

## DISPATCH NO. 29 - BRAZIL

# CORONAVIRUS AND TURBULENCE IN BRAZILIAN LABOR LAW: AN ANALYSIS ON THE MAIN LEGAL CHANGES DURING THE PANDEMIC

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### INTRODUCTION

The Brazilian Labor Law is based on the Federal Constitution (CF) of 1988 and the Consolidation of Labor Laws (CLT) of 1943, as well as laws governing specific themes, such as rural, domestic, outsourced work, etc. Although the CLT mentions different possibilities in the event of force *majeure*, such alternatives are controversial and understood by many jurists as unconstitutional.<sup>1</sup> In the face of the coronavirus pandemic in Brazil, new legal needs have emerged. This has multiplied doubts about which legal paths to follow in the new scenario, requiring social distancing, interruption of non-essential activities and monitoring of essential activities, as defined in the Decrees No. 10,282 and 10,292 of 2020.

As the Labor Law “is a law in constant formation,” several rules were issued to overcome the new challenges brought by the pandemic and the state of emergency in public health, as declared by Ordinance no. 188<sup>2</sup>. The first

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<sup>1</sup> MAURICIO G. DELGADO, CURSO DE DIREITO DO TRABALHO 241 (2019). The unconstitutionality, defended by some jurists, is due to the normative structure of the Brazilian legal system. In this sense, as the CLT is from 1943, some authors believe that different devices (although they are still formally written in the CLT, as they have not been excluded from the text of the law) are not in harmony with the Brazilian Federal Constitution of 1988.

<sup>2</sup> AMÉRICO P. RODRIGUEZ, PRINCÍPIOS DE DIREITO DO TRABALHO 9 (2000).

and most general of these was Law No. 13,979, of February 6, 2020, which establishes general measures for the treatment of the public health emergency resulting from Covid-19. It provides for the simplification of certain public purchases, collaboration with health authorities, the possibility of mandatory medical procedures and isolation and quarantine measures. This Law has an important provision related to the world of work. Article 3 deals with a justified absence (that is, without prejudice to remuneration) in both the public service or in the private sector due to Covid-19.

In addition to this provision, the labor rules issued to address the pandemic were approved in the form of Provisional Measures.<sup>3</sup> Between March 22<sup>nd</sup> and April 7<sup>th</sup> of 2020, five Provisional Measures were issued relating to labor issues:

Provisional Measure 927,  
 Provisional Measure 928,  
 Provisional Measure 936,  
 Provisional Measure 945 and  
 Provisional Measure 946.

In the period, a regular law was adopted in April 2<sup>nd</sup> of 2020, the Law No. 13,982/2020.

Each of these is discussed in turn.

#### I. PROVISIONAL MEASURE 927 (MARCH 22<sup>ND</sup>, 2020)

Provisional Measure 927 establishes labor measures to be adopted by employers, on the grounds of preserving employment and income, during the nationally recognized state of public calamity. As possible measures, Article 3 listed teleworking, bringing forward individual vacations, granting collective vacations, the use and bringing forward of holidays, the banking of hours, the suspension of administrative requirements for safety and health at work, the targeting of the employee for professional qualification and the deferment of payment of the Severance Pay Fund for Time of Service (FGTS)<sup>4</sup>.

Despite the provisions in CLT arts. 75-A to 75-E concerning teleworking, the Provisional Measure establishes that the change from face-to-face work to teleworking, remote work or other distance work will be at the employer's discretion, dispensing with any collective bargaining and

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<sup>3</sup> Provisional Measures are an exceptional legal instrument, constitutionally authorized, adopted by the President of the Republic (Executive Power), in cases of relevance and urgency. GILMAR MENDES & PAULO BRANCO, CURSO DE DIREITO CONSTITUCIONAL 914 (2015). These Measures have a deadline to operate and to produce effects. They have immediate effects, but depend on approval by the National Congress (Legislative Power) for definitive transformation into a regular law.

<sup>4</sup> The Severance Pay Fund for Time of Service—"Fundo de Garantia por Tempo de Serviço (FGTS)" in Portuguese—is a fund supplied by compulsory contributions of the employer to protect the employee. At the beginning of each month, employers deposit in employee bank accounts, managed by a public bank, the amount corresponding to eight percent of each employee's salary. If an employee is dismissed without justification, the employee can withdraw from the fund.

prior registration in the contract (Article 4). This measure must be notified to the employee with, at least, 48 hours' notice (Article 4, § 2) and can even be applied to interns and apprentices (Article 5), governed by Law 11,788 / 2008 and Law No. 10,097 / 2000 respectively.

Regarding holidays, Provisional Measure 927 contemplate two possibilities, respectively applying to individual and collective circumstances. With regard to the former, Article 6 provides for bringing forward individual vacations, even if the acquisition period has not been completed. In Article 8, the payment of the additional one-third vacation over the normal wage may be made after the vacation is granted<sup>5</sup>.

Provisional Measure 927 also provides, in arts. 11 and 12, that collective leave will be granted at the discretion of the employer, who must communicate their decision to employees within at least 48 hours. The Measure dispenses with the need for prior communication to the local body of the Ministry of Economy and to the trade unions representing the professional category, even though Article 139 of the CLT has a contrary provision.

Article 13 provides for the use and bringing forward of public holidays. Therefore, employers can determine the moment in which any holidays will be enjoyed, with only the religious ones requiring the agreement of the employee. To make it possible, the employer has to communicate the decision to the employee with, at least, 48 hours in advance. Article 14 allows for the compensation of working hours, authorizing the establishment of a "bank of working hours". This workday compensation measure may take effect through collective or individual (formal) agreement and be compensated for up to eighteen months. In this provision, the period for compensation was extended due to the state of public calamity, since, in the CLT forecast, the hour bank can only be compensated in up to six months (Article 59, § 2, CLT).

Notwithstanding the pandemic being an emergency situation in public health, Provisional Measure 927 establishes the suspension of administrative requirements in occupational safety and health, ceasing the obligation to carry out occupational, clinical and complementary medical examinations, with the exception of dismissal examinations (Article 15) if the most recent was more than one hundred and eighty days prior. Moreover, Article 16 provides for the suspension of the obligation to carry out periodic and occasional training of employees, established in safety and health regulatory standards (NRs), enabling them to occur through a distance learning modality.

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<sup>5</sup> According to the Federal Constitution, in Brazil, workers are guaranteed the following labor rights: an additional 1/3 of the value of their regular salary as payment for the month of vacation, in addition to the regular salary; a thirteenth salary (one in addition to the twelve monthly salaries received per year). Constituição Federal [C.F.] [Constitution] art. 7.

Article 18 of the Provisional Measure provided for the possibility of enrolling an employee in a professional qualification program, regardless of any collective bargaining. For this, the employment contract would be suspended for up to four months. During this period, the payment of the remuneration and / or of a scholarship to the employee is granted. This provision is at odds with Article 476-A of CLT, which, while allowing the suspension of the contract for the participation of the employee in a course or professional training program, requires collective negotiation (convention or agreement) and the formalized agreement of the employee. Article 18 was the target of criticism and controversy, leading to its subsequent revocation, on March 23, 2020, by Provisional Measure 928.

Further, the Provisional Measure 927 provides for the deferral of the payment of the March, April and May 2020 amounts of the FGTS (Articles 19 to 25), which are percentage values deposited monthly by the employer in an account linked to any employee (Law No. 8,036, of May 11, 1990). The Measure also provides for the extension of working hours and the adoption of overtime schedules in health facilities, including the possibility of adoption of an schedule of 12-hour of work followed by 36 hours of rest for unhealthy activities (Article 26). Finally, the Measure removes recognition of coronavirus contamination as an occupational disease of cases by employees, unless there is evidence of a causal link (Article 29). This last provision creating a presumption that there is no occupational disease was suspended in a judgment on the constitutionality of Provisional Measure 927 by the Federal Supreme Court (STF).

On July 7<sup>th</sup> of 2020, Provisional Measure 927 expired and ceased of producing effects in Brazilian Legal System.

## II. PROVISIONAL MEASURE 928 (MARCH 23<sup>RD</sup>, 2020)

Provisional Measure 928, published the day after the previous one, has only three Articles and amends Law No. 13,979 / 2020 and Provisional Measure 927/2020. Only Article 2 impacted labor legislation, since, as mentioned above, it revoked Article 18 of Provisional Measure 927/2020, thus prohibiting the possibility of enrolling the worker to training after the suspension of the employee's employment contract.

## III. PROVISIONAL MEASURE 936 (APRIL 1<sup>ST</sup>, 2020)

Provisional Measure 936 instituted the Emergency Employment and Income Maintenance Program, which proposes, during the state of public calamity, to preserve employment and income, to guarantee the continuity of work and business activities and to reduce the social impact resulting from consequences of the pandemic. Provisional Measure 936 provides for the payment of Emergency Benefits for the Preservation of Employment and

Income, the proportionate reduction of working hours and salaries and the temporary suspension of the employment contract.

In the case of proportionate reduction in working hours and wages continues and temporary suspension of the employment contract, an Emergency Employment and Income Preservation Benefit (BEm) will be paid to the employer. This benefit will be paid monthly with resources of the Federal branch of the State, managed by the Ministry of Economy. Also, the amount of the benefit is based on the unemployment insurance amount to which the worker would be entitled.

The proportionate reduction in working hours and wages can last for up to ninety days and requires the preservation of the hourly wage and an individual written agreement between employer and employee, that have to be made at least two days in advance, for proportionate reduction in the percentages of 25%, 50% and 70% (such percentages can be changed if the reduction is agreed upon through collective bargaining). The reduction can be agreed individually or through collective bargaining depending on the income and education level of the worker, as summarized in the table below:

Reduction	Benefit amount	Individual agrément	Collective bargaining
25%	25% of unemployment insurance	All employees.	All employees.
50%	50% of unemployment insurance	Employees with a salary equal to or less than R\$ 3.135,00 or employees with a higher education degree with a salary equal to or greater than two maximum value of General Regime of Social Security (R\$ 12.202,12)	All employees.
70%	70% of unemployment insurance	Employees with a salary equal to or less than R\$ 3.135,00 or employees with a higher education degree with a salary equal to or greater than two maximum value of General Regime of Social Security (R\$ 12.202,12)	All employees.

The temporary suspension of the employment contract can last for a maximum of sixty days and can be divided into up to two periods of thirty days. Although there is no payment of wages during the contractual suspension, Provisional Measure 936 guarantees to the employee benefits (such as meal tickets) granted by the employer and the authorization for payment to the General Social Security System as an optional insured<sup>6</sup> (Law No. 8,213 / 1991), who, despite being a formal employee, is not required by law to contribute for the System. The suspension may be agreed individually or through collective bargaining depending on the income and education level of the worker and the amount of the benefit and any supplement to be

<sup>6</sup> In Brazil, the General Social Security System is public and consists of compulsory insureds and optional insureds. All formal employees are compulsory insureds. In this case, the Provisional Measure make possible, for those who are in the situation of temporary suspension of their employment contract, to continue as insured, but as an optional one. Here, the only change is that, despite the same coverage, the optional insured is not enforced by law to continue as an insured.

paid the employer will vary according to the employer's gross revenue, as summarized in the table below:

Company gross revenue	Monthly compensatory aid due by the employer	Benefit amount	Individual agrément	Collective bargaining
Less than R\$4.800.000,00	Not obligatory.	100% of the unemployment insurance amount	Employees with a salary equal to or less than R\$ 3.135,00 or employees with a higher education degree with a salary equal to or greater than two maximum value of General Regime of Social Security (R\$ 12.202,12)	All employees.
Less than R\$4.800.000,00	Mandatory (30% of the employee's salary).	70% of the value of unemployment insurance	Employees with a salary equal to or less than R\$ 3.135,00 or employees with a higher education degree with a salary equal to or greater than two maximum value of General Regime of Social Security (R\$ 12.202,12)	All employees.

The Provisional Measure was challenged before the Supreme Federal Court on the basis that such changes are made through an individual agreement. The Court decided that the Provisional Measure was not in breach of the Constitution, thus recognizing the validity of individual agreements. According to the Ministry of Economy of Brazil, within a month of the promulgation of Provisional Measure 936, more than 5 million jobs have already been preserved with the reduction of wages and working hours or suspension of the employment contract.<sup>7</sup>

On July 6th of 2020, Provisional Measure 936 had been converted in Law no. 14,020, maintaining the integrality of its content in the Brazilian Legal System.

#### IV. LAW NO. 13,982 (APRIL 2<sup>ND</sup>, 2020)

Law No. 13,982 / 2020 established emergency aid - popularly known as a "coronavoucher" - which guarantees a payment of R\$ 600,00 per month for a three-month period.

To qualify for this aid, workers must cumulatively fulfill these requirements: being over 18 years of age; not having active formal employment; not holding a social security or assistance benefit or a beneficiary of unemployment insurance or a federal income transfer program, except, under the terms of §§ 1 and 2, Bolsa Família;<sup>8</sup> having a per capita monthly family income of up to 1/2 minimum wage or total monthly family income of up to 3 minimum wages; not having a taxable income above R\$ 28.559,70 in 2018; and working as:

<sup>7</sup> Ministério da Economia, *Programa Emergencial de Manutenção do Emprego e da Renda*, GOVERNO DO BRASIL, <https://servicos.mte.gov.br/bem/#o-que-e> (last visited May 5, 2020).

<sup>8</sup> The "Bolsa Família" is a government program dedicated to families in poverty and extreme poverty throughout Brazil, so that they can overcome the situation of vulnerability and poverty. According to the family profile—income, number of children, etc.—the family receives monthly financial assistance to facilitate access to food, education and health.

- a) an individual microentrepreneur;
- b) an individual contributor to the General Social Security System; or
- c) an informal worker, whether employed, self-employed or unemployed, of any nature, including the inactive intermittent worker.

The Law limited the receipt of the emergency assistance to a maximum of two members of the same family and, in the case of a single-parent family with a provider woman, the assistance will be due in two installments.

#### V. PROVISIONAL MEASURE 945 (APRIL 4<sup>TH</sup>, 2020)

Provisional Measure 945 is directed at addressing the impact of covid-19 in the port sector. Among the measures adopted are the removal of sick port workers or workers with symptoms of Covid-19, pregnant women, workers aged over 60 years and workers with autoimmune, respiratory, chronic or pre-existing serious illnesses. In such cases, removed workers will receive a monthly compensatory indemnity of fifty percent of their monthly average salary.

#### VI. PROVISIONAL MEASURE 946 (APRIL 7<sup>TH</sup>, 2020)

Finally, Provisional Measure 946, published on April 7, 2020, was responsible for defining the extinction of the PIS-Pasep Fund, instituted by Complementary Law No. 26, of 1975, and regulated by Decree No. 9,978, of 2019. This Fund was established as a result of the consolidation of funds constituted by resources from contributions of employees and public servants. With the extinction, the MP determined the transfer of the assets of the PIS-PASEP Fund to the FGTS, which is a fund fed with monthly contributions from the employer to protect the dismissed worker without cause.

#### CONCLUSION

In Brazil, the state of public calamity caused by the pandemic has had a direct impact on the political, economic and, above all, social spheres. The legislative instruments published so far, despite being based on the discourse of reducing social and labor impacts of Covid-19, are controversial in Brazilian legal circles. They flexibilize fundamental labor rights and authorize deregulation, in most cases, through individual agreement.<sup>9</sup> They do not involve the participation of trade unions and the respect for the principle of protection, according to which the worker is considered a vulnerable party in the employment relationship and, therefore, in need of special legal protection, so that it is possible to balance a legal relationship

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<sup>9</sup> OSCAR E. URIARTE, A FLEXIBILIDADE 10 (2002).

marked by the asymmetry of forces.<sup>10</sup> Also, on more than one occasion the constitutionality of these instruments was challenged in the Supreme Federal Court.

In this Dispatch, we have focused only on the legislative instruments directly related to labor regulation. However, other instruments have been published on different subjects which impact on labor such as Provisional Measure 944, which instituted the Emergency Employment Support Program based on credit lines for the payment of employees' payroll, and Law No. 13,993 / 2020, which prohibited the export of medical, hospital and hygiene products, considered essential in the fight against coronavirus.

For the moment, we conclude that, despite the publication of several regulatory instruments, legal uncertainty remains in Brazil, due to the introduction of several flexibility measures. Notably, this legal insecurity has generated an imbalance between the main branches of the State. The Executive Branch is passing controversial instruments and the Judiciary (Labor Justice), will be called to evaluate them.

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<sup>10</sup> RODRIGUEZ, *supra* note 2, at 45-54.