

Brazil's Supreme Federal Court and the Employment Reform

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In the five years since the Employment Reform under Law 13.467/2017 came into force, various matters dealt with by the new legislation have ended up before Brazil's constitutional court, the Supreme Federal Court (STF – Supremo Tribunal Federal). Among these constitutional challenges and appeals, the STF faces questions that affect both the economy and the day-to-day life of employees and businesses.

An overview of the challenges to the Employment Reform now before the STF shows there are many more cases still pending than cases that have been decided, and that, despite the high rate of judicialization since 2017, in general the Supreme Court does not adopt either a pro-Reform or anti-Reform stance, but makes its decisions based on the circumstances of each case.

In the judgments rendered prior to the covid-19 pandemic, the court had rejected a new provision that would allow pregnant and nursing women to work in environments presenting health risks, upheld the change making union dues non-compulsory, and rejected the imposition of the Reference Rate (TR – Taxa Referencial) as the inflation index for adjusting awards made by the Labor Courts.

During the height of the covid-19 pandemic, there was a slow-down in the STF's judgment of Employment Reform cases, and only one was decided, at the end of 2021, dealing with court-awarded fees against the unsuccessful party in employment claims. The court held that unsuccessful claimants who are entitled to free access to the courts cannot be held liable to pay court-appointed experts' fees or honoraria awarded by the court to the successful party's legal counsel.

In 2022 the court returned to important employment issues and in May, by majority judgment, it held that Restatement of Precedents (Súmula) 277 issued by the Superior Labor Appeals Court was unconstitutional, along with a number of judicial decisions that gave continuing effect to the provisions of expired collective bargaining instruments by deeming them to be part of employees' individual terms and conditions of employment until a new collective bargaining agreement was made.

One of the last decisions issued by the STF on the Employment Reform before the production deadline for this article dealt with a hotly debated issue, referred to in Brazilian legal and business circles as "negotiation over legislation" (negociado sobre o legislado). The STF's ruling was that "Collective agreements and conventions must be complied with, even if they exclude or restrict labor rights, regardless of whether the agreement or convention expressly provides for advantages to compensate for the rights relaxed through collective bargaining, saving, in all cases, absolutely inalienable rights guaranteed by the Constitution."

And, just before the English version of our e-book was released, the STF issued its decision in constitutional challenge ADI 6142, which dealt with the role that workers' unions play in mass dismissals. As discussed in another article in this e-book, "Mass Dismissals in Brazil", the Supreme Court's decision may have created more problems than it solved in ruling that "intervention" by unions is required, without explaining what "intervention" means.

Of the decisions referred to above, two have the greatest impact on businesses' bottom line: the change in the index used to adjust awards for inflation, and the fact that claimants entitled to free access to the courts do not have to pay court-awarded honoraria to the successful party's legal counsel. In the first case, the STF's decision can affect employers' contingent liabilities, since prior to the STF's ruling, the amounts involved in labor claims were sometimes adjusted according to the TR and sometimes by the IPCA-E, a consumer price index. In the second case, the impact is in the volume of claims brought against employers and former employers, since studies show that after the Employment Reform came into effect, employees were more cautious in bringing labor claims and in formulating their claims against former employers.

In addition, the STF's ruling that collective bargaining will prevail over legislation, as long as workers' constitutionally-guaranteed rights are assured, means that companies all over Brazil will be able to negotiate terms and conditions of employment that reflect their businesses.

Looking to the future, however, the STF still has a long road to travel before it comes to the end of the controversies ignited by the Employment Reform.

Among the issues that the STF has been asked to resolve are innovations introduced by the Employment Reform, such as the scale for non-economic damages (pain and suffering), and "intermittent" employment contracts, along with more familiar questions such as whether "12x36" work schedules (12 hours on, 36 hours off) can be validly established by agreement with individual employees rather than negotiated in collective agreements.

There are also questions of procedural law to be decided by Brazil's highest court, such as the formalities required to file labor claims, and whether claimants must quantify their demands in their statement of claim, and the issuing of Restatements of the Law, known as *Súmulas*, by the court of third instance in employment and labor matters, Superior Labor Appeals Court (TST – Tribunal Superior do Trabalho).

As we have seen, the road to resolution of the various conflicts over the Employment Reform is long, and there is no way to predict whether the Supreme Federal Court will take a position in favor of or against the changes introduced by the new legislation. Still, with the return to in-person work and the end of emergency measures dictated by the pandemic, which occupied much of the Supreme Court's attention, we can expect to see the STF turn to the issues discussed in this article.

NOTES

[1] BONIN, Robson. Novas ações trabalhistas caíram 43% em cinco anos, após reforma. *Veja*, 2022. Available at: <https://veja.abril.com.br/coluna/radar/novas-acoes-trabalhistas-cairam-43-em>

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