held accountable for any fault regarding the incorrect choice of its contractors, granted that these do not comply with the legislation in force, or even if the company fails to inspect them.

It must also be highlighted that, even if the outsourcing of any activity is unrestrictedly allowed, some positions may only be fulfilled by actual employees of the companies,

especially positions whose liability is set out in specific legislation. Although this has not been mentioned in the Draft Law, its wording must be interpreted jointly with the existing legislation.

Besides, the Draft, which has been approved by the Plenary of the Chamber of Deputies, while it alters the temporary work agreement's length, from the current three months to 180 days ("consecutive or not, however authorized its extension for up to 90 days, consecutive or not"), it has not altered the rules which authorize the contracting of temporary companies, in other words, only in cases of transitory need for personnel replacement, not deriving from a strike, which exceeds 6 months, given that its extension shall be justified only by the preservation of the primary conditions, which originated the contracting of temporary work. In any event, issues such as the temporary replacement of female employees that are out on maternity leave, for instance, shall no longer prevail, given the extension of the work agreement's length.

Moreover, in order to prevent labor frauds, there is a prohibition on the hiring of the same employee, by the same company for which he/she has once worked, which lasts for a period of 90 days upon the termination of the first agreement, under penalty of characterization of employment relationship. Temporary workers are also assured working hours and salary that are equivalent to those received by actual employees, which occupy the same position at the contracting company, as well as social security protection against occupational accidents, granted by the INSS- National Institute of Social Security.

On the whole, it shall be noted that the Draft Law, if it is approved, will benefit not only companies, by allowing them to specialize even further, but also the employees, insofar as the unrestricted service outsourcing will imply their hiring by highly specialized service providers.

Our practice's Labor Consulting team remains at full disposal for the clarification of possible doubts