BMA ADVOGADOS

Can the debate over non-compete clauses in the United States impact employment relations in Brazil?

26.12.2024 3 min read

Authors

Cibelle Linero

Larissa Medeiros Rocha

Related areas

Labor and Employment

Topics

Labor and Employment BMA Review

In April of this year, the United States' Federal Trade Commission (FTC) issued a rule banning all non-compete agreements in the country. The rule was to come into effect on September 24, 2024, at which time employers would be required to inform their employees that their non-compete obligations would no longer apply.

The ban sparked great debate, and many lawsuits were filed to suspend the FTC's Non-Compete Rule. In August, the U.S. District Court for the Northern District of Texas issued an injunction preventing the FTC from enforcing the rule throughout the United States. The dispute is far from over, because on October 18th, the FTC appealed the Texas court's decision.

Given that this issue is still active in other courts across the country and considering the relevance of the issue, it is likely that the U.S. Supreme Court will be called upon to ultimately decide the fate of non-compete clauses in the United States.

With this uncertain scenario, businesses in Brazil that have subsidiaries or parent companies in the U.S.A. may wonder whether decisions by the FTC and US courts affect non-compete clauses signed in Brazil.

In Brazil, the validity of non-compete clauses depends on a number of factors. Although there is no specific legislation on the matter, the Brazilian Labor Courts have taken the position that restrictions of this kind are valid. However, they must respect the principle of the social value of work, and so must be reasonable and proportional, both as to the length and the geographical scope of the non-compete, and provide for payment of compensation that reflects the degree of the restrictions imposed.

Consequently, the dispute over the FTC's rule cannot directly affect the validity of non-compete clauses in employment agreements in Brazil. Nonetheless, companies should be alert to cases involving Brazilian expats working in the U.S., or foreign employees initially hired in the U.S. and then relocated to Brazil.

In the case of expat workers in Brazil, non-compete agreements should be reviewed to prevent employees or authorities leveraging the debate surrounding the FTC´s prohibition to challenge the validity of such obligations, especially if it is in the employer's interest to ensure the enforceability of the non-compete in Brazil.

In other words, when foreign workers are transferred to Brazil, their non-compete agreement, if any, should be "nationalized" to conform to the requirements established by the Brazilian courts. After these adjustments are made, companies will have greater certainty that the employees' non-competition obligations will be binding in Brazil.

As for Brazilian employees who are transferred to the United States, with a suspension of their Brazilian employment while working abroad, the ideal is to have a non-compete provision along the lines accepted in Brazil. A clause that meets Brazilian standards is more likely to be enforceable when the employees' domestic employment contract is reactivated post-assignment, especially since such clauses tend to be enforced only after the (formerly suspended) employment contract is effectively terminated.

In summary, while the debate over non-competes continues in the United States, Brazilian companies should be prepared to review and adapt their non-compete practices for expat Brazilian employees and foreign workers transferred to Brazil to ensure they meet the requirements established by Brazil's Labor Courts and so minimize the risk of unenforceability.

>>> This content is part of BMA Review #85. Click here for more.

› PROFESSIONALS

Professionals who combine legal insight and market perspective

Cibelle Linero

Larissa Medeiros Rocha