CHANGES TO THE LABOUR CODE

THE PROHIBITION OF OUTSOURCING

INTRODUCTION

Of the new legislative changes to labour law, those which have been causing the most controversy are certainly those related to the outsourcing of services.

This practice has been gaining ground in the national market and consists of the acquisition of services from a third party entity to meet the company's needs. It is usually used in companies where there is a shortage of manpower for certain functions or where the cost of manpower is high.

But what do these new articles establish regarding outsourcing?

ARTICLE 338ª A

This first article states in number 1 that *"It is not allowed to resort to the acquisition of external services from a third party entity to satisfy needs that were assured by an employee whose contract was terminated in the previous 12 months due to collective dismissal or dismissal by extinguishment of a workplace. "*

First of all, the new article 338-A is very clear in establishing the prohibition to resort to outsourcing to satisfy needs that have been assured by an employee whose contract terminated in the previous 12 months due to collective dismissal or extinction of the job.

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As will be well understood, this has been one of the measures which has generated the most controversy and, in our opinion, with good reason. This is because the recourse to the outsourcing of services is often the most effective means, or even the only means, to guarantee the functioning of large companies that face some type of challenge inherent to business development itself, and it is not plausible to impose this prohibition on them.

As a matter of fact, this is a business management instrument that makes all the sense, bearing in mind that many times companies do not have enough scale to have certain services such as accounting or IT services. Therefore, the use of outsourcing brings greater business competitiveness and may even make possible a greater offer of employment in the areas in which each company effectively focuses.

Thus, we agree with the criticism that has been made that this measure goes against basic principles such as the free economic initiative of companies and business management

ARTICLE 498ª

Number 1 of this article states that *"In the case of acquisition of external services from a third party entity for the performance of activities corresponding to the purpose of the acquiring company, the collective work regulation instrument that binds the beneficiary of the activity shall apply to the service provider, whenever it is more favourable".*

Number 3 of the same article states that *"The provisions of the previous numbers only apply after 60 days of providing an activity for the benefit of the acquiring company, and before that period, the service provider is entitled to the minimum salary stipulated in the collective work regulation instrument that binds the beneficiary of the activity that corresponds to his functions, or to that practiced by the latter for equal work or work of equal value, whichever is more favourable."*

Therefore, this article establishes that, in the cases of outsourcing, the collective work regulation instrument applicable to the beneficiary of the activity shall also be applicable to the service provider, whenever it is more favourable to him. However, this will only be the case after sixty days of activity rendering in benefit of the acquiring company.

This norm makes perfect sense, as it is in line with the logic present throughout the Labour Code, which is to guarantee the application of the most favourable norms to workers, as well as to extend these guarantees to service providers, whose distinction with workers is often not easy to make.

FINAL COMMENTS

Finally, as already mentioned, article 338-A of the Labour Code seems to raise

serious problems, especially when confronted with other constitutionally protected interests, so it is expected that it may cause several difficulties to companies, especially the larger ones.

The second addition to the Labour Code, regarding the outsourcing of services, article 498-A, fits perfectly with the remaining labour law norms, preventing those who are considered to be service providers from having lesser protection than workers, namely in those cases in which their bond is equivalent to that of a worker.

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