Overview Of Health And Safety At Work In Brazil

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Abstract: This article showcases the author researches both as a labor law professor and as a labor judge and therefore presents an overview of the health, hygiene and safety at work in the Brazilian legal system. It describes the occasional initiatives throughout the twentieth century until the great reform of 1978, in which the permanent foundations were laid to this day. The great reform came into force under extraordinary circumstances as long as many tripartite efforts were provided throughout one year of debates and consistent proposals by employees unions, employers associations and governamental entities as well. There is doubt about the relevance of the adopted model, which favors ministerial ordinances over ordinary laws, but the essentially technical character of the norms usually justifies their treatment at ministerial level. General updating of norms – irrespectively of the scientifical area such as chemical levels, biological components or heat and noise exposure – is an urgency noted by many scholars, especially when we remember that the reform will reach 40 years of existence by 2018.

Key words: occupational health - occupational hygiene - Ordinance 3214/1978 - labor law - Brazilian legislation

Historical evolution of Brazilian legislation. The Consolidation of the Labor Laws (1943), whose original wording was not particularly emphatic regarding health and safety at work, was largely overhauled, in particular, by Law 6.514, dated of December 22th, 1977. This is a historical milestone in the evolution of

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health and safety at work in Brazil. The drafting of this norm, the result of a consensus among employees, employers and public authorities, occurred synchronously to the elaboration of the technical texts that carefully mapped such different topics as noise, extreme temperatures, medical examinations and election of representatives to internal committees. That is how we had a very rich biennium for the discipline of health and safety, with the enactment of the law in 1977 and the ministerial ordinance edition with more than 600 pages in the year 1978. We will reflect a little on the legislative amendment of 1977.

Earliest beginnings. Prior to 1977, efforts for health and safety at work were sparse. In 1923, the Inspection of Industrial and Professional Hygiene was created. In 1940, when establishing guidelines on the minimum wage, the Decree-Law 2.162 mentions the payment of additional health insurance, which would nevertheless cease to be part of the Labor Code in 1943. Ministerial Order of 1965 laid down noise levels, temperature and chemical agents. The well-known Decree-Law 229/1967 refers to the Specialized Service in Engineering and Occupational Medicine. Although isolated, the norms began to gain consistency and formed the basis for definitively establishing a public body dedicated exclusively to the theme: this was how Fundacentro was created, by Law 5.161/1966, with statute approved by Decree 62.172/1968 and functioning in 1969, being essentially tripartite, with representatives of workers, employers and public authorities, and dedicated to the study and development of health and safety conditions at work. It is a body linked to the Ministry of Labor and Employment. It had its denomination altered by the Law 6.618/1978, in order to honor one of its creators: it appeared, then, the name that made it well-known, Foundation Jorge Duprat Figueiredo of Safety and Medicine of the Work, leaving aside the original nomenclature, National

Foundation Center for Safety, Hygiene and Occupational Medicine.

Effects of Law 6.514/1977. Since Fundacentro was established in São Paulo and studies of health and safety at work increased, adequate conditions were created for a broad legislative revision of the discipline. In a short period of time, it was possible to elaborate and approve the Law 6.514/ 1977 and, subsequently, publish the immense Ministerial Ordinance 3.214/1978, of great scope, regulating the health and safety at work positions in Brazil in the coming decades. The Ministerial Ordinance 3.214/1978, of the Ministry of Labor and Employment, names each one of its annexes a "Regulatory Norm", an expression that was not included in the manuals of the legislative process, but which found great acceptance by society, popularizing the use of the abbreviation "NR". For a layman, it seems that the "NR" has a life of its own and is an ordinary law, barely knowing that as a Ministerial Ordinance Annex is often relegated to ignorance or contempt, despite the rich content that conveys. So, for example, telemarketers refer naturally to the "NR 17", occupational hygienists address to "NR 9", engineers discuss the explosives and flammable of "NR 16" and so on.

The 1977 Reform. Among other provisions, the 1977 legislative reform rewrote the art. 155 of the Labor Code in order to assign to the "national body competent in matters of occupational safety and health" the task of establishing norms on the application of the provisions of that chapter of the Labor Code, an attribution that will be recalled by several other articles of the same chapter. In fact, there will be eighteen other citations to the Ministry of Labor, which is responsible for regulating the functioning of the Commissions for the Prevention of Accidents (article 163), disposing of protective equipment (article 167) and medical examinations (art. 168), as well as to

prepare lists of unhealthy elements (article 192) and dangerous ones (article 193). The Labor Code reform undertaken in 1977 was also in line with the supervening environmental legislation, such as Law 6. 938/1981, which establishes the National Environmental Policy. As a historical reference, it is worth noting the late implementation of a National Health and Safety Policy, described in Dec. 7. 602/2011 - which, in turn, expressly evokes ILO Convention 155 as it validity basis. Three major practical issues stand out: a) legal bases for the edition of labor law norms by the Ministry of Labor, over the legislature; b) possibility or not of executing a collective bargaining on occupational health and safety matter; and (c) the exact scope of the term "safety at work". Let us face the challenges separately.

Scope of the normative power of the Ministry of Labor and Employment. It is questioned whether the Ministry of Labor is authorized to legislate on matters related to occupational safety. Was the Executive Power usurping its powers by holding the almost monopoly of occupational safety legislation in Brazil? Given the issue in a hurried way, one could object against the powers attributed to the Minister of Labor, because only the Union could legislate on labor matters, as required by art. 22, I, of CF/1988. The Union did not relinquish this prerogative, and effectively did so, by promulgating extensive labor legislation led by the Consolidation of Labor Laws itself. However, the Brazilian legislative process contemplates the figure of the Regulation as a way of assigning to the Executive Power, by express authorization of the Legislative Power, the complement of certain technical details that the law may have lacked or may not have been considered adequate for that moment of the formation of the norm.

Scope of the Executive Power: issuance of Presidential Decrees. The most

widely used form of Regulation is certainly the Presidential Decree, which as a rule accompanies practically all labor laws. The exception is the Consolidation of Labor Laws, which was not accompanied by presidential decree. Recently, however, the chapter on protecting the work of the under eighteen year old was rewritten by Law 10.097, of 19.12.2000 (Apprentice Law, as it was called), which, exceptionally, is added to Decree 5.598, of 01.12. 2005.

Consignment Expedition. It reinforces the argument in favor of regulation via the Ministry of Labor, art. 87, sole paragraph II, of the Federal Constitution of 1988, authorizing it to submit regulations for the operationalization of laws and decrees. This is how the vast field of legislative action of the Ministry of Labor is justified, thanks to the publication of general laws, which only delegate to that body the task of detailing the norm. Because it is a highly specialized matter involving thorough knowledge of chemicals and biological agents, this delegation of legislative powers to an auxiliary body of the Executive Power is usually tolerated. The difficulty lies in knowing what the limits are for the Minister of Labor, since he either fixes additional levels of insalubrity or establishes working days and intercalated pauses, as is observed in Regulatory Norm 17, all on the grounds of extending the prevention of fatigue and combating occupational disease.

Protagonism of Ministerial Ordinance 3.214/1978. In order to regulate Law 6.514/1977, the ministerial order model was adopted. There are numerous references to the need to issue a decree along this law, with expressions such as "supplementary instructions to be issued by the Ministry of Labor" (article 168 of the Labor Code), "and the Ministry of Labor ... may set limits (article 198, sole paragraph), or "limits of tolerance established by the Ministry of

Labor" (article 192), not including the complex art. 200, which determines to the ministerial body the discipline of complementary dispositions alluding to "peculiarities of each activity or sector of work". In order to carry out the task, the Ministry of Labor and Employment, with the support of Fundacentro, created Ministerial Ordinance 3.214/1978, with 28 annexes, named regulatory norms, capable of covering all subjects. The virtue of this system lies in the facilitation of access to information, clarifying the provisions and avoiding the disagreement about what is and is not in force - whether for the implementation of measures in the work environment or not to disrupt the process of labor inspection. Hence the criticism of the possible hypertrophy of the norms, and care must be taken to ensure that the ideal laid down by the 1977/1978 norms is preserved, i. e. possible technological innovations and the discovery of new environmental and operational risks can and should be included in the of the same 28 NRs of 1978, avoiding the pulverization in new disconnected ministerial ordinances.

Extension of NRs: in search of balance. The good organization of health and safety at work norms justifies the systematization undertaken by Ministerial Ordinance 3.214/1978, written in a short time with the help of engineers, doctors, occupational hygienists and other professionals of the Fundacentro of that time, presenting the following aspects:

Universality of the application. The NRs are intended for all working environments in Brazil, avoiding the setting of values and premises that could not be measured by laboratories outside large urban centers.

Uniformity of themes. NRs have sought to cover all major occupational health and safety issues, from general topics (medical examinations, internal

accident prevention commission, specialized services) to specific topics (limits of tolerance to physical and chemical agents, concentration of explosives and flammable, furniture design).

Periodic review. NRs call for periodic updating to address scientific advances (medical findings, changes in tolerance levels) and to include new economic activities and new production processes. The requirement of item 8.3 of ILO Convention 148, ratified by Brazil, is crystal clear: "Criteria and exposure limits should be set, completed and reviewed at regular intervals in accordance with national and international knowledge and data (…) ". The biennial review seems to be more appropriate, but it was not carried out, despite the expectations generated in 1980 and 1982. Some issues ignored by NRs can be found in the Occupational Hygiene Norms (NHO), formerly known as Occupational Hygiene Norms, developed by Fundacentro as an update. Although these do not have normative force, these serve as basis to measure the degree of the outdatedness of NRs and instigate studies. Although the inertia of the legislator during the decades that followed has been disheartening, there has been a movement favorable to the periodic updating, with the insertion of texts, as was the case of telemarketing operators and supermarket cashiers (Annexes I and II to NR 17), the limits on the use of benzene (Annex 13-A to NR 15), among others. Aside from this, the Ministry of Labor and Employment adopted the understanding that other NRs could be edited, apart from the original 28, in order to contemplate specific professions and activities, such as the activity in refrigerators, hospitals, the shipbuilding industry and the like. It is not the perfect system, because it can lead to hypertrophy of the rules, but at least it has the virtue of maintaining the immediacy for some topics.

Opening for other systems. NRs necessarily have to admit the fallibility of their system and the inadequacy of their postulates in the face of such a colossal matter as the balance of the working environment and the interaction of man with machines, equipment and physical and chemical agents. For example:

- Instead of legislating on the maintenance of air conditioners, the regulations for Resolution 9/2003 of the National Health Surveillance Agency (Anvisa), according to Annex II of NR 17, item 4.3.b ("sick building syndrome ");

- Instead of normalizing the worker's exposure to radioactive elements, a direct mention is made of the positions of the National Nuclear Energy Commission (CNEN), in NR 15, annex 5;

- Instead of a regulation on comfortable lighting levels in the workplace, it was chosen to adopt the standards registered by the Brazilian Institute of Weights and Measures (Inmetro), as stated in NR 17, item 17.5.3.3; (NBR ISO / IEC 8995-1: 2013), without prejudice to its application to labor law.

- The regulations of the Brazilian Association of Technical Norms (ABNT) are mentioned in several passages, as in NR 10 (Annex II, item 5, training for electrical installations) and in NR 22 (item 22.8.1, use of continuous conveyors through of strap);

- a Brazilian system of colors and symbols for the labeling of

chemicals was abandoned, adhering to the United Nations Globally Harmonized System of Classification and Labeling of Chemicals (GHS) (NR 26, item 26.2.1), and so on.

Use of collective bargaining in occupational health and safety. Another very important question concerns the feasibility or not of executing collective labor agreements or agreements. Is the issue of health and safety at work outside the field of collective bargaining? There is strong case law of the Higher Labor Court removing occupational safety from the scope of collective norms on the ground that there is a hard core of labor law, inflexible to negotiation. The issue is rather controversial. On the one hand, it is argued that collective bargaining was expressly recognized as a valid and desired form of conflict resolution, by art. 7, XXVI, and by art. 114, paragraph 1st, both of the Constitution of 1988. It is also argued that art. 7 authorizes the collective norm to reduce the employee's wages, which corresponds to one of the most relevant items of an employment relationship, where it would be reasonable to conclude that, therefore, other items referred to as "minor" in the context of a could and should be released for simple trade union bargaining.

Limitation to collective bargaining in occupational health. However, in matters of constitutional law, it is not always correct to apply the forms of interpretation of ordinary laws, such as the "who can do more, the least also can." Even if the Constitution did not claim a particular interpretation - for example, equipping its devices as effectively as possible and calling on the interpreter to make a systematic reading of its entire spectrum - it would be rash enough to say that health is a "minor" when compared to wages, that would be a "bigger" topic. This is how the understanding that the collective

norm is allowed to improve working conditions in almost all labor matters, such as extra hours, night hours, basic food, stabilities, etc., has taken on greater importance, provided that it is maintained away from the field of health and safety at work. Therefore, a Collective Convention could not dispose of the supply of protection equipment because it is a cogeneration norm that is not subject to change by the parties' will, nor does it change the limits of tolerance to noise, heat or cold levels, to remain only in two cases.

Casuistry: the question of the interval for a meal. Emblematic example appears in Formula 437 of the Higher Labor Court, which considers the interval for meal and rest of one hour, as it appears in art. 71 of the Labor Code, as a matter that cannot be negotiated collectively. One might suppose that the interval for meal and rest is merely a form of brief rest or a way of obtaining overtime payment in case of its violation, but an even broader understanding enshrined by associating the interval for meal and rest as an important mechanism for occupational safety. Those who enjoy the break have lower chances of accidents than those who were deprived of food. The pause assists in increasing productivity, while breach of the interval is usually associated with the drop in employee productivity ratios. The inclusion of the interval for meal and rest in the list of infrequent matters to collective bargaining should have caused astonishment, but it was not done without criterion, because it was based correctly on the association of rest with the prevention of fatigue and other deleterious effects of the work.

Casuistry: reference to collective bargaining in the NRs. On the other hand, there are several examples of the possibility of collective bargaining around occupational health, hygiene and safety issues, which are scattered in the regulatory norms that discipline the matter. It is not, of course, the use of

collective norms to aggravate the employee's situation in exchange for some financial compensation, but clearly the use of the power of the normative instrument to achieve generic norms to meet the specificities of each work environment. A prominent example appears in Regulatory Norm 9 (NR 9), namely in the ambit of the Program for the Prevention of Environmental Risks (PPRA). Section 9.3.5.1.c of NR 9 expressly provides that trade unions may stipulate tolerance limits that are more beneficial than those provided for in occupational hygiene legislation (for example, lower levels of noise, warmer temperatures, etc.) or, (e.g. chemical elements not yet cataloged by the norms). References to the desired participation of union entities also appear in the following norms:

- NR 7 (item 7.1.2, on the frequency of medical examinations),
- NR 17 (Annex 2, item 4. 3. c, for verification of air quality standards in buildings) and
- NR 31 (item 31.5, on medical examinations of rural workers), among others, always with the purpose of increasing and adapting occupational health and safety postures to the environment in which the activity takes place.

Scope of the term health and safety of work. Simultaneously with the study of the limits of collective bargaining, the question arises as to the exact meaning of the term health and safety at work. After all, is safety only physical protection, such as the use of helmets and boots, or does it also cover the right to rest, sleep, and food? It is not a matter here of discussing whether the word safety is more or less effective for matter than the word health or

hygiene. In the previous version of the Labor Code, Chapter V of Title II was called Occupational Safety and Health, until Law 6.514, dated 12.22.1977, restructured the issue and began to forge the subject in ocupational safety, represented by topics related to operational risks, and occupational health, reflecting employee health and the relationship between man and the environment. It is, on the contrary, to discuss the scope of this study, regardless of its nomenclature.

In search of a concept. If occupational safety deserves an expansive interpretation, including in the modules of the working hours, lunch and sleep intervals, restriction of repetitive movements and other issues related to the comfort of the worker, we will have as consequence a greater performance of the Ministry of Labor , to whom the ordinary legislator has delegated competence to regulate the matter, and at the same time the lesser performance of the trade union entities, on the ground that the jurisprudence of the Higher Labor Court indicates that collective bargaining with issues inherent to safety and health is incompatible. Thus, the high relevance of the concept of occupational safety is justified. To follow the clues left by the Consolidation of Labor Laws, the concept tends to be restrictive, because its fifth chapter, covering arts. 154 to 201, is primarily aimed at matters related to protective equipment, Accident Prevention Commission, prevention of muscle fatigue, maximum noise levels, humidity, temperature and other forms of comfort in strict sense.

Dynamic interpretation. However, it is moving towards a more dynamic and comprehensive interpretation of occupational safety, because a safe environment can suddenly become unsustainable if operated by unprepared or malnourished people. Hence the High Court of Labor's success in attracting

to the field of health also the theme of the intra-bundle interval - and, like him, the various types of intervals, especially those destined for muscular rest, as set forth in arts. 72, 227 and 253 of the Labor Code. This broader understanding of work safety, which can simultaneously cover the study of the physical and chemical comfort of the work environment, but also the need to limit working hours and fix pauses to energize energies, justifies the concern of the Ministry of Labor in terms of ergonomics. NR 17 (an integral part of the aforementioned Ordinance 3.214 / 1978), which originally only included dispositions on furniture suitable for work, today brings dozens of technical specifications on the number of touches of a typist on the keyboard, prohibition of productivity goals in situations of effort repetitive work, travel restrictions, additional breaks for some occupations such as telesales operator and supermarket box operator and even references about the right to toilet in the course of the working hours. The minutia of occupational health has already reached this point. It is a path with no return.

Tripartite structure associated with health and safety at work. At the same time, the tripartite structure for the development of health and safety at work should be observed. In this field, the efforts of the public authorities, the employers and the employees. As already mentioned, Fundacentro, the body of the Ministry of Labor and Employment dedicated to the study and research on health and safety at work, has always been conceived with a tripartite nature, as a pioneer. Tripartism is not immune to criticism, as it may hinder the development of some studies, because of a lack of consensus between capital and labor, as can happen when accreditation or revision of personal protective equipment (item 6.4.1, NR 6). However, it cannot be denied that tripartism is an essential feature of various labor decision-making bodies, starting with the very structure of the International Labor Organization. It

would therefore be no different in the field of occupational health and safety. Aside from the tripartite structure envisaged for most collegial bodies, there is also a clear reference to the need for collaboration between employees, employers and public authorities as the only way to improve health and safety at work.

Employees and employers. From the employees, art. 158 requires collaboration, but if this does not come spontaneously, the sole paragraph warns that the unjustified refusal to comply with instructions issued by the employer (item "a") or the use of personal protective equipment (point "b"). In fact, failure to comply with the employer's orders would already be enough for the configuration of the just causes known by the expressions insubordination, when the noncompliance refers to the general norms of the company, and indiscipline, when contempt turns especially to some orientation of the hierarchical superior. However, the legislator wanted to further strengthen the relevance of compliance with safety norms and particularly the need to use protective equipment, even if these are uncomfortable or uncomfortable, thus justifying the creation of a just cause outside the limits of art. 482 of the Labor Code. From the employers, art. 157 urges them to comply with safety norms and occupational medicine, guidance to employees and constant concern with precautions to be taken in the environment.

The role of public authorities. From the public authorities, the highlight is the work of the Regional Superintendencies of Labor. While the Department of Occupational Safety and Health coordinates the regulation of the matter, the inspection and compliance of these norms require the establishment of a network of auditors spread throughout Brazil, given the need for visits to the

workplace and the promotion of understandings sectoral. This task is removed by the system of Regional Superintendence of Labor, presented by art. 156 of the Labor Code. Among other important functions, the Regional Superintendencies should visit 100% of new projects, as an indispensable condition for operating authorization. So it is still up to date from the writing of arts. 160 et seq. of the Labor Code, and the inspection must be repeated whenever there is a substantial change in movable or immovable property (article 160, § 1). The term "substantial change" shall be understood as a change in operational risks, regardless of the area covered.

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