

Court-awarded attorneys' fees in the Labor Courts

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One of the most important changes made by the Employment Law Reform (Law 13.467/2017) was new rules requiring the losing party to pay the cost of court-appointed expert witnesses and the court's award of fees to the successful party's legal counsel, and imposing court costs on claimants who fail to appear at the initial hearing without giving good reason for their absence. Prior to the change, losing parties were only liable to pay court-awarded attorneys' fees in disputes that did not arise out of employment relationships, or where the successful claimant was assisted by a union and had an income of less than two times the minimum monthly salary, or was in vulnerable economic circumstances, in which case the claimant was entitled to court-awarded legal fees.

If these changes represented increased costs for employers, they also created a significant obligation for claimants, with the potential to reduce the number of clearly groundless claims because of the cost of court-awarded attorneys' fees, which range from 5% to 15% of the value of the claim.

The measures introduced by the Employment Law Reform performed as intended in reducing the number of employment claims, at least in part. According to the 2020 Labor Courts' General Report, from 2010 to 2016, employment claims grew annually, with 1824 new cases for each 100,000 inhabitants. Following the 2017 reform, the rate dropped to 1391, and in 2020, there were 1214 new cases per 100,000 inhabitants.

At the end of October 2021, however, Brazil's constitutional court, the Supreme Federal Tribunal (STF – Supremo Tribunal Federal) decided a Constitutional Challenge (ADIn 5766) brought by the Federal Prosecutors' Office, and struck down the provisions of the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho) dealing with payment of expert witness fees and court-awarded attorneys' fees by persons entitled to free access to the courts (CLT, articles 791-B (part), 791-B§4, 791-

A§4). The court upheld only the provision that imposes costs on parties that fail to appear at the initial hearing of their claim (CLT, article 844§2). The full text of the STF's decision has not yet been released, and the court has not made any pronouncement as to whether its decision will apply retrospectively.

With the STF's decision, the inhibiting effect created by the risk of having to pay experts' fees and court-awarded attorneys' fees no longer exists, and the situation returns to the state it was in prior to the reform. In other words, if claimants are entitled to the benefit of free access to justice, then regardless of any amount they may receive (whether in the employment claim or otherwise), they do not have to pay court-awarded attorneys' fees.

The federal government and employment attorneys will be affected by the

STF's decision. As unsuccessful claimants are not required to pay the cost of court-appointed expert witnesses, the federal government will have to pay the bill, and employment attorneys acting for employers will no longer be entitled to receive court-awarded fees from unsuccessful claimants.

The STF's decision addresses the concerns of those who believe that imposing court-awarded attorneys' fees on claimants entitled to free access to the courts took away claimants' right of access to justice, but disappoints those who think that the rules introduced by the Employment Law Reform were a means to halt opportunistic and unfounded lawsuits. The truth is that the possibility of having to pay court-awarded attorneys' fees should not be seen as a barrier to justice to those who are entitled to free access to the courts. An equally important issue, which was not addressed by the Employment Law Reform, is the need for a better delimitation of free access to the courts, with clearer criteria for eligibility, so that the labor courts grant the benefit to claimants for whom lack of economic means is a true barrier to justice.

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