Brazil’s Supreme Court rules on the constitutionality of other ways of structuring work

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The decisions reinforce the position that employment is not the only way to structure work and that other models, such as outsourcing, contracting services from professionals' legal entities, and franchise agreements, are also valid.

In March, 2023, Brazil's highest court, the Supreme Federal Court (STF - Supremo Tribunal Federal) issued two decisions that confirmed the validity of franchise agreements (which are governed by Law No. 13.966/2019) which had been made in compliance with the law but were later challenged in the courts. In doing so, the STF followed the understanding it had applied before of recognizing the constitutionality of work relationships other than employment as defined by Brazil's labor code, the Consolidation of Labor Laws (CLT - Consolidação das Leis do Trabalho), in constitutional challenges such as ADPF no. 324, ADC No. 48 and ADI No. 5625.

The STF's most recent decisions also find support in the ruling on General Repercussion Theme[1] No. 725 (Appeal RE 958.252, Justice Luiz Fux reporting), which states that "outsourcing and all other forms of dividing work among distinct legal persons is licit, regardless of the corporate purposes of the companies involved, although the company contracting the service remains secondarily liable."

Moreover, the decisions strengthen the position that the capitalist system, which was adopted in the Constitution of 1988, allows not only employment relations as those contemplated in the CLT, but also other ways of organizing work, such as outsourcing, contracting services through professionals' business entities, and franchise agreements. Therefore, the state may not impose or restrict business owners' freedom to chose the legal structure to be used to contract the services needed in their business, because to do so would violate the constitutional principles of free enterprise and free competition.

The STF's decisions thus highlight that arrangements such as business partnerships between beauty salons and estheticians, where the estheticians' services are provided through legal entities, are possible, even where the service provider's corporate purpose is the same as the client company's, as long as the contract is real and the relationship between the client company and the esthetician providing the services does not present the features typical of an employment relationship – in other words, such arrangements will not be valid if they are used to defraud employment legislation. Similarly, the decisions recognize that franchise agreements are a legitimate arrangement, under which the franchisor and franchisee form a business partnership for the distribution of goods and services.

The decisions issued on March 14 and 30, 2023, by Justices Alexandre de Moraes and André Mendonça in their capacity as reporting justices, are therefore correct both (i) in noting that the Labor Courts have failed to respect the STF's decisions, and (ii) in holding that outsourcing and other ways of structuring work, such as franchises, are valid, although government authorities do have the power to determine that such arrangements were created to defraud employment legislation, when there are real grounds to do so.

In other words, without proof of fraud against employment legislation, the courts may not undo contracts that are recognized in the Brazilian legal system if those contracts are made in compliance with legal requirements. Denying the constitutionality of work arrangements allowed by the legal system, with a view to allowing traditional employment relationships to prevail (and which are typically claimed only after the "contested" work arrangement has been terminated), only generates legal uncertainty and unjustifiably restricts parties' freedom to enter into lawful contracts.

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[1] In "General Repercussion" appeals, the STF defines a question of law – the theme – on which it will rule. The ruling is binding on all lower courts and on the federal administration.

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