Termination of employment by agreement

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One of the well-known features of the Employment Reform under Law 13.467/2017 is that it gives priority to collective bargaining over legal provisions in matters such as annual overtime bank schemes and teleworking.

The Reform also supports individual negotiation between employers and employees by providing for court certification of out-of-court settlements and termination of employment by mutual agreement.

In making provision in the CLT for court certification of out-of-court settlements, the Employment Reform gave legal recognition to a type of negotiation that already existed, especially in cases involving executives and other senior corporate employees; in contrast, termination of employment by agreement by employer and employee was unknown prior to the Reform.

Article 484-A of the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho) now allows employment to be terminated by agreement entered into by the employer and the employee. In this type of "bilateral termination", pay in lieu of notice (if owed) is cut in half, as is the fine of 40% of the balance of the employee's Severance Guarantee Fund (FGTS – Fundo de Garantia por Tempo de Serviço). All other severance amounts provided for by law are owed in full. In addition, while termination by agreement allows former employees to withdraw up to 80% of their FGTS balance, they are not entitled to unemployment insurance benefits.

In effect, termination of employment by agreement is another form of amicable settlement, although the subject matter of the settlement is not the former employee's claims against the employer but instead termination of the employment relationship itself, with severance payments that strike a balance between the higher amounts that the employee would be entitled to on dismissal without cause by the employer, and the limited amounts owed on resignation by the employee.

The fundamental element of bilateral termination (not least to avoid future litigation over the validity of the agreement) is the free expression of the party's interest in, and consent to, terminating the employment relationship, particularly on the part of the employee. In other words, employees, regardless of their bargaining power, cannot be coerced or pressured into a negotiated termination of their employment.

For this reason, although the CLT does not establish formal requirements, employment termination agreements should be in writing and signed by the employer and the employee. The agreement should also state that it was negotiated within the terms of article 484-A CLT, contain an express statement of the parties' consent, provide for the reductions in severance pay, and stipulate whether the employee will work during the notice period, or receive pay in lieu of notice.

Even if a written agreement is made, employees who feel that they were coerced or forced by their employers to accept bilateral termination can bring action before the Labor Courts, claiming payment of the severance amounts owed on dismissal without cause, along with damages for non-economic injury.

The Labor Courts have taken the position that termination of employment by agreement is presumed valid, within the terms of article 484-A CLT, as long as there is no evidence of a defect of consent or other irregularity that could void the agreement. Employers should therefore take care to ensure that negotiations over termination of employment are free of coercion or other types of constraint.

Five years after the Employment Reform, experience shows that employers are making use of the new bilateral model for termination of employment, which has proved itself to be a good fit for employees who wish to leave their jobs but don't want the onus of resigning. Depending on the circumstances, many employers now have a secure legal basis to reduce the "loss" suffered by employees when they resign from employment, while at the same time avoiding the cost of the full severance amounts owed when employment is terminated at the employer's initiative. In other words, the new type of termination represents a viable model for compensating employees who leave their employment, without imposing an undue onus on the state (in the form on unemployment benefits) or the employer (which did not initiate the termination).

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