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TEMA 3 OCCUPATIONAL RISK : SOCIAL PROTECTION AND EMPLOYER'S LIABILITY

BRAZIL

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I – GENERAL QUESTIONS

Briefly describing, one can state that the Brazilian legal system of protection from occupational risk, includes: i - the existence of a compulsory public insurance system, devoted to prevent accidents and provide pre-fixed damages for labor injuries; ii - the legal possibility of a simultaneous civil conviction of the employer to full compensation, in case of injuries at work caused by his or hers fault and - iii – the public supervision and inspection concerning the adoption of measures for risk prevention.

The legal duty to provide insurance regarding occupational risk was originally established in Brazil by means of the Federal Act n. 3.742 from 15.1.1919, which adressed to employers the obligation of contracting private insurance in order to face occupational damages. At the beginning, the existence of a private insurance avoided employers from the duty to full compensation, in matter of both material damage and pain and suffering, indifferently to the occurence of employer's fault.

The gradual transition from a private trend of insurance to a public social protection system, changed hugely the patterns of compensation for occupational injury and disease, by means of including it into a broader state institution: the National Institute for Social Security. It is for sure the most important legal reform carried out since 1919 in Brazil. In other words, it transformed insurance from a private issue into a public agenda.

The social system is presently supported by compulsory contributions from employers (exclusively from them concerning occupational risk), as well as by compulsory contributions from employees, public and private non-employee workers, entrepreneurs, and firms

devoted to almost all lawful activities, which means: a huge system of taxation and compensation for a variety of social risks. The funding sources also includes returns on the investments made by the system, and percentages of public lottery premiums.

Presently, the social risks legally covered comprehends old-age retirement, unemployment, sickness (by means of medical and financial support), occupational diseases and injuries, invalidity, maternity and family benefits. The system allows voluntary affiliation for students, housewives and unemployed workers. Public servants are still mainly covered by specific systems of insurance and both, public and private workers are also allowed to spontaneous affiliation to a complementary private insurance coverage.

The general public insurance also comprehends compensation when an accident victimizes the affiliated on the way to or back from works (compensation which is legally equivalent to employment injury – *in itinere*).

In accordance to preceding judiciary decisions, the 1988th, Federal Constitution finally disposed that the employer is hold responsible for supporting damages, beyond the ones provided by the public security system, including both, material damage and pain and suffering, in case of the fault is credited to the firm.

Once it occurs an occupational disease or an employment injury the employee cannot be elected to dismissal, except on account of misconduct. In this exceptional case the employee's fault must be submitted to judicial decision.

II EMPLOYER'S LIABILITY

It belongs to the employer the general duty to prevent occupational risks.

Facilities as well as work routines are supposed to be submitted to public administrative inspection, in accordance to detailed public norms and regulations, though it does not exclude the employer's liability in case of occupational injuries.

It is no way allowed subcontracting nor subrogation of the employer's duty to observe general measures of risk prevention. However, it is legally admitted additional coverages by means of private insurance companies to face civil conviction regarding occupational injuries.

Brazil has an national public foundation (Fundacentro) devoted to promote scientific researches in order to supply informations concerning the prevention from occupational risk. Besides, there is a large though insufficient branch of the public administration, that belongs to the Ministry of Labor and Employment and to the Ministry of Social Security, which is in charge of providing supervision and inspection concerning the adoption of measures regarding the prevention of occupational injury and disease.

The subcontractor employer is inevitably liable for imputed negligence (*in solidum*) in case of occupational injury and disease. By the way, subcontracting of service should be accepted only in a few legally authorized hypothesis.

III – PARTICULAR ISSUES

Psychological issues have been increasingly brought up at the Brazilian contemporary agenda regarding occupational injury prevention. Besides, as one already pointed out, both material damages and pain and suffering have been increasingly included as subject to judicial debate; mostly after the approval of the 45th Constitutional Emend (2004), which formally fixed to the specialized Labor Courts the power to pass judgement concerning pain and suffering.

Though there are several federal, state and local norms prescribing the prohibition of tobacco in both, public and private work place, their practical enforcement depends on the

cultural awareness of its harmful effects; and it not seems exaggeration to state that it varies a lot.

All substances used in work activities, provided it is dangerous or potentially injurious for the worker, no matter if it's previously known by the entrepreneur, belongs to employer's responsibility. According to most recent decisions from the superior Federal Courts, Brazilian legal system accepts liability without personal deliberate fault in such cases.

One cannot assume that HIV blood test should be considered forbidden in any case, specially when the positiveness could create or increase the risk of injury for the ones submitted to it. Anyway, it mostly depends on judicial scrutiny.

In Brazilian legal system, the fairness of refusing to work in presumably harm situations is not precisely depicted yet; which means that it depends on the circumstances that it could happen.

IV – COMPENSATION IN OCCUPATIONAL INJURY

The public coverage involves services (health care), damage and pensions. In all the cases the coverage is managed by public institutions, and it cannot be denied.

V – UNIONS AND WORKER'S REPRESENTATIVES REGARDING HEALTH PROTECTION AND RISK PREVENTION

Regarding public administration there are several collective commissions in which worker's representatives take sit, mainly by means of their local and central unions.

On the level of work place it is legally obliged to organize and implement Internal Commissions for Risk Prevention, in which necessarily participate worker's representatives.