

PINHEIRONETO
ADVOGADOS

**Overview of Labor Proceedings and
Major Labor Concerns in Brazil**

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Labor Law in Brazil - Overview

- Very protective law.
- Labor and Employment Laws apply to all cases and all companies (regardless of its size).
- Employees are hired for an indefinite term. Part time workers and temporary workers are considered exception to the general rule.
- Employers cannot change the terms and conditions of labor contracts unfavorably for an employee (e.g. salary reduction).
 - Even if an employee agrees with such change, it's null and void.
 - Exception: in case there is a collective agreement with the union, it is possible to reduce the salaries.
- Active judiciary system:
 - The Consolidated Labor Laws (*Consolidação das Leis do Trabalho*) ("CLT") contains 922 Articles.
 - The Superior Labor Court (*Tribunal Superior do Trabalho*) issued 1167 instructions (including court precedents and case law orientations).

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1. Administrative Proceedings

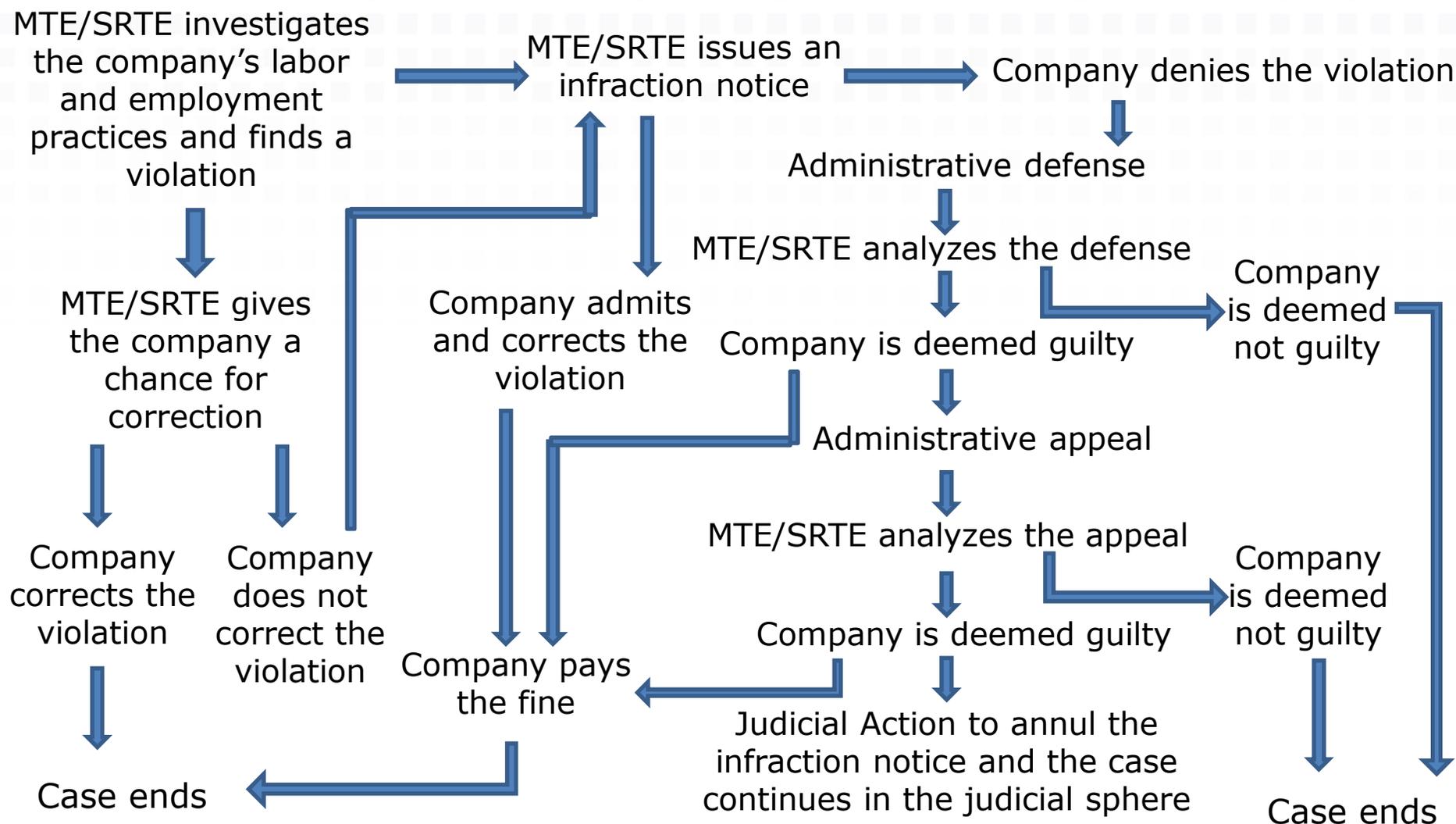
MTE/SRTE (1)

- The Ministry of Labor and Employment (*Ministério do Trabalho e Emprego*) (“MTE”) - Regional Labor and Employment Office (*Superintendência Regional do Trabalho e Emprego*) (“SRTE”) is responsible for inspecting companies facilities.
 - The purpose is verifying the compliance of (i) the work health and safety standards and (ii) labor and employment regulations.
- MTE/SRTE usually starts an investigation without prior notice.
 - This investigation is in fact very common and MTE/SRTE is very active in conducting such investigations.
 - MTE/SRTE verifies whether labor and employment laws are not violated by the company.
 - Typical examples are investigations related to overtime payment, proper equipment for employees’ security, etc.

MTE/SRTE (2)

- MTE/SRTE can impose fines when they find any violation.
- It is hard to expect how long the investigation will take; it depends on each case.
- Every company in Brazil must have a Labor Inspection Book in every office, factory, etc.
 - This Labor Inspection Book records (i) the visit of MTE/SRTE officers for investigations and (ii) penalties issued or recommendations provided by MTE/SRTE.
- Recommendation: keep all the necessary documents and records updated in advance for eventual investigations (e.g. time card).

Flow Chart for Typical Case - MTE/SRTE



MPT (1)

- Public Prosecutor Office of Labor Affairs (*Ministério Público do Trabalho*) (“MPT”) is an independent law enforcement authority responsible to defend the collective interests of employees.
 - MPT has the authority to start investigations on reported violations of any labor and employment regulations, usually based on anonymous report, notification from the authorities or information provided by the unions.
- MPT proceedings:
 - (i) Preparatory Proceeding for Public Civil Inquiry - administrative procedure.
 - (ii) Public Civil Inquiry (*Inquérito Civil*) – administrative procedure.
 - (iii) Civil Public Claim (*Ação Civil Pública*) – judicial procedure.

MPT (2)

- Public Civil Inquiry is a formal procedure to investigate potential violations.
 - It can be made by means of interview, inspection and/or documents.
 - Public Civil Inquiry is not open to the public.
 - It is hard to expect how long the Public Civil Inquiry takes.
- If MPT believes there is a violation of any labor and employment laws and regulations through the Public Civil Inquiry, MPT will file a Civil Public Claim against the company.
 - MPT judicially represents the employees of a company who suffer from the alleged violation.
 - MPT can claim the compensation of damages and, if appropriate, the rectification of illegal conducts (e.g. cease of company's practice to hire employees as legal entities).
 - MPT can also claim punitive damages. The amount will be determined by the judge based on facts of each case. There is no fixed amount provided by the law.

MPT (3)

- Regardless the MPT decision to file a Civil Public Claim, the employee still holds the right to individually file a lawsuit by himself against the company.
- MPT and a company may negotiate a Conduct Adjustment Agreement (*Termo de Ajustamento de Conduta*) ("TAC") in order to prevent the Civil Public Claim.
 - TAC is a settlement agreement.
 - If MPT and the company agree with TAC, the case will be shelved (finalized) and MPT will not file a Civil Public Claim.
 - After the filling of a Civil Public Claim, it is still possible to negotiate a settlement in a court.

Flow Chart for Typical Case – MPT

Anonymous report, notification from the labor authorities or information provided by unions or courts



MPT



Preparatory Proceeding for Public Civil Inquiry
– investigatory proceeding



MPT confirms there are
no violations



Case ends



MPT confirms there are violations



MPT starts a Public Civil Inquiry



Civil Public Claim



TAC



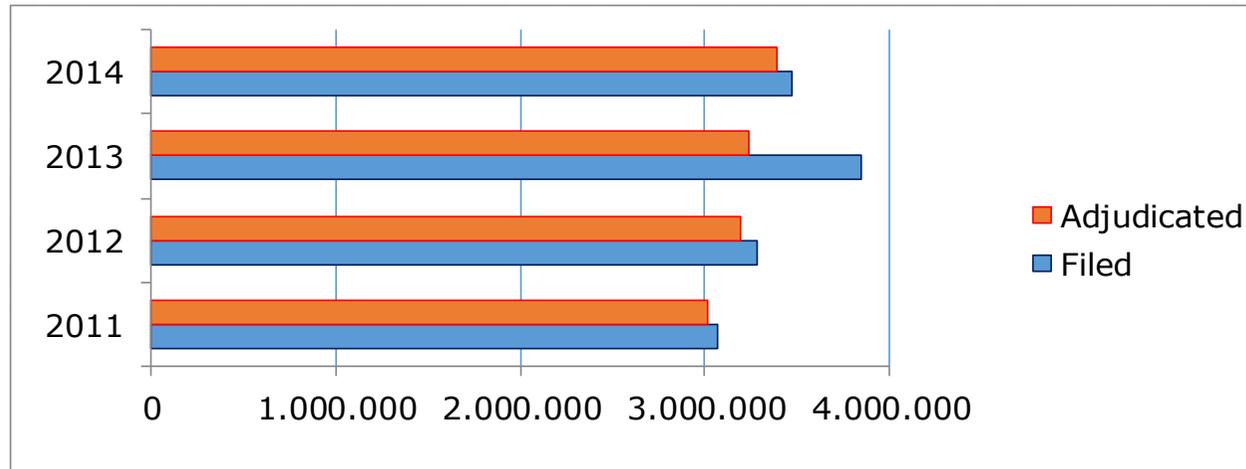
Case ends

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2. Labor Lawsuits

Number of labor lawsuits in Brazil

Resource: Superior Labor Court Website

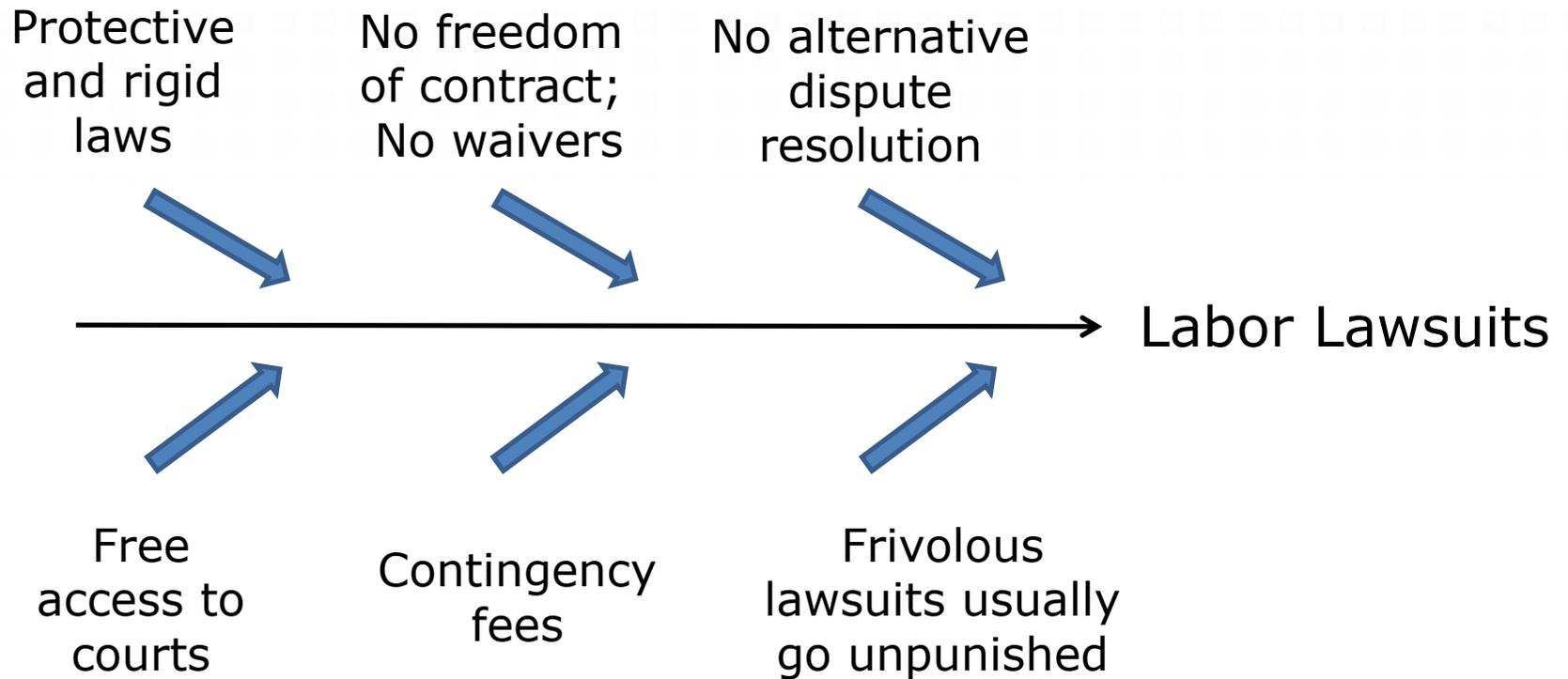


Year	Cases Filed	Variation	Cases Adjudicated	Variation
2011	3.069.489		3.016.219	
2012	3.286.341	+7%	3.192.246	+6%
2013	3.843.885	+17%	3.234.968	+1%
2014	3.472.861	-10%	3.391.615	+2%

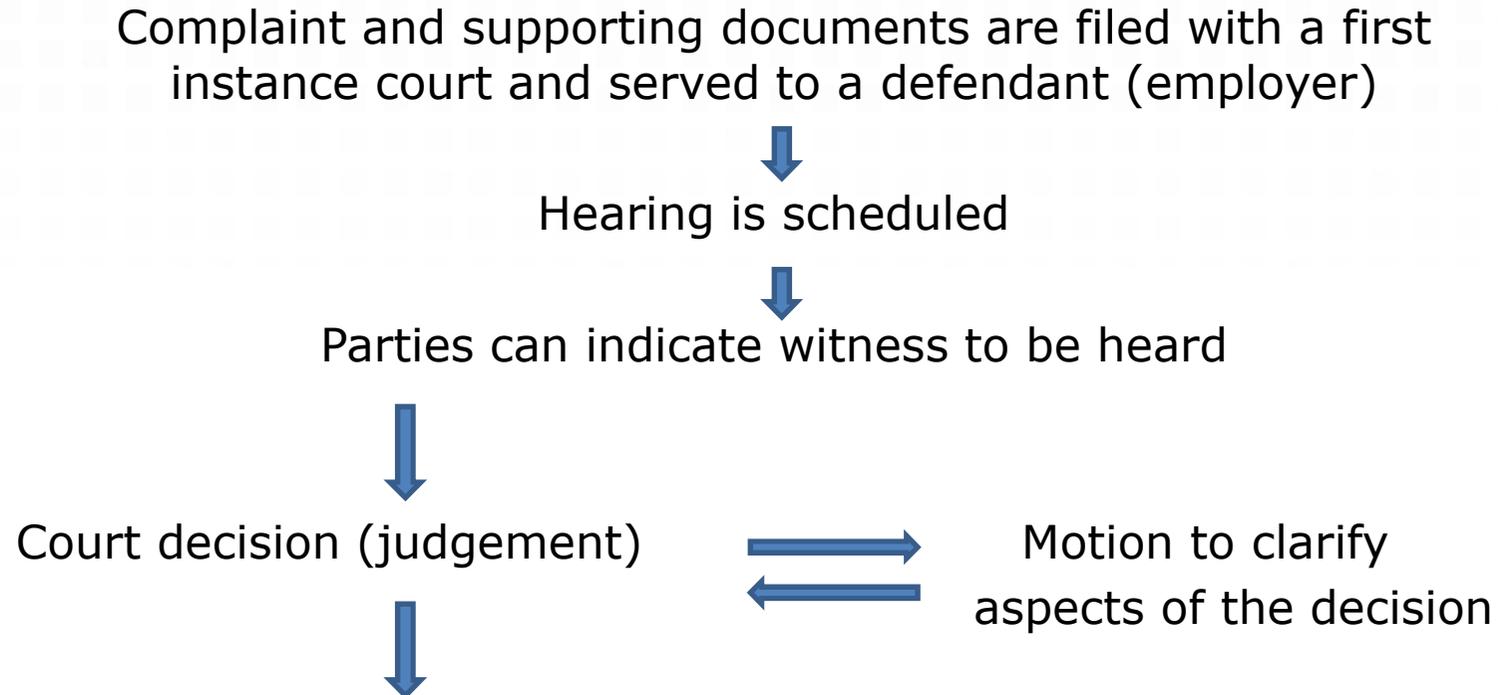
Most Commonly Litigated Issues in Brazilian Labor Courts

- Contractors v. Employees
- Overtime and breaks
- Wrongful termination with cause
- Discrimination
- Fringe benefits
- Non-economic damages including:
 - intentional infliction of emotional distress;
 - moral harassment;
 - invasion of privacy; and
 - Defamation.

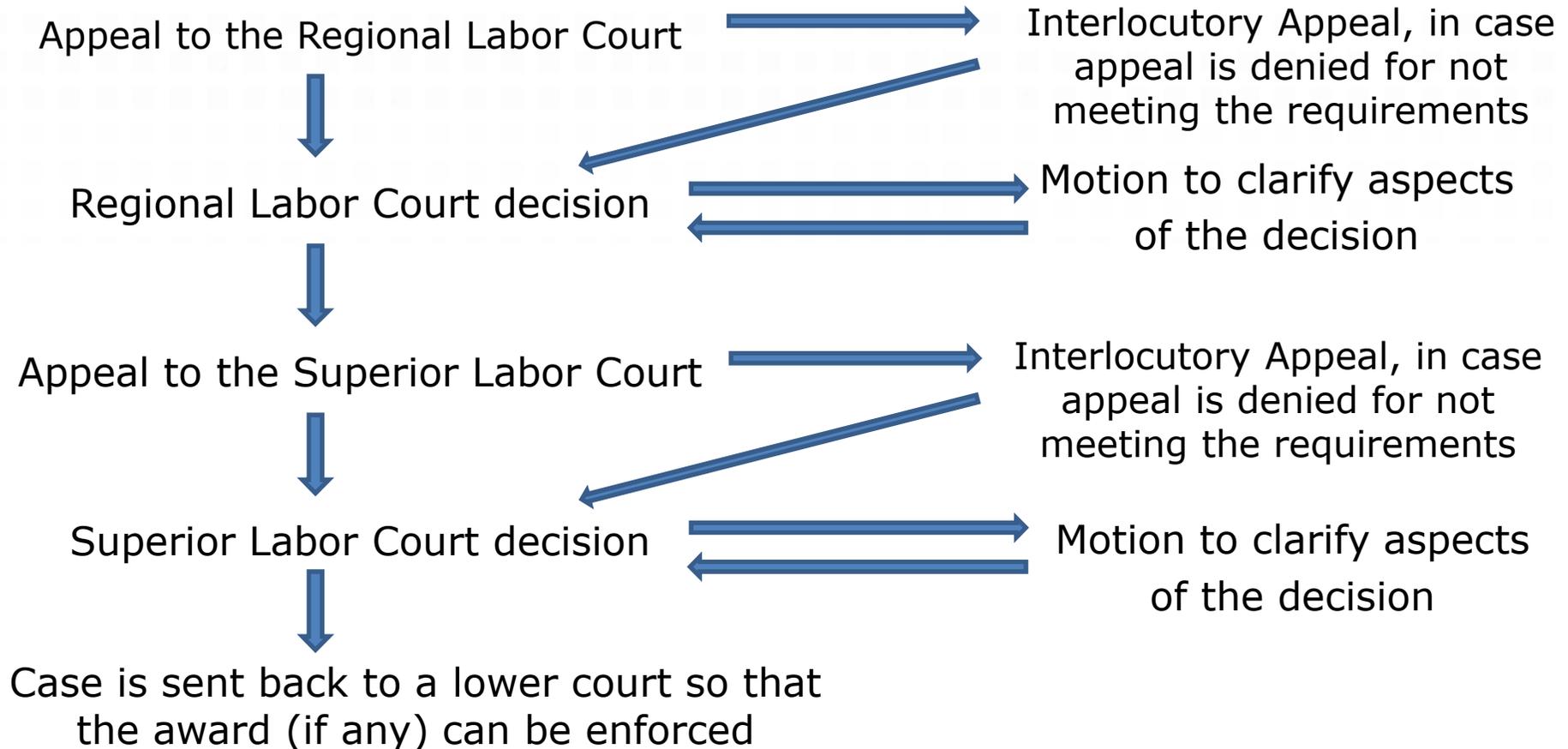
Misplaced incentives for labor lawsuits



Flow chart for typical case (1)



Flow chart for typical case (2)



Procedure for Labor Lawsuits (1)

- Judicial procedures for labor lawsuits are basically set in the CLT, but in the lack of provisions therein the Civil Procedure Code (*Código de Processo Civil*) will be applied.
- Examples of differences between labor lawsuits and other lawsuits:
 - the labor lawsuits are filed at the labor courts (not at the civil courts); and
 - judges in labor courts are specialists in labor laws.
- Procedures at the lower labor courts:
 - the lower labor court is a federal court;
 - the claim will be proposed in the jurisdiction of the employee's work place;
 - the defendant will deliver the defense at the first hearing with the paper evidence;
 - the parties and witness will be heard in the hearing;
 - in some cases, experts will be appointed to deliver a report; and
 - at the lower court, only one judge will decide the case.

Procedure for Labor Lawsuits (2)

- Appeals:
 - to the Regional Labor Courts (*Tribunal Regional do Trabalho*) and the Superior Labor Court, the panel is comprised by 3 judges who will decide the case;
 - the Regional Labor Courts review both factual and all legal decisions made by the lower labor court; and
 - the Superior Labor Court reviews only the breach of federal law or conflict with precedent cases in the decision made by Regional Labor Courts.
- The timeline and the interval of hearings really depend on each case (average of 3 years).
 - There are no rules in Brazilian law about timelines of labor lawsuits.

Procedure for Labor Lawsuits (3)

- Settlements are common in labor lawsuits.
 - Settlements can solve labor lawsuits in a shorter period and reduce the costs.
 - Settlements can avoid a bad precedent when the chances of success are low.
 - But settlements may be viewed as a precedent by other employees.

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3. Important Issues

Unions in Brazil (1) - Overview

- Unions (*Sindicatos*) exist based on the core-business of the companies.
 - In Brazil, a union representing only employees of one company is not common.
- There are two 2 types of unions in Brazil:
 - one union represents employees, and another union represents employers;
 - all employees and all employers are members of a union; and
 - all employees and all employers have to pay union's fees.

Unions in Brazil (2) - Overview

- The union representing employees and the union representing employers negotiate a collective bargaining agreement every year.
 - The collective bargaining agreements are binding and applicable to all employees and all employers represented by those unions.
 - They cannot opt out from these collective bargaining agreements, except if there is a separate agreement executed directly between the union and a company.
- Main roles of employees' unions are negotiating conditions of the employment relation and additional benefits to be granted to the employees (such as salary increase and health insurance).
 - The union can file lawsuits claiming rights of a group of employees represented by that union.

Unions in Brazil (3) - How to deal with Unions

- No one-size-fits-all policies to deal with unions:
 - policies must be adjusted to specific locations and unions;
 - some unions are more active than others;
 - the more organized the industry is, the stronger the union is. (e.g. banks' employees union is very strong); and
 - keep safe distance, but do not be a stranger.
- Unions could help to mediate a termination of protected employees, who cannot be fired without their consents.

Firing Employees (1) - Overview

- As a general rule, employees can be fired at any time without “objectively reasonable ground”.
 - But the employer shall pay a severance payment.
 - Certain employees (such as pregnant employees) are protected by law from being terminated.
- An employer shall make a notice 30 days plus 3 extra days per an employment year (but capped at 90 days in total) before termination.
 - For example, if an employee worked for 3 years for the employer, the employer shall make 39-days prior notice.
 - But an employer can pay a lump-sum corresponding to the amounts the employee would receive for that period instead of providing the notice in advance.

Firing Employees (2) - Overview

- Employees who have worked more than one year for the same employer shall have his or her severance payment ratified (*homologação*) by the union or the SRTE.
- An employee must receive a payment corresponding to (i) all the vested but unused vacation remaining until the end of the employment period, (ii) the 1/3 vacation bonus and (iii) the 13th month's salary proportional until the end of the employment period.

Firing Employees (3) - FGTS

- FGTS system (*Fundo de Garantia do Tempo de Serviço*):
 - this is a public fund for terminated employees;
 - each employee has his personal account under the FGTS system;
 - an employee can withdraw the FGTS amount from his account in certain situations;
 - an employer shall contribute an amount equal to 8% of a monthly salary of each employee to each employee's account during their employment; and
 - in addition, when an employer fires an employee, the employer must make a contribution equivalent to 40% of the total amount already deposited in the employee's FGTS account.

Firing Employees (4)

- Just Cause for Termination

Article 482 of the CLT defines the acts or facts that are considered just cause for termination:

- misconduct (theft, fraud, embezzlement);
- misbehavior (harrassment, mismanagement);
- unfair competition with the employer;
- disclosure of trade secret;
- defamation or personal injury against the employer or a co-worker;
- indiscipline or insubordination;
- gambling;
- regular or occasional on the job intoxication on alcohol or illegal drugs; and
- definitive criminal conviction.

Firing Employees (5)

- Just Cause for Termination

- The act or misconduct that triggers the termination for cause shall **be fully and clearly evidenced**, both as to (i) its existence and (ii) as to the one who has committed such act or misconduct.
- The **termination for cause must be made immediately after** there are grounded evidence that an irregular act existed and is sufficient to result in a termination for cause. On the contrary, **any delay** in terminating the individual properly, may be construed as implicit forgiveness of said act by Brazilian labor courts.
- If the company fails to show enough evidence for termination, especially if the cause entails serious damages to the reputation of the executive, the **employee may allege having suffered from emotional distress** brought by the termination for cause, and claim for relief or indemnification.

Economic Group Theory (1)

- Two or more companies sharing the same controlling interest in some upper level of the corporate structure are considered to belong to the same Economic Group (*Grupo Econômico*) for labor and employment liability purposes in Brazil.
 - For example, a parent company, subsidiary, another subsidiary of the parent company are all considered to belong to the same economic group.
 - Foreign corporations are also included in the same economic group.
- Other companies in the same economic group are jointly and severally liable for a labor claim of an employee of another company in that group.
 - But the employee shall claim against his employer first.
 - If that employer cannot pay, then the employee can claim the amount to other companies in the same economic group.

Economic Group Theory (2)

- Case laws have a broader interpretation as to what would be considered an economic group than the law. Case law shows following companies can belong to the same economic group:
 - partners or shareholders which exchange or share employees;
 - another company who use the same facilities;
 - a company which interferes with the business of another company; and
 - JV partner or other partner who engage in common businesses.

Labor Succession (1)

- General Rules under CLT:
 - the change in a company's legal nature will not affect the vested rights of its employees (Article 10 of CLT);
 - the change in the company's ownership interest will not affect its contracts with employees (Article 448 of CLT); and
- Various forms of labor successions under the case law:
 - conveying of property from a seller to a purchaser (most common type);
 - merger, transformation or acquisition; and
 - transfer of assets, field of business, client portfolio, productive plant, activities from one company to another.

Labor Succession (2)

- As a general rule, in all of various forms mentioned above, a company that continues the corporate activities will be regarded as a labor successor (*Sucessão Trabalhista*).
 - The successor will be responsible for the compliance of all labor and employment obligations assumed and/or not paid by the succeeded employer.
 - If an original company continues to exist, it may also be held liable to pay the unpaid labor and employment debts, but the successor has the primary responsibility.
 - On the other hand, a company does not have the obligation to negotiate with an employees' union prior to the labor succession events.

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