

8 KEY TAKEAWAYS

How the Upcoming Brazilian Privacy Law May Affect Internal Investigations

In 2018, the Brazilian government passed the Lei Geral de Proteção de Dados (LGPD), which comes into effect in August 2020. [Bernadete de Figueiredo Dias](#), partner at CGM Advogados and [Adria Perez](#), Kilpatrick Townsend Partner on the firm's Government Enforcement & Investigations Team, offer the following 8 Key Takeaways concerning "How the Upcoming Brazilian Privacy Law May Affect Internal Investigations."

1

LGPD applies to any company that "processes" "personal data" of employees, third-party agents and customers in Brazil, regardless of where the company itself may be located. Consequently, if your company is conducting an internal investigation based on communications with or data concerning any employees, third-party agents or customers in Brazil, the LGPD will apply.

2

Currently, the LGPD broadly defines "personal data." It can be any data that identifies a natural person or subject a person to specific treatment. This means company documents and emails can easily include personal data as it is currently defined, including signatures on executed agreements, emails attaching internal expense, gifts or meals reimbursement requests or tender responses that identify employees or third-party agents in Brazil.

3

Under the LGPD, the processing of personal data includes the use of data, such as the collection, classification, processing, storage, sharing and transfer of personal data. Therefore, if a U.S.-based company prefers to collect company documents and emails that include personal data and review the information in Brazil or transfer it to the U.S. for review, during an internal investigation, the LGPD will apply in either event.

4

In general, employees in Brazil can ask to eliminate any personal data from the collected information for an internal investigation. Employees generally can also ask with whom the company has shared the information, which could include law firms, data vendors and possibly a government authority.

5

A company conducting an internal investigation generally needs to inform the employees in Brazil about how they are not required to provide consent and the consequences of not providing it. Employees in Brazil may also revoke consent. Informing the employees does not necessarily have to be done on a case-by-case basis and can be provided via company policies.

6

LGPD currently provides more legal bases for processing data than the GDPR, including consent; needing to comply with legal or regulatory obligations; public policy; contracts, participation in judicial, administrative or arbitration procedures and legitimate interest, among others. It is conceivable that a company conducting an internal investigation may be able to use the legitimate interest legal basis to process personal data without an employee, third-party agent or consent. However, time will tell us how aggressive the Brazilian government's enforcement of LGPD will be.

7

The maximum fine for a LGPD violation is 2% of a company's revenue in Brazil, for the prior fiscal year, excluding taxes, up to a total maximum of 50 million Reals (which is currently approximately U.S. \$11,000). Other penalties may also apply, such as public disclosure of the infraction or even total or partial prohibition of activities related to data processing.

8

To protect your company during an internal investigation involving data in Brazil:

- a. Make it clear in company policies, such as a privacy policy, that the company may conduct internal investigations, which could require the collection, review, storage and transfer of business communications and data. The policies should contain all of the necessary language concerning consent and the consequences of not providing the information;
- b. Although consent may be revoked, obtain consent to collect, review, store and transfer business communications and data early on via employee agreements, corporate policy acknowledgements and employee manuals;
- c. Include in contracts and purchase orders with third-party agents and customers that the company may need to collect, review, store and transfer business communications and data; and
- d. Make it clear in such policies, contracts and purchase orders that the company may also retain data, regardless of consent, based on the LGPD legal bases, such as to comply with legal or regulatory obligations; public policy; contracts, participation in judicial, administrative or arbitration procedures and legitimate interest, among others.

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