

Corporate Newsletter

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Legal Developments and Issues Surrounding the Coronavirus (COVID-19) Pandemic in Brazil

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1. Overview¹

Brazil's first case of COVID-19 was diagnosed on February 25, 2020; as of April 5, Brazil had 11,130 confirmed cases. This dramatic increase has prompted many discussions about how to deal with the epidemic and compelled public authorities to repeatedly enact new (temporary) legislation to fight this unprecedented disease.

One major issue is that the Federal and State Governments cannot agree on appropriate measures to restrain the virus. This failure has created uncertainty in Brazil's business environment and feelings of insecurity concerning the economy.

On February 6, 2020, the Brazilian Government enacted Law No. 13,979/2020 (the "Coronavirus Law") which provides measures for dealing with public health calamities resultant of the coronavirus. Among other measures, the Coronavirus Law allows the Minister of Health Affairs to establish restrictions on the affected population, such as isolation, quarantine, compulsory medical exams, and exceptional and temporary restrictions on entering and

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leaving the country by highways, ports, or airports. It further provides that any measure to be taken by the government must be determined based on scientific evidence and must be limited in time and space to the minimum necessary for the promotion and preservation of public health.

The Minister of Health Affairs published proposed regulations on March 12, 2020. Once they are approved by the competent Health Secretary (through an administrative act) and widely disclosed to the population, isolation may be imposed for up to 14 days, extended for an equal period if necessary, and quarantine imposed for up to 40 days.

In this article, we describe the impact of coronavirus-related incidents on certain legal institutions in Brazil.

2. Labor Law

(1) Temporary measures under MP 927

On March 22, 2020, Provisional Act No. 927 (“**MP 927**”) was enacted by the Brazilian Government allowing temporary modification of the Consolidation of Labor Laws (Consolidação das Leis do Trabalho, the “**CLT**”). Through MP 927 it was prescribed that, for all purposes, the coronavirus should be deemed a force majeure event under Article 501 of the CLT, which thus allows employers to reduce their employees’ remuneration by up to 25% for as long as the force majeure lasts (n.b: MP 927 states that the force majeure period shall be deemed to end on December 31, 2020), provided that the remuneration paid is never lower than minimum wage.

In addition, under the transitory rules introduced by MP 927, employees and employers will be allowed to enter into individual written agreements for purposes of establishing special work conditions to assure the continuity of their employment relationships (reducing the necessity for layoffs). These individual agreements will prevail over other laws, collective agreements, and individual agreements.

Despite the amicable alternative (individual agreements) mentioned above, MP 927 also creates rules on behalf of employers, including:

- (i) The ability to compel adoption of teleworking with only forty-eight hours’ advance notice to employees (instead of the standard 15-day period). The new rules waive the need for individual or collective agreements, or changes to individual employment contracts, as required under the CLT.
- (ii) Compulsory individual vacations upon at least forty-eight hours’ advance notice (instead of the standard 30-day period), which may be granted by an act of the employer, even if the vesting period (i.e., a 12 month work period) has not yet elapsed. Another new rule allows employees and employers to negotiate anticipated² future vacation periods by individual written agreement. The transitory rules require employers to prioritize the vacation requests of workers who belong to coronavirus risk groups (either individually or collectively). The employer may choose to pay vacation remuneration up to the 5th

² “Anticipate” in Brazilian laws context means to bring to an earlier date.

business day of the month following the start of the vacation period, and an additional one-third vacation fee on the date on which the Christmas bonus is due (instead of the standard 2 days prior to the vacation period).

- (iii) Concession of collective vacations upon at least forty-eight hours' prior notice (instead of the standard 15-day period). The typically required prior communications to the local body of the Ministry of Economy and the unions representing the workers' professional category are also waived during the state of "public calamity".
- (iv) Anticipation of federal, state, district and municipal non-religious holidays upon at least forty-eight hours' advance notice, with express indication of the holidays to be anticipated (no similar rule exists under the CLT). This means that employers have the ability to grant days off to employees as if it was a public holiday, and when the actual date of the holiday comes employees will have to work instead of having the day off.
- (v) Certain changes to a special working hours compensation scheme called the "Hours Bank (Banco de Horas)," under which overtime hours of up to 2 hours per day may be transferred to later working hours/days, provided that total working hours may not exceed 10 hours a day. Under MP 927, the transfer of working hours can be made within 18 months, counting from the end of the state of public calamity. Also, under MP 927, the Hours Bank scheme may be applied at the discretion of the employer, regardless of the provisions contained in a collective agreement or individual agreement.
- (vi) Suspension of the obligation to carry out occupational, clinical, and complementary medical examinations, except for dismissal exams (a legally required health examination when an employee is fired or quits, which attest that the employee was in good health at that time). Such suspended examinations will be carried out within 60 days after the end of the state of public calamity. In addition, the obligation to carry out periodic training under the regulatory standards governing workplace safety and health is also suspended. The training will resume within 90 days after the end of the state of public calamity.
- (vii) Enforcement suspension for employer time of service guarantee fund (Fundo de Garantia por Tempo de Serviço – "FGTS") payments due in March, April, and May 2020. All employers may exercise this prerogative regardless of the number of employees, taxation regime, legal nature, economic activity, or prior utilization of the benefit. The collection of the FGTS for the relevant months will be settled in up to 6 monthly installments, starting in July 2020, without penalties, fees or interest. The employer is obliged to declare the information necessary to identify the credits owed by June 20, 2020, with such declaration operating as a confession of debt. If the employer does not declare the FGTS amounts that are due, it will be obliged to pay the charges in full, along with the applicable fine.

These transitory rules will last for the same period as the state of public calamity declared by the Federal Government (i.e., until December 31, 2020).

(2) Temporary measures under MP 936

On April 1, 2020, the Federal Government published Provisional Measure No. 936 (“**MP 936**”) which is intended to avoid mass layoffs. This provisional measure was enacted in response to a regulation in the Coronavirus Law. MP 936 establishes an emergency program for maintenance of employment and income during the state of calamity, the primary terms and conditions of which are as follows:

- (i) Proportional reduction in working hours and wages and temporary suspension of employment contracts (the “**Labor Measures**”).
- (ii) The Labor Measures will be applied to employees with: (a) salaries equal to or less than R\$ 3,135.00 a month, and (b) holders of degrees from institutions of higher education who receive a monthly salary equal to or greater than twice the maximum limit of the benefits of the General Social Security System (i.e., R\$ 12,202.12 or higher).
- (iii) During the state of public calamity Labor Measures will have to comply with the following criteria: (a) an employer may agree to the proportional reduction in the working hours and salary of its employees exclusively on the following bases: 25%, 50% or 70%, for a period of up to 90 days, and (b) a temporary suspension of employment contracts for a maximum period of 60 days, which can be split into two periods of 30 days each.
- (iv) The Labor Measures must be agreed upon in individual written agreements between employers and employees, which must be sent to the employee(s) at least 2 days in advance.
- (v) The original employment conditions shall be reestablished within 2 calendar days from: (a) the cessation of the state of public calamity (b) the date established in the individual agreement as the agreed-upon end of the period of the reduction or suspension, or (c) the date of a communication from the employer to the employee(s) informing the employee(s) of its decision to bring an end to the agreed-upon reduction period (i.e., shortening the period of reduction).
- (vi) Emergency employment and income preservation benefits (the “**Emergency Benefits**”) will be paid exclusively during a proportional reduction of employees’ working hours and salary or the temporary suspension of the relevant employment contract(s).
- (vii) The Emergency Benefits will be operationalized and paid by the Ministry of Economy.
- (viii) The value of the Emergency Benefits will be based on the monthly unemployment insurance amount to

which the employee would be entitled in case of dismissal.³ In the event of a reduction in working hours and wages, the amount will be calculated by applying the percentage of such reduction to the base calculation. In the event of a temporary suspension of the employment contract, the Emergency Benefits will have a monthly value equivalent to: (a) 100% of the amount of unemployment insurance to which the employee would be entitled in case of suspension for 60 days, or (b) 70% of the unemployment insurance to which the employee would be entitled if the employer had gross profits over R\$ 4,800,000.00 in 2019, under which circumstances the employer will pay the remaining 30%.

- (ix) In addition to the severance installments provided for in the labor laws currently in force, dismissal of an employee without cause during the period defined in the Labor Measures will subject the employer to mandatory payment of the following amount(s): (a) 50% of the salary to which the employee would be entitled during the period of provisional guaranteed employment, in the event of a reduction in working hours and salary equal to or greater than 25% and less than 50%; (b) 75% of the salary to which the employee would be entitled during the period of provisional guaranteed employment, in the event of a reduction in working hours and salary equal to or greater than 50% percent and less than 70%, or (c) 100% of the salary to which the employee would be entitled during the period of provisional guaranteed employment, in the event of a reduction in working hours and salary equal to or greater than 70%, or temporary suspension of the employment contract

3. Contract Law

Considering the measures to contain COVID-19 adopted worldwide, as well as the severe financial repercussions of the pandemic, some companies may find it impossible to fulfill certain contractual obligations. In this context, it is important to analyze the legal consequences of default, especially the legal characterization of the event that gave rise to non-compliance, including the possibilities of force majeure and excessive burden.

In carrying out such an analysis, in addition to the specific elements of each case, we should also consider the nature of the defaulted obligation, the time and context of the assumption of the obligation, the event that gave rise to the breach and its estimated duration, and the financial and social consequences for the parties involved.

In the context of M&A operations, in particular, it is especially important to perform a careful evaluation of the so-called MAC or MAE clauses, which deal with adverse events that may occur between the execution and closing of a given transaction. For transactions with executed contracts, it is important to assess whether the COVID-19 pandemic fits the agreed-upon contractual definition of force majeure and, if so, to analyze the resulting repercussions. For transactions still under negotiation, it is important to evaluate the MAC/MAE clauses carefully, considering the current global situation and the potential repercussions for the parties involved, from the points of

³ As a reference, the minimum unemployment payment in 2020 is R\$ 1,045.00 and the ceiling is R\$ 1,813.00. Unemployed workers who are dismissed without just cause can receive unemployment insurance. The unemployment payment due is calculated based on the average wages earned during the last 3 months prior to layoff. The worker receives between three and five installments of unemployment insurance. The number of installments varies according to how many times the worker has requested this benefit and how long he/she worked before dismissal.

view of both deal certainty and availability of funds for closing. It is also important to remember that many cross border M&A transactions involving Brazil are denominated in foreign currencies, and as such, the economic instability generated by the coronavirus could give rise to increased exchange risks.

Similar situations involving force majeure arguments were analyzed in Brazilian courts during the global H1N1 pandemic. At that time, numerous decisions reinforced the understanding that, generally speaking, epidemics fall within the definition of force majeure under Brazilian law. Therefore, the enforceability of contracts under Brazilian jurisdiction may be temporarily affected by the spread of coronavirus.

4. Consumer Law

Under the Brazilian Consumer Protection Code (Law No. 8,078/1990), suppliers have a legal obligation to provide clear and accurate information to consumers; this legal obligation becomes even more important with reference to the possible impact of COVID-19 on products and services offered to consumers. Although Brazilian retailers are generally considered to be under a strict liability regime, the law provides some possibilities for exclusion, including acts of God or *force majeure* events. Nevertheless, it is extremely important that suppliers institute mitigation measures, such as providing accurate and timely information, if they are unable to provide the service or product purchased by a consumer.

In case of cancellation of a product or service at the request of the supplier, the consumer should have a choice between receiving a refund of the amount(s) paid or a rescheduling of the service and/or delivery of the product. In case of cancellation of the product or service at the consumer's request, the supplier should assess the specific situation and act appropriately. Whenever possible, the parties should try to reach a common understanding, in order to avoid complaints to consumer protection agencies or judicial proceedings. If an amicable solution is not possible, whenever a consumer requests cancellation, the supplier should assess the possibility of paying contractual indemnification obligations due to the eventual inevitability of the cancellation. It is important to note that there are specific rules that must be evaluated depending on the product or service, such as air transportation, shipping, online shopping, and others.

5. Judicial Matters

The Superior and State Judicial Courts have started issuing orders and preventive recommendations to control the spread of coronavirus.

In São Paulo, for example, the State Courts ordered, among other things: (i) the suspension of all procedural deadlines for a period of 30 days, except for urgent measures, arrested defendants, and cases involving underage offenders, (ii) the suspension of hearings that are considered non-urgent by magistrates for an initial period of 30 days, (iii) limitation of access to hearing rooms and court sessions to the parties and the magistrates only, and (iv) authorization of remote work for an initial period of 14 days for pregnant women, employees over 60 years of age, and people with chronic diseases or physical disabilities. It is likely that within a short period most State Courts will have similar measures in place.

6. Intellectual Property

On March 20, 2020, the Brazilian National Industrial Property Institute (“**INPI**”) instituted a work-from-home policy for its public agents. Currently, communications with INPI can be made only electronically, although they will try to provide remote services that are as close to normal as possible. No date has been established for the workers to return, which is expected to occur only when sanitary conditions allow. In addition, INPI issued Ordinance No. 120 of March 16, 2020, suspending all deadlines between March 16, 2020 and April 14, 2020. Any temporal compliance requirements scheduled to initiate during the period of suspension will start to run on April 15, 2020. For periods that commenced prior to the suspension, the remainder will recommence from April 15, 2020. Though deadlines are suspended, interested parties can submit a petition electronically to comply with the original deadlines, at their discretion.



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