

## **I. INTRODUCTION**

In Brazil, the employment relationship is based on informal liaison; an official document is not required for a lawful employment relationship to exist.

The employment agreement does not necessarily have to be consolidated or evidenced by a signed written agreement. It may also be a verbal agreement, as long as there is an agreement between the parties. It should be stressed that an agreement may be made even implicitly, as it is sufficient when services are provided on continuous basis. If the employer is not opposed to the provision of services by the employee and makes use of the employee's services and pays them a salary, this will be evidence of an implicit employment agreement.

The employment agreement may be changed by mutual consent and as long as no damage is caused to the employee (any contractual clause infringing this guarantee is considered null and void). Consequently, the termination of the agreement is based on just cause in relation to the party that changed the employment agreement.

It is recommended that the employment agreement always be made in writing, with well worded clauses, written simply and clearly, and setting out all the respective obligations, rights and duties of the employee and the employer.

## **2. THE DIFFERENT TYPES OF EMPLOYMENT CONTRACTS AND THEIR TERMINATION**

### **2.1 THE OPEN-ENDED EMPLOYMENT CONTRACT**

In Brazil, the most common labour contract is the open-ended (indefinite) employment agreement. When the parties do not mention anything concerning the term, it is assumed that the agreement is for an undetermined time, which is used in most cases. The open-ended employment agreement is however not an eternal agreement, but it only has an indefinite duration in time. The open-ended agreement has no legal provision for being terminated, so this depends on the will of the employer and the employee.

There are some cases that generate provisional stability for the employee and prevent the termination of the agreement without just cause, for example, pregnancy, illness, nomination of the employee as trade union leader, and so forth.

Just cause, force majeure, reciprocal guilt, compulsory retirement, indirect dismissal (just cause motivated by the employer), the death of the employee or the employer, the temporary standstill of the work motivated by an act of the legal entity concerning internal public law are reasons for termination of the agreement.

Brazilian statutory law sets forth that the party (employer or employee) wishing to terminate the employment agreement for undetermined time shall give early notice to the other party of its decision at least 30 (thirty) days in advance, except in the case of an agreement between the parties or the Unions.

The events of termination due to just cause are provided for by law and shall be rigorously observed with the penalty that the termination is considered void.

Brazilian legislation provides that the party (employer or employee) wishing to terminate an open-ended employment agreement shall give advance notice to the other party of its decision at least thirty days in advance, except in the case of an agreement between the parties or the Unions, whatever is more beneficial to the worker. If the termination has been made by the employer, the employee's normal working schedule shall be reduced by two hours daily during the period of the early notice, and the worker may also opt for being absent, with justification, for seven subsequent days as a substitution for the two daily hours' reduction, in order to look for a new job. The period of the early notice may be worked or indemnified.

In the event of unjustified termination of the employment agreement for undetermined time on the part of the employer, the employer is obliged to pay a fine in the amount of 40% on the balance of the account linked to the FGTS - Fundo de Garantia por Tempo de Serviço [Unemployment Guarantee Fund] of the employee. In Brazil, employers are requested to make monthly deposits being the equivalent of 8.0% of the salary for the FGTS on the account of the employee. Such account belongs to the employee and may be used in accordance with legal provisions. The penalty shall not be due in the event of termination upon request of the employee and/or just cause by the employee.

The termination of employment agreements with a duration of more than one year needs to be approved by the Labour Union or the Regional Labour Office [Delegacia Regional do Trabalho].

## **2.2 THE FIXED-TERM EMPLOYMENT CONTRACT**

This is an employment agreement whose validity is for a fixed term or for the execution of specified services provision. Of the employment agreements this is the exception and follows specific provisions contained in the law. It may be made verbally, but it is recommended that it be in writing. It may not be for more than 2 (two) years.

The fixed term employment agreement is only valid if it is: (a) a service whose nature or transitory character justifies the predetermination of the term; (b) business activities of transitory character or; (c) a probationary or experimental employment agreement.

The end of the fixed term contract may be established according to the number of days, weeks, months or years or in relation to a certain specific service as the conclusion of works or, if possible, a forecast of when the approximate end of an event will occur.

Fixed term agreements are considered in the following situations: harvest, professional athlete, artist, foreign technician, based on projects, and apprenticeship.

After the expiry of the fixed term agreement, the same employee may only be hired again for determined time after 6 months have elapsed, unless the expiry depends on the execution of specialised services or on the occurrence of certain events. This is what happens with employees of guesthouses or hotels that need an increased number of employees only in certain periods of the year, such as holidays and long weekends. There is also the possibility of successive renewal of such contracts.

There is no advance notice period for the termination of the agreements, as the parties know beforehand when the agreement will end. The same rule applies to the indemnification of 40% of the unemployment fund (FGTS), as the employee is not dismissed on the date the agreement ends, but the agreement ends due to the elapsing of the term.

In fixed term employment agreements, the employer does not have to observe the employment guarantee even if for example, the employee gets pregnant during the validity of the employment contract, as the parties knew from the beginning that the employment agreement would end on the last day of the term, as agreed. On this day, the employment contract shall end.

In the event that the employee is dismissed before the final date of the agreement, the employer must pay them half the remuneration to which they would be entitled until the end of the agreement as indemnification.

Special conditions, such as a fixed term agreement, are to be recorded in the Labour and Pension Fund Booklet of the employee.

### 2.3 TEMPORARY EMPLOYMENT CONTRACT

The hiring of temporary workers can only be justified in exceptional cases where regular and permanent staff need to be replaced temporarily or due to an extraordinary increase in the workload. It shall be incumbent upon the employer to prove the conditions that justify the temporary hiring in the moment of any supervision or labour suit.

Recruitment of temporary workers can only be made via an intermediary, namely a company specialising in the supply of temporary labour. For the hiring of a temporary worker, it is necessary to have an agreement between the service-receiving company and the temporary labour company. This agreement must be in writing, and shall expressly contain the reason justifying the need for temporary labour, as well as the level of remuneration and service provision, and the proportions of salaries and social encumbrances must be clearly itemized. Such agreements may not exceed three months, unless authorised by the local body of the Labour and Employment Ministry (“MTE”) and as long as the total period of temporary labour does not exceed six months.

### 2.4 SPECIAL EMPLOYMENT CONTRACTS

The **apprenticeship agreement** is a special employment agreement, made in writing and for a fixed term, in which the employer undertakes to provide methodological technical-professional education to young people of over fourteen and under eighteen years, enrolled in a apprenticeship program, and such education shall be compatible with his physical, moral and psychological development, and in which the apprentice undertakes to carry out the necessary tasks for such education with dedication and diligence.

All types of establishment are obliged to employ and enroll in the courses of the National Apprenticeship Services a number of apprentices between 5% and 15% of workers employed in each establishment, whose functions require a professional education. The following conditions must be observed: (a) the apprentice shall be aged between 14 and 18 years; (b) the employers shall register the apprentice in apprenticeship programs, offered by the National Apprenticeship Services (SENAI, SENAC, SENAT) or by other entities qualified to provide methodological

technical-professional education; (c) in the event that the apprentice has not yet concluded basic school education, it is obligatory for them to be enrolled and go to school.

The company shall therefore, make the apprenticeship agreement in writing. This agreement shall contain the signature of the person responsible for the apprentice, and, as a general rule, have a duration corresponding to the course, however it may not exceed a period of two years.

The validity of the apprenticeship agreement depends on it being recorded in the Labor and Pension Fund Booklet, but also depends on the registration with and frequency of attendance of the apprentice at school (if they have not yet concluded the basic school education), and on the enrolment in an apprenticeship program developed under the supervision of an entity qualified in methodological technical-professional education.

The apprenticeship agreement may be terminated at the end of its term or when the apprentice reaches 18 years of age, or beforehand in the following cases: (a) insufficient performance or lack of adaptation of the apprentice; (b) serious disciplinary misconduct; (c) unjustified absence at school which causes repetition of the school year; or (d) upon request by the apprentice. In any of these cases no indemnification equivalent to 50% of the remuneration to which the employee would be entitled until the end of the agreement shall be due.

The **probationary employment agreement** is a part of the agreement for determined time. The purpose of the probationary employment agreement is so that the employer can get to know the abilities and the character of the employee and the employee can get to know the norms of the company. Therefore, it is a contract of mutual assessment.

The probationary employment agreement is still an employment agreement for a fixed term. Thus, it is necessary to make the records in the CTPS of the employee regarding the said contract, which provides for all the rights and obligations of the worker in connection with the abovementioned agreement.

The maximum term for the probationary employment agreement is 90 days. If this term is exceeded, the agreement shall be in force as if it was an agreement for undetermined time, i.e. the duration will be transformed regardless of the will of the parties.

The probationary employment agreement may be extended, but only once. It is not possible to extend a probationary employment agreement of 90 days for another 90 days, as the maximum of 90 days would be exceeded. It is however possible to hire someone for 30 days and then extend this period for another 60 days, or for 20 days and extend it for another 70 days, or for 45 days and extend it for another 45 days. In all these cases, the maximum term of 90 calendar days shall be observed and also only one extension may be made.

If the employee completes the probationary period and leaves the company, the employer may not request a new probationary period when hiring them for the same function, as they were already tested.

It is not possible to enter into a probationary employment agreement after the end of a temporary employment agreement, as the employee was already tested.

### **3. SOCIAL CONTRIBUTIONS AND THE DIFFERENT KINDS OF BENEFITS IN BRAZIL**

#### **3.1 THE STATE PENSION SCHEME**

The purpose of the Pension Fund is to provide its beneficiaries with indispensable maintenance means, for the reason of physical handicaps, old age, total employment years, involuntary unemployment, family encumbrances and imprisonment or death of those from whom they depend economically.

Organised in the form of a general system of contributive character and with mandatory association, the Pension Fund covers in this way:

- disability, handicap, death and old age;
- maternity protection and protection especially for pregnant women;
- protection for the worker in situations of involuntary unemployment;
- family salary and imprisonment assistance for the economically dependent of the insured with low income;
- bereavement benefits of the insured, whether man or woman, to the spouse or companion and dependents.

With relation to the pension organisation, the following principles and guidelines shall always be observed:

- universality of participation in the pension funds, by means of contribution;
- amount of the monthly income from the benefits, base salary substitutes or work earnings of the insured, not below the minimum salary;
- calculation of the benefits considering the inflation adjusted base salaries;
- conservation of the real value of the benefits;
- optional complementary pension, calculated by additional contribution.

The Social Security System (INSS) is financed by the entire society directly, and indirectly by means of resources coming from the budget of the Federal Government, the Federal States, the Federal District [Brasília], the Municipalities, and the social contributions shall be shared by the employee and employer.

Employees allow a direct discount of the pension contribution, which is deducted from the salary by the employer at percentages ranging from 8%, 9% or 11% of the monthly basis salary, in non-cumulative form, whereby the table in force shall be observed and the contribution cap shall be respected.

Employers discount and recollect the contribution of the employees for the security funds and are obliged to contribute on the amount of the payroll, in the following fashion: (a) 20% on the salary of the employees (22.5% for the financial sector); (b) 1%, 2% or 3% on the salary of the employees, in accordance with the risk level of the company's activity; (c) 12%, 9% or 6% exclusively on the salary of the employee, whose exercised activity causes the granting of a special pension at 15, 20 or 25 years of contribution.

#### **3.2 THE UNEMPLOYMENT BENEFITS SYSTEM**

This is a benefit granted to the employees dismissed without just cause who prove that: (a) they were employees during at least 6 months in the past 36 months prior to the date of dismissal

from which the request for unemployment insurance originated; (b) do not enjoy any pension benefits for continuous work, as foreseen in the Regulation of the Pension Fund Benefits, with the exception of the insurance against accidents and the bereavement benefits; (c) do not have own income of any kind sufficient for the maintenance of their families.

It is granted for a variable period between 3 to 5 months, depending on the duration of the terminated employment agreement. The amount shall be calculated in accordance with the table in force, but shall always be lower than the last monthly remuneration received by the employee.

The unemployment insurance shall be suspended: (a) in the event of admission to a new job; (b) when receiving some benefits of the Pension Fund; (c) when fraud is proved; (d) upon death; (e) when a new job has been refused.

#### **4. FOREIGNERS WORKING IN BRAZIL – TRANSFERS OF UNDERTAKINGS**

##### **4.1 FOREIGNERS WORKING IN BRAZIL**

In Brazil the companies that carry out public services under administrative authorization or public utility services or that carry out industrial or commercial activities are obliged to have in their staff, when composed of three or more employees, a proportion of Brazilians of 2/3. Such proportion includes the natives and nationalized as well as the Portuguese in the event of reciprocity treatment in favour of the Brazilians. Assimilated to Brazilians are those foreigners that, when residing in the country for over 10 years, have a Brazilian spouse or child.

These proportions are not applicable to public companies and to companies that carry out rural activities, as long as they are in an agricultural zone, dedicate themselves to the processing or transformation of products of the region and to extractive industrial activities, except for mining.

Some jurists argue that this proportion of Brazilians to foreigners no longer exists since the Federal Constitution of 1988 came into effect.

The foreigners that live in border regions may exercise remunerated activities on the Brazilian national territory without a Labour and Pension Fund Booklet, as it is sufficient that they have an identification document issued by the Federal Police.

Foreigners that have a courtesy, official or diplomatic visa do not need to obtain a Labour and Pension Fund Booklet, but may only exercise remunerated activities linked to the foreign State, organisation or international or intergovernmental agency for which they are in Brazil, or of the Brazilian entity or government, by means of an international instrument pursuant to a treaty with the other government that deals with the issue (art. 104 of Law No. 6.815/80 – “Statute of Foreigners”). Brazilian labour legislation is not applicable to any of those visas.

Foreign professionals who have a permanent visa may be hired as employees in Brazil and shall be treated equally to Brazilian employees, and their employment agreements are governed by the rules of Brazilian statutory law, as it is actually unlawful to make any discrimination between Brazilians and foreigners on the basis of their nationality.

Employers may not hire foreign employees with temporary, tourist or transit visas, as they may not exercise a remunerated activity in the country. The only exception is for foreigners admitted temporarily under an employment agreement, however they have to exercise their activities in the company that hired them for the purpose given in the request to the Labour Ministry, and can only do this if authorised by the Ministry of Justice

The dismissal of foreign employees shall precede the dismissal of Brazilian employees that exercise a similar function, in the event of lack or stoppage of work.

#### 4.2 TRANSFERS OF UNDERTAKINGS

With relation to the transfer of the working place, this is authorised by Brazilian law under the following circumstances: (a) as long as this does not necessarily require the moving of the employee's domicile; (b) of employees as confidants; (c) due to an explicit or implicit clause of the agreement; (d) due to the shutting down of the establishment where the employee works; (e) provisional situations.

As for the change of the employment agreement with relation to the employer, it should be clarified that any change in the ownership or legal structure of the company shall neither affect the employment agreements nor the rights acquired by its employees.

### Author

**Edson Mazieiro**

Paulo Roberto Murray - Advogados  
São Paulo, Brazil

E-mail [emazieiro@prmurray.com.br](mailto:emazieiro@prmurray.com.br)  
Tel. +55 11 2198 7400

### To contact PLG

Julienne Laveaux  
PLG Secretariat  
PANNONE LAW GROUP E.E.I.G.  
avenue de Sumatra 41  
1180 Brussels  
Belgium

Tel. +32 2 374 88 46  
Fax: +32 2 374 90 61  
E-mail [plg@plg.be](mailto:plg@plg.be)  
[www.plg.eu.com](http://www.plg.eu.com)

### Disclaimer

The contents of this article are intended to provide guidance only and should not be taken to constitute legal advice on specific problems. PLG cannot accept responsibility for this information or matters affected by subsequent changes in the law.

Readers are requested to direct their enquiries to the author(s) of the article.

© 2010 Pannone Law Group