

NEW 2021 COVID-19 EMPLOYMENT RELATED GOVERNMENTAL MEASURES

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The Brazilian government reissued the measures taken in 2020 with a view to maintaining employment and income, as well as flexibilizing some workplace health and safety rules to enable working from home.

Since the state of public calamity declared in 2020 remains in force and, in the midst of the second COVID-19 wave, companies continue to face difficult decisions on how to deal with the survival of their businesses and the maintenance of jobs, having regard to the end of the measures provided under Provisional Measure (PM) No. 927/2020 (which was not converted into law) and PM No. 936/2020, converted into Law No. 14,020/2020, the term of which has already been achieved.

Recently, new PMs No. 1,045 and No. 1,046/2021 were issued by the federal government, published in the Brazilian Official Gazette on 28th April 2021, which reissued, respectively, the Emergency Program for the Maintenance of Employment and Income and the flexibilization of employment rules related to vacation leaves, working from home regime, occupational health and safety, among others.

In connection therewith, we outline below the currently available legal options for business economics and job preservation, already contemplating the innovations brought by PMs No. 1,045 and No. 1,046/2021, highlighting that they are clear in determining that their provisions only apply for 120 (one hundred and twenty) days from the date of their publication in the Official Gazette (ie, in principle, they will expire at the end of August 2021, if they are not converted into law).

It must be noted that, regardless of the measures chosen by the company, as long as employees remain in the workplace, it is the employer's responsibility and obligation to adopt the necessary and possible precautions to protect its employees and prevent the spread of the Coronavirus, such as: informing and instructing employees on personal hygiene care, provide a washbasin with soap and water, provide sanitizers (70% alcohol or other suitable product), measuring body temperature, implementing measures to change the work routine to make working hours more flexible and avoid agglomerations, spacing of workstations or installation of partitions etc.

1 – Provisional Measure No. 1,045/2021

Such measure implemented the New Emergency Program for the Maintenance of Employment and Income, for a period of 120 (one hundred and twenty) days, the objective of which is the preservation of employment and income, with the continuity of work and business activities, to reduce the social impact caused by COVID-19.

The following measures have been established:

- Proportional reduction of working hours and wages

This may be implemented in a sectorial/departamental manner, and may be applied partially or to all jobs, for up to 120 days, under an individual agreement or a company specific collective bargaining agreement ("ACT"), with the following having to be observed:

- a) preservation of the hourly wage amount;
- b) individual written agreement entered into between employer and employee, which must be forwarded to the employee at least two calendar days in advance;
- c) reduction of working hours and wages, exclusively, in the percentages of 25%, 50% or 70%:

The federal government will be responsible for supplementing the income of the employee benefited by the New Emergency Program for Maintaining Employment and Income, such amount being paid by the Federal Union as "Emergency Benefit for Maintenance of Employment and Income".

The amount of the benefit will be based on the calculation of the monthly amount of unemployment insurance to which the employee would be entitled and will correspond to the percentage of the reduction.

In the case of a collective bargaining agreement ("CBA"), it is possible to establish percentages of reduced working hours and wages different to those previously defined in the PM, and the amount due from the benefit will be:

- a) no Emergency Benefit due in the event of reduction of working hours and wages in less than 25%;
- b) 25% of the value of unemployment insurance amount for the reduction of working hours and wages equal to or greater than 25% and less than 50%;
- c) 50% of the value of unemployment insurance amount for the reduction of working hours and wages equal to or greater than 50% and less than 70%; and
- d) 70% of the value of unemployment insurance amount for the reduction of working hours and wages above 70%.

Working hours and salary previously paid will be reinstated within 2 calendar days, counted as from:

- a) the date established in the individual agreement as the end of the agreed reduction period; or;
- b) the date of communication by the employer informing the employee of his/her decision to terminate the reduction period, such decision being exclusive to the employer.

- Temporary suspension of the employment agreement

This may be implemented in a sectorial/departamental manner and may be applied partially or to all employees, for up to 120 (one hundred and twenty) days.

How to instrumentalize: individual written agreement (sent to the employee two days in advance) or ACT, and there must be communication to the respective labour union, within ten consecutive days, counted as from the date of its execution.

The employee, during the period of temporary suspension of the employment agreement:

- I - will be entitled to all benefits granted by the employer to its employees; and
- II - will be authorized to contribute to Social Security as facultative insured.

The benefit amount will be:

- a) equivalent to 100% of the unemployment insurance amount to which the employee would be entitled, or
- b) equivalent to 70% of the unemployment insurance amount to which the employee would be entitled, for companies with an annual gross revenue greater than BRL 4,800,000.00. Companies with gross annual revenue in 2019 was greater than BRL 4,800,000.00 must pay compensatory aid of at least 30% of the employee's salary.

Working hours and the salary previously paid will be reinstated within 2 calendar days, counted as from:

- a) the date established in the individual agreement as the end of the agreed reduction period; or;
- b) the date of communication by the employer informing the employee of his/her decision to terminate the reduction period, such decision being exclusive to the employer.

In the event the employee maintains work activities, even if partially, through telecommuting, remote work or distance work during the period of temporary suspension of the employment agreement, such suspension will be deemed uncharacterized, and the employer will be subject to:

- I - immediate payment of remuneration and repercussions for the entire period;
- II - the penalties provided under applicable legislation; and
- III - the sanctions provided for in the CCT or in the ACT.

- General rules

Payment of the Emergency Employment and Income Maintenance Benefit is independent of:

- I - fulfillment of any acquisition period;
- II - length of employment; and
- III - number of wages received.

The measures will be implemented under an individual agreement or collective bargaining with employees:

- a) with a salary equal to or less than BRL3,300.00 (three thousand, three hundred Brazilian reais); or
- b) holders of a university diploma and who receive a monthly salary equal to or higher than twice the maximum limit of the benefits of the Social Security.

For other employees, the measures can only be established by CCT or ACT, except in case of reduction of working hours and wages by 25% and the proportional reduction of working hours and wages, or the temporary suspension of the employment agreement when such agreement does not constitute a reduction of the total amount received monthly by the employee, in which case it may be agreed under an individual agreement.

The PM also establishes a provisional job tenure (except for dismissal with cause or resignation), in the following cases:

- a) during the agreed period of reduced working hours and wages or temporary suspension of the employment agreement; and
- b) after the re-establishment of the working day and salary or the end of the temporary suspension of the employment agreement, for a period equivalent to that agreed for the reduction or suspension.

- c) for pregnant employees, for a period equivalent to that agreed for the reduction of the working day and salary or for the temporary suspension of the employment agreement, counted from the end of the period of the pregnant woman's job tenure (from the confirmation of pregnancy up to five months after delivery).

The dismissal without cause in the above-mentioned period of job tenure entails the payment of special compensation.

In the event a CCT or ACT is issued with clauses that conflict with those of the individual agreement (after an individual agreement is reached), transitional rules must be observed.

The PM rules also apply to apprenticeships and to part-time employment agreements.

- Main differences

Among the main differences between the measures adopted in 2020 and those now adopted, we can list:

- The provisions of this PM do not apply to intermittent employees ("zero hour contracts");
- Employees with job stability due to the receipt of the Emergency Benefit granted in 2020 will have such stability period suspended during the receipt of the new Emergency Benefit, and the counting will start again after the end of the job tenure related to the new agreement;
- No job stability is due in case of termination by mutual agreement (article 484-A of the Brazilian Consolidation of Labour Laws - "CLT");
- Employer and employee may, by mutual agreement, choose to cancel the prior notice in progress and adopt the provisions of this MP;
- Inapplicability of article 486 of the CLT - "factum principis" – the government cannot be held responsible for indemnities resulting from restrictive measures that impact the economy.

2 – Provisional Measure No. 1,046/2021

Working from home:

- Written notice from the employer to the employee must be given 48 hours in advance;
- Not applicable to call center and telemarketing employees;
- Valid for interns and apprentices;
- In the event that the employee does not have the technological equipment and the necessary and adequate infrastructure for the job, the employer may: (i) provide the equipment on a free lease basis and pay for infrastructure services; or (ii) consider the employee's normal hours at his disposal, even if he/she is not engaged in any activity;
- The prior written agreement is waived, but the provisions regarding the responsibility for the acquisition, maintenance or supply of technological equipment and the necessary infrastructure must be the subject of a written agreement signed within 30 days from the date of the change of the work regime.

Anticipation of individual vacation:

- Written notice from the employer to the employee must be given 48 hours in advance;
- Minimum duration of 5 days;
- May be granted unilaterally by the employer, even if the employee has not completed the acquisition period;
- Possibility of individual negotiation to anticipate future vacation periods by written agreement;
- Priority in the concession for employees of the Covid-19 risk group;
- Possibility of deferring vacation payment until the 5th business day of the subsequent month and its respective 1/3 additional until the date on which the 13th salary ("Christmas bonus") is due;
- Conversion of up to 1/3 of holidays in cash will depend on the employer's consent;
- If the employee is terminated, payment - together with the severance pay - of the amounts not yet paid regarding the vacation leave.
- The early vacation taken whose period has not been acquired will be deducted from the severance payments due to the employee in the case of resignation.

Collective vacation:

- Written notice from the employer to the employee must be given 48 hours in advance;
- Minimum duration of 5 days;
- May be granted even if the employee has not completed the acquisition period;
- Priority in the concession for employees of the Covid-19 risk group;
- Possibility of deferring vacation payment until the 5th business day of the subsequent month and an additional 1/3 until the date on which the 13th salary is due;
- Conversion of up to 1/3 of holidays in cash allowance will depend on the employer's consent;
- Early vacation taken whose period has not been acquired will be deducted from the severance payments due to the employee in the case of resignation.

Anticipation and use of holidays:

- Written notice from the employer to the employee must be given 48 hours in advance;
- Valid by unilateral decision by employers, including religious holidays;
- Holidays can be used to offset the balance in the time bank.

Time bank:

- The establishment of a special workday compensation regime, under a time bank, established by means of an ACT or a formal individual (written) agreement, is authorized for offsetting within up to 18 months, counted as from the 120th day of effectiveness of the PM;
- Offsetting of time for recovery of the interrupted period may be made by extending the workday by up to 2 hours, which may not exceed 10 hours a day, and may be carried out on weekends;
- The offsetting of time balance may be determined by the employer regardless of a collective agreement or an individual or collective agreement.

Suspension of Administrative Requirements for Workplace Safety and Health:

- Suspension of the obligation to conduct occupational, clinical and supplementary medical examinations, except for dismissal medical examinations (this can only be waived if the most recent occupational medical examination was conducted less than 180 days) - note that we do not recommend waiving the admission exam, since such exam can mitigate the exposure to the risk of possible new hiring with an unidentified pre-existing disease;
- Pending exams must be carried out within 120 days of the end of the PM's term;
- Suspension of periodic training and occasional training for current employees, provided for under regulatory workplace health and safety standards, which must be conducted within 180 days of the end of the term of the PM;
- Maintenance of CIPAs (internal accident prevention committee) meetings, including electoral processes, exclusively remotely.

Postponement of FGTS payment:

- Suspension of the demand for payment of FGTS by employers, referring to the months of April, May, June and July 2021, with maturity in May, June, July and August 2021, respectively;
- Such obligations can be paid in up to four monthly installments, with maturity on the seventh day of each month, starting in September 2021, by declaring this information until 20th August 2021;
- In the event of dismissal of the employee, there should be immediate payment of FGTS, without interest and fine.

Suspension of the employment agreement, for a period of 1 to 3 months, for employee's participation in professional qualification program (necessarily online, in the current situation) offered by the employer, through collective bargaining, signing of ACT and agreement of the employee, maintaining the concession of benefits voluntarily conferred by the employer.