LABOR AND EMPLOYMENT

LABOR REFORM AND TAXATION

22 SEPTEMBER 2023

AUTHORS

RODRIGO MARINHO
PARTNER / SÃO PAULO

ANA JÚLIA SALES ARAGÃO BUNDUKI
LAWYER / SÃO PAULO

MURILO CALDEIRA
LAWYER / SÃO PAULO

The Labor Reform (Law 13.467/17) changed, among other points, rules on the breaks for rest and feeding during the working day.

Before the Labor Reform, in force since November 11, 2017, there were discussions about whether the payment resulting from the suppression of the breaks for rest and meal would have a compensatory or salary nature.

Later, however, the Brazilian Labor Laws (CLT) expressly established that this payment has a compensatory nature, which results from the suppression of the employee's right to the rest and meal breaks. Since then, the case law of the Labor Court follows the new rule, characterizing this amount as compensation.

The legal security that is seen before the Labor Court does not seem to reach the taxpayers. Even with the compensatory nature of the amount arising from the suppression of the breaks for rest and meal, which is not part of the employee's salary, the Brazilian Federal Revenue Office (RFB) expressed the understanding that such payment would serve as basis for calculating social security contributions.

With this, the RFB attributes remunerative treatment – and not compensatory – to this amount, as evidenced in the Cosit 108 Consultation Solution, published on 06/14/2023 (SC 108/2023).

In the opinion of the RFB, without a legal provision to expressly establish that the payment in question does not fall within the concept of contribution salary defined by the , the change brought by the Labor Reform would have effects only in the labor/employment sphere, without tax consequences.

By concluding something expressly ruled with by law to the contrary, SC 108/2023:

> violates the hierarchy of norms;
>
> ignores the difference between non-incidence hypothesis and tax exemption; and
>
> disregards the fact that tax law is a right of overlap that cannot alter rights already regulated by their respective legal fields.

This is an issue that tends to be discussed by Brazilian courts, even if the discussion about it did not seem to exist.