

Negotiation versus legislation

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The Employment Reform – more formally Law 13.467 – introduced greater flexibility in labor rights through collective bargaining. Even five years after the Law was passed, some of the changes in relations between employer and employee are still being questioned, especially the prevalence of negotiated agreements over legislative provisions. For example, it was only this year, on June 2, 2022, that Brazil's constitutional court, the Federal Supreme Court (STF – Supremo Tribunal Federal) decided a “general repercussion” appeal dealing with the question of whether a collective bargaining instrument is valid if it limits or restricts labor rights that are not constitutionally guaranteed. Some 66,000 lawsuits had been stayed, waiting for the STF's ruling.

A majority of the court concurred with Justice Gilmar Mendes, who wrote the lead opinion. Justice Mendes concluded that the new provision under the Consolidation of Labor Laws (CLT – Consolidação das Leis Trabalhistas), allowing negotiated agreements to prevail over rights provided for in ordinary legislation, is constitutional. Justice Edson Fachin dissented, holding that collective negotiation cannot prevail over the law, and Justice Rosa Weber agreed with Justice Fachin.

The court's ruling was that “collective agreements and conventions which, in light of the circumstances of the sector under negotiation, establish limits on, or set aside, labor rights are constitutional, even if they do not specify compensatory advantages, as long as they respect absolutely inalienable rights.”

With this confirmation by the STF that negotiation prevails over legislation, unions and employers are increasingly turning to collective bargaining.

Making labor and employment rights more flexible through collective bargaining agreements began gaining ground with Law 13.467, which adds articles 611-A and 611-B to the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho). The first provision sets out an illustrative list of circumstances in which collective bargaining instruments will prevail over the CLT, and the second lists matters which are not subject to collective bargaining. These changes give the parties greater freedom in their relationship, because now they can sit at the bargaining table to negotiate conditions that used to be imposed by law.

Justice Mauricio Godinho Delgado¹ of the Superior Court of Labor Appeals argues that the importance of collective bargaining transcends labor and employment law itself, because “since the 19th century, the historical experience of the principal western countries has demonstrated that a diversified and active dynamic of collective bargaining in labor relations has always influenced, in a positive way, a more democratic structuring of the social fabric.”

Collective bargaining can thus be said to be the mechanism by which

employees and employers can contribute to establishing the rules that will govern labor relations.

Article 611-A of the CLT reinforces the role of collective bargaining as a means of dialogue, which allows participants to find flexible solutions to conflicts that reflect the interests of the collectivity and provide greater legal certainty with respect to their agreement.

At the same time, arguments can be made against giving negotiation priority over legislation, and the main argument is that it amounts to a renunciation of workers' rights. The argument loses strength when one considers that a collective agreement is always achieved through negotiation between the parties, which make mutual concessions, so that neither party is subject to the unilateral will of the other. Instead, bargaining strikes as balance between their interests.

After all, in collective bargaining there is no disadvantaged party. Represented by the union, the workers' bargaining power is equal to the employer's, so negotiations take place between parties of equal strength.

The Labor Courts are showing a tendency to accept the prevalence of negotiation over legislation. The Superior Labor Appeals Court has ruled, for example, that the length of workday breaks can be reduced by collective agreement.² Another example is a decision by the 4th Region Labor Appeals Court, which held that the employer was only required to pay the premium for work in hazardous conditions at the medium risk rate, since that was the rate stipulated in the collective agreement, even though expert evidence showed that the effective risk³.

Interpreting the provisions introduced by the Employment Reform that recognize collective bargaining as a tool that guarantees the free will of the parties, based on the principles of freedom of enterprise and freedom to negotiate in a balanced way, confirms the legitimacy of collective bargaining and gives employers and employees the lead in finding solutions that serve their interests.

NOTES:

¹ DELGADO, Mauricio Godinho. Curso de Direito do Trabalho. 18. ed. São Paulo: LTr, 2019, p. 1642. Our translation.

² BRAZIL. Tribunal Superior do Trabalho, 3rd Panel. AIRR - 1001109-43.2019.5.02.0080. Justice Alberto Luiz Bresciani de Fontan Pereira reporting, judged October 1, 2021.

³ BRAZIL. Tribunal Regional do Trabalho a 4ª Região, 10th Panel. ROT – 0021085-64.2018.5.04.0005. Appeal Judge Ana Rosa Pereira Zago Sagrilo reporting, judged 29 September 2020.