LABOR AND EMPLOYMENT

# IS THE SEARCH OF EMPLOYEES' BELONGINGS LAWFUL?

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## AUTHORS


**ANDREA GIAMONDO MASSEI**
PARTNER / SÃO PAULO

**MARCELA ORTEGA TAVARES**
LAWYER / SÃO PAULO


On February 24, the Brazilian Superior Labor Court (TST) confirmed that it is possible to search employees' belongings. This was established during the judgment of an Incident of Repetitive Appeals (IRR) – which extends the decision to all cases involving this matter.

Does this mean that companies can now indiscriminately search their employees?

No. It is important to understand that the TST's decision strictly involves recognizing the lawfulness of searching employees' bags and belongings, not any type of search.

There are two types of searches: intimate and personal.

An intimate search involves checking the employee's body, through touch or visualization, and is very similar to the one performed on visitors in prisons.

For labor purposes, this type of search is considered unlawful. The employer cannot perform it, under penalty of violating the rights to intimacy, privacy, and honor provided for in the Brazilian Federal Constitution, according to an understanding already consolidated by Brazilian labor courts.

In case of a judicial dispute, this practice results in the payment of compensation for moral damages, in addition to possibly leading the Labor Public Prosecutors' Office to conduct investigations or the Ministry of Labor and Employment to carry out inspections.

A personal search, on the other hand, involves checking the employee's property and belongings. Although the TST has already predominantly positioned itself in many cases that it is possible to carry out a personal search, there was still divergence in the various levels of Brazilian Labor Courts.

The controversy involved whether the personal search would represent a violation of the employee's intimacy and privacy – with companies being required to pay compensation for moral damages.

With the recent TST decision, discussions on the lawfulness of conducting personal searches are finished. However, discussions about the limits of searches on employees and how they are conducted remain. This is because, although it is expected that Labor Courts will apply the TST's precedent, the lawfulness of the procedure itself will depend on the analysis of the case. It will be necessary to assess whether the search occurred within the constitutional limits that guarantee the worker's right to privacy and intimacy.

For the employer not to be required to pay compensation, the personal search must:

> be previously communicated, so that all employees are aware that they can undergo a personal search at any time;

> be carried out indiscriminately, that is, on all employees (usually when there are few employees in the company) or employees chosen randomly and impersonally (usually when there are a large number of employees in the company), to avoid any differentiated treatment that may characterize discrimination/persecution of a particular employee or group of employees;

> be carried out visually, without involving touches or handling of the employee's belongings by the employer;

> be carried out privately, that is, without other employees, clients, suppliers, or service providers accompanying the search being carried out, so that it does not become vexatious.

In summary, judicial discussions involving the personal search of employees will be limited to the analysis of the facts, to verify the absence of vexatious situations or those that have contradicted the constitutional rights of intimacy and privacy.

With this new binding precedent on the matter, it is expected that the number of appeals submitted to the TST involving this matter will decrease. This is because the analysis of the lawfulness of how the personal search occurred would depend on the re-evaluation of facts and evidence, which is not admitted in appeals presented to the TST.

The decision also guarantees greater legal security, by preventing decisions with different understandings about the possibility of conducting personal searches from being issued. Thus, it will be possible to give equal treatment to companies.

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