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NEWSLETTER LABOR

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STF ruling on adjustment for inflation of labor debts published

The Brazilian Supreme Court ("STF") issued, on 12/18/2020, a decision of partial grant of claims in direct actions of constitutionality and unconstitutionality, **establishing a new applicability of the index of inflation adjustment in labor lawsuits**. The decision generated several legal questions, as well as conflicting decisions in the Labor Courts. **The opinion was only published on April 7, 2021, clarifying part of the questions**.

We understand that the questions that have persisted may be resolved by means of motions for clarification. For now, companies may file specific appeals in the labor court or constitutional complaint addressed to the STF.

New clarifications

In the pre-judicial phase. The inflation adjustment index will be combined with legal interest. The National Special Extended Consumer Price Index ("IPCA-E") should be applied as a inflation adjustment, in addition to the interest provided for in Article 39, *head* of Law 8,177/91, equivalent to the Referential Rate ("TR").

In the judicial phase. The inflation adjustment of amounts deposited in court, such as appeals deposits, will be made at the reference rate of the Special Settlement and Custody System ("SELIC"), from the date the defendant is served with summons. In order to resolve any questions involving the topic, Justice Rapporteur Gilmar Mendes was clear regarding the use of SELIC on the default interest on federal taxes, and that it cannot be combined with the application of any other index.

This clarification should revert decisions under Regional Courts that had been determining debts should be adjusted by the Selic rate, but with the accrual of monthly default interest provided for in article 883 of the Consolidation of Labor Laws ("CLT").

Reasoning

The understanding was that SELIC was the criterion to be used to update debts within the scope of the Labor Court. However, the use would be justified only during the legislative gap, there being a request to legislators to correct the issue in the future, "equalizing interest and inflation adjustment to market standards".

The STF **justified the unconstitutionality of the TR in the judicial phase** by presenting a historical context of the Brazilian monetary system, concluding that **the index does not reflect inflation and therefore would be inappropriate in the context of the CLT**. According to the rapporteur, judicialized labor debts took on extremely advantageous forms.

As for **the IPCA-E not being applied in the judicial phase**, the justices understood that the **use of this index by the TST was the result of an improper comparison of the nature of labor credit with the credit assumed against the Public Treasury**, which is subject to its own legal regime (Law 9.494/1997).

There are still questions

Although the application of the effects over other decisions (modulation of effects) is included in the opinion, the following points still give rise to questions:

- Is it possible to plead for the application of the SELIC if there is no res judicata on the subject, but if it is no longer the object of an ongoing appeal?
- Is it possible to claim the application of SELIC if the final and unappealable decision is silent on the inflation adjustment index, but with express terms on the interest on arrears?
- What moment will be considered for summons in the plurality of defendants for the purpose of beginning the application of the inflation adjustment?
- What moment will be considered for summons in the late inclusion of the company as defendant in a claim for purposes of beginning the application of the inflation adjustment?

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Possibility of companies with judgments against them to recover amounts in the labor courts via redress

Two recent decisions opened up space for discussions involving the **possibility of redress under labor law and the recovery of amounts disbursed by companies with judgments against them, as a result of actions taken by their employees**.

On 03/05/2021, a judgment of the 8th Panel of the Superior Labor Court ("TST") was published, in the case records of claim No. 619-50.2018.5.06.0019, recognizing that the employer's right of recourse is possible when there has been an irregular conduct of its employee. Rapporteur Justice Dora Maria da Costa understood that the employee of the company convicted of moral harassment should compensate his former employer, given the evidence of willful conduct in labor claims.

In the same vein, the appellate judges of the Regional Labor Court of the 2nd Region ("TRT2") decided to keep the judgement against an employee, bus driver, ordered to reimburse amounts spent by the company, resulting from a traffic accident. In this case, the employer had made an indemnity payment to the son of the fatal victim of the accident, and was therefore able to recover the amount paid in the case records of matter No. 1002126-03.2019.5.02.0602.

Legal basis for suit for redress. With legal basis in article 934 of the Civil Code, the suit for redress is appropriate to compensate what was paid for damage caused by others. However, employers and employees' liability is based on different premises, which must be taken into account in suits for redress.

Companies' and employees' liability. On the one hand, the **liability of the companies** stems from Precedent 341 of the STF, which establishes "*the fault of the boss or principal for the wrongful act of the employee or agent is presumed*", thus there is **strict liability of the employer**. On the other hand, **the employee's liability depends on there being fault or intent**.

In the aforementioned judgments, it was found, in other matters, the employee was at fault or had acted willfully, which led to the judgement ordering reimbursement of amounts. Thus, employees' liability must be considered as fault-based. To be able to recover values, there is, in addition to causality between the damage and the agent, the element of fault or intent.

According to a survey by the "Datalawyer" platform, there are currently 6,900 lawsuits in Brazil involving the right of redress in the labor sphere. The recent favorable decisions for employers may increase the number of these actions, making them more and more common.

Convictions for moral or sexual harassment and for accidents caused to third parties, mainly involving fatal victims, have not only economic impact, but also implications for the company's image in the market. The right of redress may serve, in addition to obtaining economic reimbursement, to restore the business reputation.

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TST en banc decision: vacation payment in double is not due if made on the first day of enjoyment

Over the years, labor case law has established the understanding that the payment of vacation plus 1/3 must be made before the start date of the rest. According to **Precedent 450 of the Superior Labor Court** ("TST"), double payment of vacation pay, including the constitutional third, is due when the employer fails to meet the payment deadline at least 2 days in advance (article 145 of the Consolidation of Labor Laws - "CLT"), even though the employee took vacation at the proper time. The justification is that the lack of advance payment of the installment would jeopardize the actual enjoyment of the right, giving rise to the incidence of the doubling provided for in Article 137 of the CLT.

However, in an unprecedented decision, published on 04/08/2021, **the full TST** (all Justices of the Court), understood, by majority of votes (15 x 10), **that the 2 or 3 day delay when settling the values related to vacations does not generate the obligation of the employer to pay double the amount and that imposing the judgment against the employer for delay considered as insignificant violates the principles of reasonableness and proportionality**.

The understanding that minute delays do not give rise to the right to double the amount prevailed.

Majority Opinion

At the trial, the vote of the rapporteur Justice Ives Gandra Martins prevailed. He pointed out that the sanction of the TST's Precedent 450 arises from a case law construction by analogy, that is, there is no legal provision that imposes it in cases of late payment. "*Rules that deal with penalties should be interpreted restrictively, taking into account the principles of reasonableness and proportionality, so that only partial non-compliance with the rule does not result in a manifestly excessive penalty*," he said.

The rapporteur also stressed that Precedent 450 was issued based on precedents on the payment made after the vacation, a situation that, in fact, frustrated the adequate enjoyment of the right. In the situation analyzed in the trial, defendant employer used to pay the vacation coinciding with its beginning, "a *case which, in addition to not causing any harm*

to the worker, would also lead to unjust enrichment if sanctioned with double payment, without a specific legal rule providing for the sanction."

Dissent

For the dissent led by Justice José Roberto Pimenta, the 2-day period must be met and, in case of late payment, compensation is due, regardless of whether the payment was made outside the period or late only by a few days. According to the Justice, Precedent 450 *"was broad, generic and exhaustive, thus not admitting late payments*."

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Bill that reinstates measures to reduce hours and wages may pass until the end of April

Law No. 14,020/2020 ("Law 14,020") was one of the main governmental labor measures in 2020 to mitigate the economic impacts caused by the pandemic resulting from COVID-19. The main consequences of its enactment were the possibilities of proportional reduction in working hours and wages, suspension of employment contracts and the payment of the emergency benefit ("BEm"). After the end of the effects of Law 14,020, **with the non-extension of the state of emergency in 2021, the expectation of companies in Brazil is that the Senate will pass, as soon as possible, a new measure that will allow the provisional cut of wages and hours, since the pandemic has shown no signs of lifting up**.

Bill No. 1,058/2021 ("Bill 1,058"), which provides for a new extension of measures to stimulate credit and the maintenance of employment and income, should be voted by the Senate this week, but on the session of 04.15.2021 have been decided to delay it until the end of the month.

Early payment of unemployment insurance. As announced by the Minister of Economy, Paulo Guedes, employees who suffer a proportional reduction in working hours and wages or suspension of employment contracts will receive in advance part of the unemployment insurance due in the event of dismissal, reducing the companies' payroll costs. The government's idea is that layoffs be avoided by the early payment of part of the benefit.

Provisional job stability. In view of the provision of PL 1,058 to maintain the same conditions established in Law 14,020, it is also expected that, as in 2020, employees with proportional reduction of working hours and wages or suspension of employment contracts will have guaranteed provisional employment stability for the same period that the exceptional measures last.

Employees entitled to the BEm. All employees with a formal contract who have agreements to **temporarily reduce the workday or to suspend the employment contract will be entitled to BEm and** the intermittent employee, without working hours, without fixed wages, who had a formal contract on April 1, 2020. The measure is expected to be approved in the next few days.

Extension of the Emergency Credit Access Program. The expectation of Bill 1,058 passing brings new hope for companies that are in a weakened economic situation in the country: the extension of the Emergency Program for Access to Credit - Peac (Law No. 14,042/2020) will be allowed, in the following modalities: provision of guarantees via the Investment Guarantee Fund and the granting of a loan guaranteed by fiduciary assignment of receivables.

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