

PREGNANT EMPLOYEE LEAVE FROM ON-SITE WORKING ACTIVITIES AS A PROTECTIVE HEALTH MEASURE - LAW NO. 14,151/2021

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Sanctioned by the President and published in the Federal Official Gazette on 05/13/2021, Law No. 14,151/2021 introduces new protective guidelines and measures adopted by the Federal Government as a way to reduce the risks of contamination and exposure resulting from the COVID-19 pandemic, which, in this case, is associated with the protection of pregnant employees.

Originating from Bill of Law No. 3,932/2020, the proposal had been approved by the Federal Senate on 4/15/2021, after approval by the House of Representatives, in August 2020.

The main purpose of the new Law is to reduce the risk of exposing expecting mothers to be contaminated by Covid-19, given the advance of the pandemic in Brazil, the exponential increase of cases, and the respective occupation of hospital ICUs.

In accordance with data published on 04/19/2021 by the Brazilian Obstetric Observatory Covid-19 (OBR Covid-19), in 2020, 453 pregnant women died and, in 2021, this number has already reached 362 deaths due to contamination by the new Coronavirus.

Pursuant to the new Law, during the public health emergency resulting from the Coronavirus, all pregnant employees must remain away from working on-site, without any loss to their monthly remuneration.

During the pregnant employee's leave, she must make herself available to her employer to carry out her activities at home, by teleworking, remote work, or any other form of distant work.

Therefore, the main purpose of the new Law is to reduce exposure of pregnant employees to the Coronavirus.

Despite this being a major legislative evolution for the protection of pregnant employees and their fetus, the new Law is quite simplistic and ended up raising questions about specificities that were not contemplated or detailed in the text. One of the most relevant is the lack of a clear solution for cases in which working remotely would not be possible.

Unfortunately, the Law does not offer alternatives to the employer or pregnant employee if working remotely is not possible, since, in the strict sense of the Law, if the employee is pregnant, she must be removed from her on-site working activities, without prejudice to her remuneration, regardless of whether or not the work can be done remotely.

Further, the Law creates instability in relation to other points not yet clarified or regulated, for instance:

- When the pregnant employee is put on leave, and when remote work is not possible, who will be responsible for paying her remuneration: the employer or the Government? It is worth remembering that the vast majority of small and medium-sized companies are experiencing severe financial difficulties due to the duration of the pandemic, however, there is no forecast of benefit, financial aid or anticipation of maternity leave for this (new) scenario;
- If a pregnant employee has already taken the Coronavirus vaccine under the State or Federal vaccination plan, will she be able to work on-site or should she be on leave based on the provisions of the Law, which does not deal with such differentiation?
- There is also no clear definition of the "public health emergency due to the coronavirus" period. It is worth remembering that each State is in a different moment or situation and, strictly speaking, the state of national public calamity instituted by Legislative Decree 6/2020 expired on 12/31/2020.

As far as this last issue is concerned, it is important to mention that, although the validity of Law No. 13,979/2020, which provides for measures to deal with the public health emergency of international importance resulting from the coronavirus, is associated with the validity of Legislative Decree N. 6/2020, which instituted the state of public calamity, the Federal Supreme Court, in a decision issued on 12/30/2020, extended the effects of Law No. 13,979/2020 to 12/31/2021.

Under this decision, the health measures provided for under such Law must be part of the arsenal of measures the health authorities have to fight the pandemic, and these must be maintained, even if the Legislative Decree has expired.

Although the maintenance of measures to deal with the public health emergency has been deferred, with the extension of the norm's validity, it is noted that the issue regarding the clear definition of "public health emergency period resulting from the coronavirus" is not satisfied, since the implementation of safety measures is not connected to the declaration of a state of public calamity contained in the already expired Legislative Decree N. 6/2020.

In addition to all the problems presented above, and as if they were not enough, there is still fear of discrimination and reduction in the hiring of pregnant women during the pandemic period, since, under the terms of Technical Note No. 01/2021 of the National GT of COVID-19 issued by the Labor Public Prosecution Service, the dismissal of pregnant workers in this pandemic period may constitute discriminatory dismissal pursuant to article 373-A, item II, of the CLT and article 4 of Law No. 9,029/99.

Are there effective alternatives to overcome all these problems? Unfortunately not.

Although the Federal Government has issued new Provisional Measures 1,045 and 1,046, which reinstated, respectively, the Emergency Program for the Maintenance of Employment and Income and the flexibilization of employment rules relative to vacation leaves, working from home regime, occupational health and safety (in relation to which we wrote an article which can be accessed by clicking on this link <https://montgomery.adv.br/en/new-2021-covid-19-employment-related-governmental-measures/>), it is known that the application of these measures is restrictive, since they are limited to 120 days (expiring on 08/25/2021), thus, such period may not coincide with the gestational period of the pregnant employee, which ultimately may cause more complications for the application of the Law, than, properly, help to implement it. As if that were not enough, many companies have already exhausted the possibilities of anticipating vacation and holidays in the first year of the pandemic.

Perhaps another alternative, for the sake of clarity, is classifying pregnancy as 'risky' since there are legal restrictions regarding the commute of the pregnant employee to the workplace, which would lead to the perception of maternity wages during the period of absence, pursuant to Law No. 8,213/1991.

For now, this alternative faces another problem, related to the collection of social security contribution and whether the Social Security Institute ("INSS") will grant or not the relative allowance, in connection with its possible questioning regarding this 'risky pregnancy' framework, since, strictly speaking, there are legal alternatives somewhat capable of guaranteeing the social distance of these workers, either with the application of the measures of the Law itself, with remote work, or even the valid alternatives presented by the Provisional Measures.

However, these alternatives are scarce, limited in time and may already have been fully used, since they were previously implemented as a form of "sigh" for drowning companies due to the economic and financial crisis generated by the pandemic.

Regardless of the doubts and interpretative margins that the new law entails, it is certain that the protection of the pregnant woman is a Constitutional guarantee, which covers not only the protection of the pregnant employee but also the preservation of the fetus and the family entity as a whole.