



GLOBAL EXPANSION GUIDEBOOK GLOBAL EQUITY

Brazil



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INTRODUCTION

Welcome to the 2024 edition of DLA Piper's *Global Expansion Guidebook – Global Equity*.

GLOBAL EXPANSION GUIDEBOOK SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics companies need to know. The *Global Expansion Guidebook* series reviews business-relevant corporate, employment, intellectual property and technology, and tax laws in key jurisdictions around the world.

GLOBAL EQUITY

Our philosophy for providing services to our clients can best be described as a partnership. We strive to provide our clients with a solutions-oriented approach to address their current and future legal needs. Specifically, we analyze each project from a risk and cost-benefit standpoint. We also advise our clients of current best practices and keep them apprised of any legal, cultural, and business changes that may affect their programs. We hope that you find the information in this guide useful for the implementation of your company's equity compensation programs. In preparing the guide, we have made several assumptions about the stock awards that may or may not be applicable to your company. The assumptions include: (i) the local entity is a wholly-owned subsidiary of the issuing company; and (ii) the participants are employees of the local entity or the issuing company.

In addition, you should be aware that the information provided in the guide is presented in a general format and is not a comprehensive summary of all the tax and regulatory issues that may be applicable to your company's specific circumstances (i.e., plan design, corporate governance, tax practices and administration). Furthermore, the laws and regulations applicable to stock awards are constantly changing. These changes may not be incorporated into this version of the guide. With these factors in mind, it is important that you do not consider this guide to be legal advice and do not rely solely on the information provided when implementing an equity award plan abroad. We would be pleased to help you review all pertinent information and can assist you in developing a comprehensive strategy to offer an equity award plan globally.

We hope that you find this guide valuable and we welcome your feedback.

This publication is provided to you as a courtesy, and it does not establish a client relationship between DLA Piper and you, or any other person or entity that receives it.

This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

DLA Piper and any contributing law firms accept no liability for errors or omissions appearing in this publication and, in addition, DLA Piper accepts no liability at all for the content provided by the other contributing law firms. Please note that global equity law is dynamic, and the legal regime in the countries surveyed could change.

BRAZIL



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RESTRICTED STOCK AND RSUS

Securities

The grant of restricted stock or RSUs by entities incorporated abroad to the employees of Brazilian subsidiaries generally is not subject to securities law requirements.

Foreign exchange

Shares held outside of Brazil are subject to certain reporting requirements before the Brazilian Central Bank.

Tax

Employers and employees are encouraged to consult with their own tax advisors regularly to determine the consequences of taking or not taking any action concerning restricted stocks and RSUs, and to determine how the tax, social insurance, or other laws in Brazil apply to their specific situation.

Employee

Usually, the grant of restrict stock units does not give rise to a taxable event in Brazil. However, Brazilian tax authorities may have a different view, and understand that this could be seen as taxable event for employees, particularly if clearly treated as compensation by the issuer.

Upon vesting, the restricted stock units will be converted into shares and usually seen as income earned by employees, which shall result in the recognition of taxable income at the fair market value of the shares acquired and treated as employment (ordinary) income. Employees might need to self-assess and pay for such taxes if no withholding is made, especially if it is granted by a foreign company.

If employees sell any shares purchased under the plan, gains will be subject to capital gains taxation.

Employer

Withholding & Reporting

Tax withholding and reporting by the employer located in Brazil will be required if it is treated as compensation and treated as employment (ordinary) income. Otherwise, if the employer is not located in Brazil, the employee will have to self-assess and report the income tax due. Capital gains tax calculation and reporting would be the employee's responsibility

Deduction

If restricted stock and RSUs are offered to all employees in Brazil and the subsidiary reimburses the parent company for the cost of the benefits, the subsidiary should be able to deduct such cost from its income taxes provided that it is treated as compensation, which could cause restricted stock and RSUs to be deemed employment (ordinary) income subject to social insurance contributions.

Social insurance

Restricted stock and RSUs may be subject to social insurance contributions since it could be deemed employment income subject to such contributions.

Data protection

The Brazilian Data Protection Law (Federal Law No. 13,709/18), which entered into force on September 18, 2020, applies to the processing of personal data, including under a labor relationship.

In view of this, it is necessary to assess each case individually in order to confirm the proper legal basis for the processing of personal data for the purpose of granting restricted stocks and RSUs to employees of Brazilian subsidiaries, in accordance with Article 7 of the Brazilian Data Protection Law.

In general, the employee consent is not a recommendable legal basis due to discussions about the validity of consent under an employment relationship, considering the existing subordination between parties, and/or given that the consent may be revoked at any time by means of an express request of the data subject. However, consent may be necessary for certain processing activities.

In relation to the international transfer of data outside Brazil, it should be also covered by one of the available legal basis of the Brazilian Data Protection Law, such as standard contractual clauses or binding corporate rules. Such grounds, however, will be regulated in the future by the national supervisory authority in Brazil.

Labor

Benefits received from restricted stock and RSUs may be considered part of the employment relationship and included in a severance payment. Labor Courts tend to consider restricted stock and RSUs as salary, especially when the employee does not participate in any risk of the transaction (eg, if the award is granted for free or with a very reduced cost). Upon involuntary termination of employment, an employee may assert that he or she is entitled to continued vesting and other rights with respect to his or her award. In order to reduce the risk of claims, the award agreement signed by an employee should provide, among other things, that vesting of an award ceases upon termination of employment, and that the plan and any awards under it are discretionary.

Communications

Although plan materials are not required to be translated, translation is required for any government filing, and is recommended to ensure that employees understand the terms of their awards.

STOCK OPTIONS

Securities

The grant of options by entities incorporated abroad to the employees of Brazilian subsidiaries generally is not subject to securities law requirements.

Foreign exchange

Subject to certain foreign exchange requirements, employees may exercise options by sending funds abroad. Shares held outside of Brazil are subject to certain reporting requirements before the Brazilian Central Bank.

Tax

The taxation of stock options in Brazil is subject to controversy since some practitioners take the position that the gain realized should be subject to capital gains tax because of the uncertainty of the triggering event, whereas others sustain that it should be taxed as ordinary income as part of an employee's compensation plan.

Therefore, employers and employees are encouraged to consult with their own tax advisors regularly to determine the consequences of taking or not taking any action concerning stock options.

Employee

Usually, the grant of stock options does not give rise to a taxable event in Brazil. However, tax authorities may have a different view and charge individual income tax and social insurance contributions upon grant, particularly if clearly treated as compensation by the issuer.

Depending on the position adopted, employees may be subject to ordinary income type of taxation upon exercise of options. Employees might need to self-assess and pay for such taxes if no withholding is made, especially if it is granted by a foreign company.

If employees sell any shares acquired upon exercise of options, gains will be subject to capital gains tax.

Employees may be exempt from capital gains tax if the gross proceeds from the sale of any stock during a particular calendar month are below a designated threshold. If the threshold is exceeded for the relevant month, the entire gain is subject to tax (ie, not just the amount exceeding such threshold).

Employer

Withholding & Reporting

Tax withholding and reporting by the employer in Brazil will be required if it is treated as compensation and treated as employment (ordinary) income. Otherwise, if the employer is not located in Brazil, the employee will have to self-assess and report the income tax due. Capital gains tax calculation and reporting would be the employee's responsibility.

Deduction

If options are offered to all employees in Brazil, and the subsidiary reimburses the parent company for the cost of option benefits, the subsidiary should be able to deduct such cost from its income taxes, provided that it is treated as compensation which could cause options to be deemed employment income subject to social insurance contributions.

Social insurance

Although options generally are not subject to social insurance contributions, regularly granting options or reimbursement of option costs could result in the options being deemed employment income subject to such contributions by tax authorities.

Data protection

The Brazilian Data Protection Law (Federal Law No. 13,709/18), which entered into force on September 18, 2020, applies to the processing of personal data, including under a labor relationship.

In view of this, it is necessary to assess each case individually in order to confirm the proper legal basis for the processing of personal data for the purpose of granting stocks options to employees of Brazilian subsidiaries, in accordance with Article 7 of the Brazilian Data Protection Law.

In general, the employee consent is not a recommendable legal basis due to discussions about the validity of consent under an employment relationship, considering the existing subordination between parties, and/or given that the consent may be revoked at any time by means of an express request of the data subject. However, consent may be necessary for certain processing activities.

In relation to the international transfer of data outside Brazil, it should be also covered by one of the available legal basis of the Brazilian Data Protection Law, such as standard contractual clauses or binding corporate rules. Such grounds, however, will be regulated in the future by the national supervisory authority in Brazil.

Labor

Benefits received from an option may be considered part of the employment relationship and included in a severance payment. Labor Courts tend to consider restricted stock and RSUs as salary, especially when the employee does not participate in any risk of the transaction (eg, if the award is granted for free or with a very reduced cost). Upon involuntary termination of employment, an employee may assert that he or she is entitled to continued vesting and other rights with respect to his or her option. In order to reduce the risk of claims, the award agreement signed by an employee should provide, among other things, that vesting of an option ceases upon termination of employment, and that the plan and any awards under it are discretionary.

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STOCK PURCHASE RIGHTS

Securities

The grant of purchase rights by entities incorporated abroad to the employees of Brazilian subsidiaries generally is not subject to securities law requirements.

Foreign exchange

Subject to certain foreign exchange requirements, funds for the purchase of shares may be transferred abroad.

Tax

The taxation of stock purchase rights in Brazil is subject to controversy due to its similarity to stock options, which case some practitioners sustain that any gain realized should be subject to capital gains tax because of the uncertainty of the triggering event, whereas others sustain that it should be taxed as ordinary income as part of an employee's compensation plan.

Therefore, employers and employees are encouraged to consult with their own tax advisors regularly to determine the consequences of taking or not taking any action concerning stock purchase rights.

Employee

Generally, if stock purchase rights utilize the employee's own funds, any gain will be subject to capital gains tax. However, if there's a discount on the purchase price, then such discount may be viewed as compensation and subject to ordinary income taxation. Employees might need to pay for such taxes if no withholding is made, especially if it is granted by a foreign company.

If employees sell any shares acquired upon exercise of purchase rights, gains will be subject to capital gains tax.

Employees may be exempt from capital gains tax if the gross proceeds from the sale of any stock during a particular calendar month are below a designated threshold. If the threshold is exceeded for the relevant month, the entire gain is subject to tax (*ie*, not just the amount exceeding such threshold).

Employer

Withholding & Reporting

Reporting is required if the employer makes deductions from the employee's payroll to fund the employee's stock purchase plan.

Generally, withholding is required, if it is treated as compensation, but the employer in Brazil. Otherwise, if the employer is not located in Brazil, the employee will have to self-assess and report the income tax due. If treated as an investment made by the employee, no withholding is required by the Brazilian employer.

Deduction

So long as purchase rights are offered to all employees in Brazil and the subsidiary reimburses the parent company for the cost of benefits, the subsidiary should be able to deduct such cost from its income taxes. However, reimbursement could cause purchase rights to be deemed employment income subject to social insurance contributions.

Social insurance

Although the spread generally is not subject to social security contributions, regularly granting purchase rights or reimbursement of costs could result in the purchase rights being deemed employment income subject to such contributions.

Data protection

The new Brazilian Data Protection Law (Federal Law No. 13,709/18), which entered into force on September 18, 2020, applies to the processing of personal data, including under a labor relationship.

In view of this, it is necessary to assess each case individually in order to confirm the proper legal basis for the processing personal data for the purpose of granting stocks purchase rights to employees of Brazilian subsidiaries, in accordance with Article 7 of the Brazilian Data Protection Law.

In general, the employee consent is not a recommendable legal basis due to discussions about the validity of consent under an employment relationship, considering the existing subordination between parties, and/or given that the consent may be revoked at any time by means of an express request of the data subject. However, consent may be necessary for certain processing activities.

In relation to the international transfer of data outside Brazil, it should be also covered by one of the available legal basis of the Brazilian Data Protection Law, such as standard contractual clauses or binding corporate rules. Such grounds, however, will be regulated in the future by the national supervisory authority in Brazil.

Labor

Benefits received from a purchase right may be considered part of the employment relationship and included in a severance payment. Labor Courts tend to consider purchase rights as salary, especially when the employee does not participate in any risk of the transaction (eg, if the award is granted for free or with a very reduced cost). Upon involuntary termination of employment, an employee may assert that he or she is entitled to continued participation in the plan and other rights with respect to his or her purchase rights. In order to reduce the risk of claims, the offer documents signed by an employee should provide, among other things, that participation in the plan ceases upon termination of employment, and that the plan and any awards under it are discretionary.

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