

Jurisdiction over labor and employment and online hiring for remote work

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The new reality imposed by the coronavirus pandemic has brought with it many changes in people's day-to-day lives and, consequently, in employment relationships. If in pre-pandemic times working in another city or even in another country without relocating to the new location was unthinkable, the post-pandemic reality is quite different.

The pandemic has shown that remote work – i.e. work performed preponderantly away from the employer's establishment, without a record of the time worked each day – is not only entirely viable, it is here to stay.

Add to this the high level of unemployment caused by the pandemic and, in contrast, the growing need in certain areas for qualified professionals. The result is that more and more professionals are being hired to work for companies outside Brazil, without leaving their Brazilian homes.

The possibility of companies located anywhere in the world hiring employees located in countries other than the company's does, however, raise some issues from an employment and labor law perspective.

These days, it is not uncommon for a company located in São Paulo to hire an employee living in Porto Alegre, without requiring the new employee to relocate to the city of São Paulo. But what happens if the employee wants to bring a claim against the employer? Which Labor Courts have jurisdiction? São Paulo's or Porto Alegre's?

The question arises because article 651^[1] of the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho) provides that the labor courts of the place where services are rendered have jurisdiction.

More specifically, the issue is this: when an employment contract is made online, and the employee is located in a city different from the employer's, will the rule under article 651 CLT apply, or can it be relaxed to accommodate this new situation?

In examining a similar situation, the Superior Labor Appeals Court (TST – Tribunal Superior do Trabalho) took the position that jurisdiction to hear and decide the labor claim was in the courts where the employee was hired (which in this case was the employee's domicile). The TST reasoned that deciding otherwise would constitute a bar to the employee's right of access to the courts.

According to the reporting justice, Justice Evandro Valadão, the size of Brazil, the new means of communication, and the ease of access to people and places, along with the high rate of unemployment, has caused people to move to other cities and states in their search for jobs, and companies' employees, operations and establishments are no longer necessarily located

in the same place. He goes on to observe that "the Law has a duty to accompany the modernization in the way of life brought about by technology, where employment relationships are forged virtually, without the employer even recognizing the employee's face. This shows that the focus of the modern era is being redrawn, and the identity of the parties has been giving way to the purpose of the contract. The reality of interpersonal relationships is undergoing a transformation, in conjunction with disruptive technologies and innovations."^[2]

If hiring an employee located in different city is controversial when it comes to jurisdiction, just imagine how complex the question becomes when an employee resident in Brazil is hired to work for a company located outside the country.

In such cases, the rule that jurisdiction is in the place where the services are rendered is relaxed even further. An objective analysis of the issue, in light of the provisions of article 651 CLT, could lead to the conclusion that Brazil does not have jurisdiction, since the services were rendered, virtually, outside Brazil. At the same time, it could be argued that the CLT's rules on telework apply, even though the employer is a foreign company.

In determining which courts should have jurisdiction, many factors come into play: how the employee was hired (directly by the foreign company, or through a staffing agency), how the employee is paid, the agreement made by the parties to the employment contract, and the possibility of defrauding employment rights.

Decisions in such cases are still unsettled, and there is much legal dispute over this type of "international" employment. It is becoming clear, however, that employers must consider the details of each individual case before entering into an employment agreement, in order to reduce the risk of future labor claims arguing that Brazilian labor courts have jurisdiction, and seeking rights under Brazilian employment law.

NOTES:

[1] Art. 651 CLT: The jurisdiction of the Conciliation and Judgment Boards is determined according to the place where the employee, whether claimant or defendant, provides services to the employer, even if the employee has hired in another place or outside Brazil.

[2] Extract from the judgment in Conflict of Jurisdiction CCCiv-232-81.2019.5.21.0019, II Subsection for Individual Disputes, judged 15 December 2020, published DJe 18 December 2020.

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