

<https://doi.org/10.18778/0208-6069.101.24>



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## ATYPICAL EMPLOYMENT RELATIONS IN BRAZIL AFTER THE LABOR REFORM

**Abstract.** The purpose of this publication is to provide an overview of labor law changes in Brazil that have significantly affected fundamental employment principles. Laws 13.427/17 and 13.467/17, collectively known as the Labor Reform, introduced atypical forms of employment, heavily modifying individual and collective labor laws. In particular, the changes include: employment in the form of intermittent work, telework, outsourcing or hyper-sufficient workers. The labor law reform, which has been carried out, introduces a number of novelties into the Brazilian legal system and raises many questions and doubts. There are concerns about whether the regulation undermines the existing legal order and thus threatens the dignity of workers, their physical and mental health, as well as negatively affects the working environment.

**Keywords:** rights of workers, atypical employment, labor law in Brazil, telework, outsourcing

## ATYPOWE FORMY ZATRUDNIENIA W BRAZYLII PO PRZEPROWADZENIU REFORMY PRACY

**Streszczenie.** Celem niniejszej publikacji jest przybliżenie zmian w prawie pracy w Brazylii, które znacząco wpłynęły na fundamentalne zasady zatrudnienia. Ustawy nr 13.427/17 i 13.467/17, zwane zbiorczo Reformą Pracy, wprowadziły atypowe formy zatrudnienia, mocno modyfikując indywidualne i zbiorowe prawo pracy. Zmiany obejmują w szczególności: zatrudnienie w formie pracy przerywanej, telepracę, outsourcing oraz pracowników hyper-sufficient (typ zatrudnienia występujący w Brazylii). Przeprowadzona reforma wprowadzając szereg nowości do brazylijskiego systemu prawnego wzbudza wiele pytań i wątpliwości. Istnieją obawy czy regulacja nie podważa obowiązującego porządku prawnego i tym samym nie zagraża godności pracowników, ich zdrowiu fizycznemu i psychicznemu, jak i negatywnie wpływa na środowisko pracy.

**Słowa kluczowe:** prawa pracowników, zatrudnienie atypowe, prawo pracy w Brazylii, praca zdalna, outsourcing

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## 1. INTRODUCTION

The labor reform, introduced by Laws 13.427/17 and 13.467/17, was approved with a speed rarely seen in Brazilian legislative history. This is a unique event, additionally carried out in the face of extremely turbulent political, economic and social circumstances, promoting profound and dangerous changes in Brazilian labor law and procedures, both individual and collective. New regulations were enacted, existing ones were modified, and provisions (articles, paragraphs and clauses) of the Consolidation of Labor Law and minority legislation (Law No. 6.019/74) were repealed.

The Labor Reform changed, in the spectrum of substantive law, working time, wages, employee dismissal, unionization regulations, collective bargaining, punitive damages, the economic group of employers, outsourcing, and introduced unusual forms of the employment relationship such as intermittent work, teleworker, outsourced and hyper-efficient. Mauricio Godinho Delgado and Gabriela Neves Delgado assess the Labor Reform as:

Deeply disconnected from the key ideas of the 1988 Constitution – such as the concept of the Democratic Rule of Law, humanistic and social constitutional principles, the constitutional concept of basic human rights in the field of labor law, and the constitutional understanding of Law as an instrument for the development of civilization – Law No. 13.467/2017 attempts to establish many mechanisms in an adversarial and regressive direction (Delgado 2018, 40).

In 2017, one of the biggest labor law reforms since 1943, the time when the Labor Law Code was established, was approved. One of the main goals (from a legal point of view) was to regulate flexible forms of employment. As a consequence of the changes, it was made possible to make arrangements between the employer and the employee, which in practice violate labor law. The aspiration of Brazilian lawmakers was to introduce more modern regulations that, as they hoped, would bring informal employment out of the shadows and better protect employees and employers. From an economic perspective, Brazil's new labor reform was intended to encourage employer job creation and increase productivity by reducing the burden on employers. The reform reflects the government's public policy to foster a more business-friendly environment in Brazil. New, often referred to as modern, regulations on atypical forms of employment have come into effect, which are intended to allow employers and employees greater freedom in defining the employment relationship. This trend is undoubtedly a result of the ongoing political and economic changes affecting Brazilian society, such as the aging of the population, the economic and financial crisis and the increase in the unemployment rate in recent years, the need to balance public finances (especially with respect to the social security system), and the creation of new forms of work (work from home and work provided by companies that exist solely in digital form, such as Uber).

To everyone's surprise, instead of the labor law reform signifying an expansive labor law movement, incorporating real atypical workers (digital platform and app workers) into the field of labor law and beginning to access labor rights, we have witnessed a reductive labor law movement. Such a thesis can be put forward in view of the fact that many workers who were previously considered traditional employees and entitled to all the labor rights provided by the Labor Law Consolidation, after the reform were considered atypical workers (intermittent, teleworkers, outsourced and hyper-efficient). As a logical corollary to these changes, workers have begun to have access to fewer labor rights, as existing laws grant them fewer rights. The reform has provoked and continues to provoke much discussion, and its approval was met with a lack of understanding and even resistance. The changes were not consulted with labor unions and institutional entities such as the National Employment Forum. Employers' associations played a very important role in shaping the reform. The unions called two general strikes: the first, in April 2017, gathered a significant number of participants, while the second, in June, ended with a turnout far below expectations. Unfortunately, the labor unions on labor law reform have not been able to agree on a common strategy on labor law reform proposals. It is also worth mentioning that Brazil has not signed the International Labor Organization's 87<sup>th</sup> Convention on Freedom of Association and Protection of the Right to Organize.

In other words, truly atypical workers, who should be covered by protective labor law standards, continue to be socially excluded, and some workers who were previously typical workers have begun to be considered atypical (intermittent, telecommuters, outsourced and hyper-efficient). In summary, since the Labor Reform, much of what was typical has been erroneously considered atypical, and what was truly atypical employment has been excluded under current regulations. In assessing the legislative actions taken, it can be said that this is not a Labor Reform, as the structure of the existing legal order has been changed, introducing innovations that have been little seen in Brazilian, foreign and supranational legislation to date. Namely, a number of solutions have been introduced into the Brazilian legal system that threaten not only human dignity, the traditional labor relationship, collective law, the physical and mental health of the worker, but can have a negative impact on the working and natural environment, the social integration of the working class. The implemented acts pose threats even to Brazilian Labor Law and Labor Procedure.

The present presentation will focus its attention on the atypical employment relations implemented in Brazil by the Labor Reform, being them specifically: intermittent, the teleworker, the outsourced and the hyper-sufficient.

## 2. TELEWORK

At the outset, it should be noted that until the Labor Reform, although telework was not regulated in Brazil, Brazilian jurisprudence based on Art. 6 of the CLT, was uniform in recognizing the teleworker as a traditional worker. Judicial jurisprudence to date has generally been consistent in recognizing the existence of subordination in this legal relationship, recognizing the essence of off-site work and the use of telecommunications and information technology links, and not differentiating between employees who perform remote work and those who work on the employer's premises. Regarding telework, Geraldo Magela Melo points out that in the new regulation of telework, the employee is not properly protected within the framework of the contracted employment relationship. He says that there is even an effort to remove the employer's obligation to comply with the constitutional right to working time protection. This is due to the excessive and burdensome accessibility of the employee through digital links, without preserving the employer's obligation to pay accordingly, which is contrary to the principle of the social function of property, Art. 5, Section XXIII of the 1988 Constitution M. G. Melo, *O teletrabalho na CLT pós-reforma trabalhista* (Rocha, de Melo 2021, 401).

As it happens, since the Labor Reform, telework has been recognized as atypical work and therefore began to be regulated specifically in Articles 75-A through 75-E of the CLT, representing an innovation in the orbit of labor law that, instead of assigning all labor rights to this category, on the contrary, assigned only a portion of them, a true normative fragmentation. Consequently, this will result in the downgrading of the status of the worker and his rights, thus deepening the precarization of employment and social regression. Art. 75-B determines that it will be considered telework the rendering of services mainly outside the employer's premises, with the use of information and communication technologies that, due to its nature, do not constitute external work.

The presence at the employer's premises for the performance of specific activities that require the presence of the employee at the establishment does not disqualify the telework regime. Art. 75-C establishes that the rendering of services in the telework regime must be expressly stated in the individual employment agreement, which will specify the activities that will be performed by the employee. The change from the in-person regime to telework may be made, as long as there is a mutual agreement between the parties, agreed upon in the body of the contract. The change from telework to on-site work may also be made by determination of the employer, guaranteeing a minimum transition period of 15 days with a corresponding contractual amendment.

Art. 75-D regulates that the responsibility for the acquisition, maintenance or supply of technological equipment and the necessary and adequate infrastructure

for the rendering of the telework, as well as the reimbursement of expenses borne by the employee, will be provided in a written contract, and the utilities are not part of the employee's compensation. The provision of Art. 75-D brings with it the possibility of the employee bearing the costs of acquisition, maintenance or supply of equipment and of the necessary structure to work. The current regulation is completely unacceptable, as it fundamentally contradicts the very foundations of the Labor Law. Telework, like any other type of work, is subordinate work, and by the principle of alteration, it is the employer who must invest and take the risk of running his business, and all the opportunities listed in this article are exclusively dedicated to the employer.

Art. 75-E requires that the employer instructs the employees, expressly and ostentatiously, about the precautions to be taken in order to avoid diseases and accidents at work, and the employee must sign a term of responsibility committing to follow the instructions provided by the employer. Art. 62, III, excludes teleworkers from the working hours regime foreseen in the Consolidation of Labor Laws, which also means a social regression and a legal fragmentation, since it also goes against the foundations of Labor Law, removing from these workers one of the main labor rights – working hours. It is unacceptable that in the 21<sup>st</sup> century a worker can perform his activities without daily or weekly limits, and worse, because if he works beyond the limit provided by law he is not entitled to overtime due to the fact that he is not included in the working day regime. We all know that employers and companies, through computer and telematic tools, send orders, control, inspect and punish their employees. Therefore, it becomes inexplicable why teleworkers do not have specific hours of the working day, which is directly an example of labor discrimination. Truly, this is an unconstitutional device.

### 3. THE INTERMITTENT WORK

Intermittent work is regulated by Art. 443(3) of the Uniform Labor Law. It is defined as the provision of services with subordination, in a discontinuous manner, performed alternately with periods of work and idleness, defined in hours, days or months, regardless of the type of activity of the employee and employer, except for aeronauts, subject to their own regulations. Art. 452-A determines that the intermittent work contract must be executed in writing and must specifically contain the value of the work hour, which cannot be less than the hourly value of the minimum wage or that due to the other employees of the establishment performing the same function under an intermittent contract or not.

Regarding intermittent, Mauricio Godinho Delgado and Gabriela Neves Delgado point out that the intermittent labor contract, in the forms in which it has been proposed by the Labor Reform Law – if one reads the provisions literally – seems to break with two important rights and guarantees that are with the

foundations of the Labor Law: the concept of work (and travel) duration and the principles of remuneration (Delgado 2018, 162).

§ 1 regulates that the employer shall call, by any effective means of communication, for the provision of services, informing the working hours, at least three calendar days in advance; § 2 states that once the call is received, the employee will have a period of one business day to respond to the call, and in case of silence, refusal will be assumed; § 3 states that refusal of the offer does not characterize subordination for the purposes of the intermittent work contract; § 4 that if the offer to report to work is accepted, the party that does not comply, without just cause, will pay the other party a fine of 50% (fifty percent) of the remuneration that would be due, allowing for compensation within the same period of time; § 5 that the period of inactivity will not be considered time at the employer's disposal, and the worker may provide services to other contractors; § 6 that at the end of each period of service, the employee will receive immediate payment of the following I – remuneration; II – proportional vacation with the addition of one-third; III – proportional thirteenth salary; IV – remunerated weekly rest period; and V – legal additional; § 7 that the payment receipt shall contain the breakdown of the amounts paid relative to each of the installments referred to in § 6 of this article; the § 8 that the employer will collect the social security contribution and the deposit of the Severance Premium Reserve Fund, pursuant to the law, based on the amounts paid during the monthly period and will provide the employee with proof of compliance with these obligations and; the § 9 every twelve months, the employee acquires the right to use, in the twelve subsequent months, one month of vacation, during which time he/she cannot be called up to provide services for the same employer.

Although intermittent work carries the slogan of worker inclusion, the expansion of labor rights for workers who were on the margins of labor law, in reality this slogan is a false narrative, because we are observing the opposite. Workers who were previously considered traditional employees are being hired as intermittent workers after the labor reform, because this is a type of cheaper work for the employer, who benefits from the fact that the worker is covered by lower protection in terms of labor rights.

In addition, because intermittent is a mix of worker and self-employed, these workers end up accepting several invitations to provide work on the same day. Fear and the uncertainty of tomorrow cause these workers to overburden their health and personal and family lives, making sacrifices today. As a result, the mental and physical health of these workers is torn apart and vulnerable to workplace accidents, occupational diseases and psychosocial disorders.

It should also be noted that the labor rights provided for the intermittent worker fall far short of the labor rights provided for in the Constitution, thus undermining the effectiveness of the labor law itself.

#### 4. THE HYPER-SUFFICIENT

Art. 444 classifies the hyper-sufficient employee as the one who holds a higher education degree and receives a monthly salary equal to or greater than two times the maximum limit of the benefits of the General Social Security System.

The hyper-sufficient employee may freely negotiate the labor rights set forth in Art. 611-A of the CLT, which are: workday agreement, observing the constitutional limits; annual hour bank; intra-day break, respecting the minimum limit of thirty minutes for workdays longer than six hours; adherence to the Employment Savings Program (PSE), dealt with in Law no. 13. IX – remuneration for productivity, including tips received by the employee, and remuneration for individual performance; modality of recording working hours; exchange of holiday days; framing of the degree of insalubrity; extension of working hours in unhealthy environments, without prior license from the competent authorities of the Ministry of Labor; incentive prizes in goods or services, eventually granted in incentive programs and; participation in the company's profits or results.

Art. 507-A allows that in individual labor agreements whose compensation is higher than twice the maximum limit established for the benefits of the General Regime of Social Security, an arbitration clause may be agreed upon, provided that at the employee's initiative or upon his/her express agreement, under the terms foreseen in Law no. 9.307, dated September 23, 1996.

The hyper-sufficient employee is also a new employment mode that takes labor rights away from the workers, since Art. 444, sole paragraph allows this worker to negotiate individually and directly with his employer all the rights established in Art. 611-A of the CLT – which are rights negotiated only by Unions through collective bargaining. Therefore, incredible as it may seem, the rule placed in a situation of equivalence the employee who holds a college degree and receives a monthly salary equal to or higher than two times the maximum limit of the benefits of the General Regime of Social Security and the Unions, allowing both to negotiate directly with the company the 15 labor rights established in Art. 611-A of the CLT. It is clear and obvious, that unlike the Unions, the worker is the weak and individual part of the legal relationship and will always give in and negotiate his or her rights if necessary to be hired. An employee will never be hiper-sufficient in reality, being always the hyper-sufficient one. As for the hyper-sufficient Mauricio Godinho Delgado and Gabriela Neves Delgado summarize the changes made by the regulations of Art. 444 of the CLT as unreliable (Delgado 2018, 172).

## 5. THE OUTSOURCED WORKER

Until the labor law reform, Brazil had no law on outsourcing, so Precedent No. 331 of the Supreme Labor Court was the one that regulated outsourcing in Brazil. The act was intended to establish the boundaries, the possibilities of both parties to the contract, and to indicate the effects of the agreement, so as to ultimately offer due legal security to the parties. It prohibited the outsourcing of the borrowing company's core business and prohibited the presence of direct personality and subordination between an employee of the supplying company and the borrowing company. Otherwise, outsourcing would be considered illegal, and consequently the employment relationship between the employee and the borrowing company would not be recognized.

Since the Labor Reform, outsourcing has been regulated by 13.429/2017, which amended the Law No. 6.019/1974, which changed diametrically the outsourcing in Brazil, making no longer exist the possibility of illegal outsourcing. From then on, outsourcing was allowed in the main activity of the contracting company, and the outsourced employee may receive less labor rights than the employee of the contracting company, even when performing the same services.

Art. 4-A of Law 6.019/74 regulates as follows: the company that renders services to third parties is the private legal entity destined to render determined and specific services to the contracting company; and in § 1 it establishes that the service rendering company hires, remunerates and directs the work done by its workers, or subcontracts other companies to perform these services and in § 2 there is no employment relationship between the workers or partners of the service rendering companies, whatever their field of business, and the contracting company.

Art. 4-B stipulates that the following are requirements for the functioning of the third party service rendering company: I – proof of enrollment in the National Register of Legal Entities (CNPJ); II – registration with the Trade Board; III – social capital compatible with the number of employees, observing the following parameters: a) companies with up to ten employees – minimum capital of R\$ 10,000.00 (ten thousand reais); b) companies with more than ten and up to twenty employees – minimum capital of R\$ 25,000.00 (twenty-five thousand reais); c) companies with more than twenty and up to fifty employees – minimum capital of R\$ 45,000.00 (forty-five thousand reais); d) companies with more than fifty and up to one hundred employees – minimum capital of R\$ 100,000.00 (one hundred thousand reais); and e) companies with more than one hundred employees – minimum capital of R\$ 250,000.00 (two hundred and fifty thousand reais).

Art. 5-A establishes that the contracting party is the individual or legal entity that enters into a contract with a company to provide specific and determined services; § 1 determines that the contracting party is prohibited from using



workers in activities other than those that were the object of the contract with the service provider company; o § 2 that the contracted services may be performed in the physical facilities of the contracting company or in another location, by mutual agreement between the parties; o § 3 that it is the contracting company's responsibility to guarantee the safety, hygiene and health conditions of the workers, when the work is performed in its facilities or in a location previously agreed upon in the contract; o § 4 that the contracting company may extend to the service provider company's workers the same medical, ambulatory and meal services as those provided to its employees, which exist on the contractor's premises, or at a place designated by the contractor and; o § 5 that the contracting company is subsidiarily responsible for the labor obligations related to the period during which the services were provided, and the payment of the social security contributions will comply with the provisions of Art. 31 of Law no. 8.212/02; Art. 31 of Law no. 8.212, of July 24, 1991.

Art. 5-B, on the other hand, requires that the contract for the rendering of services must contain – qualification of the parties; – specification of the service to be rendered; term for performance of the service, when this is the case; the value. Therefore, Law No. 13.429/2017, which amended Law No. 6.019/1974, is truly a legal setback, because in addition to deconstructing the entire content of Precedent No. 331 of the Superior Labor Court, it allows outsourcing in the end activity of the borrowing company (illegal outsourcing), which removes the possibility of the employment relationship between the employee and the borrowing company. In addition, it legitimizes an evident discrimination, since it allows the outsourcing company's employee to receive a salary different from the salary of the employee of the company providing the service, even though both perform the same activities.

## 6. CONCLUSION

In Brazil, since the Labor Reform, the intermittent worker, telecommuter, outsourced worker and hyper-efficient worker are now considered atypical workers, with special regulations governing each type of employment contract, respectively. Despite the fact that the Labor Reform, and especially the creation of atypical employment relations have been created under the tonic that they would create more jobs, in practice this is not what happened in Brazil.

The IBGE (Brazilian Institute of Geography and Statistics) shows that unemployment in 2021 is higher than in 2017. In the quarter ending July 2021, the vacancy rate stood at 13.7%. This figure is almost two percentage points higher than the 11.8% recorded in the last quarter of 2017. In the period, the total number of unemployed rose from 12.3 million to 14.1 million. Moreover, the same IBGE shows that informality has also increased, since in the quarter ended October

2017, before the new rules, the informality rate was 40.5%. Between May and July 2021, the proportion of employed people working in informality was 40.8%. The informality rate considers: employee in the private sector without a signed work permit; domestic employee without a signed work permit; employer without CNPJ registration; self-employed without CNPJ registration and; auxiliary family worker.

Besides, legal regulation of atypical labor relations cannot create new jobs or reduce existing informal employment, as this is a task for the economy. That's where solutions that create new jobs should be sought. On the other hand, it can be said that introduced in Brazil, all these new forms of atypical labor mean legal retrocession, because the acts have caused a significant reduction in the labor rights of atypical workers. No company hires an employee, whether in a typical or atypical employment relationship, because he has fewer labor rights. What generates employment is the economy, not Labor Law. In the Brazilian case, besides the economic issue, a tax reform is also necessary, so that companies (especially small and medium-sized ones) can make investments, so that new job openings are needed.

It is also noteworthy that the atypical employment relations will hardly contribute to the great planetary challenge: the reduction of carbon emissions. Considering that the atypical employment relationships carry with them access to fewer labor rights than the typical employment relationship, and at the same time a hybrid autonomy, it ends up that these employees assume some of the risk of the legal business and due to their economic fragility they cannot afford to acquire modern equipment that can contribute to the clean economy and green jobs through machines that use renewable energy.

In addition to what has been demonstrated, it is also mentioned that the atypical employment relationships, generally, end up being instruments of social and economic dumping, giving rise to unfair competition, which concomitantly harm the State (in tax collection), the other companies that comply with all labor and tax norms (and therefore sell their products more expensively and consequently less quantity) and all of society that, in this context, has access to fewer public services.

Finally, it should be noted that, to everyone's surprise, instead of the Labor Reform regulating the true atypical workers (workers in digital platforms and applications), meaning an expansionist movement of Labor Law, it considered as atypical, the intermittent, the telework, the outsourced and the hyper-sufficient, removing labor rights that were previously intended for them.

In other words, the true atypical workers that should be included in the labor archetype continued to be socially excluded and the workers that many considered typical employees began to be considered atypical (the intermittent, the telecommuter, the outsourced and the hyper-sufficient). Labour law reform introduces legal mechanisms to make the following more flexible: leave,

termination of employment, work breaks, part-time work. New forms of work in Brazil have paved the way for this general labour reform, which affects all workers. Changes in atypical forms of employment unfortunately have affected the standards of working conditions for all workers.

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