Higher- Level Employees

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By including a new paragraph in article 444 of the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho, Brazil's labor code), the Employment Reform established specific rules applicable to higher-level employees, along with a new way of analyzing the relationship between those employees and their employers.

The new paragraph provides that employers and employees are free to negotiate on the matters set out in article 611-A CLT, and their agreement will have legal effect and prevail over collective bargaining instruments, if two requirements are met: (i) the employee holds a university degree and (ii) the employee's monthly salary is equal to or greater than two times the ceiling for benefits under the public social security and pension plan (currently equivalent to BRL 14,174.44 or about USD 2,800.00).

According to article 611-A CLT, the matters that can be negotiated directly between employers and higher-level employees include: (i) working hours, subject to the limits under the Constitution; (ii) overtime compensation schemes, where overtime can be compensated by time off on another day, within one year; (iii) breaks during the working hours, subject to a limit of at least one 30-minute break in a working day of six hours or more; (iv) participation in the Unemployment Insurance Program (provided for in Law 13.189/2015); (v) career and salary plans compatible with the employees' personal conditions, and specification of positions that qualify as "positions of trust"; (vi) company regulations; (vii) workers' representation at the workplace; (viii) remote work, on-call time and intermittent work; (ix) productivity-based pay, including tips earned by the employee, and pay based on individual performance; (x) how time worked is recorded by the employer; (xi) transferring public holidays to another agreed day; (xii) classification of work conditions that present health risks; (xiii) extending the work day in environments that present health risks without the prior authorization of the Ministry of Labor; (xiv) incentives in the form of goods or services awarded under incentive programs; and (xv) profit sharing programs.

Although these provisions have not come before the Labor Courts very frequently in the five years since the Employment Reform, the Labor Appeal Courts and the Superior Labor Appeals Court have had occasion to interpret and apply the new paragraph in article 444 CLT, taking the position that it establishes an absolute legal presumption that higher-level employees' bargaining power is equal to their employers' and consequently that they are entirely free to negotiate their own terms and conditions of employment.

Examples of the courts' position can be found in two other changes introduced by the Employment Reform: court certification of out-of-court settlements, and the use of arbitration to resolve employment disputes. The courts have shown themselves to be less reluctant than they were pre-Reform to accept out-of-court settlements between higher-level employees and employers, and they have been applying article 507-A, which provides that employees falling with the new paragraph of article 444 CLT may accept arbitration as a means of dispute resolution.

By introducing an educational criterion and a pecuniary criterion that together will set aside the presumption that employees are at a disadvantage when negotiating with employers, the Employment Reform gives employers more scope to agree on terms and conditions of employment with higher-level employees, without interference by workers' unions. The good news is that to date the Labor Courts have been ratifyng this greater freedom in employment relations.