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Transparency Reports under the New Pay Equality Law: More questions than answers

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Combating pay inequality between men and women has become an increasingly pressing topic around the world, as an essential part of the ESG agenda. In Brazil, the issue recently came into the spotlight with Law 14.611/2023, known as the "Pay Equality Law". Like the other jurisdictions, with this new legislation Brazil has reinforced the prohibition against the use of discriminatory criteria in establishing workers' pay, especially with respect to pay equality between women and men. The Law makes changes to the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho) and imposes severe sanctions on employers that do not comply with the new rules.

The change that has caused the most controversy is certainly the new requirement, applicable to all private companies that have 100 employees or more, to publish half-yearly "salary and remuneration criteria transparency reports".

The reports have sparked a strong reaction because although companies will have to present their first report in January 2024, the legislation contains only very vague guidelines, to the effect that the reports must furnish information on the criteria for remuneration of employees that will enable an objective comparison, between men and women employees, of pay and other compensation and distribution of management positions, along with statistical information on other possible inequalities based on race, ethnicity, nationality or age. The legislation does not specify the form the reports are to take, or how and where they should be published. The problem is not trivial: failure to comply with the new reporting obligations is subject to a fine of up to 3% of the employer's payroll (limited to 100 times the minimum monthly salary, or about BRL 132,000), in addition to other penalties.

Equally controversial is the requirement to submit an action plan to reduce inequality (if shown to exist in the transparency report), with targets and deadlines, with mandatory participation by workers' unions and employee representatives. To complicate matters even further, to date the federal government has not launched the publicly-accessible digital platform where information and indicators on the job market and income, broken down by gender (along with other information), will be available.

The new legislation raises many more questions than it answers: Where and how are transparency reports to be published? Is compliance with the pay equality requirements under article 461 CLT sufficient to exclude the possibility of discrimination? What are the "remuneration criteria" referred to in the legislation? What are the parameters for action plans? Does each company come up with its own, or must action plans following still unannounced guidelines?

Until regulations under the new legislation are issued, one alternative for companies is to turn to comparative law, and look to other countries' legislation for answers to some of these worrying questions. Such comparisons must be made with caution, however, because the reality in Brazil tends to be different from other countries', not least because our concept of pay equality is not the same as in most other countries that have dealt with the issue.

At present, despite the undeniable lack of certainty as to next steps and the scope of employers' obligations, the letter of the law requires presentation of transparency reports starting January 2024, and so there is a risk that labor authorities will begin enforcing the reporting obligations early next year. The wise course, therefore, is for employers to be prepared to submit reports containing the information required by the new legislation, even if they must establish their own criteria to do so.

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