

Insight

IN-DEPTH DISCUSSION

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New Rules for Tipped Employees in Brazil and How They Affect the Hospitality Industry

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On March 13, 2017, Brazil's President Michel Temer signed into law new regulations concerning the payment, distribution, tax withholdings, and reporting of tips, whether voluntarily given by customers or charged by employers as a service fee. The law will become effective on May 14, 2017.

Until now, there were no statutory regulations concerning tips in Brazil. Tipped wages are mentioned under section 457 of the Labor Code, but only to indicate that tips constitute part of the compensation of an employee. That provision explains that tips include the amounts provided spontaneously by a customer to an employee or those charged by the employer as a surcharge to the client's expenses, to be distributed among the employees.

With the lack of legislative guidance, the labor courts reasoned that that tips must be considered part of the compensation, but not salary.¹ As a result, the courts included tip amounts as part of an employee's compensation for purposes of calculating vacation pay, 13th salary,² and contributions to the unemployment fund ("FGTS"). Tips were not, however, included in the calculation for any notice of termination, overtime, paid rest days and nighttime premium.

In addition to these court opinions, employers often have been bound to the terms of a collective bargaining agreement ("CBA"), either executed by the local employer association representing employers of the hospitality industry in the region and the respective union representing the employees of those employers, or executed directly by and between the employer and the union.

1 An analogy can be made here with the biological classification system of genus and species: under Brazilian law, "compensation" is the genus and "salary" is a species of that genus. This Brazilian distinction is relevant for wage and hour purposes, as well as specific constitutional rights and statute of limitations.

2 In Brazil, employees receive an additional month of salary, known as the 13th salary. The 13th salary is paid out in two installments, one in or before November and the other in December, shortly before Christmas.

Some stronger unions, such as the São Paulo union, had for years regulated the collection, distribution, and payment of tips through such CBAs. But other unions in other parts of the country were less active, and, therefore, there has been substantial disparity in regulations and enforcement on the treatment of tipped wages.

With the new law, the unions will still have a significant role in setting the parameters, but the law sets minimum requirements and also increases the power held by employees.

In a nutshell, the new law provides the following clarifications:

1. Tips are not revenue of the employer but are exclusively for the employees and will be distributed based on criteria established by a CBA.
2. If there is no CBA, the criteria for sharing and distributing the tips, and the percentage of the tip amounts that may be withheld for payroll taxes, will be determined by a vote of the employees in a general assembly called for that purpose.
3. Employers that charge service fees (tips) will be allowed to withhold (a) up to 20% of the amount charged, as determined by a CBA, for covering payroll taxes (income tax and social security contributions) and the costs of integrating the tips into the employees' compensation (vacation, 13th salary and FGTS), if the employer uses the simplified tax system; or (b) up to 33%, if the employer uses the general tax system.
4. If the tip is paid directly by the customer to the employee, the criteria for sharing and distributing the tips will be set forth in a CBA, and it may include the withholding mentioned above.
5. Employers must record on the employees' Employment and Social Security Booklet (CTPS) their fixed salary and the average of tips received in the last 12 months.
6. If the employer ceases to charge service fees to customers, after doing so for at least 12 months, the average tip paid to the employee for the past 12 months must be incorporated into the employee's fixed base salary, except as otherwise provided by the CBA.
7. Employers with over 60 employees must have an employee committee, formed per the terms of the CBA, to oversee the collection and distribution of the tips. The committee members will be elected by vote during an employee general assembly, called by the union specifically for this purpose, and will have job stability (i.e., they cannot be fired without cause). Employers with less than 60 employees will be bound to a union committee formed for the same purpose, but the rules do not specify who shall be part of that committee (we assume employees from different companies and/or union officers), how they will be elected and for how long, and the extent of their power to review/audit the distribution of tips.
8. If the employer breaches any of these regulations, it will pay to the affected employee a penalty equivalent to 1/30th of the average of tips for each day of delay, up to the minimum monthly wage for that bargaining unit, subject to any defense by the employer. The penalty may be tripled if the employer breaches the law again during a 12-month period, and if such breach lasts over 60 days.

With the new law, employers that use the general tax system and charge customers a service fee may lose the opportunity to recoup some of their expenses for payroll taxes and other costs associated with the distribution of the tip. For example, in São Paulo, the hospitality industry is entitled to a 35% withholding under the current CBAs, which the new law will cap at 33%. However, these employers will at least have their obligations based on actual tips paid.

The new law did not address a common practice that affects employers that do not charge service fees from their clients. Many unions impose an estimated monthly tip for each category of employees³ in the industry they represent, regardless of whether such tips reflect the reality of each employer. In that case, employers must make withholdings and pay contributions and benefits based on the tips artificially set by the unions. Unions, such as the one in São Paulo, have even set annual increases on the value of the estimated monthly tips in excess of 30%, which is incompatible with the reality of the economy. While these practices remain unchecked, the new regulations nonetheless should add clarity and consistency for the compensation of tipped employees in Brazil, particularly for employers that charge service fees.

³ E.g., bartenders, waiters, cooks, receptionists, messengers, porters, housekeepers, maintenance workers, etc.