

**Fourth Studies Committee  
Public and Social Law**

**QUESTIONNAIRE**

**AGE DISCRIMINATION**

**BRAZIL**

**Initial Observations:**

This questionnaire covers different topics of labor law, with special focus on age discrimination. One of the main goals is to obtain initial informations about the approach adopted in national systems of labor law regarding age discrimination.

It's also important to bear in mind that there may be different legal provisions for different groups of employees. For example: Federal employee and others who work for the government under common employment contracts, rural workers, people who work on ships, religious communities, teachers. If there are exceptions for these groups, they should be mentioned. Likewise, should be mentioned statutory provisions, or otherwise, that allow different treatments to men and women with regard to age discrimination.

1.a. Are there constitutional principles that prohibit age discrimination? What do these principles, exactly? How are they applied in other levels of the legislative process?

*The first article of the Federal Constitution, promulgated on October 5, 1988 explains that "The Federative Republic of Brazil, formed by the indissoluble union of states and municipalities, as well as the Federal District, is a legal democratic state of law and is founded on: (...) II - citizenship; III - the dignity of the individual; IV - the social values of work and of free enterprise; (...)."*

*In the third article, section IV requires that "The fundamental objectives of the Federation Republic of Brazil: IV - to promote the well being of all, without prejudice as to origin, race, sex, color, age, and any other forms of discrimination."*

*According to article 5 of the Constitution, everyone is equal before the law, without distinction whatsoever, Brazilians and foreigners residing in the country been insured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (...) XLI - the law shall punish any discrimination wich may attempt against fundamental rights and liberties; (...)."*

*The Constitution of the Federative Republic of Brazil in the art. 7, XXX clause, provides the rights and phohibition below: "The following are rights of urban and rural workers, among others that aim to improve their social condition, the prohibition of any differece in wages, in the performance of duties and in hiring criteria by reason of sex, age, color or marital status."*

*As a protective measure, the same article of the Constitution, XXXIII, establishes the prohibition of night, dangerous or unhealthy work for minors under eighteen years of age, and of any work for minors under fourteen years old.*

*Law No. 9029 of 13 April 1995, prohibits the adoption of any form of discriminatory practices for the purpose of admission or continuation of the legal employment relationship.*

*The first article of the mentioned Law below, provides that "It's forbidden the adoption of any form of discriminatory and limiting practice in the admission to the working force or its continuation by reason of sex, origin, race, color, legal status, family situation or age, except in the hypothesis of protection of minor foreseen in article 7(XXXIII) of the Federal Constitution XXXIII (forementioned).*

*Also, the third article of the same Law provides that "Without prejudice to the provisions of the previous article, breaches of the provisions of this article shall be punishable by: I - an administrative fine ten times the value of the highest salary or wage paid by the employer, and in the event of recurrence such fine shall be increased by fifty per cent; II - a ban on the obtaining of loans or funding from official financial institutions."*

*Finally, the article 4 disciplines that " Should there be any suspension of the employment relationship by reason of discrimination of the kinds provided for in this Law, the employee may choose to: I - be readmitted with full reinstatement of the period of suspension through payment of remuneration due, rectified in monetary terms, with the additional interest payable by law; II - receive double the remuneration for the period of suspension rectified in monetary terms and with the addition of any interest payable by law..*

*Also, in the Consolidation of Labor Laws, there is a legal provision that is about age discrimination, but only in the chapter dedicated to the women's protection of women's work:*

*Art. 373-A. Ressalvadas as disposições legais destinadas a corrigir as distorções que afetam o acesso da mulher ao mercado de trabalho e certas especificidades estabelecidas nos acordos trabalhistas, é vedado: I - publicar ou fazer publicar anúncio de emprego no qual haja referência ao sexo, à idade, à cor ou situação familiar, salvo quando a natureza da atividade a ser exercida, pública e notoriamente, assim o exigir; II - recusar emprego, promoção ou motivar a dispensa do trabalho em razão de sexo, idade, cor, situação familiar ou estado de gravidez, salvo quando a natureza da atividade seja notória e publicamente incompatível; III - considerar o sexo, a idade, a cor ou situação familiar como variável determinante para fins de remuneração, formação profissional e oportunidades de ascensão profissional; IV - exigir atestado ou exame, de qualquer natureza, para comprovação de esterilidade ou gravidez, na admissão ou permanência no emprego; V - impedir o acesso ou adotar critérios subjetivos para deferimento de inscrição ou aprovação em concursos, em empresas privadas, em razão de sexo, idade, cor, situação familiar ou estado de*

*gravidez; VI - proceder o empregador ou preposto a revistas íntimas nas empregadas ou funcionárias.*

*Article 373-A. Disclaimer to the legal provisions for correcting the distortions that affect women's access to the labor market and certain specific requirements laid down in labor agreements, it's is prohibited: I - Publication of employment advertisements which discriminate by gender, age, color and family situation, except in the case of notorious and public incompatibility with the nature of the employment; II - Refusal of employment and promotion or dismissal motivated at work by grounds gender, age, color, familial status , including pregnancy, except in the case of notorious and public incompatibility with the nature of the employment. III - Making grounds such as sex or family situation a factor in determining remuneration, training or professional advancement; IV- Employers requiring the presentation of sterilization or pregnancy certification or examination as a requirement for obtaining or remaining in employment; V - To have subjective requirements which restrict access to employment in private enterprises for reasons which include sex and family situation, including pregnancy. VI - To conduct intimate examinations of employees.*

1.b. What international agreements and conventions ratified by your country with regard to age discrimination?

*By Decree No. 62,150 of January 19, 1968, Brazil ratified the ILO Convention nº 111 about discrimination in the field of Employment and occupation, in that sense " any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.*

*Besides that, Brazil ratified the conventions on general discrimination - The International Convention as theme on Elimination of All Forms of Racial Discrimination (1966), ratified by Brazil on 27 March 1968; - Convention about Elimination of All Forms of Discrimination against Women (1979), ratified by Brazil in 01/02/1984.*

1.c. What are the main sources of legislation against age discrimination?

*The above issues 1.a and 1.b.*

1.d. Are Collective agreements obliged to obey specific laws on age discrimination?

*Collective agreements can not have rights as workers in the Federal Constitution nor the common law, unless there is specific exception in the law itself. In the case of age discrimination, there is no exception in*

*constitutional law, or in the infra-constitutional legislation allowing collective bargaining diverse disciplines by law.*

1.e. Are there laws that protect certain groups against age discrimination? (What? For example: young employees, older employees). Or simply is forbidden to consider age as a deciding factor in the context of work?

*As mentioned in the first question, the Consolidation of Labor Laws, Legislation that aims to combine the laws on the protection of labor, such provision prohibiting age discrimination only in the chapter on protection of women's work.*

*Besides this, there is constitutional provision that prohibits night work, dangerous or unhealthy for persons under eighteen and any work for minors sixteen years, except as an apprentice, from fourteen years. This is a protective measure for children and youth.*

*A prática discriminatória por idade é ilegal na medida em que fere os dispositivos legais existentes em nosso ordenamento jurídico, conforme já expostos supra.*

2. Please specify the main criteria used to define what is an unlawful discriminatory practice associated with age (for example: relevance of age for the type of work in question).

*The practice of age discrimination is illegal as it violates the legal provisions existing in our legal system, as already explained above.*

*Are there provisions specifying the minimum or maximum age for hiring employees?*

*In the Consolidation of labor laws:*

*Article 403 prohibits any work for minors under sixteen years of age, except as a type of apprentice (the Consolidation of labor laws calls "young person") from the age of fourteen.*

*Sole subsection. The work of the minor will not be performed in prejudicial locations to their training, physical, mental, moral and social, and at times and places that do not permit school attendance.*

*Art. 404 - Young persons under eighteen years of age shall not be employed on night work; work performed between 10 P.M. and 5 A.M. shall be deemed to be night work.*

*Art. 405 - It shall not be lawful to employ a young person:*

*I - in dangerous or unhealthy workplaces or types of work appearing in a schedule to be approved for the purpose by the Director-General of the National Occupational Safety and Health Department; II - in workplaces or types of work that are prejudicial to his morals.*

*§ 2º Employment in streets, squares and other public places shall be subject to the prior delivery of a permit from the juvenile court, which shall satisfy itself that the young person's employment is essential to his own*

*maintenance or the maintenance of his parents, grandparents, brothers or sisters and that such employment will not be prejudicial to his morals.*

*§ 3º The following shall be deemed to be prejudicial to a young person's morals:*

*a) employment in any capacity whatsoever in variety theaters, cinemas, night clubs, casinos, cabaret shows, dance halls and similar establishments;*

*b) employment in circuses as an acrobat, clown, gymnast or in any similar capacity;*

*c) employment in the production, composition, delivery or sale of written or printed matter, posters, drawings, engravings, paintings, emblems, images or other objects which, in the opinion of the competent authority, may be prejudicial to his morals;*

*d) the retail sale of alcoholic beverages*

*§ 4º In places where there are officially approved institutions for the protection of young workers the employment permit mentioned in the § 2 shall be granted only to young persons under the care of such an institution.*

*§ 5º The provisions of article 390 and the sole subsection of that article shall apply to young persons.*

*Art. 406 - A juvenile court may give permission for a young person to be employed in cases covered by clauses (a) and (b) of subsection (3) of article 405:*

*I if the performance is of an educational nature or the scene in which he takes part is not such as to be prejudicial to his morals;*

*II - if it is certified that his employment is essential to his own maintenance or the maintenance of his parents, grandparents, brothers or sisters and will not be prejudicial to his morals.*

*Art. 407 - If the competent authority finds that the work performed by a young person is prejudicial to his health, physical development or morals, it may require him to give up the employment; in this case the undertaking shall afford him all possible facilities for a change of job.*

*Sole Subsection. Where an undertaking fails to take all possible measures recommended by the competent authority to enable a young person to change his job, the contract of employment shall be canceled in accordance with article 483.*

*Art. 408 - The person legally responsible for a young person may apply for the cancellation of the latter's contract of employment if his work is likely to be prejudicial to his physical health or morals.*

*Art. 409 - For the purpose of making better provision for the safety in employment and the health of young persons the supervising authority may prohibit young persons from remaining in the workplace during breaks.*

*Art. 410 - The Minister of Labor, Industry and Commerce may grant exemptions from a prohibition of employment arising from the schedule mentioned in sub-paragraph (a) of article 405, if it is established that the dangerous or unhealthy nature of the workplace or employment which gave rise to the prohibition has been wholly or partially eliminated.*

*The maximum age, before the promulgation of the Constitution currently in force, for the exercise of certain professions had maximum age, as eg, for practical (Pilot). With the promulgation of the Constitution all the limitations of maximum age for the exercise of work or profession no longer exist.*

*For civil servants there is a mandatory retirement age of 70.*

4. Are there provisions specifying the minimum or maximum age for admission to retirement funds?

*General System of Social Security (Public) - Law No. 8213/1991*

*Article 11 - Compulsory insurance (as an employee, domestic, individual loose and special), without express provision of age, except for the insured special, rural, in conditions of child over 16 years old (Article 11, VII, "c").*

*Article 13. It is voluntary insured the major of 14 (fourteen) years to join the General System of Social Security, upon contribution, since that is not included in the provisions of art. 11.*

*In the General Social Security, there is no law specifically establishing maximum age for admission of the insured, but some benefits have a grace period of contribution for that insured persons can benefit.*

*In the private social security system there isn't a minimum age for admission. Since the birth of a child, parents can make a private social security plan for it. The minimum age to begin receiving the benefit is 50 years old. The maximum age for admission to private pension plan is 99 years years old. In that case, the benefit has been used as an investment for easy transfer to the successors.*

5. Are there regulations or collective provisions which confer protections or benefits only to employees who have reached a certain age? If so, please describe them.

*There are no express statutory provisions, but there are collective agreements which provide, for example: job security for employees who are about to implement the conditions required by law for retirement.*

6. The calculation of wages depends on the age of the employee? If so, please describe.

*No. The calculation of wages does not depend on age. Some collective agreements provide an additional, but calculated according to length of service and not with age.*

The period of vacation or payment in case of illness depend on the age of the employee, length of service, or both?

8. Are there arrangements by giving older workers the right to reduce hours of work? Please describe.

*In Brazil there are no provisions giving older workers the right to reduce working hours.*

9.a. Is it allowed to terminate an employment relationship (fire) depending on the age of employees? If so, what age?

*The working relationship between the servant and the public administrations is terminated compulsorily when the servant turns 70 years of age.*

*For employees of private companies, nor the granting of compulsory retirement extinguished the contract of employment. As the contract of employment a bilateral contract, if the parties of the contract agreed to maintain the bond, even after retirement granted to the employee, the contract of employment continues in force and may be terminated only with the compliance of legal guidelines for the exemption. However, the company may have, canceled a contract of employment by the employee when granted retirement required by this employee.*

9.b. Is it allowed to terminate an employment relationship (resign) because the employee has the right to receive a pension age? If so, at what age?

*No. In Brazil is not allowed to release an employee because he has the right to receive a pension age.*

10. Are there provisions on the labor laws of your country to promote the integration of unemployed older workers, or not employees young people, that eventually resulting in the weakening of protections guaranteed by law?

*For example, are there provisions that allow the closure of fixed term contracts once the employee has reached a certain age? Are there such provisions with respect to certain groups of employees?*

*In Brazil there is no legislation ensuring stability to employees, unless some temporary employment guarantees in specific situations, such as a pregnant employee. But the general rule is that legal work contracts have been concluded for an indefinite period and for that fact, for the exemption of an employee without cause the employer must give notice of 30 days and fined 40% of the value of a Guarantee Fund for Length of Service, which is formed with deposits made by the employer during the employment contract.*

*Only in special situations the law allows the employment contract for a fixed period to end when the employee shall not be entitled to notice or to a fine of 40% of the Guarantee Fund for Length of Service.*

*One of these situations is precisely the work of the child learner (apprentice), the learning contract will always be for a specified period and must be extinguished when the employee turns 18 years old, according to the legislation the following letter.*

*Article 428. Apprenticeship contract is is a special employment contract, in writing and for a fixed period of time, in wich the employer undertakes to ensure to the greatest of fourteen and under eighteen years of age, and which must be registered in an apprenticeship programme, technical and*

*professional training methodical, consistent with their physical, moral and psychological, and the apprentice to carry out with zeal and diligence, the tasks required for the development of the apprentice. "(NR)*

*(...)*

*"§ 3 The learning contract can not be prescribed for more than two years."  
(AC)*

*The Learning Agreement shall cease to exist with the end of the term or when the student completes eighteen years old (...)*

*In fixed-term contracts, if the employer wants to terminate it before the end of final term stipulated, the employer must pay a fine in an amount equivalent to 50% of the remuneration of the remaining period. If it is a contract of apprenticeship, even that fine is due.*

11. Are there provisions that give special legal protection to prevent the termination of contracts of employment of older or younger workers?

*Only the provisions of Law No. 9029/1995. This law prohibits the adoption of discriminatory practices and for the purpose of limiting access to the employment relationship, or its maintenance by reason of sex, origin, race, color, marital status, family status or age, except in case of labor protection minor.*

12. What are the rules that govern the distribution of the burden of proof?

*Art 333 – The burden of proof lies:*

*I – The author, about the constitutive fact of his(her) right;*

*II – The defendant, as to the existence of fact precluding, alterate or eliminate the right of the author.*

*Sole Paragraph. Null and void the agreement that distributes differently the burden of proof when: I – Fall on inalienable right of the part; II- make it extremely difficult the right to the part..*

*CLT - Art 818 - Proof of claims instruct the part that does the proof claims.*

13. Are there administrative or criminal penalties? If so, please detail.

*The same Law No. 9029/1995, which prohibits discriminatory practices for the purpose of admissions or permanency of the legal relationship of work, in the third article provides that "(...) "Without prejudice to the provisions of the previous article, breaches of the provisions of this article shall be punishable by: I - an administrative fine ten times the value of the highest salary or wage paid by the employer, and in the event of recurrence such fine shall be increased by fifty per cent; II - a ban on the obtaining of loans or funding from official financial institutions."*

*Concluding remarks:*

*During the conference, we would also like to discuss the practical importance of age discrimination, examining issues such as: **How is prevalent age discrimination in your country? Are there studies on the subject? It would be possible to estimate your country in economic losses - if exist - due to age discrimination, especially following the non-employment of older experienced workers?***