

EMPLOYMENT ISSUES ARISING FROM INTERNAL INVESTIGATIONS

Over the past few years Brazilian companies have been scrutinized more than ever and, accordingly, the need for effective policies ensuring compliance with legal obligations and ethical standards has grown significantly.

This situation is the result of two main factors: the so-called Car Wash Operation, which started in 2014 and triggered investigations on bribery, money laundering and other illegal schemes in several sectors of the economy; and the Clean Company Act, which entered into effect in 2014 and holds companies liable, regardless of fault, for corruption practices of their employees. Under this Law, companies may enter into leniency agreements with authorities and integrity programs are a mitigating factor in the imposition of sanctions.

As a consequence, internal investigations have been increasingly carried out in companies of all sizes and lines of business.

As these probes are relatively new in the Brazilian corporate culture, companies may face resistance and discomfort on the part of employees in relation to proceedings such as formal interviews and requests for providing information about documents and communication exchanged through professional devices.

In addition, Brazilian employment law is strict, labor lawsuits are frequent and labor courts have traditionally adopted a worker-protective line of judgment. Thus, internal investigations shall be conducted carefully to avoid the undue exposure of employees participating as witnesses, as well of those who are subject matter of investigations.

The conduction of internal investigations involving employees is not governed by specific regulation, but rather by general patterns such as the obligations of an employment relationship and the constitutional principles of inviolability of privacy, private life, honor and image.

Employment contracts are ruled by the general principle of good faith, which imposes on the parties the duties of loyalty, information and mutual respect. Moreover, under the power of direction the employer may define and supervise employees' activities, require compliance with its rules and impose disciplinary measures.

Accordingly, employees shall cooperate with their employers and may be requested to participate in formal interviews to clarify the content of documents duly obtained from professional devices and to disclose information on the activities they perform.

Before questioning begins, the employee shall be duly informed that the investigators represent the company and that, although the investigation shall be maintained confidential, the facts

reported by them may be disclosed to authorities or third parties at the company's discretion. The signature of an "Upjohn warning" in writing is not mandatory but it may be recommended to be used as future evidence in lawsuits that may arise in connection with the matter at hand.

Interviews shall be conducted in a comfortable environment and with civility. Although the statements by employees may be confronted with contrary evidences, they shall not be embarrassed or demeaned, nor obliged to reveal facts that imply involuntary self-incrimination.

In exceptional situations, employees may be imposed a temporary leave to preserve evidences and restrict their contact with other witnesses. This leave, however, shall last the minimum reasonable time necessary to conclude the investigations.

Brazilian labor case law usually holds that conducting internal investigations is a right of the employer, who assumes the risks of the business. However, long-lasting examinations that unduly expose employees or submit them to unjustified interrogations may be deemed abusive.

Violations of individual rights of employees who have participated in an internal investigation or whose acts were under investigation may subject the relevant company to the payment of indemnities for pain and suffering (moral damages).

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