

DOING BUSINESS
IN BRAZIL



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Introduction

Brazil is one of the major markets of the 21st Century. It is the sixth largest economy by nominal GDP and fifth largest country in the world. Foreign investors find Brazil offers a very favourable business environment for a number of reasons:

- the abundant agricultural, mineral, and energy resources;
- its diversified economy and infrastructure;
- it is the largest economy in Latin America;
- lower inflation;
- a strong currency regime; and
- a strong and stable economy.

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We are Here to Help

If you have any questions, please do not hesitate to contact us. We would be very pleased to advise further on the general matters discussed in this guide as well as on any specific points relating to your particular circumstances or industry sector.

This guide has been prepared with great care and diligence. However, any liability as to the accuracy, correctness and completeness of the guide is explicitly excluded. This guide is not intended to serve as legal or business advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

BUSINESS PRESENCE

The Brazilian Advantages: A Snapshot

Brazil is one of the major markets of the 21st Century. It is the sixth largest economy by nominal GDP and fifth largest country in the world. Foreign investors find Brazil offers a very favourable business environment for a number of reasons:

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Establishing a Business Presence in Brazil

The most common forms of legal entities used by foreign investors to conduct business in Brazil are:

- limited liability companies (*sociedades limitadas* – a “*limitada*” or “*limitadas*”); and
- corporations (*sociedades anônimas*).

Brazilian law gives corporate status to such companies after they are registered with the competent public registry office. *Limitadas* and corporations are legal entities with assets separated from those of their owners. Creditors cannot seize the owners/shareholders’ personal assets to pay off the company’s debts. Forming a legal entity in Brazil is a more lengthy process than in some other countries.

Sociedade anônima. Corporation structuring usually have the following characteristics:

- Complex corporate governance
- Public disclosure of corporate events and financial statements.

Sociedade limitada are favoured by investors who:

- Have a simple business structure
- Want to avoid the costs related to the attendant disclosure and recordkeeping requirements.

In either case, please note that, should circumstances change, corporations can be converted into limited liability companies and vice versa. The conversion is a relatively simple process that requires, among other things, the approval of the quota-holders / shareholders, as the case may be.

Limited Liability Company/*Limitada*

Limitadas are the most common type of corporate entity in Brazil. *Limitadas* are divided into “quotas” (like shares or units) representing the amount in money, credits, rights or assets the quota-holder contributed when forming the company. Quotas are not represented by securities or certificates. The *limitada* records quota ownership (including the number of quotas for each holder) in its Articles of Association. A *limitada* has a minimum of two quota-holders and each quota-holder’s liability is limited to the value of its quotas. However, if the capital is not fully paid in, each quota-holder is liable for the full value of the *limitada*’s entire capital. A *limitada* may be managed by all quota-holders, by a designated quota-holder, or by a third person and all management provisions should be noted in the Articles of Association. The managers must be residents in Brazil.

Limitada Organisation

The Articles of Association for a Brazilian *limitada* must be registered with the Chamber of Commerce in the state where the *limitada* is formed and must contain the following information concerning the corporate structure of the *limitada*:

Corporate Name: The name must contain words that identify the *limitada*’s business and include the word “*limitada*” (or “LTDA”).

Corporate Objective: The corporate objective should describe the type of business that the *limitada* will pursue (e.g., provide consultancy to the oil and gas industry).

Headquarters: The *limitada* must be located in the most convenient place for its activities.

Quota Holders: Brazilian law does not prevent non-Brazilian entities or individuals from being the major quota-holder in a domestic business but the *limitada* must have at least two quota-holders, even if the second quota-holder holds only one quota.

Capital Stock: *Limitadas* require no minimum or maximum legal capital. There is no requirement that a minimum amount of the quotas be paid in up front, nor is there any mandatory time limit for the quotas to be fully paid in (the time frame is set forth in the Articles of Association).

Quotas: The *limitada*’s capital is represented by quotas of equal or different par value. Quota holders may not pay up their quotas by means of rendering services to the company but must transfer cash or property to the *limitada*.

Liability of the Quota-holders: The liability of each quota-holder is limited to the value of the quotas it holds. However, all quota-holders are jointly and severally liable for the payment of the total capital stock.

Management: Management of Brazilian companies is restricted to Brazilian residents or foreigners with a permanent resident visa.

Audit Committee: A limitada must have an Audit Committee. It must have "General Meetings" of quota-holders at least once a year, within the first four months of the start of the financial year. The audit committee must examine and approve the managers' accounts and financial statements for the past year and elect directors, if necessary.

Quorum: The Brazilian Civil Code requires different quorum levels depending on the matter, in order for a limitada to pass a resolution.

Practical Issues: Registrations and Licenses

After filing Articles of Association with the Chamber of Commerce, a limitada must obtain the following registrations, licenses and certificates in order to start its activities:

CNPJ for the limitada: This is the Brazilian equivalent of a Federal Tax identification number (EIN).

CNPJ or CPF for non-Brazilian quota-holders: Under this requirement non-Brazilian quota-holders (entities or individuals, respectively) must register under the CNPJ (entity) or CPF (individual).

Brazilian Central Bank (BACEN): The limitada must obtain a password for the BACEN electronic system, which will enable the limitada to receive funds for the payment of subscribed capital stock and any other transactions involving its capital stock.

Opening of a Bank Account: The limitada must open a bank account in Brazil in order to receive the funds remitted by non-Brazilian shareholders.

Operating License: The limitada must register with the municipality (or municipalities in the case of multiple locations) that will grant the company rights to operate its facilities.

Municipal Tax ID: The limitada must obtain this certificate in order to make municipal tax payments.

State Tax ID: The limitada must obtain this certificate in order to make state tax payments.

Commercial invoices: The limitada must obtain commercial invoices in its name in order to execute commercial activities (i.e. import and sale of products).

FGTS and INSS Enrolment: If the limitada has employees, it must also register with the Mandatory Fund for Unemployment Guarantee Fund (FGTS)¹ and the Federal Social Security Institute (INSS)² in order to comply with Brazilian labour laws.

Estimated Timetable

Under normal circumstances, it can take between four to six months, from "start to finish" to set up a limitada.

Corporation/Sociedade Anônima

The capital of a Brazilian corporation is comprised of shares, with shareholder liability limited to the value of the shares they subscribed to or acquired. Capital can be common or preferred and there is generally no legal requirement for minimum or maximum capital stock. A corporation must have a minimum of two shareholders and has to be managed by either a Board of Directors and Board of Officers or only a Board of Officers. The officers must be resident in Brazil.

Corporation Organisation

The following guidelines must be observed in order to form a corporation:

- **Capital Stock:** There is generally no legal requirement concerning minimum or maximum capital stock for corporations. However, specific statutes demand minimum stated capital for certain types of businesses, such as banking, insurance and shipping companies. At the time of incorporation, shareholders must pay in a minimum of 10% of the subscribed capital stock up front.
- **Shares:** Capital can be divided into (i) common, (ii) preferred or (iii) fruition shares. Common shares entitle the holder to the rights of common or essential shareholders. Preferred shares have special rights of a financial or policy nature and fruition shares result from the paying off of common or preferred shares. The rights they give their holders will vary accordingly.
- **Shareholders:** A corporation must have at least two shareholders who subscribe to all the shares comprising the share capital quoted in the bylaws of that corporation.

¹ FGTS is a monthly amount equal to 8% of the employee salary which is deposited by the employer in a special account in the name of each worker.

² INSS is a contribution payable by employees and is managed by the Federal Social Security Institute. The contribution is 20% of the gross monthly payroll for employers. The rates the employees pay varies depending on their gross monthly salary.

- **Liability of the Shareholders:** shareholder liability is limited to payment of the shares for which they have subscribed. Shareholders have no further liability once their respective shares have been fully paid in, except in cases of a violation of law or breach of the bylaws.
- **Management:** A corporation is managed by (i) a Board of Directors and a Board of Officers or (ii) solely by a Board of Officers, having at least two officers, depending on what the law or the bylaws require. The Officers may or may not be shareholders but they must be resident of Brazil.
- **Audit Committee (*Conselho Fiscal*):** The audit committee has statutory inspection rights for the specific purpose of examining the company's accounting records and practices. It operates permanently or temporarily. If it does not operate permanently, shareholders holding at least 10% of the voting capital or 5% of the non-voting capital may convene it.
- **Formalities:** Just as in the US, Brazilian corporations are subject to legal formalities and requirements. Those formalities and requirements include, among others, (i) special quorum requirements, (ii) minutes of shareholders' meetings and management meetings must be published in the official gazette and a newspaper of nationwide circulation, (iii) in most cases, with few exceptions, the financial statements of the corporations must also be published.

Joint Venture

Most joint ventures (JVs) are simply formed by contract between two or more companies. The formation of a JV does not bring a new legal entity into existence, with parties preserving their corporate identity and pooling their efforts to achieve certain objectives.

Since joint ventures have no corporate existence, the companies that form them only bind themselves under the terms of their joint venture agreement, each party being liable for its specific obligations as established therein, without any assumption of joint liability before third parties.

FOREIGN INVESTMENTS

In order for a non-Brazilian person or company to operate in Brazil, it must have capital. Such foreign capital is not limited to cash. In Brazil, "foreign capital" is defined as (i) goods, machinery and equipment which has been brought into Brazil without any initial expenditure of foreign currency and which will be used in the production of goods or services, and (ii) capital brought into the country to be invested in economic activities. In both cases, in order to qualify as foreign capital, any such assets are to be held by individuals or corporate entities resident, domiciled or with their registered offices abroad.

Bacen

The Brazilian Central Bank (BACEN) is the governmental entity responsible for controlling and registering foreign investment as well as approving the repatriation of capital and remittance of profits by foreign-companies outside of Brazil. All foreign investments must be registered.

BACEN has no jurisdiction over the quality of the investment and cannot restrict the remittances of funds resulting from risk capital or a loan.

Registration of Foreign Capital

As already mentioned, a foreign investor and/or a Brazilian company must register the foreign investment. To do so, these parties must first obtain a BACEN access code and use the online Electronic Declaratory Registry of Direct Foreign Investment (or SISBACEN – RDEFIED). This number allows the parties to sign the exchange contract converting the foreign currency to Brazilian Reals. Once the parties have signed the exchange contract, they must then register the investment within 30 days, using the SISBACEN – RDEFIED.

This registration allows the foreign investor to remit profits, dividends and the capital initially invested abroad through the same exchange market as it used to bring the capital to Brazil. Parties failing to register foreign investment will be treated as if it were a domestic investment and pay higher taxes to remit the funds abroad. Furthermore, the foreign investor may be subject to heavy fines for not having registered the investment with BACEN within the prescribed period.

Profit Remittance

Direct Investment: There are normally no governmental restrictions on distributing profits, dividends and interest on capital investments abroad. The investor must present the RDEFIED number to the bank in Brazil authorised to operate in the foreign exchange markets when sending the money abroad.

Payments of profits and dividends from results accruing after 1 January 1996 are not subject to withholding income tax. However, the payment of interest on capital investments is subject to withholding at a rate of 15% (or 25% in case of investments distributed to so-called tax havens).

Repatriation of Capital

Investors may repatriate BACEN registered foreign capital investments at any time without authorisation and, generally, on a tax-free basis. If an investor attempts to repatriate more than the registered amount, tax authorities will consider the sum to be a capital gain and levy withholding income tax at 15% (such rate is increased to 25% in case of distributions to investors residing in so-called tax havens).

For capital repatriation purposes, BACEN will examine the company's balance sheet or financial statements in order to determine its net worth. If that value is negative, the bank sending the money abroad may consider that the investment has been diluted, in which case BACEN could deny repatriation.

Reinvesting Profits

Should a foreign investor decide to reinvest profits rather than send them abroad, the investor may register such funds as foreign capital along with the original investment in order to increase the amount available for later repatriation.

IMMIGRATION VISAS

Immigration

Non-Brazilian citizens who are not Brazilian permanent residents are required to hold a valid visa with work entitlements in order to work in Brazil. The following types of immigration visas are usually granted by the Immigration Division of the Ministry of Labour to foreigners rendering services in Brazil on behalf of foreign or foreign-controlled companies:

- Temporary V Visa; and
- Resident Visa

In both cases, the holder of the visa is required and entitled to a Foreigner Identity Card (RNE), which is obtained through application.

Temporary V Visa

Temporary visas are recommended for professionals (a) with employment contracts with a Brazilian company, or (b) under a technical assistance and/or technology transfer agreements, both without a formal employment relationship with a Brazilian company.

The Temporary “V” Visa is available in the following circumstances:

- **Professionals with employment contracts with a Brazilian Company:** This visa is applicable to professionals who will work temporarily in a Brazilian company, engaged in duties demanding specialised knowledge and know-how not available in the Brazilian market. The visa can be granted initially for a period of two years, renewable by application for another equal period. The Brazilian company must comply with the “two-thirds” rule, which sets forth that two-thirds of the employee positions and amount of the company payroll must be composed of Brazilian citizens; and
- **Technical Assistance Agreement without Employment Relationship:** Called the “technician visa”, this type of visa applies to a foreign professional coming to Brazil to provide technical assistance services or transfer of technology under a service agreement or transfer of technology agreement executed between a Brazilian company and a foreign company. Such type of visa is not appropriate for foreign professionals coming to Brazil to perform administrative, financial or management activities.

This visa can be granted for a period of two years, in the case of transfer of technology, or one year in the case of technical assistance and may be renewed for an equal period if all the requirements for extension are satisfied.

In the event of visas granted by means of a technical assistance agreement between a foreign and a Brazilian company, the foreign company may not hire local employees for the development of the activities set forth in the agreement, being limited to rendering the relevant services through its own employees.

Resident Visa

Resident Visa is a type of permanent visa, indicated for executive officers and/or managers of Brazilian companies.

A foreign individual must secure a resident visa in order to be considered a Brazilian resident.

If a foreign quota-holder acquires a Resident Visa, that quota-holder may be also appointed as manager of the limitada.

Please note that the Resident Visa can also cover dependent family members such as the applicant’s spouse, children under 21 years (or 24 years if in higher education) or the applicant’s parents. The family members will be issued the same visa as the applicant. However, the dependent family member will not be allowed to obtain work permits in Brazil.

Tax Obligations Related to Visa Issues

Foreigners who work in Brazil and who are present in the country for more than 183 days (irrespective of whether those days are consecutive or not) during any 12-month period (counted as from the first entry) are considered Brazilian residents for taxation purposes.

If such employee obtains Brazilian resident status for tax purposes, the employee becomes subject to Brazilian income tax as a regular taxpayer. As a result, the employee must be assessed on a worldwide basis for all income, from whatever source derived, during the applicable fiscal year. This also means the employee must file an income tax return.

When the individual leaves the country, he should present a definitive departure statement to the Brazilian Revenue Service, the Secretaria da Receita Federal, at which point his/her tax residency will be considered terminated.

TAX

Tax System

The 1988 Federal Constitution and enabling legislation govern taxation in Brazil. The 1966 Tax Code (the Tax Code) sets forth how the federal, state and municipal governments may levy taxes. In turn, the Federal Income Tax Regulations (the Regulations) provide more detailed rules on federal, personal and corporate income tax in the Tax Code. States and municipalities have similar regulations.

Federal Corporate Income Taxation

The Regulations apply to all taxpayers. Only the federal government, however, may charge income tax.

World-Wide Scope of Brazilian Taxation

Brazilian companies are subject to tax on worldwide profits and capital gains. The origin of the capital is irrelevant, as is whether the investor is foreign or domestic. Foreign branches must pay tax in the same manner as resident entities.

Tax Year

The tax year is the calendar year, irrespective of the corporate financial year.

Government Determined Profits

Tax authorities may, if the company keeps inadequate or deficient records for example, re-determine company's return profits.

Audit of Tax Returns

Federal tax inspectors randomly audit tax returns. The scope and frequency of auditing does not follow a set pattern. The tax authorities' audit "statute of limitations" is five years after the end of the tax year in which the tax return should have been filed.

Taxpayers wishing to appeal assessments must file their appeal within 30 days of the assessment. If the assessment is upheld, the taxpayer may appeal to the Internal Revenue administrative court, and finally to the Federal Court of the State.

Tax Losses

Companies may carry forward tax losses indefinitely against future profits. However, they may only offset such losses against 30% of the current year's taxable income. Carrying-back losses is not allowed.

Interest on Equity

When calculating income tax, companies may deduct interest they have paid or credited to shareholders as remuneration on their capital investment.

Brazilian Taxes

Definitions

Taxes ("*Tributos*") in Brazil are divided into: (i) taxes, (ii) fees, (iii) real estate improvement fees, (iv) social contributions, (v) other contributions, and (vi) compulsory loans. Each level of government is allotted specific taxes they can levy as specified in the Brazilian Constitution.

Fees are levied based on the exercise of police power or as compensation for specific public services actually rendered or made available to citizens (i.e. trash fee in São Paulo).

Real estate improvement fees (which are rarely levied) are collected from the owners of real estate that benefit from public works.

"Contributions" may only be levied by the federal government. These contributions taxes include: (i) social contributions; (ii) to intervene in the economic domain, (iii) in the interest of professional or economic categories and (iv) to finance social security.

Compulsory loans can only be levied by the federal government, and only in case of an urgent public need or to defray extraordinary expenses resulting from public calamity, war or the threat of such event.

Major Brazilian Taxes

Tax	TaxBase and/or Triggering Event	Rate
Corporate Income Tax (IRPJ)	Actual or estimate profits; determined by tax authorities	15%
IRPJ Surcharge	Actual or estimate profits; determined by tax authorities	10% on the income in excess of R\$240,000 per annum
Social Contribution on Corporate Profits (CSL)	Adjusted net profit	9%
Profit Participation Program Contribution (PIS)	Gross revenues	Cumulative regime: 0.65% Non-cumulative regime: 1.65%
Social Security Financing Contribution (COFINS)	Gross revenues	Cumulative regime: 3% Non-cumulative regime: 7.6%
Tax on Industrialised Goods (IPI)	Sales price when a product leaves the industrial establishment or upon import	Variable per product classification
Sales Tax (ICMS)	Transaction value	7% – 25%
Tax on Services (ISS)	Service price	2% – 5%
Import Duty (II)	CIF product value	0% – 35%
Withholding Income Tax (IRF) on overseas remittance	Income and capital gains earned by non-residents from paying sources in Brazil	15% or 25%, depending on the type of income
Tax on Financial Transactions (IOF)	Credit, foreign exchange, insurance and securities transactions	Variable per type of transaction
Export Duty (IE)	When a product made in Brazil or with domestic content leaves the country, as per CAMEX act	Usually 30%; other rates may be established up to 150%. Currently, most products are taxed at a zero rate.

Tax Treatment of Income Recognised by the Brazilian Legal Entities

Regardless of form, legal entities (whether a corporation or a limitada) are treated more or less the same for tax purposes with regard to the income earned and the activities performed by taxpayer in Brazil. For purpose of this discussion, we will refer to corporations and limitadas both as “corporate taxpayers.”

Tax Implications on the Outflow of Dividends, Interest Payments and Capital Reimbursements by Legal Entities to Foreign Investors

Dividends: Dividends paid by a Brazilian legal entity to shareholders (regardless of nature – individual or legal entity), whether or not a resident of Brazil, out of after-tax profits, are not subject to Brazilian withholding income tax (WHT).

IOF³ / Exchange tax applies every time that there is a conversion of Reais⁴ into foreign currency and on the conversion of foreign currency into Reais. The IOF/Exchange Tax rates are different for each exchange transactions.

Interest on Net Equity

In addition to dividends, legal entities may distribute interest on net equity to its shareholders and treat those payments as a deductible expense for purposes of calculating the taxable basis of the IRPJ.

Payment of interest on net equity is conditioned to the existence of profits at least twofold the interest amounts to be paid or credited. Interest on net equity is calculated by applying the Long-Term Interest Rate (TJLP) on the company’s adjusted net equity.

3. IOF - Financial Transactions Tax

4. Brazilian Currency

As the Brazilian Security Commission (CVM) qualifies interest on net equity as dividends, it is viewed as a company's results rather than expenses. However, unlike the payment of dividends, the interest on net equity is tax-deductible and subject to income tax at the rate of 15%, or 25% if the foreign investor is domiciled in a low-tax jurisdiction (LTJ)⁵.

Loan Interest and Royalty Remittance Abroad

Interest and royalty payments to non-residents are subject to withholding tax at the 15% standard rate or at the applicable treaty rate. Royalty payments are subject to 15% withholding and 10% Intervention in the Economy Contribution. Payments for services not subject to CIDE or those to beneficiaries in tax haven countries are subject to a 25% income tax withheld at source.

A zero income tax withholding rate is available for:

- sea and air charter, demurrage, container and freight payments to foreign companies;
- aircraft and ship leases;
- some promotional activities abroad, such as export fairs;
- commissions exporters pay to their agents abroad;
- payments for hedging operations;
- interest and commissions on export notes; and
- interest and commissions for credits obtained abroad for export financing.

Investment Incentives

Federal government incentive programs promote domestic policy objectives including the growth of exports and capitalising the domestic private industry. However, state and local incentive programs take aim at specific objectives such as increasing local employment.

Usually, the executive branches of the federal government, the states, federal district and municipalities have authority to grant such incentives. Incentive projects are approved on a case-by-case basis by the relevant government agency. Incentives include an exemption from taxes for a specific period of time, subsidised credit from governmental development banks and the privilege of importing capital goods duty-free, or at sharply reduced tariff rates.

Industrial Development Projects

The industrial and Agro-industrial Technology Development Programs (PDTI and PDTA) stimulate industrial technology development by creating and maintaining a permanent technology management structure and by establishing associations between companies and research institutes.

Tax incentives include:

- accelerated amortisation for certain intangible assets;
- accelerated depreciation on domestically produced equipment;
- reduced withholding income taxes by up to 30% for remittances of royalties and technical service fees, if there is an investment commitment of twice the amount of the tax benefit;
- income tax reduction of 75% until 2013, for manufacturing or agribusiness projects carried out after year 2000.

Other tax incentives available include:

- **Meals for employees:** a business expense deduction and a tax credit of up to 4% of taxable income for expenses in providing meals to employees;
- **Agriculture:** income tax withholding at source reduced by up to 30% on royalties the company pays under an INPI registered, agricultural or industrial development project. ICMS and IPI are suspended or eliminated for the sale and production of various foodstuffs;
- **Culture:** to provide funds for cultural activities in Brazil including the domestic cinema industry. Companies may deduct investments in Ministry of Culture approved cultural projects;
- **Audio-visual:** corporate taxpayers are also eligible for tax incentives in approved domestic film production. Foreign film producers and distributors may reduce their income tax withholding liability by 70% if they invest that amount in the co-production of audio-visual cinematic pictures projects approved by the Ministry of Culture; and
- **Children's fund:** Companies may donate up to 1% of their tax liability to federal, state or municipal children's funds.

⁵ LTJ is a country or location that does not impose taxation, or imposes the income tax at a rate lower than 20%, or where the laws of that country or location impose restrictions on the disclosure of shareholding composition or the ownership of the investment. Brazilian tax authorities have issued a list containing the jurisdictions included in the concept of LTJ. According to the Administrative Rule N. 188/2002, the following jurisdictions are considered as LTJs: Andorra, Anguilla, Antigua and Barbuda, Dutch Antilles, Aruba, Bahamas, Bahrain, Barbados, Belize, Bermudas, Campione D'Italia, Channel Island (Jersey, Guernsey, Alderney and Sark), Cayman Island, Cyprus, Singapore, Cook Island, Costa Rica, Djibouti, Dominica, United Arab Emirates, Gibraltar, Grenada, Hong Kong, Leban, Liechtenstein, Luxemburg (in relation to its 1929 holding company regime), Macau, Madeira Island, Maldives, Malta, Man Island, Marshall Island, Mauricio Island, Monaco, Montserrat Island, Nauru, Niue Island, Sultanate of Oman, Panama, San Cristovan and Nevis, Samoa Americana, West Samoa, San Marino, Saint Vincent, Santa Lucia, Seychelles, Tonga, Turks and Caicos Islands, Vanuatu, American Virgin Islands, British Virgin Island.

LABOR

Labor Issues in Brazil

Employment Law

The Consolidated Labour Laws (CLT) of 1943 contain the basic Brazilian employment law principles.

Definition of Employee

- An employee is a person who provides services “permanently” to an employer, under its direction and in exchange for a salary. The subordination factor is essential in an employment relationship.
- Companies belonging to a group of corporate entities under the same control, direction or management are jointly liable for the employment obligations and liabilities of any of the group’s companies.

Employment Contracts

Brazilian Labour Law does not establish the requirement of a written employment agreement. Thus, it is possible to have valid verbal or implied contracts from the relationship between the individual and the company to which it provides services.

Although not mandatory, it is a common practice to have written agreements and we recommend the company to use it. Despite the principle that facts prevail over formal documents, a written agreement expressly establishing the conditions may be used to defend any challenge regarding the employment relation. The terms of the contract must obey the law, the decisions of the authorities and any collective bargaining agreements.

Employment agreements in Brazil are usually simple, with only the main conditions stipulated (name of the parties, probation period, position, remuneration, exempt situation or non-exempt with work shift, among others). This is due to several conditions of the employment relationship already being established by law (for instance: severance, vacation, overtime allowance, among others), meaning it is not necessary to repeat them in the agreement. However, parties may wish to repeat the law in the agreement and also to include additional provisions.

Note that foreign employees living abroad and transferred to Brazil must sign a written employment contract and submit it to the Ministry of Employment before entering the country.

Duration of Individual Employment Contracts

Employment contracts normally last indefinitely: fixed terms are allowed only in specific circumstances. The term is considered “indefinite” when:

- the contract states it is indefinite;
- the contract does not stipulate a term;
- a fixed-term contract is renewed more than once; and
- an existing fixed-term contract is terminated, but the same parties contract again for a fixed term within six months. This does not apply where the termination was connected with the rendering of specialised services or the occurrence of certain events.

For a company, the main advantages of having a fixed-term contract are the flexibility that it brings in addition to lower benefit contributions and severance payments.

Fixed-term contracts are allowed for the 90-day trial employment period. If the employment continues, the contract will become a contract for an indefinite term or for a maximum two-year term where:

- the nature of the services, considering the temporary character, justifies a present term;
- the services are related to business in transition; or
- upon collective negotiation in other cases.

Compensation

Compensation includes the employee’s fixed salary, commissions, bonuses, fringe benefits (such as personal or family benefits) and living expenses. Companies cannot reduce compensation, except by a collective bargaining agreement.

Employers must pay compensation at least monthly. This does not include commissions. Annually, employees are entitled to receive a Christmas bonus of one month’s salary, with the employer obliged to pay half by 30 November and the remainder by 20 December of that year.

The employer must pay compensation in Brazilian currency. It can pay a portion in kind: for example, when the employer is responsible for providing employees with housing, food and clothing.

Working Hours and Overtime

Unless provided otherwise within an autonomous bargaining or collective labour convention, the CLT provides that the maximum weekly working schedule in Brazil is 44 hours per week, or eight hours per day. Further, every employee whose working day exceeds six hours is entitled to a one-hour “rest break” during the day. Between two working days, employees must be granted with at least 11 hours for rest.

The regular eight-hour working day may be extended by two hours per day, with the employees being entitled to a premium rate of at least 50% of their usual hourly rate for each worked overtime hour during the week and to a premium rate of at least 100% for each worked overtime hour on Sundays and holidays.

Managers and field-based employees who do not have fixed hours of work or working hours control are not entitled to receive overtime pay, subject to compliance with the requirements imposed by law.

Holidays and Leaves of Absence

After each 12 months of employment, employees can take 30 calendar days’ holiday, which must be taken within that set 12 months. Further, employees are entitled to receive a vacation bonus of one-third of their salary.

Maternity leave is 120 days, during which the employee’s job and salary are secured. In 2008, maternity leave was extended from 120 to 180 days; however, the supplementary 60 days are optional for private companies. Companies that choose to grant the additional 60 days may deduct the additional salary paid to the woman from their income tax. During the maternity leave the Brazilian Social Security Institute (INSS) pays the employee’s salary. Fathers are entitled to five consecutive days’ paternity leave.

Termination of Employment Contracts

Contracts of employment may be terminated by:

- The employer (with or without just cause);
- Resignation;
- Expiration of the term of a fixed-term contract; or
- Constructive dismissal.

Notice and redundancy payments depend on the type of termination.

Employer’s Initiative – Termination Without Just Cause and Severance Payment

The law does not distinguish between terminating employment without just cause and redundancy, and does not oblige the employer to tell the employee its reasons for terminating their contract. If the employer terminates the contract, the employee is entitled to the following severance payments:

- unused holidays and proportional holiday pay proportionate to how many months the employee worked in the previous 12 months, plus one third of the employee’s monthly compensation (“Vacation Bonus”);
- Christmas bonus proportionate to the number of months worked during the calendar year; and
- FGTS contributions plus a 40% fine of the total amount deposited in the FGTS account of the employee, plus 10% of especial contribution⁶.

The employer must give the employee at least 30 calendar days’ notice or dismiss immediately and pay one monthly salary in lieu of notice.

Termination With Just Cause

CLT defines just cause for terminating the employment contract. Below are the cases which may give rise to termination of employment by a justified cause:

- any dishonest act;
- lack of self-restraint or misconduct;
- the employee’s doing regular business on his/her own account or on behalf of third parties without the employer’s consent, or whenever there is a conflict of interest between any such activities and those of the employer to the detriment of the latter;
- the employee’s criminal prosecution in final judgment, provided that the penalty has not been pardoned;
- inadequate performance of employee duties;
- regular intoxication or intoxication during working hours;
- violation of trade secrets;
- any act of indiscipline or insubordination;
- abandonment of employment;
- any act detrimental to the honour or reputation of any person, practiced during working hours, or any physical violence practiced under the same conditions, except in case of self- or third-party defence;
- constant gambling.

⁶ Law 110/2001.

The employer has the burden of proof as to any of the legal situations above.

Where an employee is dismissed with just cause, they are only entitled to pay for unused holidays (after twelve months' work) plus the Vacation Bonus (one third of the employee's monthly compensation). The employee is not to receive the 40% fine on its balance.

Resignation

The employee may resign with at least 30 days' notice to the employer. The employer may, however, release the employee from their obligation to work through the notice period.

The employee will be entitled to:

- pay for unused holiday (after one year in employment); and
- proportionate Christmas bonus equivalent to the number of months worked during the calendar year.

Expiration of Fixed-term Employment Contracts

Employees are entitled to:

- holiday pay proportionate to the number of months worked in the previous 12 months, plus the Vacation Bonus (one third of the employee's monthly compensation);
- Christmas bonus equivalent to the number of months worked during the calendar year; and
- FGTS contributions.

A party who terminates a fixed-term contract without just cause must pay damages to the other party. Those damages are 50% of the amount of compensation the employee should have received until expiration of the contract. Furthermore, if the employer terminates the contract, it will also have to pay the 40% FGTS fine.

Job Security

These employees have protected stability rights:

- a pregnant employee – for up to five months after delivery;
- a union leader – for one year after their mandate;
- members of the Internal Commission for Accident Prevention (CIPA) – for one year after their mandates;
- employees injured while carrying out their professional activities – for one year after their return to work; and
- other employees provided for in the collective bargaining agreements (including pre-retirement periods).

The employer may not dismiss employees who have work stability except with just cause. If the employer dismisses the employee for gross misconduct and the employee takes the employer to the employment tribunal, the employer must then prove the grounds for the dismissal. If the employer fails to do so, it may have to rehire the employee or treat the dismissal as having been without just cause. This would subject the employer to having to pay all past employment indemnities.

Social Security

Under Brazilian social security law, every employee must be covered by social security insurance. Social security in Brazil is made up of monthly contributions by employees, employers and the government. These payments entitle the employee to receive social security benefits.

Employers are obliged to take out work accident insurance for its employees from the INSS. The cost of this insurance is fixed by the Ministry of Labour and Social Security. Directors and partners of firms who are not employees, self-employed workers, and domestic workers are not covered by work accident insurance legislation.

Unemployment Guarantee Fund (FGTS)

Under the compulsory FGTS system, every month an employer must deposit the equivalent of 8% of each employee's compensation for the previous month into a blocked bank account in the name of the employee as a "social security contribution".

The employee can only withdraw the fund if:

- their employer dismisses them without just cause;
- the duration of their fixed-term contract expires;
- they become ill with a certain illness;
- they retire; or
- they wish to buy real estate.

An employee who is dismissed without just cause is entitled to withdraw the FGTS deposit, together with interest, monetary correction and a further 40% fine calculated on the total. Collective employment contracts may provide for an additional indemnity. If the employee dies, the fund will form part of their estate.

Union Levy

The Brazilian Federal Constitution (the Constitution) ensures freedom of association to professions and trade unions. Unions may also enter into collective bargain agreements. The Constitution adopts the “single union” concept, which prohibits the existence of more than one union for each professional category in a given geographical area.

Although union membership is not compulsory, workers and employers are required to collect a union “levy” each year (articles 578 to 591 of the CLT).

Health and Safety at Work

Several compulsory programs on health and safety standards include:

- **Occupational Health and Medical Control Program (PCMSO)/Medical Records.**

This program includes the compulsory submission of employees to a medical examination before admission, periodically during employment, and upon dismissal. The pre-admission medical examination is to discover if the individual suffers from any health problems that might prevent him or her from performing his or her duties. The periodical examinations determine if the employee’s health has deteriorated or if there is any sign of a work-related disease. The medical examination on dismissal is intended to see if the employee is suffering from a health problem or is pregnant; both of which would prevent the employer from dismissing them.

Environmental Risk Prevention Program (PPRA)

This program is designed to protect the employee’s health and integrity by anticipating, recognising, evaluating and controlling environmental risks in the workplace, while respecting the environment and natural resources.

- **Internal Commission for Accident prevention (CIPA)**

Brazilian companies must have an internal commission for accident prevention (CIPA). It comprises employees and company representatives who remain in office for one year. The number of CIPA members depends on how many employees the company has and how dangerous the work is.

Those elected by the employees to the company’s CIPA (either as current or substitute members), cannot be removed from their position from the date of their registration as candidates until one year after their term in office.

- **Health Hazard Allowance**

Employees working under hazardous health conditions receive an additional monthly 10%, 20% or 40% of the current minimum salary. The amounts vary according to the degree of danger (which experts will appraise). Companies must provide employees with satisfactory Individual Protective Equipment (EPI). They do not have to pay this allowance if there is satisfactory equipment to neutralise or erase the agents causing the health hazard.

On the Job Risk Allowance

Employees working in dangerous conditions (that is, those in contact with explosives, flammable materials or electricity) have the right to an added 30% of their base pay.

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