

# Newsletter

## Employment

Amendments to Employment Law



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**MARCH 2023**

### THE FUTURE PROHIBITION OF OUTSOURCING.

#### I – Preventive monitoring without success

With the entry into force of the amendments to the Labour Code, the controversial prohibition of outsourcing will also enter into force, despite the pressure exercised by the employers' confederations on the President of the Republic to raise the preventive review of constitutionality, which did not happen.

At stake would be the breach of the constitutional principle that foresee that private economic initiative is freely exercised. To this extent, and although it is not an absolute principle, it was often invoked that the prohibition in question restricted the right of companies to adapt their activity to the context in which they operate.

#### II – Prohibition of the recourse to outsourcing

Outsourcing of services is now included in two new articles added to the Labour Code – article 338-A and article 498-A.

It is now prohibited for a company to resort to outsourcing to satisfy needs that were assured by an employee whose contract was terminated in the previous 12 months due to a collective dismissal or extinction of job position.

The breach of this prohibition is deemed a very serious administrative offence, which falls on the beneficiary of the service.

Considering the wording of the law, it is arguable that scenarios of termination of employment contracts covered by such prohibition are limited to

collective dismissal and extinction of job position, leaving out, for example, the termination of contracts by mutual agreement.

Regarding the 12-month period during which the prohibition in question is in force, said period is counted as of the date on which the dismissal of the employee takes effect – therefore, mandatory prior notice under the provisions of the collective dismissal and extinction of job position must be considered.

### III – Enforcement of collective bargaining agreement

As regards the scope of enforcement of the collective bargaining agreement, a new provision is included in the Labour Code – article 498-A.

According to this, the beneficiary of the outsourcing of services must apply the collective bargaining agreement in force to the service provider, if the acquisition of services encompasses activities corresponding to its corporate object – a restrictive interpretation must be made and it must be understood that by 'corporate object' the legislator refers to the main activity developed by the company.

The enforcement of the collective bargaining agreement depends, however, on the following:

- Being more favourable to the service provider;
- The duration of the provision of services must be over 60 days.

If the duration of the provision of services is less than 60 days, the service provider is entitled to the minimum remuneration provided for in the

collective bargaining agreement that binds the beneficiary of the activity and that corresponds to activity carried out by said provider, or to that practiced by the former for equal work or work of equal value, whichever is more favourable.

Finally, the contract for the provision of services must foresee which entity is responsible for ensuring the fulfilment of the obligations provided for in the collective bargaining agreement that binds the beneficiary of the activity.

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