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Introduction

Institution of the "Toyotist" manufacturing system in the 1970's brought groundbreaking dynamics which transformed the consumer and labor relationships. The process of adapting manufacture according to the demand variation caused companies to seek more flexible solutions for their manufacturing lines.

Such flexibility was seen by agreements between large industries and other smaller companies to conduct tasks in support of the final manufacturing purpose. Thus, industries played the character of contracting parties of the employees to the contracted companies.

Outsourcing is an informal expression to define the situation where the contracting party, which is benefitted by the worker activity, transfers the liabilities for labor charges to third parties: contracted companies.

Such relationship could be a three-party relationship:

> *"...a legal relationship involving the interests of three parties. The party contracting the services of a company specialized in its material and human resources as its primary activity, referred to as contracting party. On the other hand, the*

company specialized in the contracted services is called provider. And, finally, the employee as agreed by provider who performs his/her assignments benefiting, on the second hand, the contracting party.".[1]

Lately, outsourcing is widely used in the most different economy sectors. Jurists have different opinions over the topic. However, among criticism and exaltations, outsourcing has no appropriate regulation to provide greater legal security to contracting parties and outsourced workers.

Act no. 13.429/2017 provides some interesting and necessary mechanisms for the current market dynamics. It regulates one of the outsourcing methods: use of seasonal jobs. However, many insecurities were not settled with the standard and questions remain unanswered.

History of standards and precedents

Prior to dealing with the news brought by the mentioned act, explaining how the matter was approached by the legislators and courts is also important.

Decrees 1212 and 1216 dated 1966 were the first standards on the matter in the country. They enabled the bank security services to be outsourced.

Then, other standards were providing for the instruments for outsourcing: rental of labor by specialized agencies[2], regulation on surveillance services in banks[3], among other specific activities.

Also, at the private level, another landmark for outsourcing was Act no. 6.019/1974, providing for seasonal jobs. The rights of the seasonal workers are governed by such Act and not by the Brazilian Consolidated Labor Laws (CLT). The seasonal job act was amended by the Act no. 13.429/2017 and impacts thereof shall be reviewed later.

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1 CASTRO, Rubens Ferreira de. Outsourcing in Labor Law. Malheiros. 2000. Pg. 82.
2 Decree 62.756/1968
3 Decree 1.034/1969

Outsourcing of the surveillance and cash-in-transit services was permitted by means of Act no. 7.102/1983 and Decree no. 89.056/1983.

Outsourcing at the public level was consolidated by other standards. The first step was given in 1967 by means of Decree no. 200 providing for Federal Administration arrangement. Use of outsourcing may be seen in the following article:

> *Art. 10. Conduct of Federal Administration activities shall be widely decentralized.*
>
> *§ 7. To be released from the planning, coordination, supervision and control tasks and intended to prevent uncontrolled growth of the administrative framework, the Administration shall try to release from the material accomplishment of executive tasks, appealing, whenever possible, to indirect execution, upon an agreement, provided that there is, in the area, private sector sufficiently developed and qualified to perform the execution duties.*

Later, by means of Act no. 5.645/70, the public authorities defined the following activities as "subject to secondary execution": transportation, preservation, custody, operation of lifts, cleaning and other similar tasks.

In order to contain the abuses deriving from the outsourcing instruments, a dossier was drafted in 1986. Dossier 256[4] by the Superior Labor Court began to consider as illegal the contracting of workers by a third company, except in the cases of seasonal jobs and surveillance services.

Such dossier was reviewed by the superior court by means of another dossier, no. 331. It defined, in its 4 items, the legal forms of outsourcing:

> "*I – Hiring workers through a third company is illegal, and the employment bond is formed*

[4] "*Except in the cases of seasonal jobs and surveillance service, as provided for in Acts no. 6.019, dated 01.03.1974, and 7.102, dated 06.20.1983, the hiring of workers by third company is illegal, the employment bond being formed directly with contractee.*"

directly with the contractee, except in the event of seasonal jobs (Act no. 6.019, dated 01.03.1974).

II – The irregular hiring of a worker, by means of a third party, shall create no employment bond with the direct, indirect or foundational public administration agencies (art. 37, II, of the FC/1988).

III – Contracting of surveillance services (Act no. 7.102, dated 06.20.1983) and maintenance and cleaning services, as well as specialized services associated with the contracting party's ancillary activities, shall not form an employment bond with the contracting party, provided that personal service and direct subordination do not exist.

IV – Non-compliance with the labor obligations, by contractee, implies secondary liability of contractee, as to such obligations, including the direct administration agencies, independent agencies, public foundations, public companies and government-controlled companies, provided that they have taken part of the procedural relationship and are also contained in a judicially enforceable instrument (art. 71 of Act no. 8.666, dated 06.21.1993)."

As seen, illegal contracting has, as a result, the creation of employment bonds between worker and contractee. That is not the case in the situations involving the Public Administration, surveillance-related activities, as well as maintenance, cleaning and specialized services, provided that the personal service and subordination elements are nonexistent. Even with legal outsourcing being possible, compliance with the labor obligations is assured, secondarily, by contractee.

Act No. 13.429/2017

Act No. 13.249/2017, popularly known as "Outsourcing Act", only made changes to one of the forms of outsourcing used: Seasonal jobs in Urban Companies, as regulated by the Act no. 6.019/74.

The Seasonal Job Act suffered significant changes, which aimed at granting increased contractual flexibility to contracting parties and contracting companies and some warranties for the seasonal workers.

We shall now deal with the most significant changes:

The requirements for operation and registration of seasonal job companies with the Labor Department were simplified. The company must hold a Corporate Taxpayers' Register (CNPJ), registration with the respective Commercial Registry and minimum capital stock of BRL 100,000.00. However, the act has a contradiction. Its art. 4B, III, asserts that the capital stock of the seasonal job company should match the number of employees. Such compatibility ranges from BRL 10,000.00 for up to 10 employees to BRL 250,000.00 for over 100 employees. On the other hand, art. 6, III, of the act asserts that one of the requirements for operation and registration of the seasonal job company is the evidence of minimum capital stock of BRL 100,000.00. Thus, there is certain doubt for companies with less than fifty employees.

The items to be included into the agreement entered between the contracting company and the seasonal job company were amended. The agreement, necessarily written, is to include qualification of the parties, justification for demand of seasonal jobs, the service provision period, amount for the services and provisions regarding the worker's safety and health, to be complied with by contractees. It should also be pointed out that contractees remain as subsidiary debtors of the labor amounts due to the seasonal workers.

One of the primary changes noticed in the act is the possibility of contracting seasonal jobs to conduct target activities. "Target activities may be defined as the corporate and labor functions and tasks adapted to the center of the corporate dynamics of the contracting parties...[5]". In the past, only ancillary activities could be outsourced. Thus, the law innovates in view of a consolidated position adopted by courts.

[5] DELGADO, Mauricio Godinho. Curso de Direito do Trabalho. LTR. 2002. Pg. 429.

The labor agreement, previously with, at most, 90 days, was extended to 180 days, being possible to be extended for additional 90 days. It should be pointed out that, despite the Act asserting that there is no employment bond between contractee and seasonal worker, it carries an exception. Contractee cannot hire the same seasonal worker for a 90-day period after the end of the contracted term, or else such hiring is to be an employment bond.

Another instrument whose use was permitted by the new Act was contingency. Contingency consists of subcontracting, this is hiring another company for providing the services to contractee.

Finally, we should point out that activities regulated by specific laws, such as the guard and cash-in-transit carriers, have not been changed by the new Act.

Persistent questions

The legislation concisely regulates polemic understanding in the labor area. Although outsourcing is part of the current corporate dynamics, the broad range of possibilities in the outsourcing target activity seems to be improper and other issues remain unanswered.

Many target activities conducted require their follow-up for over 180 days for appropriate execution. Such as those associated with pedagogy, psychology or research and development cannot be safely and appropriately developed without extending the professional’s activity in time.

The issue of “contracting workers as legal entities under issuance of an invoice to receive their salaries”, which is responsible for large number of labor complaints, persists. The term “PEJOTIZAÇÃO” in the Portuguese language is an acronym arising out of the initials "PJ" for legal entities. Such practice, seen as illegal, consists in hiring individuals as if these were legal entities.

Other issues are found in the own text of the law. The seasonal job companies should hold, as a minimum, BRL 100,000.00 of capital stock to be registered with the Public Prosecutor Office. However, the standard asserts that capital stocks of reduced value are accepted for companies with a lower number of employees.

Finally, we have a standard which attempted to decrease the number of complaints in the Labor Justice, in the opposite direction of the construction by the courts on the matter. On the other hand, society is anxious for regulation of other matters to grant further security to workers and contractees.

Frequently Asked Questions

Which companies does the new law apply to?

Act No. 13.429/2017 amended Act no. 6.019/74 providing for Seasonal Jobs. Changes and provisions are applied for seasonal job companies, service provision companies and respective contracting parties.

What types of work have been impacted?

Only the seasonal jobs were modified by means of the new Act. Changes such as the possible hiring of seasonal worker to conduct target activities, the specific requirements to enter into an agreement with the seasonal worker and the measures associated with the workers' health and safety which shall now be complied with by the service contracting company.

Is it possible to hire seasonal workers to conduct the assignments of workers on strike?

No. Such practice is expressly prohibited. Such replacement can only occur in the cases outlined by the law, but the rule points towards prohibition thereof.

Were there any changes to liabilities of contractees?

Yes. Contracting parties shall remain as secondary debtors of the pending labor sums of seasonal workers. In addition, such companies shall ensure the safety, hygiene and health conditions of the workers. Activities regulated by specific law, such as guards and cash-in-transit carriers, were not changed by the new Act.

Is it possible to hire employees by means of legal entities incorporated by them?

No. The practice of "PEJOTIZAÇÃO" was not regulated and may represent labor fraud. Seasonal job companies and service provision companies are the only ones that can provide seasonal workers to other companies. These are defined in law as: legal entity, duly registered with the Labor Department, responsible for placement of workers at disposal

of other companies seasonally and are required to comply with minimum standards to perform their activities.