

Proving compliance with the quota for PwDs required under Brazil's new Bidding Law

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Almost 33 years after Law 8213/1991 established an affirmative policy of reserving positions for people with disabilities and employees rehabilitated under the Social Security system ("PwDs"), Brazil's new government contracting legislation, Law 14.133/2021 (the "New Bidding Law") now requires companies with one hundred or more employees to prove compliance with the PwD quota in public procurement procedures.

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Unlike the earlier Law 8666/1993, which gave bidders that complied with the quota a simple preference in the event of a tie, the New Bidding Law requires bidders to present a statement of compliance with reserved positions for PwDs in order to qualify for participation in procurement procedures. Successful bidders must maintain compliance with the requirement while the contract is in effect, and must present proof of compliance whenever requested by government authorities, by specifying the employees holding the reserved positions.

Although the change introduced by the New Bidding Law – which has been mandatory since January 2024 – represents a welcome advance in promoting the inclusion of PwDs in the job market, its impact on government contracts should not be ignored. Many companies face challenges in recruiting, hiring and retaining these employees, and despite the issue being relatively new at the administrative sphere, it has long been debated in the Labor Courts.

It is not uncommon for Brazil's Ministry of Labor or the Labor Prosecution Office to conduct investigations into companies' compliance with the PwD quota, which often result in notices of infraction issued by the Ministry of Labor, or formal procedures or inquiries brought by the Labor Prosecution Office with the signing by the companies of Commitments to Adjust Conduct and fines for non-compliance. As a last resort, Labor Prosecution Office may even file Public Civil Actions, seeking compensation for collective moral damages and compliance with certain obligations.

What should not be overlooked is the real difficulty that many companies face in complying with the quota, despite their real efforts to do so. The challenge involves not only the obstacles to attracting PwDs candidates, but also reconciling the medical condition and work capacity of PwDs with the demands of the job, without putting the physical health and safety of the worker and other employees at risk. This leads to a clash between two fundamental values: including PwDs in the job market and protecting the lives and safety of these people and other employees.

Over the years, this reality has led the Labor Courts to the conclusion that despite the legal requirement, companies should not be penalized when non-compliance is beyond their control. Proof that the nature of the

company's business is incompatible with PwD's capacity for work, or that despite the company's best efforts, it could not find enough qualified people to meet the percentage established by law, are examples of when non-compliance is not the companies' fault.

There have even been recent rulings by the Superior Labor Court ("TST" – *Tribunal Superior do Trabalho*, the highest court in employment and labor matters) finding that a company had no liability for a notice of infraction issued by the Ministry of Labor because it could prove that it had taken action to hire PwD's employees as required by law, by advertising for candidates and hiring job placement agencies to find potential employees.

In addition to the labor and employment consequences, failure to comply with the quota for PwDs now has other impacts. With the change introduced by Law 14.133/2021, companies that cannot prove compliance with the law may be disqualified from government contracting procedures.

Based on the trend seen in the Labor Courts in recent years, it seems inevitable that the question of compliance with the reservation of positions for persons with disabilities under Law 14.133/2021 will end up in the courts. Nonetheless, there are favorable precedents, and obtaining a judicial decision may be an alternative, especially where the nature of a company's business put the safety of PwDs and other employees at risk.

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