Economic Groups and the Employment Reform

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The Employment Reform introduced important changes in the concept of "economic group" under Brazilian employment law. In broadening the concept, by adding elements such as "integrated interest", "community of interest" and "joint action", it's fair to say that the Employment Reform has increased the chances that two companies will be found to be part of an economic group for employment purposes.

Under article 2§2 of the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho), an economic group will exist for employment purposes:

§2. Whenever one or more enterprises, although each has its own legal personality, are under the direction, control or management of another, constituting an industrial, commercial or any other type of business group, they will be, for the purposes of employment relationships, jointly liable with the principal enterprise and with each of the subordinate enterprises.

At the end of 2017, the Employment Reform included a new paragraph 3 in article 2 CLT, which reads as follows:

§3. *Having the same shareholders or partners is not sufficient to characterize an economic group; for an economic group to exist, a demonstration of integrated interest, an effective community of interests, and joint action by the enterprises in the group are necessary.*

The Employment Reform thus added to the CLT the concept of an economic group by reason of coordination, which exists whenever there is integrated interest, effective community of interests, and joint action by all the companies, even if they are entirely independent from each other in terms of ownership.

A controversial question that arose with the changes made by the Reform is whether all the companies within an economic group must be included in employment lawsuits, before the merits of the complaint are decided, to ensure that the defendants are able to exercise their constitutional rights to a full answer and defense. The Labor Courts' position prior to November 2017 was that an economic group could be found to exist at any procedural stage.

Nonetheless, with the new wording of article 2 CLT, and principally the inclusion of §3, some employment law specialists took the position that article 513§5 of the Code of Civil Procedure applies to employment claims, and that consequently companies within an alleged economic group must be named in the claim. They reason that since article 513§5 CCP provides that judgment cannot be enforced against guarantors, co-obligors or jointly liable parties if they did not take part in the phase of the proceeding dealing with the substantive claim, and that it is now necessary to prove "integrated interest", "community of interest" and "joint action" in order for an economic group to exist for employment purposes, claimants must name as defendant all companies against which they may wish to enforce judgment on the grounds that they constitute an economic group.

Recently, on May 18, 2022, the Superior Labor Appeals Court (TST – Tribunal Superior do Trabalho) ruled that a party that did not take part in the substantive proceeding cannot be held liable at the enforcement phase, when the party has lost all its chances of defense.

In addition to ratifying the understanding of the law adopted by the Federal Supreme Court in Appeal RE 1.160.316, the TST held that article 513§5 CCP applies by analogy to employment lawsuits, and ordered a stay of all pending proceedings that deal with the same issue until the matter is decided by the Supreme Court or under the repetitive appeals system.

If the Employment Reform created a point of dispute related to economic groups – the application of article 513§5 CCP – it also settled another controversy that had existed in the labor courts – the need for hierarchical direction in order for a group to exist. It is now clear that the mere fact that two or more companies have the same shareholders is not enough to create an economic group. In addition, those shareholders must control all the companies, exercising a unified direction by their power to determine whether resolutions will be approved at shareholders' meetings, and to elect a majority of the members of management.

On this point, the TST issued the following decision in 2019:

APPEAL SUBJECT TO LAW 13.467/2017. POLICY ISSUE OF IMPORTANCE. SUMMARY PROCEDURE. ECONOMIC GROUP. NO ECONOMIC GROUP BASED SOLELY ON COORDINATION BETWEEN ENTERPRISES. Following the position currently taken by the TST's 1st Subsection Specializing in Individual Disputes, the formation of an economic group presupposes the existence of control and inspection by a company that acts as group leader, and the existence of shareholders in common or a relationship of coordination between legal entities is not sufficient. By maintaining the appellant's liability based on article 2§2 CLT and the relationship between the companies, the Regional Labor Appeal Court violated the principle of legality by creating obligations in the absence of a legal provision to that effect. Precedent by the 1st Individual Disputes Subsection holding that article 5(II) of the Federal Constitution was violated. Appeal admitted and granted. (TST-RR 10338-24.2017.5.03.0165; 5th Panel; Justice Emmanoel Pereira reporting; judged August 21, 2019)

Despite the five years that have passed since the Employment Reform and the TST's judgment, the issue of economic groups remains controversial, with countless decisions by the lower labor courts holding companies jointly liable based on common shareholders.

In time, however, these decisions should became less frequent, and the changes made by the Employment Reform should take stronger root, so that companies will be held jointly liable for employment obligations only if the legal requirements under article 2 CLT are met.