
OUTSOURCING OF INFORMATION TECHNOLOGY SERVICES

Luiz Fernando Alouche
lfalouche@almeidalaw.com.br

Collaborators:
Ana Carolina Renda
Cassio Augusto Ambrogi

Outsourcing has been a measure increasingly used as a better way to organize business and reduce costs of the companies, turning the activity more profitable and sustainable. This type of contracting is a safe alternative if it follows the requirements determined by law and may help to avoid high costs of contracting direct employees.

The taxes over the payroll in Brazil - considered a record country on this aspect - are a real obstacle to regular employment. In the Information Technology Industry this scenario is even more stimulated, considering the lack of good professionals, high salaries, periodicity of the projects developed in this industry and also the low rates of future labor claims, taking into consideration that even the outsourcers benefit from this relationship once the high discounts of Income Taxes (IR) and Social Security Contribution (INSS) over their payments are reduced as if they were hired as direct employees of the contracting companies.

For this reasons outsourcing prevails in this industry by the organization of consulting or service provider companies, in which their partners develop the activities as outsourcers inside other companies.

However, inspections by the Social Security Office and the Labor Ministry may represent an obstacle to the success of this engagements. From the practical point of

view, complaints can arise from the Labor Unions due to the decrease of the formal employment.

Regarding the understanding of the Brazilian Courts with respect to the outsourcing of other activities it is possible to verify that it has been contrary to this practice, as it is evident the increase of decisions condemning companies that contract outsourcers to develop their activities.

This situation arises from the understanding that the rendering of outsourcing services related to the company main activity brings the risk of employment bond between the contracting company and the service provider¹. If the employment bond is acknowledged, the contracting company shall be responsible for the payment of all

¹ Precedent 331 – Service Agreements. Validity (Review Precedent nº 256 - res. 23/1993, DJ 21.12.1993. Item IV amended by Res. 96/2000, DJ 18.09.2000).

I - Engagement of service providers by intermediary company is illegal, creating a direct bond with the contracting company, except in the case of temporary work.

II - Hiring workers on an irregular basis through an intermediary company does not create employment bond with the direct, indirect or social security public offices.

III – It does not create employment bond the hiring surveillance services (Law nº 7102 from 20.06.1983), maintenance and cleaning services, as well as specialized services related to the company support activities, once it is not present the personal nature and direct subordination.

IV - The non compliance with the labor obligations by the employer constitutes the joint liability of the contracting company with respect to such obligations, also before the direct public offices, independent government agencies, public foundations, public companies and mixed companies, once they have participated on the lawsuit and are party on the extrajudicial enforcement instrument. (Article 71 of Law nº 8666 of 21.06.1993).

labor costs arising from the employment bond, including the possibility of administrative penalties by Labor Ministry or Social Security Office (INSS).

Therefore, it is important a careful review of the activities to be outsourced and, additionally, the execution of service agreements which shall clearly determine which activities will be outsourced, the correct disposal of the job to be performed and the inclusion of protective clauses to the contracting company. Also, it is necessary a monthly management of all documents issued by the outsourcing company with respect to the payment of wages and labor costs due to its employees, as well as those resulting from the outsourcing relationship.

Engagement of professionals to execute a specific job and for a specific period, for example the development of a software, is very common in the Information Technology industry due to its special nature. This kind of service rendering, by being specific and for a specific term, is a form of outsourcing that, in theory, reduces the risk of employment bond, once it does not present the legal requirement of periodicity. However, in order to protect the contracting company interests it is necessary to accomplish the legal requirements which authorize the contracting for a specific term to the execution of a specific service under the penalty to be considered a fraud by the Labor Courts or Labor Ministry and acknowledged the employment bond.

It is important to emphasize the introduction in our legal system of the Provisional Measure converted into Law nº 11.196/05 that in its article 129² authorized the

rendering of intellectual services, including the information technology services, through services companies. However, even being the risks reduced due to the mentioned article there are still some obstacles regarding the company main activity.

Another important aspect regarding this subject, even it is not related to the outsourcing of the company main activity, is the risk of paying wages³ and labor costs⁴ to the service provider. This risk arises from the current legislation⁵ which determines that the contracting company has indirect liability for the compliance of the labor obligations of the contracted company, due to the failure or mismanagement, and may be condemned to pay such costs if the contracted company does not do it.

It is understood as failure or mismanagement of the contracted company when the contracted company does not comply with its obligations before its employees or before the contracting company. It is identified by the delay or improper payment of labor costs, such as salary, overtime, vacation, additional, among others, as well as social security contributions (INSS and FGTS) and taxes (IRRF).

Therefore, it is essential to manage on a monthly basis all documents issued by the contracted company which proves the compliance on payment of salary and labor costs (IRRF, FGTS and INSS) to its employees and arising from the service agreement, in order to reduce risks from the outsourcing relationship and also to correct immediately eventual failures.

observation of the article 50 of Law nº 10.406, from January 10, 2002 - Civil Code.

³ Salaries, vacations, overtime, additional, premium, previous notice, among others.

⁴ IRRF, Social Security (INSS) and FGTS.

⁵ Precedent 331, IV, from Superior Labor Court.

² Article 129. For tax and social security purposes, the rendering of intellectual services, including scientific, artistic or cultural, with or without personal nature, with or without designation of any obligation to the partners or employees of the contracted company, when performed by it, is subject only to the law applicable to legal entities, without limiting the

Suggestion is made in order to have a direct supervision by the contracting company regarding the periodicity of payments and correct filling of GFIP forms, as they validate the effective outsourcing services, especially with respect to amounts, turning valid the outsourcing relationship for all purposes.

Simultaneously, it is very important the careful analysis of the service agreements for eventual inclusion of protective clauses to the contracting companies, establishing obligations to the outsourcing companies to certify their financial standing during the term of the agreement, as well as the right of the contracting company to withhold the amounts to be paid in case of failure or mismanagement on the payment of the salary, taxes or social security contributions by the contracted company. Certainly, these procedures will provide the contracting companies a secure condition regarding the present matter, preventing them against any future breaches and irregularities.

Almeida Advogados is available to clarify any doubts on the present matter, as well as discuss the strategic measures for an effective protection from the risks involved in the outsourcing services in the information technology industry.