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CSMV ADVOGADOS

Labor issues - COVID-19 (Provisional Measure 927/2020 and Provisional Measure 928/2020)

*Updated on March 23rd, 2020 after publication of Provisional Measure no. 927/2020

*Updated on March 24th, 2020 after publication of Provisional Measure no. 928/2020

Since March 11, 2020, the World Health Organization (WHO) increased the status of the world contamination by the new coronavirus (COVID-19), declaring it as a worldwide pandemic. Such has happened due to the dissemination speed of COVID-19, without hindering the severity of the illness.

One of the main concerns related to the pandemic is the risk of the country's health system enter in collapse if the search for hospital care greatly increases, especially in cases of patients that need intensive care. As a result, the main order for the containment of COVID-19 is the social isolation, and such order shall only be successful if there is an engagement from all society. Nevertheless, the social isolation implies in measures that affect directly the labor relations.

On March 22nd, 2020, after the National Congress declared public calamity in Brazil (Legislative Decree no. 6/2020), the Federal Government published Provisional Measure no. 927/2020 ("PM 927/2020"), providing on labor measures to tackle the COVID-19 pandemic. According to Article 36 of PM 927/2020, the labor measures already adopted by employees in the last 30 days are validated automatically, as long as the measures do not contradict with the provisions of the MP.

In this scenario, as part of the contribution of our law office, we **updated** this special edition of our LIDA bulletin in order to attend to labor issues that arise from this specific moment of the society.

- **What does my company shall do when the employee announces that he/she has symptoms of COVID-19?**

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The employee that shows any symptom associated with COVID-19 shall be oriented to look for the medical services for an assessment and examination of COVID-19. The employer shall treat the situation with discretion, in order to safeguard the employee from any kind of discrimination.

- **Can the company demand a medical examination in order to confirm COVID-19? If the employee refuses to do the exam, what should the employer do?**

The company cannot force its employee to do the medical exam, considering that only the local health managers have the legal right to demand the mandatory medical examination (art. 3º, §7º, item III, Brazilian Law No. 13,979/2020)

If the employee refuses to be examined, we recommend granting to such employee a paid leave in order to avoid his/her exposure to other employees. With strong evidence that the employee has COVID-19 (e.g., has traveled abroad, has had close contact with a positive COVID-19 person, has shown the symptoms disclosed by public authorities), it is possible to request in Court for the State to determine to such employee to be examined, according to art. 3º, item III, of the Brazilian Law No. 13,979/2020.

- **While the result of the exam for the confirmation of COVID-19 is not ready yet, how should the employer proceed with the employee?**

During the period between the medical examination for the confirmation of COVID-19 and its outcome, the absence of the employee shall be considered as a justified absence, according to the art. 3º, §3º, of the Brazilian Law No. 13,979/2020.

- **In case the exam is positive for COVID-19, what shall the company do?**

If the exam is positive, the employee probably shall receive medical orientation to be in isolation. **Due to the high demand for COVID-19 diagnostic tests, it is possible that the employee will be instructed to return home and remain in isolation only, without the effective diagnostic test to confirm the eventual contagion.** In any case, the company shall **request** the presentation of the respective medical certificate to be registered and his justified absence accounted.

In addition, the company shall verify if there was any close contact from such sickened employee to other employees, clients and/or third parties, in order to verify if it is necessary to suggest additional medical examination and to inform the health authorities (as per art. 5º, of the Brazilian Law No. 13,979/2020).

- **How should the withdrawal of the employee and payment happen during his/her recovery?**

The medical certificate shall appoint the necessary period of withdrawal. Such period shall be considered as a justified absence for labor, according to art. 3º, §3º, of the Brazilian Law No. 13,979/2020. If the period of withdrawal is above 15 (fifteen) days, the employee shall be directed to the Brazilian Social Security Institute (INSS)¹ for the receipt of the common sickness aid.

- **What is the quarantine and the isolation due to the COVID-19? Who shall determine which case is applicable? How shall the company proceed in such cases?**

Quarantine is the period in which there is restriction of activities or segregation of people suspected from contamination in order to avoid the possible contamination or dissemination of the virus.

Isolation is the segregation of the sickened people or baggage, means of transportation, goods or parcels affected, in order to avoid the contamination or the dissemination of the virus. The Ministry of Health determines the recommendation to be of total isolation for a period of 14 (fourteen) days, and such period may be extended for 14 (fourteen) more days if the medical exam indicates the risk of contamination.

The determination of quarantine or isolation is made by the Ministry of Health and, under the Ministry's orientation, by the local health managers.

The worker in quarantine or in isolation shall have justified absences, according to the aforementioned item.

- **What shall happen if the employee does not have COVID-19, but lives with a person with positive COVID-19?**

Ordinance No. 356/2020 from the Ministry of Health indicates the possibility to determine the isolation of those close to people with positive COVID-19. Therefore, it shall be requested to the employee to present the respective medical orientation of isolation in his domicile, in order to the employee be exempted from his activities with

¹ We inform that Brazilian Law No. 13,979/2020 determines that only the absences from the isolation period and quarantine shall be considered as justified absence, without mentioning if the employer or the INSS shall bear the expenses of the withdrawal period longer than 15 (fifteen) days. Therefore, we adopt the understanding of art. 59, of Brazilian Law No. 8,213/91, **which provides for the granting of sickness aid when work incapacity exceeds 15 days.**

justified absence.

- **The employer is obliged to suspend his commercial activities, leaving his employees without work?**

So far, municipal and state governments have published decrees determining or recommending the suspension of non-essential services as a measure to restrict the movement of people. In general, face-to-face service in stores and all events and / or places that involve agglomerations will remain closed, except in relation to establishments considered essential (such as supermarkets, bakeries, gas stations, etc.). Under Decree no. 10,282/2020, which regulates Law n° 13,979/2020, public services and essential services² are those indispensable to meet the urgent needs of the community. In other words, the absence of those services endanger survival, health or population security.

The period and extension of these measures must be confirmed through municipal or state legislation. In São Paulo city, for example, Decree no. 59.285/2020 determined the closure of commercial establishments and event venues until April 5th. This suspension does not apply to markets, animal feed stores, bakeries, restaurants, cafeterias and gas stations. Additionally, the State of São Paulo Government issued Decree No. 64,862, recommending the closure of malls, shopping center and gyms by April 30th.

For those establishments where there is no determination to suspend services, the Ministry of Health has reinforced the adoption of measures to reduce the risk of transmission in community areas. The Ministry has also reinforced social isolation as

² The decree indicates as essential service: (i) health care, including medical and hospital services; (ii) social assistance and assistance to the vulnerable population; (iii) public and private security services, including surveillance, custody and custody of prisoners; (iv) national defense and civil defense; (v) intercity, interstate and international passenger transportation and passenger transportation by taxi or application; (vi) telecommunications and internet; (vii) call center service; (viii) water collection, treatment and distribution; (ix) sewage and garbage collection/treatment; (x) generation, transmission and distribution of electricity and gas; (xi) public lighting; (xii) production, distribution, commercialization and delivery, carried out in person or through electronic commerce, of health, hygiene, food and beverage products; (xiii) funeral services; (xiv) custody, use and control of radioactive substances, nuclear equipment and materials; (xv) phytosanitary surveillance and sanitary certifications; (xvi) prevention, control and eradication of plant pests and animal disease; (xvii) inspection of food, products and derivatives of animal and vegetable origin; (xviii) international agricultural surveillance; (xix) air, water and land traffic control; (xx) bank clearing, credit and debit card networks, ATMs and other in-person services from financial institutions; (xxi) postal services; (xxii) transportation and delivery of cargo in general; (xxiii) services related to information technology and data processing (data center) to support other activities provided for in this Decree; (xxiv) tax and customs inspection; (xxv) cash transportation; (xxvi) environmental inspection; (xxvii) production, distribution and sale of fuels and derivatives; (xxviii) monitoring of constructions and dams that may pose a security risk; (xxix) survey of analysis of geological data; (xxx) capital and insurance markets; (xxxii) care for animals in captivity; (xxxii) advisory activity in response to ongoing and urgent demands; (xxxii) medical-expert activities related to the general summary of social security and social assistance; (xxxiv) medical-expert activities related to the characterization of impediments; and (xxxv) other Federal Medical Expert services indispensable to meet the urgent needs of the community.

a measure of flattening the contamination curve, such as meetings held virtually, cancel or postpone non-essential trips, implementation of home office and adoption of alternative or flexible hours to avoid peak hours.

We recommend that **all** business travels should be avoided, especially to regions in which there are high risk of contamination (such as China and Europe), in order to avoid the employer to be strictly liable if the employee is contaminated in such travel. **We note that PM 927/2020 expressly provides that contamination by COVID-19 will not be considered an occupational disease, except upon proof of causal link. In other words, the company must take precautionary and preventive measures to remove possible responsibilities.**

We observe that the adoption of such security measures also aims to respect the principle of the social responsibility of the company, as provided by art. 170 of the Brazilian Federal Constitution, which determines the responsibilities of the company before the community in which it operates, promoting and respecting the rights and interests of the society.

- **What shall happen if the Government determines the suspension of my business activities?**

The company shall follow the Government's determination, according to the terms and orientations set forth therein. **So far, despite the suspension of services of numerous establishments, there is no definition by the Government (municipal, state or federal) how the situation of the employees shall be in such period. In the absence of law, the obligation to pay the salaries shall maintain, since the company is entirely liable for the business risk.**

Acknowledging the state of public calamity declared by Legislative Decree No. 6/2020 and that the situation may render a collapse in the economy, there is an expectation that the Federal Government will provide aid packages to companies in this period.

After the return of the labor activities, it shall be possible, according to art. 61, §3º, of Brazilian Consolidation of Labor Laws ("CLT"), to demand the compensation from the days that the work was interrupted, up to 2 (two) hours per day, in a period of up to 45 (forty-five) days per year, provided that there is prior authorization from the Ministry of Economy.

In case the company closes whether by its choice or by determination from the Government, **alternatives were regulated under PM 927/2020 to allow the viability of the company's business in this period, as well as the preservation of employment**

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relations and income.

- **What safety measures can be made and demanded by the company, on a day-to-day basis?**

Following the instructions from the Ministry of Health, due to the means of contamination of COVID-19 (by touching), **the companies and employers must** disinfect objects and surfaces frequently touched (e.g. doorknobs, handrails, cellphones), and adopt measures to enforce the health and safety orientations for its employees. In such matter, we suggest that the companies that have their Internal Commission for the Prevention of Accidents (“CIPA”) and Specialized Services in Security Engineer and Labor Medicine (“SESMT”) hold meetings in an adequate environment (to avoid any crowding), with the registry of the minutes of such specific deliberations in relation to the pandemic situation. **Furthermore, the companies must reinforce all the cleaning, hygiene and precautions to reduce contagion.**

Nevertheless, according to the Ministry of Health, the company shall provide places in which the employees wash their hands frequently, alcohol-based hand sanitizer 70% (seventy per cent), **gloves and disposable paper towels. Instructions to employees to keep their distance between themselves, not to share personal items and to cover their nose to mouth when sneezing and coughing.**

We recommend, once again, that reminders be set to reinforce the importance of washing hands with soap and water and using alcohol-based hand sanitizer, as well as measures to raise workers' awareness with CIPA (Internal Commission on Accident Prevention). The employees that refuses to comply with such basic hygienic measures shall be warned and punished for not complying with security measures.

The prevention and protection measures shall be funded by the company.

- **Can the employer place his employees in home office?**

Yes. Home office (*teletrabalho*), as per the Brazilian labor law), is one of the exceptions for the control of the working hours, according to the Law No. 13,467/17, in its art. 75-A, B, C, D and E from CLT, when it comes to a work regime in which the provision of services is made mostly outside of the establishment of the employer, using information and communication technologies. The work shall be mostly **or entirely outside from the company premises** and without any control of the employee's working hours by the employer.

If there is any form of control, the work schedule shall be registered in a timecard and

any extraordinary hours shall be paid by the employer. In this case, the render of remote services will not be “teleworking” for the purposes of Article 62, III, of the CLT but only a remote work with control of working hours.

According to PM 927/2020, during the period of public calamity, the employer may alter the employment agreement to telework, home office or remote work, regardless of the existence of a prior individual agreement. The employer must notify the employee at least 48 hours before the alteration. Interns and apprentices also apply to telework, home office or remote work.

Within thirty days of the alteration of the work arrangement, in the absence of express contractual provision, the parties must define to whom shall be entitled the liability for the work equipment and if the company shall bear any extraordinary expense for the employee. In case the company provides the equipment and/or reimburse the employee, such amounts shall not be considered as salary.

If the employee has not the necessary infrastructure for remote work, the employer can supply the equipment on a free lease basis and pay for infrastructure services; if this is not possible, the PM 927/2020 presumes that the employee is at the employer's disposal during the normal working hours.

The period in which the employee uses communication applications and softwares, aside the normal working hours, will not be considered as overtime.

By being performed outside of the company, the law demands that the employer provides guidelines to its employees regarding safety measures and occupational medicine in order to avoid “sickness and work accidents”. Thus, we recommend that the employee shall be oriented and sign a term of responsibility. The guidance should include prevention measures for COVID-19.

The company shall verify the possibility to begin working in home office, considering the inner safety measures and the provision of technology for such work.

- **And to those employees in which the activities is incompatible with home office? What should the company do?**

The companies that perform activities incompatible with home office shall adopt other measures to reduce the movement of its employees, in compliance with the orientation of the Ministry of Health, in order to avoid the infection from COVID-19, according to PM 927/2020. There are several ways to treat the situation, and the company shall assess which one is compatible to its business and to its economic health, such as:

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a) Flexibilization of the working hours

The employer could adopt measures to adjust the working hours, such as changing the entrance and exit hours (in order to not coincide with the hush hours), reduce the working hours of the employee without changing its salary, adoption of compensation systems of the working hours (bank of hours). To avoid any further problem, we recommend that the flexibilization of the working hours shall be negotiated previously with the workers union.

According to PM 927/2020, the companies are allowed to anticipate day-offs of non-religious holidays, with 48 hours' notice. Religious holidays day-offs may be brought forward with the employee's written consent.

In addition, the interruption of work may apply through a bank of hours, established by formal individual or collective agreement, with compensation in up to 18 months starting at the end of public calamity.

b) Paid leave

The employer shall grant paid leave to its employees, considering the situation of public health emergency due to the COVID-19. In such case, the labor agreements shall be interrupted, and the payment of the salaries shall be maintained. If the leave is longer than 30 (thirty) days, the employee will lose its rights to proportional vacation and the new acquisition period of such vacation shall restart from his return, as per art. 133, III, from CLT.

c) Anticipate employee vacation

The PM 927/2020 exceptionally allows anticipating the employees' vacations, even if they have not completed 12 months of acquisition period. To concede vacation in advance, the employer must notify (in writing) the employee with at least 48 hours in advance. The minimum period of vacation is of 5 (five) calendar days. Parties may negotiate future vacation periods, also in writing. The concession of vacation must prioritize the COVID-19 risk-group employees.

The vacation pay shall be made until the fifth business day of the month following the start of the vacation (within the same period as the normal salary pay), and the company may choose to pay the additional 1/3 vacation after concession of vacation, until December, 20th, when the 13th salary is paid.

d) Joint vacation

Joint vacation concession extends to all employees or a particular sector or branch. The PM 927/2020 extinguishes the obligation of a minimum limit of the duration of joint vacation and the maximum limit of annual vacation. The PM 927/2020 also allow companies to grant joint vacation with 48 hours' notice to employees, dismissing the report to the Ministry of Economy and workers' unions.

e) Suspension of the employment agreement or salary reduction

After several critics to the Federal Government, at the end of March 23rd, 2020, it was published the new Provisional Measure no. 928/2020, canceling Article 18 of PM 927/2020, which stated about "guidance of the worker for qualification".

In general, PM 927/2020 allowed the suspension of the employment agreement for up to four months. The suspension is conditioned to the subscription of the employee in a course or a professional qualification program through distance learning offered by the employer or by qualifying entities. The parties could negotiate the suspension individually. The period of suspension should be registered in employee' Work and Social Security Card.

During this period, the employer might grant a monthly compensatory aid, without salary nature, in an amount defined with the employee. The employee would continue to receive the benefits granted by the employer. If the course is not awarded or if the employee remains working, the suspension would be void.

Even with Article 18 of PM 927/2020 being immediately revoked after the publication of PM 928/2020, it should be noted that the situation of *force majeure* due to the state of public calamity, in accordance with Article 501 of CLT, and Article 1st of PM 927/2020, which means the company may conduct a salary reduction in accordance with Article 503 of CLT (reduction up to 25% of salary), or, upon union negotiation, the company shall negotiate possible suspension of the labor agreement (*layoff*) or reduction of the salary with the respective reduction of the working hours, according to art. 7^o, item IV, of the Brazilian Federal Constitution. Considering it is a drastic alternative that the company may adopt, and due to the direct impact over the salaries of its employees, the negotiation shall be done with caution with the respective union, and considering the allocation of further benefits for the employees.

It can be considered as "further benefits" the maintenance of the employment relation during the agreement period, as provided by PM 924/2020 for "job preservation" and "continuance of employment relation". As well as Article 611.-A, paragraph 3rd, of

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CLT, which provides “protection of employees against dismissal unmotivated during the term of the collective agreement”.

Any harsher alteration of the employment contract should be conducted through negotiation with the workers union and the draft of a collective bargaining agreement. The term of the collective bargaining agreement should be analyzed carefully.

- **Which operations of the companies are affected on a daily basis due to PM 927/2020?**

a) Occupational Health and Safety

During the period of public calamity, the PM 927/2020 suspended the obligation to carry out occupational medical examinations, except for dismissal examinations, carried out within 60 days of the closure of public calamity. It is excepted if the examination is essential to perform it immediately, or if there is an exam had been undertaken less than 180 days (in which case, a new exam is dismissed).

Periodic training of employees is also suspended, resuming within 90 days after the end of public calamity, or it might be carried out remotely.

The CIPA may be maintained until the end of public calamity, suspending the election in progress.

The PM 927/2020 expressly provides that contamination by COVID-19 will not be considered an occupational disease, except upon proof of causal link.

b) Unemployment Guarantee Fund (“FGTS”)

The PM 927/2020 suspends the collection of the FGTS for the reference months of March, April and May of 2020. The obligation of collection of these 3 months resumes from July 2020, with payment in up to 6 monthly installments, with no increase of monetary adjustment or the applicable fine. To request the suspension, the employer must declare the required information by June, 20th.2020. The declaration will be equivalent to a debt confession.

If the employment contract is terminated, the suspension will be resolved, and the employer must collect the FGTS immediately, including the 40% applicable fine.

c) Labor inspection

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For the period of 180 days from the enforcement of PM 927/2020, Labor Auditors actions are limited to guidance (and not impose fines), except in case of: (i) irregularities regarding lack of employee registration; (ii) imminent risk and danger; (iii) fatal occupational accident., and last (iv) work in conditions similar to slavery or child labor.

All the orientations presented on this LIDA consider the situation at the moment of its publication, and it may be modified according to any positioning from the Federal, State and/or Municipal Government, as well as to any possible publication of specific rules regarding the matter and/or rules decreeing state of emergency and/or restricting the movement of people.

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