ACC DOCKET
INFORMED. INDISPENSABLE. IN-HOUSE.

Ten Rules on Equal Pay in Brazil

Employment and Labor

Brazilian law requires “equal pay for equal work” and provides that all employees are to be protected under this law, regardless of age, sex, race, or other protected status.The Brazilian Federal Constitution provides, as one of the fundamental rights, that all individuals are equal before the law,

and prohibits any difference in wages, performance of duties, and admission criteria based on sex, age, color, or marital status, and prohibits any distinction between manual, technical, and intellectual work, or among their professionals.

The Brazilian Labor Code (CLT) sets the main parameters for equal pay in article 461. This article establishes the general rule that, when workers' functions are identical, provide equal value, and are provided to the same employer at the same locality, the workers shall be compensated with equal salary, regardless of sex, nationality, or age. The article then clarifies that work is considered to be of equal value if it is performed with equal productivity and with the same "technical excellence" by individuals whose difference in length of service is not more than two years. This article will not, however, apply when the employer has its staff organized in a formal career plan. Also, an employee who, due to a mental or physical disability, performs a new function during a rehabilitation period cannot be used for comparison.

The Brazilian labor courts have defined and expanded the rights and exceptions applicable to "equal pay for equal work," making this a concept that continues to evolve.

This article discusses the 10 basic rules about equal pay established by the Superior Labor Court.

The 10 Rules

The Superior Labor Court, the highest labor court in Brazil, regularly consolidates its understandings in abridgments called "Sumulas." In Súmulas #6, the Superior Labor Court, consolidated its understanding of the equal pay law's rules and exceptions, addressing the topic in 10 items.

Súmula 6: Equal Pay - Art. 461 Of CLT

1. A career plan is only valid when it is ratified by the Ministry of Labor, except for the career plans of government entities and semi-governmental agencies.

A career plan sets a detailed organizational structure of positions, duties and salary, usually with several levels of seniority and merit milestones for employees to achieve during their tenure. However, to be valid it must be ratified by the labor authorities.

Many companies, however, prefer not to adopt a registered career plan to maintain flexibility in their promotion decisions.

2. For the purpose of salary pairing for equal work, the length of service should be in the job function, not in the length of employment.

The requirements for equal pay do not apply if one employee has been performing the job function for more than two years longer than the other employee. The Superior Labor Court in this Sumula clarifies that the two- year period relates to the period of time spent performing the same function, not from when the employment started.

For instance, let's say that John was hired Jan. 1, 2012, to sweep floors and was promoted to stamp buttons on Jan. 1, 2015. His salary is $400 per week. George was hired on June 1, 2015 to stamp buttons. By law, George's salary should be $400 per week, unless one of the other exceptions applies, because John has only been performing this stamp button function for six months (i.e., less

than two years) before George arrived.

This rule is particularly problematic when you have a period of great profits and salaries are high, followed by a period of economic crisis that leads to attempts to restructure and reduce labor costs. Under this rule, generally you could not hire George for $200 per week, even if he were to agree to the lower salary.

3. Equal Pay is only possible if the employee and his peer execute the same function and perform the same tasks, regardless whether their positions have the same title.

This rule is intended to curb the proliferation of job titles in order to suggest differences in tasks and functions. Creating different job titles with different job descriptions will not necessarily be sufficient to prove that two employees were not required to have the same salary.

4. It is not required that at the time of the filing of a claim for equal pay, the claimant and peer still work for the employer, as long as the claim relates to a previous simultaneous situation.

Most employees will not complain about differences in salary until they are terminated. Therefore, quite often the employee and/or peer will no longer be employed and performing the function in question at the time of the claim. The courts understand this is irrelevant and will focus only on the period when both were performing the same function.

5. The assignment of employees to another entity does not exclude the equal pay obligations, even if the function is performed at a governmental entity unrelated to the assigning company, if the assigning company pays the salaries of the peer and claimant.

This rule looks at who is responsible for the claimant's and peer employee's salaries. If the same entity continues to be responsible for the employees in question even after the employees are assigned to another entity, the salary comparison is still possible. This issue often occurs with governmental and semi-governmental entities, which have strict rules requiring that employees be hired exclusively through a public contest and, therefore, sometimes borrow employees from other entities without transferring the employee to their own payroll.

6. The requirements of article 461 of CLT apply even if the pay disparity originates from a judicial decision that benefited the peer, unless it resulted from a personal advantage or is based on a judicial decision that was superseded by a superior court's jurisprudence.

Furthermore, if the judicial decision was based on an equal pay claim or a sequence of equal pay claims, the employer must provide facts that modify, impede, or terminate the right to equal pay in relation to the remote peer in the chain, other than the two-year period rule.

This topic encompasses two important components of the equal pay rules. The first is that equal pay disparities may sometimes be created by court order. An employee (or former employee) who might have his salary history revised by a court's ruling may subsequently be used as the comparing peer in another employee's equal pay claim. That the claimant's peer has (or had) a higher salary because of a court order does not per se render the comparison unfair.

The second part of this rule provides exceptions that prevent reference to a higher salary that results from a court order as a comparison and also provides limitations to those exceptions. The exception list includes situations where the peer gained a personal advantage through court order or when the

employer can prove that the then-right to equal pay of the remote peer would no longer exist.

One of the consequences of the innumerable claims for equal pay is the creation of chains of equal pay claimants who performed the same function (with the same productivity and technical quality) for the same employer in the same locality. Each new claimant ben- efits from the court decision of the last claimant (but for the exceptions). The most recent adjustment by the Superior Labor Court of its understanding about this matter is that it is not relevant to the analysis of equal pay for equal work that the remote peer (e.g., the first peer to get a salary correction by court order) was not working with the claimant in the same function, within the two-year require- ment established by article 461. Only the immediate peer (i.e., the last peer on the chain before the claimant) must have been performing the same function within two years of the claimant, so there is no limit to how far back the chain can go (assuming no other exceptions apply).

7. It is possible that equal pay for intellectual work which can be evaluated by objective criteria for its "technical excellence" will be subject to the requirements of article 461of CLT.

This is one of the most relevant points for the services industry where most work done by employees involves some degree of intellectual work, which is quite difficult to evaluate objectively. Employers have the burden of demonstrating that there is a considerable gap in the technical aspects of their performance between the work done by the claimant and that done by his/her peer that renders the difference in salary acceptable.

Quite often, foreign companies operating in Brazil are under the incorrect impression that an individual who has more education and/or experience (based on years of service) automatically justifies the payment of unequal wages for two employees who perform essentially the same tasks. The employer must demonstrate there was a significant difference in the quality and technical expertise of the services provided by the higher-paid employee to justify the difference in wages.

8. The employer has the burden proving alleged facts that impede, modify or extinguish the right to equal pay.

When an employee claims unequal salary, he or she must show the claimant and the peer employee performed the same tasks or function, which is usually successfully done through witnesses. It then falls on the employer to show any fact that may block, modify, or destroy that presumption. The standard of proof is, of course, hard to meet, especially if there is little to differentiate the work actually done.

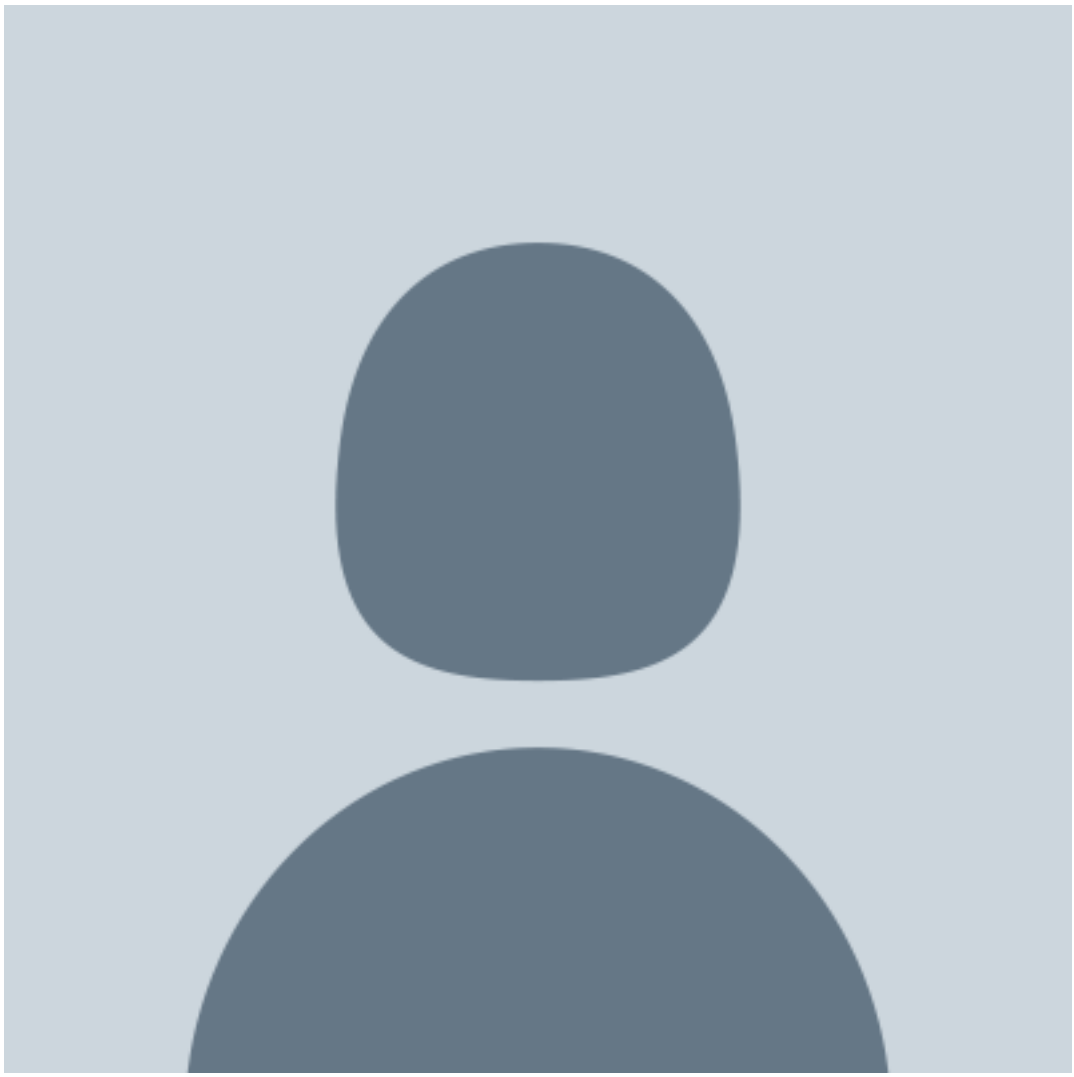
9. For an equal pay claim, the statute of limitation applies partially, and only reaches salary differences owed during the five-year period before the filing of the claim.

The look-back period for an equal pay claim is the same as for other employment rights: five years before filing the claim. Employees also are required to file any employment-related claim within two years following the date of their termination of employment.

10. "Same locality" under article 461 of the CLT refers, in principle, to the same municipality, or distinct municipalities that belong to the same metropolitan region.

There is a presumption that it wouldn't be justifiable to have employees with different salaries performing the same functions in the same metropolitan area, even if they worked in two offices located in two separate municipalities.

Renata Neeser



Shareholder

Littler Mendelson P.C., New York