

VEIRANO ADVOGADOS

**Borderless Organizations: Managing  
Workforce Mobility**

A

Littler / SwedCham / Veirano

Workshop

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## An Overview of the Most Recurring Labour Problems with:

- *Expatriation from Brazil*
- *Expatriation to Brazil*

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## Introduction

### A bit of History, Economics & Politics

**(A)** Why is the Brazilian legal environment unfavourable to manpower exportation?

- Considerable immigration;
- Emigration is 'informal' (unskilled workers), or scarce and independent (skilled ones).
- Brazilian investments abroad are very recent.

## Introduction

### A bit of History, Economics & Politics

- **(b)** Why is the Brazilian employment legal environment so inflexible?
  - CLT became in effect on Nov. 10, 1943, when the Brazilian workers had little statutory protection – Clear inspiration in the Spanish, French and Italian laws.
  - Other countries' employment legislation evolved and gave more power to the union-company negotiations.
  - But Brazil: (a) endured 20 years of military regimen, which was particularly concerned about left-wing movements, including unions; (b) until mid 90's recouping monetary depreciation was top priority for workers unions.

## Transfer of Brazilian Workers

### 1. Law 7,064/82

- (a) Temporary transfer of engineers and related manpower to civil works and
- (b) Recruiting of Brazilian workers by foreign companies.

“Mendes Junior” Law: infrastructure works in Iraq – Justifiable protection to Brazilian citizens. – eg life insurance with indemnification equal to at least 12 times the monthly wage, health care, transfer cost (except if employee resigns).

It had been frequently applied by analogy to any case of expatriation from Brazil.

## Transfer of Brazilian Workers

### 2. Law 11962, 07/03/2009

*“Art. 1o Esta Lei regula a situação de trabalhadores contratados no Brasil ou transferidos por seus empregadores para prestar serviço no exterior.”*

- New wording is imprecise whether the law applies to temporary and/or permanent transfer.
- My opinion: temporary, only
- Logical interpretation in light of several provisos, especially time limitation.

*[Save the questions about permanent transfer for later, please.]*

## Transfer of Brazilian Workers

### 3. Milestones

- Law 7,064/82 does not apply to temporary assignments shorter than 90 days.
- Law 7,064/82 stipulates that the transfer will end after 3 years of continued work.
- Teaser: *“Three is a Charm”?* [Keep that for later, please.]

## Transfer of Brazilian Workers

### 4. Other conditions

- Brazilian employment remains in effect.
- Compensation must consist of two parts: (i) the base salary in Brazilian currency only and (ii) the transfer allowance (temporary) in any currency, including Brazilian).
- The portion in Brazilian currency is subject to the annual compulsory salary adjustments in Brazil (CLA), irrespective of local of payment.
- Split payroll is a possibility but total amount is basis for FGTS and Social Security (INSS).

Some chose not to pay Brazilian employment benefits, including FGTS and INSS, on the top of foreign payroll, considering that offshore payments are difficult to detect. – Risks of labour litigation, though.

## Permanent x Temporary Transfer

Twist of fate – Transfer intended to be permanent, but:

- (a) Individual returns to Brazil to a new assignment because of cultural background;
- (b) Individual has adaptation problems abroad and Brazilian company still needs him/her.

Continued employment – Economic group.

So, despite the time elapsed, if the employee returns to Brazil...

Would it be possible to argue that the transfer obtains the legal status of permanent, after 3 years?

*[Remember the Law 7,064/82?]*

## Permanent x Temporary Transfer

### 1. Temporary Transfer

- CLT –Additional Pay (25%) during transfer, only.
- Employee's consent is needed.
- Pre-existing proviso in employment agreement is irrelevant.

## Permanent x Temporary Transfer

### 1.1 Social Security (Law 8,212/91, article 12)

*“c) o brasileiro ou estrangeiro domiciliado e contratado no Brasil para trabalhar como empregado em sucursal ou agência de empresa nacional no exterior;”*

*“f) o brasileiro ou estrangeiro domiciliado e contratado no Brasil para trabalhar como empregado em empresa domiciliada no exterior, cuja maioria do capital votante pertença a empresa brasileira de capital nacional;”*

- Independent Legal Entity is not “branch”, neither “office”.
- Conflict between Social Security and Labour Laws – Risk of labour litigation.
- INSS on the condition of voluntary taxpayer is not an alternative.
- However it is a frequent arrangement.

## Permanent x Temporary Transfer

### 1.2 Suspension

- Often solution.
- CLT stipulates few cases of suspension.
- Temporary expatriation is not one of them.
- “Lei das S.A.” – Possible alternative?

## Permanent x Temporary Transfer

### 2 Permanent Transfer

- Remember the ‘History, Economics & Politics’ background?
- What happens with FGTS, INSS? *There is simply no solution.*
- Termination x Continued Employment
- Termination: dismissal x resignation: High termination costs in Brazil.
- FGTS rebate: *Don't even think about it...* It's a felony.

## Expatriates in Brazil

Foreign citizens legally residing in Brazil have the same rights applicable to Brazilians citizens, including those related to employment.

- *How strong it is? It's in the Constitution...*

## Expatriates in Brazil

### 1. Split payroll

- Foreign payroll is often ignored – Taxation is a strong driver.
- *“Things change”* – Risks of labour litigation.
- Tax evasion will be pardoned upon the tax payments, plus fines and interests.
- Employment benefits usually exceed tax exposure.

## Expatriates in Brazil

### 2. Overlapping Benefits

- Rebate? (*Not the FGTS, please.*)
- Benefits or costs associated with relocation? (*Maybe...*)
- Mutually agreed condition could be valid for voluntary benefits only, over and above the statutory requirements.
- Statutory benefits are a matter of public policy.

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## Thank you

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