Intermittent work, five years later

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Authors

Cibelle Linero

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The Employment Reform introduced a novel type of employment relationship, governed by articles 443§3 and 452-A of the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho). In "intermittent" employment, the employee is a subordinate, just as in ordinary employment, but does not work continuously and instead alternates between periods of service and periods of inactivity. Intermittent employment can be used in any type of business or profession.

Mere days after the Employment Reform, Provisional Measure 808 was issued to try to deal with certain points in intermittent employment that had not be covered by Reform, but the Provisional Measure was not converted into ordinary legislation and ceased to have effect. As a result, employers can rely only on the new articles in the CLT, which means that various points remain open to question.

According to data published by the Brazilian Institute of Geography and Statistics – IBGE[1] on November 12, 2020, the number of employees in intermittent employment had doubled from 71,456 to 155,422 over a period of two years, with the northeast and southeast regions of the country showing the greatest increase in this type of employment.

The Labor Courts have validated intermittent work, confirming that this type of employment can be agreed on between the parties regardless of the nature of the employer's business or the job duties performed by the employee, as long as work is sporadic, with periods of activity alternating with periods of inactivity. The Superior Labor Appeals Court (TST – *Tribunal Superior do Trabalho*), Brazil's highest court in labor and employment matters, has dealt with intermittent employment in a few cases, and has held, for example, that intermittent employment is valid for maritime workers, on the grounds that work on ships is seasonal, which justifies use of the new type of employment.

The path of intermittent employment is not entirely free of obstacles, however. Various constitutional challenges, which will all be decided together, have been filed with Brazil's constitutional court, the Supreme Federal Court (STF – *Supremo Tribunal Federal*) by the National Federation of Service Station Employees, the National Federation of Telecommunications Workers and Switchboard Operators, and the National Confederation of Industrial Workers, seeking to suspend the effects of the provisions of the CLT that govern intermittent work, arguing that the law has not fixed daily working hours for intermittent employees, nor the number of hours to be worked daily, weekly or monthly. According to the plaintiffs in the constitutional challenges, intermittent work is a means of making employment precarious, and allows employers to pay less than the legal minimum.

On December 3, 2020, the reporting Justice in the cases, Justice Edson Fachin, issued his opinion against the constitutionality of the provisions that

introduce intermittent work. Justices Nunes Marques and Alexandre de Moraes, in contrast, took the position that the new type of employment is constitutional. Justice Rosa Weber asked for time to examine the case in more detail, and judgment remains pending.

Until the STF issues its decision, employers interested in using intermittent employment should take care not only to comply with the provisions of the CLT governing intermittent work, but also the provisions establishing the maximum number of hours of work per day and per week. Another way of using the new type of employment while minimizing future risks and generating greater legal certainty is to deal with issues not covered in the legislation through collective bargaining.

The five years since the Employment Reform show that intermittent employment has gained adherents, especially in the service and commercial sectors, which is a positive movement, showing that the new model encourages formal employment and can help reduce unemployment. There is still some resistance to intermittent employment, however. The Labor Courts have not yet had the opportunity to establish a well-settled position, and it is not yet possible to predict the STF's decision in the constitutional challenges to intermittent work.

NOTES:

1.

https://g1.globo.com/economia/concursos-e-emprego/noticia/2020/11/12/em-dois-anos-dobra-o-numero-de-contratos-de-trabalho-intermitente-no-brasil.ghtml

https://biblioteca.ibge.gov.br/visualizacao/livros/liv101760.pdf

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Cibelle Linero