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SERIES
COVID-19

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CORONAVIRUS - ANALYSIS OF THE GENERAL IMPACTS OF COVID-19 AND MP Nos. 927 AND 936 ON LABOR RELATIONS

The new form of the coronavirus, called SARS-CoV-2 and causing covid-19, was first discovered in Wuhan, China, in November of 2019. The coronavirus, previously associated with other known viral forms, such as SARS-CoV and MERS-CoV, suffered a genetic mutation in 2019, causing the new disease.

The transmission of the virus is identical to that of its predecessors: from person to person, when there is direct physical contact or less than 1.5 meters away, through droplets of saliva released by sneezing or coughing, or by contact with contaminated secretions such as phlegm. It also occurs through contact with contaminated objects and surfaces. Preliminary data suggest that an infected person may transmit SARS-CoV-2 not only during the symptomatic period of the disease, but also before it.

As of March 19, 2020, more than 200,000 cases had been reported worldwide, with 8,017 deaths associated with the virus.

Protective measures are social isolation (voluntary quarantine), constant hand hygiene with soap and hand sanitizer, covering the mouth when sneezing or coughing, avoiding crowds, keeping environments ventilated, and not sharing personal objects.

Governments around the world, as well as private companies, have already put voluntary or mandatory social isolation into practice, and its impacts on private initiative are visible and worrying.

The federal government, in anticipation of the impacts of preventive measures on labor relations, identified the difficulties that would be faced and, on March 22, 2020, published Executive Order No. 927 ("MP 927/20"), amending legislation to make procedures more flexible and to regulate the alternatives that could be adopted by employers to preserve jobs and income while the state of public emergency remains in effect.

Although MP 927/20 has provided for some specific measures for dealing with the crisis, as shall be better explained later on, it also provided that other alternatives may be explored between the employer and the employee, through the execution of an individual written agreement, which will take precedence over the other regulatory, legal, and business arrangements, subject to the limits of the Federal Constitution ("FC").

In addition, on April 1, 2020, the Federal Government published a new Executive Order (MP 936/20) providing for new alternatives for employers to confront the coronavirus (covid-19), by means of a proportional reduction in hours and wages and/or temporary suspension of employment contracts.

This booklet primer aims to present the impacts on labor relations of the covid-19 prevention measures and what companies can do to limit financial losses, maintaining in the first place the welfare of their employees, in particular considering the alternatives created or made more flexible by MP 927/20 and by MP 936/20.

	PROS	CONS
INDIVIDUAL VACATIONS	• Acceleration of a legal right. • Limitations on agglomeration of people. • Individual selection of employees. • Leave for up to 30 days. • Inclusion of employees with incomplete accrual period. • Acceleration of future vacations. • Payment of the one-third premium together with the 13th salary • 10-day conversion conditional on the employer's agreement. • Payment by the 5th business day of the subsequent month.	• Impossibility of immediate call to service. • Employee may not render any services during the period.
COMPANY-WIDE VACATIONS	• Acceleration of a legal right. • Limitations on agglomeration of people. • Employees with less than 12 months' time of service may be included. • Leave for up to 30 days. • Conversion of 1/3 of the period into a bonus must be agreed upon collectively. • The maximum number of annual periods and the minimum number of calendar days do not apply.	• Full shutdown of the company or division of the company. • There is no possibility of individualization. • Employees cannot render any services. • Impossibility of accelerating future accrual periods. • Impossibility of immediate call to service.
HOME OFFICE	• Avoids commuting by workers. • Limitations on agglomeration of people. • It permits continuity of the company's activities; • Period defined by the employer. • Employee may be called back to the company at any time. • Services may be provided remotely anywhere. • Rules on paying for equipment and utilities may be agreed upon between the parties. • Employee can regularly appear at the company as requested	• Reduction of the employer's directive power. • Implementation for incompatible activities not viable. • Need for control of work hours. • Potential liability in the event of accidents at home or illnesses for ergonomic reasons.

	PROS	CONS
TELEWORKING	• Avoids commuting by workers. • Limits the agglomeration of people. • Permits continuity of the company's activities; • Indefinite period. • Employee may be called back to the company. • Services may be provided remotely and from anywhere. • Rules on paying for equipment and utilities may be agreed upon between the parties. • There is no control of time per a legal determination. • No requirement to formalize the conversion of the work arrangement. • May be extended to apprentices and interns. • Time in applications and communication programs is not part of work hours • The rules for call centers and telemarketing do not apply.	• Reduction of the employer's directive power. • Implementation for incompatible activities not viable. • No control of work hours. • Potential liability in the event of accidents at home or illnesses for ergonomic reasons. • Costs of equipment and infrastructure must be provided for in a written contract.
OFFSET VIA HOURS BANK	• Avoids commuting by workers. • Limits the agglomeration of people. • It may be individualized. • Employer defines the offsetting period. • Valid for up to 6 months in individual agreements and up to 1 year in collective bargaining agreements. • Flexibility in defining periods of inactivity • MP 927/20 brought in a special arrangement for offsetting via an hours bank.	• Depending on the period, this may result in accumulation of negative hours. • Employee must agree to this form of offsetting. • Offsetting should be formalized in individual employment agreements. • There is no immediate reduction in labor costs. • Discussions on termination.
PAID LEAVE	• Avoids commuting by workers. • Limits the agglomeration of people. • Individualization by the employer. • Indefinite period. • Employee may be called to work at any time.	• Reduction of production force without reduction of labor costs. • Formalization must be pursuant to individual agreement with the employee.

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REDUCTION IN WORK HOURS AND SALARIES (MP 936/20)	• Reduces the period of contact among employees. • Limits the agglomeration of people. • Permits continuity of the company's activities. • Adjustment to company projects in the period. • Cost reduction. • Does not require negotiation with the labor union, except for reductions in wages and work hours of more than 25% for employees who receive between R$ 3,135.01 and R$ 12,202.11. • To preserve the worker's income, the government will pay an emergency benefit to the workers affected, corresponding to a percentage of unemployment insurance.	• Requires negotiation with the labor union for reductions in wages and work hours of more than 25% for employees who receive between R$ 3,135.01 and R$ 12,202.11. • In return for the reduction, employees shall be guaranteed employment for as long as this condition continues and for an equal period after re-establishment of regular hours. • Maximum period of 90 days.
TEMPORARY SUSPENSION OF EMPLOYMENT CONTRACTS (MP 936/20)	• Avoids commuting by workers. • Limits the agglomeration of people. • Permits continuity of the company's activities, but reduces its activity. • No salary payment during suspension period. • Possibility of division-wide or individual application. • Does not require negotiation with the labor union, except for temporary suspension of employment contracts for employees who receive between R$ 3,135.01 and R$ 12,202.11. • To preserve the worker's income, the government will pay an emergency benefit to the workers affected, corresponding to a percentage of unemployment insurance.	• Requires negotiation with the labor union for temporary suspension of employment contracts of employees who receive between R$ 3,135.01 and R$ 12,202.11. • Maintenance of benefits during the suspension. • Maximum period of 60 days, which may be divided into 2 periods of 30 days. • During the suspension period, the employee may not continue working, even if partially or remotely, at risk of reversing the suspension • It is mandatory to pay 30% of employees' salary as compensatory assistance for companies with gross revenues exceeding R$4.8 million in 2019. • In return for the suspension, employees shall be guaranteed employment for as long as this condition continues and for an equal period after re-establishment of the employment contract.

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	PROS	CONS
REDUCTION OF WORK HOURS AND REDUCTION OF WAGES (OUTSIDE MP 936/20)	• Reduces the period of contact among employees. • Limits the agglomeration of people. • It permits continuity of the company's activities; • Adjustment to company projects in the period. • Cost reduction.	• Formalization by collective bargaining agreement. • Legislation provides for several requirements for validity (e.g. maximum 25% reduction), which would be debatable in the context of the Labor Reform.
SUSPENSION OF EMPLOYMENT CONTRACTS TO PARTICIPATE IN TRAINING (LAY-OFFS) (OUTSIDE MP 936/20)	• Avoids commuting by workers. • Limits the agglomeration of people. • It permits continuity of the company's activities, but reduces its activity. • No salary payment during suspension period. • Possibility of division-wide or individual application.	• Collective bargaining is necessary. • Granting of professional course or training. • Maintenance of employment benefits during suspension.

EXECUTIVE ORDER 927/20

	PROS	CONS
ACCELERATION OF HOLIDAYS	• Limits the agglomeration of people. • Temporary suspension of activities. • It may be individualized. • Flexibility in defining downtimes • Defined unilaterally, except on religious holidays	• Reduction of production, without reduction of costs. • Religious holidays can only be offset per an individual agreement with employees.
DEFERRAL OF COLLECTION OF FGTS	• Deferment of ancillary obligation. • Immediate redirecting of funds for other purposes. • Independent of employee, trade union, or government authorization.	• Does not postpone payment of wages. • Does not avoid agglomeration of people or limit commuting. • Payment in the event of termination.

EXECUTIVE ORDER 936/20

ASSISTANCE FOR INTERMITTENT EMPLOYEES	• Employees with intermittent employment contracts will be entitled to an emergency benefit of R$ 600.00, for a period of three months, regardless of the number of employers with whom they have a contract.
ASSISTANCE FOR INTERMITTENT EMPLOYEES	• During the state of calamity, electronic means may be used to meet the collective bargaining requirements (Title VI of the CLT), including for call notices, deliberations, decisions, formalization, and publication. • During the state of emergency, the time limits for collective bargaining are halved (Title VI of the CLT).
EMERGENCY BENEFIT FOR PRESERVATION OF EMPLOYMENT AND INCOME	• Both in the event of suspension of employment contracts and in the event of a reduction in work hours and wages, as established by Executive Order 936/20, the Federal Government will pay an emergency benefit to the workers affected. • The Emergency Benefit for Preservation of Employment and Income to be paid by the Federal Government to the employees affected will be based on a percentage of the unemployment insurance payment.

A) INDIVIDUAL VACATIONS

The first measure that may be adopted unilaterally by employers is the granting of individual vacation days to their employees, in the manner set forth in articles 134 et seq. of the CLT and articles 6 et seq. of MP 927/20. We believe that the adoption of this alternative has the following advantages:

- It moderates the agglomeration of people and temporarily suspends activities.
- It advances a right legally assured to employees, not resulting in additional costs to the company.
- Employees may be individually selected by the employer, and there is no need to grant vacation days to all employees at the company or a certain sector.
- Leave may last up to 30 days, and this period may be sufficient for the current situation to normalize.
- MP 927/20: It may be granted even to employees whose full accrual period has not yet elapsed.
- MP 927/20: It may be granted in advance, i.e. for future vacation accrual and/or concession periods, per a written individual agreement.
- MP 927/20: Employers may choose to pay one-third of the vacation by the date of payment of the 13th salary.
- MP 927/20: The conversion of 1/3 of the vacation period into a cash allowance will be subject to the agreement of the employer and payment may be made by the date of payment of the 13th salary.
- MP 927/20: Payment of vacation may be made by the 5th business day of the month following enjoyment.

On the other hand, it will be incumbent on the company to also consider, before adopting this alternative, that:

- Employees cannot be called back if normalization occurs before the end of the vacation period.
- Unlike other alternatives, no services may be provided by employees during the period of leave.

For the adoption of this alternative, MP 927/20 made the prior procedure more flexible, with the employer only having to notify the employee of the granting of vacation 48 hours in advance, for which payment must be made by the 5th business day of the month following the beginning of enjoyment.

Until then, according to the CLT, the employee had to be notified thirty days in advance, and the payment made two days before the respective enjoyment period:

> *"Article 135 – The* ***employee shall be notified in writing of the granting of the vacation at least thirty (30) days in advance****. The interested party shall give a receipt for participation therein.*
> *(...)*
> *Article 145 –* ***Payment of the remuneration of vacation and, if applicable, the allowance referred to in article 143, shall be made up to two (2) days before the start of the respective period.****"*

Previously, we had warned companies about the labor risks of not complying the minimum deadlines for notice and payment, since they would be difficult to meet in the current scenario.

However, this risk was reduced by MP 927/20, which relaxed both deadlines, making it possible to meet them.

B) COMPANY-WIDE VACATIONS

Parallel to individual vacations, it is also possible to consider granting company-wide vacation to all employees of the company or of certain sectors or departments.

Prior to MP 927/20, the great practical differentiating factor in relation to individual vacations consisted of two main elements. The first in the fact that employees who have been hired less than 12 (twelve) months ago could enjoy company-wide vacation, in proportion to the period worked.
The second advantage consisted of the legal provision that the option to convert one third (1/3) of the vacation period was not at the employee's sole discretion, but conditioned on authorization via some collective bargaining agreement.

Both advantages have been extended to individual vacations with MP 927/20. Therefore, we believe that there is no longer any need for them to be taken into account by companies when comparing the two alternatives.

On the other hand, unlike with individual vacations, it must be taken into consideration that the company cannot: (i) select individual employees in the case of company-wide vacations, but must extend the benefit to all its employees or to those belonging to a certain department or sector; and (ii) accelerate future accrual and/or grant periods.

In addition, as to the operational side of company-wide vacations, MP 927/20 also took care to make the procedure more flexible, exempting companies from a series of formalities for implementation thereof, especially prior notice from the local office of the Ministry of Economy and the Trade Union representing the employees.

During the calamity period, employers will only be responsible for notifying the group of employees affected at least 48 hours in advance.

As with individual vacations, MP 927/20 made the procedure for granting company-wide vacations more flexible, especially with regard to minimum notice periods, reducing the risks of invalidation thereof.

With regard to the rules and deadlines for payment, we believe it is defensible to apply the same rules as in the individual vacations provided for in MP 927/20. It is worth mentioning that, due to MP 927/20, the maximum limit of 2 annual periods and the minimum limit of 10 calendar days provided for in the CLT are not applicable.

C) HOME OFFICE

Home office is understood to be work performed remotely and occasionally, usually at the worker's own home.

It is important to clarify that, although they are relatively similar arrangements, a home office is not to be confused with teleworking, which consists of performing remote work in a predominant manner, and not merely occasionally.

Among the advantages of adopting a home office, over other alternatives, we may mention the following:

- It avoids the crowding of people, while at the same time making it possible to limit the commuting of employees.
- It permits continuity of the company's activities.
- The home office period is defined by the employer itself, who may suspend it as soon as the scenario is normalized.
- The company may adjust the rules for reimbursement of equipment and infrastructure, including by assigning this burden to the employees themselves.
- In the case of work that is occasionally done remotely, it is not necessary for employees to work predominantly at their residence, and they may regularly appear at the company's headquarters, as requested by the employer.

On the other hand, we believe that, before adopting this alternative, companies should consider the following points:

- Reduction of the employer's directive power, as it will not personally monitor the activities of its employee.
- Implementation thereof not viable for activities incompatible with remote work.
- Control its employees' working hours while working remotely.
- Companies may be held liable for any accidents occurring at the employee's residence or for illnesses arising from non-compliance with ergonomic rules.

For the purposes of implementing the home office, it will be incumbent on the company to institute it in an internal policy, thus not requiring formalization thereof in an employment contract.

It is recommended that the internal policy expressly state: (i) who will be responsible for paying for the equipment and infrastructure for the remote work; (ii) the temporary and exceptional nature of the measure, and employees should be informed that this alternative will last as long as the cause that generated the implementation thereof persists; and (iii) the frequency permitted for remote work. It is also recommended that the company provide guidance on health and safety regulations for the exercise of activities at home and adjust the form of control of working hours for those employees who are usually subject to time tracking.

Regarding the risks of this alternative, we highlight the following: (i) suppression of overtime pay in the event of inadequate control of the working hours; (ii) liability of the employer for any work accident at the employee's residence or illness resulting from non-compliance with ergonomic rules; and (iii) discussions regarding the potential need to reimburse expenses assumed by employees to maintain the structure and equipment necessary for the performance of home office activities.

Regarding the first point, we believe that the risk may be mitigated by performing a reliable control of the working hours worked by the employee, which, it is worth remembering, may even be done by manual tracking. Regarding the other points, we believe that a well-structured policy can mitigate both potential exposures of the company.

A) TELEWORKING

This consists of the option to work at a distance, the main characteristic of which is the performance of activities by the worker predominantly outside the company's premises.

As previously explained, it is distinguished from the home office due to the preponderance of remote work over work performed at the company's premises. The main advantages over the home office are the following:

- Nothing prevents employees from going to the office, as long as this does not occur more frequently than work at their own residence.
- Employees subject to teleworking are expressly excluded from the control of working hours and receipt of any overtime worked.
- **MP 927/2020**: There is no requirement to enter into an amendment to the employment contract to convert in-person work to teleworking.
- **MP 927/2020**: Possible extension of teleworking to interns and apprentices.
- **MP 927/2020**: Time spent using applications and communication programs outside normal work hours does not represent time on standby or on call.
- M**P 927/2020**: Regulations applicable to call center work and telemarketing are not applicable to teleworkers.

Regarding the implementation, it is worth mentioning that MP 927/20 now provides that for the purpose of changing an in-person arrangement to teleworking, employee notice 48 hours in advance will be sufficient.

Although MP 927/20 exempts companies from formalizing this change via contractual amendment, it is recommended that companies still resort to this alternative, in particular to address who will be responsible for the costs related to the equipment and infrastructure needed in this regard. In this respect, MP 927/20 establishes that such an agreement must be entered into prior to the change in working arrangement or up to 30 days thereafter.

Regarding the risks of this arrangement, we reiterate the exposure regarding the costs of equipment and infrastructure required for remote work, as well as regarding accidents and illnesses resulting from ergonomics, which, however, may be mitigated with a well-structured implementation of the alternative.

B) OFFSET VIA AN HOURS BANK

This alternative consists of granting days off for as long as the employer deems necessary, for subsequent offsetting with positive hours worked both before and after the days off.

We believe that this alternative has the following advantages:

- It moderates the agglomeration of people and temporarily suspends activities.
- The employees who will enjoy the days off may be individually selected by the company, including in some sort of shift system.
- The days off granted by the employer may be offset up to six months (individual agreement) or one year after the rest period (collective bargaining agreement).
- Greater flexibility for employers in defining the periods of inactivity of their employees.

On the other hand, one must consider, before adopting this alternative, that:

- Depending on the delay in normalizing the current conditions, employees may accumulate a negative balance of hours that are difficult to reduce within the offsetting period set.
- There will be a reduction in production without a reduction in labor costs, since wages must be paid as normal.
- There may be debates on the feasibility of discounting negative hours accumulated upon termination of the employment contract, especially if it occurs without just cause, at the initiative of the employer.
- The employee's prerogative to accept, or deny, the agreement to implement the individual hours bank or possible difficulty in obtaining collective approval from the trade union.

To implement this alternative, it will be incumbent on the employer to enter into an individual agreement with its employees, provided that the offsetting occurs within a maximum period of six months. If a longer offsetting period is required, provided it is limited to one year, collective bargaining will be required.

Whether per an individual or collective bargaining agreement, the parties must set the conditions for offsetting of overtime, deadlines for notice, and form of payment, among other conditions.

It is worth noting that non-compliance with such rules may result in invalidation of the offsetting agreement and payment of the overtime hours offset (or the applicable additional overtime allowance).

We also recommend that companies review the collective bargaining agreement applicable to employees in order to check for any prohibition or limitation on individual agreement to offsetting via an hours bank.

Extraordinarily, MP 927/20 now provides a new format for offsetting via the hours bank during the state of public calamity. In this special arrangement, which may be agreed upon via collective bargaining or individual agreement, offsetting may occur within a period of up to 18 months from the date of closure of the state of public calamity.

During the 18 months following the end of the state of calamity, the negative hours accumulated during the interruption of the activity may be offset by a daily extension of up to two hours, without exceeding the limit of 10 work hours.

For companies that already have an ongoing hours bank, it is recommended to study the best way to implement both offsetting schemes concurrently.

C) PAID LEAVE

This consists of the granting of leave by an employer to its employees, maintaining regular payment of wages and other dues.

The adoption of this alternative allows employers greater flexibility in defining which employees and for how long they will remain on leave. Depending on the number of employees covered by the leave, it may be a good solution as a way to avoid crowding, while at the same time making it possible to limit the commuting of employees on leave.

On the other hand, it should be considered that this alternative implies a reduction in the productive activity of the employer, without a corresponding reduction in labor costs, since wages should be paid as normal.

The implementation of paid leave occurs through the execution of an individual consent with each employee, in which the company grants the leave to the employee through the regular payment of their salaries and the annotation of the interruption in the provision of services on their CTPS.

> *"Article 133 (...)*
> *Paragraph 1 – The* ***interruption in provision of services should be noted on the Work and Social Security History Ledger****.*

It is worth highlighting that, according to article 133, subsection III, of the CLT, employees who remain on paid leave for more than thirty (30) days, during the course of the accrual period shall lose the right to vacation.

> *"Article 133 –* ***During the course of the accrual period, employees shall not be entitled to vacation when they****:*
> *(...)*
> *II –* ***remain on leave, receiving wages, for more than thirty (30) days.****"*

Although this provision says nothing regarding the constitutional one third, the predominant position in the labor courts is that this payment would be due. It is worth mentioning that the understanding prevails that the constitutional one third should focus on the proportion of the accrual period elapsed and not on the period of the leave itself.

As regards the time of payment, there is also no specific provision in the legislation. In any case, we felt that it would be reasonable to pay the one third of the vacation on the date on which the current accrual period ended.

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D) REDUCTION OF WORK HOURS AND WAGES (MP 936/20)

This consists of individual or collective bargaining agreements for proportional reduction of work hours and salaries of employees, through payment of the Emergency Benefit for Preservation of Employment and Income by the federal government. The reduction may be done according to the percentages below. All may be fixed by collective bargaining or, under certain conditions, by individual agreement:

WORK HOURS AND SALARY REDUCTION PERCENTAGE	EMERGENCY BENEFIT AMOUNT PAID BY THE FEDERAL GOVERNMENT	IS IT POSSIBLE TO BE IMPLEMENTED THROUGH INDIVIDUAL AGREEMENT?
25%	25% of the Unemployment Insurance	Yes
50%	50% of the Unemployment Insurance	Only for employees receiving salaries equal to or lower than R$3,135.00 or for hypersufficient employees*
70%	70% of the Unemployment Insurance	Only for employees receiving salaries equal to or lower than R$3,135.00 or for hypersufficient employees*

(*) Employees who receive more than R$12,202.12 and hold a higher education degree.

For employees who earn between R$3,135.01 and R$12,202.11, reductions higher than the percentage of 25% may only be made through prior labor union negotiation.

In addition, companies must observe that the hourly wage value for the work must be preserved and that the reduction shall not exceed the maximum period of 90 days.

MP 936 also established that employers may agree to reduction percentages different from those indicated above by means of collective bargaining, subject to the proportion of the emergency benefit payment provided for in MP 936.

Furthermore, we observed that:

- Reduction of work hours and wages may also be applied for apprenticeship and part-time contracts.
- For individual agreements, the reduction proposal must be sent to the employee at least two calendar days in advance.
- The employer is responsible for informing the labor union and the Ministry of Economy of the execution of the agreement within 10 days. The way in which information is communicated by the employer to the Ministry of the Economy has yet to be defined.
- The emergency benefit paid to the worker may be combined with any payment made by the employer as monthly compensatory assistance.
- Previous collective bargaining agreements may be renegotiated to adapt their terms to MP 936, within 10 calendar days of its publication. Given that Executive Order 936 was silent on past individual agreements, we believe that each situation should be analyzed in detail, on a case by case basis.
- A provisional guarantee of employment should be granted for the duration of the suspension and for the same period after the closing of this condition. In the event of termination of employment during the employment guarantee period during the period of stability, the remaining period will be paid in percentages ranging from 50% to 100% of the salary to which the employee would be entitled.
- Rregular work hours will be re-established, within 2 calendar days, in the event of: (i) cessation of the state of public calamity; (ii) closing of the period agreed upon; or (iii) acceleration by the employer of the end of the period.

For information on the Emergency Employment and Income Preservation Benefit, see page 32.

E) TEMPORARY SUSPENSION OF EMPLOYMENT CONTRACTS (MP 936/20)

This consists of an individual or collective agreement for suspension of the employment contract by the employer, with payment of up to 30% of the employee's salary and the granting of the Emergency Benefit for Preservation of Employment and Income by the federal government.

On March 22, the government had published MP 927/20, providing for the possibility of suspending employment contracts without payment of wages or any state assistance, which was revoked the following day by MP 928/20. With MP 936, the government apparently sought to correct the procedure provided for in the prior Executive Order, which was harshly criticized by the press, governors, and congressmen, due to the lack of protection with which the worker could be left during the crisis.

However, contrary to what was provided for in MP 927, suspension of the employment contract as established in MP 936 should observe some specific conditions, according to the company's gross revenue in the calendar year 2019:

	COMPANIES WITH GROSS REVENUES **UP TO BRL 4,8 MILLION IN 2019**	COMPANIES WITH GROSS REVENUES **HIGHER THAN BRL 4,8 MILLION IN 2019**
Is the Employer required to pay an Allowance?	No	Yes, equal to 30% of the employee's salary*
Emergency Benefit Amount paid by the Federal Government	100% of the Unemployment Insurance	70% of the Unemployment Insurance
Is it possible to be implemented through Individual Agreement?	Only for employees receiving salaries equal to or lower than R$3.135,00 or for hypersufficient employees**	Only for employees receiving salaries equal to or lower than R$3.135,00 or for hypersufficient employees**

(*) According to MP 936, the allowance paid by the employer will not have a salary nature and, thus, will not be considered for purposes of income tax, social security contributions, other taxes on payroll and the Severance Guarantee Fund (FGTS). It may also be excluded from the company's net income for purposes of Corporate Income Tax (IRPJ) and Social Contribution on Net Profits (CSLL).

(**) Employees who receive more than R$12,202.12 and hold a higher education degree.

In the same manner as with the reduction in the work hours, temporary suspension of employment contracts for employees who earn between R$ 3,135.01 and R$ 12,202.11 may only be done through prior labor union negotiation.

In addition, certain conditions must be met by employers as a condition for contractual suspension:

- The maximum period of validity will be 60 days, which may be divided into up to two periods of 30 days.
- During the suspension period, the employer shall continue to make payment of benefits to employees.
- During the suspension period, the employee may not continue working, even if partially or remotely, at risk of reversing the suspension.

Furthermore, we observed that:

- Suspension of contracts may also be applied for apprenticeship and part-time contracts.
- For individual agreements, the suspension proposal must be sent to the employee at least two calendar days in advance.
- The employer is responsible for informing the labor union and the Ministry of Economy of the execution of the agreement within 10 days. The way in which information is communicated by the employer to the Ministry of the Economy has yet to be defined.
- The emergency benefit paid to the worker may be combined with any payment made by the employer as monthly compensatory assistance.

- Previous collective bargaining agreements may be renegotiated to adapt their terms to MP 936, within 10 calendar days of its publication. Given that Executive Order 936 was silent on past individual agreements, we believe that each situation should be analyzed in detail, on a case by case basis.
- A provisional guarantee of employment should be granted for the duration of the suspension and for the same period after the closing of this condition. In the event of termination of employment during the employment guarantee period during the period of stability, the remaining period will be paid in percentages ranging from 50% to 100% of the salary to which the employee would be entitled.
- Regular work hours will be re-established, within 2 calendar days, in the event of: (i) cessation of the state of public calamity; (ii) closing of the period agreed upon; or (iii) acceleration by the employer of the end of the period.

For information on the Emergency Employment and Income Preservation Benefit, see page 32.

A) REDUCTION OF WORKING HOURS WITH REDUCTION IN WAGES (OUTSIDE MP 936/20)

We note that the comments below deal with the scenarios for a reduction in work hours and wages that was already provided for in Brazilian labor laws and regulations, prior to the promulgation of MP 936/20, on April 1, 2020. The scenario for reduction of work hours and wages provided for by MP 936/20 is addressed on page 20.

This is an alternative in which the company, through a prior collective bargaining agreement, reduces the salary and working hours of its employees in a proportional manner. The main advantages in adopting it are the following:

- It reduces the exposure time of employees to situations of potential spread and contamination of the coronavirus.
- It allows a sensible reduction in the company's projects due to the coronavirus, without making impossible or completely suspending business activity.
- It reduces labor costs for the period agreed upon.

On the other hand, it must be considered that, since non-reducibility of wages is one of the main guarantees of workers, including at the constitutional level, the legislation and the courts impose a series of protections to be observed.

In this sense, according to the current understanding of the TST, including in light of provisions of law, a wage reduction will only be valid if the following requirements are met:

- The change should be directed at the employees as a whole.
- There must be an equivalent reduction in working hours as consideration for the employee.
- The maximum percentage of reduction of twenty-five percent (25%) of the contractual wage must be respected.

- The company must be in a proven unfavorable economic situation.
- The reduction should be temporary rather than definitive

It is recommended that one observe the aforementioned points in order to mitigate risks in the event of future litigation.

Despite this position by the Labor Courts, we believe that, based on the current exceptional scenario and on the basis of article 611-A of the CLT, it is defensible that the collective bargaining agreement overlap such requirements, such that the company and the trade union could establish their own conditions for a wage reduction.

Finally, along with the discussion above, it is worth noting that the labor reform has also provided that, for the purposes of reducing wages and working hours via collective bargaining, employees must be guaranteed protection against dismissal without cause or arbitrary dismissal during the term of the collective instrument.

We reiterate that, as this is a very recent provision, there is still no precedent on the subject. However, as it is an express provision of law, it is highly recommended that the collective bargaining agreement have mechanisms to protect the workers it covers against dismissals that are not related to technical, disciplinary, financial, or economic reasons.

Finally, we believe that an individual stipulation of reduction of work hours and wages for employees considered "hypersufficient" (article 444, sole paragraph, of the CLT) may be invalidated, considering that the need for a collective bargaining rule in order to make the wage reduction feasible is provided for in the Federal Constitution, which would not be covered by the principle of the prevalence of what is negotiated over what is legislated.

B) SUSPENSION OF EMPLOYMENT CONTRACT FOR PARTICIPATION IN PROFESSIONAL COURSES OR TRAINING - LAY-OFF (OUTSIDE MP 936/20)

We note that the comments below deal with the scenarios for suspension of employment contracts that were already provided for in Brazilian labor laws and regulations, prior to the promulgation of MP 936/20, on April 1, 2020. The scenario for suspension of employment contracts provided for by MP 936/20 is addressed on page 22.

This is a scenario in which, through prior collective bargaining, suspension of the employment contract, for a period of two to five months, is established for the participation of employees in courses or professional training programs offered by the employer (pursuant to the rules of CODEFAT Resolution No. 591/2009), under the terms of article 476-A of the CLT:

> *"Article 476-A. The* ***employment contract may be suspended*** *for a period of two to five months,* ***for employees to participate in a professional training course or program offered by the employer, with a duration equivalent to the contractual suspension, per a provision in a collective bargaining agreement and formal acquiescence by the employee*** *in accordance with the provisions of article 471, of these Consolidated Laws."*

MP 936/20, however, established that, during the state of calamity, the professional training course provided for in article 476-A of the CLT (Lay-Off) may be offered with a duration of not less than one month and not more than three months.

Among the advantages of this alternative, we highlight: (i) its high use in situations where the company needs to reduce its business activity; (ii) exemption from the obligation to pay wages to employees with suspended contracts, temporarily reducing labor costs; and (iii) the possibility of its application to part of the company's employees.

On the other hand, it must be considered that the following will be necessary: (i) the express agreement of the employee to the suspension of employment; (ii) the granting of a course or professional training to the employees, to be funded by the company; and (iii) the maintenance of the benefits granted by the company for employees with suspended contracts.

As for the implementation of this alternative, we reiterate that prior agreement thereon through collective bargaining is essential, for which any agreement should observe some points of attention, as will be explored below.

First, although payment of wages is not mandatory, the employer may grant the employee monthly compensatory aid, not of a wage nature, as negotiated with the trade union.

If the employee is dismissed during the contractual suspension period or within three months after returning to work, the employer shall pay to the employee, in addition to compensatory payments provided for in the legislation in force, a penalty to be established by a collective bargaining agreement (at least one hundred percent of the employee's last monthly remuneration).

During the suspension period, the worker will be entitled to the professional training scholarship, to be funded by the Workers' Support Fund – FAT (in view of the current scenario, the possibility that the Federal Government may do away with payment of this scholarship may not be ruled out).

In order to be awarded a training scholarship, the course must comply with the guidelines of CODEFAT Resolution No. 591/2009. However, according to MP 936/20, the courses may be taken remotely.

The professional training scholarship payments that employees have received will be deducted from the unemployment insurance benefit payments to which they are entitled, being guaranteed at least one payment of unemployment insurance and, for the purpose of qualifying for this benefit, the suspension period will be disregarded.

The deadline (five months) may be extended pursuant to collective bargaining, provided that the employer bears the burden corresponding to the value of the professional training grant.

A) ACCELERATION OF HOLIDAYS (MP 927/20)

This consists of acceleration of federal, state, district, and municipal non-religious holidays.

This alternative has as its main advantages:

- It moderates the agglomeration of people and temporarily suspends activities.
- The employees who will enjoy the holidays may be individually selected by the company, including in some sort of rotation system.
- Greater flexibility for employers in defining the downtime of their employees.
- It is independent of prior individual or collective negotiation, except for religious holidays.

On the other hand, it has to be considered that: (i) it is a scenario of reduction of production, without a corresponding reduction in costs, since monthly wages still have to be paid as normal; and (ii) religious holidays can only be offset with the express agreement of the employee in an individual agreement.

As regards item (i) above, although reduction in production may initially be portrayed as a disadvantage in acceleration of holidays, it will not necessarily be so in the production context of some companies. This is because this consequence may actually be an attractive point for this alternative for those companies that foresee an accumulation of their products after normalization of the current scenario.

For the purpose of acceleration, it will be sufficient for the group of employees benefited to be notified, in writing or electronically, at least forty-eight hours in advance, with an express indication of the holidays taken.

For religious holidays, on the other hand, express agreement by the employee in an individual agreement will be required.

B) DEFERRAL OF PAYMENT OF FGTS (MP 927/20)

The last measure provided for in MP 927/20 to face the crisis in the contractual sphere consists of suspension of the requirement to pay the FGTS with respect to periods of March, April, and May of 2020, due in April, May, and June of 2020, respectively.

The main advantage of this alternative is deferral of the employer's ancillary obligation, making it possible to immediately dispose of funds for other purposes.

In addition, the suspension is not linked to prior authorization from the employee, trade union, or government, and does not require any specific procedure to be deployed.

However, it must be considered that the adoption of this alternative alone may not be sufficient to face the current scenario, since:

- It does not postpone the payment of principal obligations (wages and other payments).
- It does not prevent the agglomeration of people, nor does it limit the commuting of employees.
- In the case of termination of employment, the employer is obliged to make the employee's overdue payments.

The collection of the amounts for March, April, and May of 2020 may be carried out in installments, that is, within up to six monthly installments, due on the seventh day of each month, starting in July of 2020.

However, in order to enjoy the installment plan, the employer must declare the necessary information by June 20, 2020, observing that: (i) the information provided will constitute a declaration and recognition of the debts arising therefrom, will constitute an acknowledgement of debt, and will constitute an adequate and sufficient instrument for the payment of the FGTS debt; and (ii) amounts not declared will be considered to be in arrears, and will require full payment of the fine and charges due.

C) EMERGENCY BENEFIT FOR PRESERVATION OF EMPLOYMENT AND INCOME (MP 936/20)

Both in the event of suspension of employment contracts and in the event of a reduction in work hours and wages, as established by Executive Order 936/20, the Federal Government will pay an emergency benefit to the workers affected.

The Emergency Benefit for Preservation of Employment and Income to be paid by the Federal Government to the employees affected will be based the amount of the unemployment insurance payment, calculated as follows:

SALARY AVERAGE IN THE LAST 3 MONTHS	UNEMPLOYMENT INSURANCE INSTALLMENT
Up to BRL 1,599.61	Average multiplied by 0.8 (80%).
From BRL 1,599.62 to 2,666.26	BRL 1,279.69 plus 50% of the average amount over BRL 1,599.61
Higher than BRL 2,666.26	BRL 1,813.03

D) ASSISTANCE FOR INTERMITTENT EMPLOYEES (MP 936/20)

Employees with intermittent employment contracts will be entitled to an emergency benefit of R$ 600.00, for a period of three months, regardless of the number of employers with whom they have a contract.

E) ADJUSTMENTS TO COLLECTIVE BARGAINING (MP 936/20)

During the state of calamity, electronic means may be used to meet the collective bargaining requirements (Title VI of the CLT), including for call notices, deliberations, decisions, formalization, and publication.

During the state of calamity, the time limits for collective bargaining are halved (Title VI of the CLT).

FACTORS EXCLUDING LIABILITY

The need to avoid agglomeration of people and restrict physical contact in closed environments, due to the ease of contagion and the rapid spread of the disease in Brazil, with proportions that, until now, are still unpredictable, is a scenario that can be placed within the concept of force majeure.

Article 393, sole paragraph, of the Civil Code provides for two cases of exclusion from liability with respect to the parties' obligations in a given legal relationship: unforeseen circumstances and force majeure.

However, this legal provision does not distinguish the two concepts, but only establishes that both are facts that have "inevitability" as a characteristic in common. Let us examine this:

> *"Unforeseen circumstances or force majeure occur in necessary facts, the effects of which could not be avoided or prevented."*

The definition of unforeseen circumstances and force majeure therefore is assigned to legal scholarship, which has established distinctions between the concepts, despite the similarities between them, as will be better addressed below.

UNFORESEEN CIRCUMSTANCES

As already pointed out previously, the concepts of unforeseen circumstances and force majeure are similar and have as a common effect exclusion from liability of the parties found in a certain legal relationship.

However, legal scholarship establishes some differences between the two concepts. Unforeseen circumstances are defined as an unavoidable fact that derives from human action and whose occurrence does not derive from the fault or will of the parties. To this effect are the teachings of Carlos Roberto Gonçalves:

> *"Article 393, sole paragraph, of the Civil Code makes no distinction between unforeseen circumstances and force majeure, defining them as follows:*
> *"Unforeseen circumstances or force majeure occur in necessary facts, the effects of which could not be avoided or prevented."*
> *Unforeseen circumstances usually takes place due to a fact or an act outside of the parties' will: strike, riot, war. Force majeure arises from natural events: lightning, flooding, earthquakes.*[1]

Maria Helena Diniz adds that unforeseen circumstances, unlike force majeure, are facts that may be caused by third parties and whose origin is unknown, as per the passage below:

> *"In unforeseen circumstances, the accident that causes the damage comes from an unknown cause, such as an aerial electric cable that breaks and falls on telephone wires, causing a fire, explosion of a power plant boiler, and causing death. It can be caused by a fact of a third party, such as a strike, which causes the factory to shut down and prevents the delivery of a certain product promised by the company, a riot, a change of government, placing the good out of business, so as to cause serious accidents or damage, due to the impossibility of fulfilling certain obligations."*[2]

1. GONÇALVES, Carlos Roberto. Civil Liability. São Paulo: Saraiva, 2009. p. 826.

From the examples cited by the legal scholarship, it is clear that unforeseen circumstances are facts that derive from human action, such as a strike, war, riot, attack, explosion, etc., while force majeure is a fact that arises from events of nature.

It is clear, therefore, that the current scenario of a pandemic caused by a virus cannot be considered an act performed by man, but rather an inevitable and unpredictable event caused by nature, thus better fitting within the concept of force majeure, as will be addressed in the next topic.

That being the case, it is concluded that the concept of unforeseen circumstances cannot be used to justify, in the midst of the current scenario, any reduction in working hours and salary, suspension of employment contracts, and failure to make full payment of severance funds.

However, we note that, due to MP 936/20, of April 1, 2020, the proportional reduction in work hours and wages and the suspension of employment contracts are now possible, by means of individual agreement, provided that the requirements and limits established by MP 936/20 are met. For information on reduced work hours and wages, see page 20 of this booklet and on suspension of contracts, see page 22 of this booklet.

2. DINIZ, Maria Helena. Curso de Direito Civil Brasileiro ["Course in Brazilian Civil Law"]. São Paulo: SaraivaJur, v. 2, 34th edition. p. 403.

FORCE MAJEURE

Due to the peculiar nature of labor relations, Chapter VIII of the CLT is entirely dedicated to the scenarios of force majeure, aiming specifically at regulating the impacts of force majeure on employment contracts.

In this sense, article 501 of the CLT conceives of force majeure as being any inevitable event, in relation to the will of the employer, and for the occurrence of which it did not contribute, directly or indirectly.

In spite of the concept provided for in the law, Valentin Carrion explains that, in general terms, the concept provided for in the CLT encompasses the unforeseen circumstances (unforeseen and unpredictable) and force majeure in a restricted sense (foreseen or foreseeable fact), both of which are superior to the forces of those who bear the effects, since they may consist of natural phenomena, private human acts, new laws, or government acts.[3]

It is important to emphasize that, recognizing the exceptionality of a situation of force majeure, whose impact affects not only the employer and employee, but also the entire community, the majority case law and legal scholarship take the position that the concept of force majeure must be given a restrictive interpretation.

3. CARRION, Valentin. Comentários à consolidação das leis do trabalho ["Comments on the Consolidated Labor Laws"]. 36th ed. São Paulo: Saraiva, 2011. P. 504.

In order to maintain the economic viability of the companies during the period of force majeure, the CLT provides for some exceptions to the rules applicable to employment contracts, such as (i) termination of employment contracts, which ensures the application of differentiated rules for the payment of severance; (ii) reduction of the amount paid for overtime; and (iii) interruption of the employment contract.

Although other alternatives, besides those listed in the previous topic, are not expressly contemplated in the CLT or in MP 927/20, we believe that, in light of the concept of force majeure, the employer could explore other measures in the current context.

However, according to the provisions of paragraph 2 of article 501, these exceptions may only be applied when the occurrence of force majeure substantially affects the economic and financial situation of the company, and the proof of the employer's lack of ability to take appropriate measures in the face of a situation excludes the possibilities for exceptions resulting from force majeure.

Thus, considering that the safety measures necessary to maintain public health resulting from the outbreak of covid-19 are events foreign to the parties (employee-employer) and may make it impossible to continue providing services in various economic sectors, which in practice may result in the shutdown of such activities, the current scenario may be classified as a situation of force majeure, as provided in the CLT.

Incidentally, ratifying this understanding, MP 927/20 expressly provided that the state of public calamity constitutes, for labor purposes, a case of force majeure, according to article 501 of the CLT.

However, as explained above, in order for companies to effectively make use of the exceptions provided for by law, it will be essential to prove a substantial impact on their economic and financial situation and to prove their efforts expended to face the situation, in order to avoid a finding of lack of appropriate measures on the part of the employer.

It is important to emphasize that, in the provision on force majeure, the CLT did not deal with the scenario of civil liability of employers for possible damages that may be caused as a result of force majeure, such that, in such cases, the rules of civil liability contained in article 393 of the Civil Code must be applied.

Accordingly, we advise you that the establishment of force majeure for the purposes of the employment contract should not be confused with the establishment of force majeure for the purposes of civil liability.

Finally, we believe that application of the concept of force majeure to exempt companies from entering into collective bargaining agreements, especially for the purpose of reducing the salary of their employees, is not justifiable, given that it is a constitutional protection ensured to workers, and therefore not susceptible to loosening in the light of force majeure.

Therefore, we believe that it would not be justifiable to apply the concept of force majeure to exempt companies from entering into collective bargaining agreements, especially for the purpose of reducing the salary of their employees, is not justifiable, given that it is a constitutional protection ensured to workers, and therefore not susceptible to loosening in the light of force majeure.

However, we note that, due to MP 936/20, of April 1, 2020, the proportional reduction in work hours and wages is now possible, by means of individual agreement, provided that the requirements and limits established by MP 936/20 are met. For information on this topic, see page 20.

THE ASSIGNMENT OF LIABILITY TO THE GOVERNMENT AND ACT OF STATE

Factus principis or act of state is the term used to define an act performed in an unpredictable and exclusive manner by the government, which produces effects on private relations and contracts, burdening them, hindering, or preventing the satisfaction of the obligations agreed upon, which leads to economic and financial imbalance, calling for the Government's liability to compensate the parties negatively affected by the administrative act.

To be characterized as an act of state, the act by the public authority must extraordinarily burden or prevent the performance of a contract, which would give rise to an obligation imposed on the causative agent to fully compensate the losses incurred by the party to the contract.[4]

From the perspective of the labor laws and regulations in force, act of state is understood as an act of the municipal, state, and federal public administration that makes it impossible to perform the employer's activity in a definitive or temporary manner.

> *"Article 486 – In the case of temporary or definitive stoppage of work, motivated by an act of a municipal, state, or federal authority, or by the enactment of a law or resolution that makes it impossible to continue the activity, the payment of compensation shall prevail, which shall be the responsibility of the government responsible"*

Considering that the act may emanate from a public authority as a state order, positive or negative, general and necessary, factum principis may be understood as a kind of force majeure, differentiating itself from the latter by the causative agent.[5]

4. ALMEIDA, Amador Paes de. CLT Comentada ["CLT Commented"]. 8th ed., ver. and current. São Paulo: Saraiva, 2014. p. 352.
5. Ibidem, pp. 352–353.

As a result of an interpretation of article 486 of the Consolidated Labor Laws, the requirements for establishing an act of state are:

- Permanent or temporary shutdown of work.
- Unpredictability of the act.
- Origin exclusively from an act of the government.
- Act that jeopardizes the continuity of economic activity.

In that sense, some Labor Courts have found:

> *"**Factum principis in the labor sphere assumes the total unpredictability of the event, the inexistence of direct or indirect contribution of the employer, and the need for the act to substantially affect the very existence of the company** (CLT, articles 486 and 501)."*
> (TRT of the 12th Circuit, Case No. 0000119-04.2018.5.12.0023, 6th Chamber, Publication: August 31, 2018, Opinion drafted by: Irno Ilmar Resener– source: www.trt12.jus.br).

> *"ACT OF STATE. FINDING.*
> *The establishing of* factum principis *s**hall require an administrative act by a competent authority or law which involves a complete interruption of the activities of the business and proof that the employer did not culpably or maliciously contribute to the cause that triggered the act of authority**.*
> *Failure to meet any of these requirements renders the invocation ineffective."*
> (TRT of the 2nd Circuit, Case No. 1001041-61.2016.5.02.0254, 17th Chamber, Publication: September 12, 2019, Opinion drafted by: Sidnei Alves Teixeira – source: www.trt2.jus.br).

Thus, as provided for in article 486 of the CLT, if there is a temporary or definitive shutdown of the work activity, motivated by an act of a municipal, state, or federal authority, or by the enactment of a law or resolution that makes it impossible to continue the operation or business activity, the payment of compensation may be required, at the expense of the public authority responsible.

Part of the lines of interpretation states that, for the public administration to be liable, legitimate closing of the company must take place.[6]

This line of interpretation believes that some measures, even if they have serious consequences, do not justify the application of act of state, because it is an issue inherent to business risk. The position of Mauricio Godinho Delgado is to this effect:

> *"In any event, jurisprudential practice has rarely accepted this type of breach of contract, since it considers the legal and administrative changes and measures of the State, which may affect companies, even seriously, to be an inherent part of business risk. As a result, occurrences such as foreign exchange devaluations, implementation of official economic plans, governmental changes in the rules related to prices, tariffs, market, etc. do not constitute factum principis."*[7]

6. MARTINS, Sérgio Pinto. Comentários à CLT ["Comments to the CLT"]. São Paulo: Atlas, 2012. p. 565.
7. DELGADO, Mauricio Godinho. Curso de Direito do Trabalho ["Course on Labor Law"]. 5th edition. São Paulo: LTr, 2006. p. 1,135.

Further, the case law emphasizes:

> *"Having recognized the possibility of continuation of the economic activity of the defendant company by virtue of the publication of a Municipal Law, the occurrence of the "factum principis", pursuant to article 486 of the CLT, is evident and has been established."*
> (Superior Labor Court, Appeal for Review 486.793/98, Publication: June 8, 2001, 2nd Panel, Convoked Reporting Judge Aloysio Corrêa da Veiga)

Therefore, mere decrease in operating cash or billing by the establishment would not give rise to compensation, even if it is a consequence of an act of the government.

However, we believe that holding the public authority liable would only be feasible if the shutdown resulted from an act by it making maintenance of the employment contract unsustainable.

This reasoning stems from the fact that article 486 of the CLT makes express reference to the payment of compensation, within the scope of chapter V, entitled "*Termination*."

In this sense, some legal scholars take the position that a judgment against the government could only be entered with respect to compensation for the penalty of 40% for the Guarantee Fund for Time of Service, such that the prior notice and severance payments would be paid by the employer, who assumes the risk of the economic activity, as set forth in article 2 of the CLT.

Further, the case law of the TST has stated that acts of the public administration aimed at safeguarding the greater interest of the population cannot be classified as acts of state, per the terms of article 486 of the CLT:

*"**There is nothing to be said of factum principis when the action by the government protects the greater interest of the population, having caused the default of the company.**"*
(Superior Labor Court, Appeal for Review 5.931/86.8, Norberto Silveira, Ac. 3rd Panel. 2,610/87)

"FACTUM PRINCIPIS. FINDING. VIOLATION OF ARTICLE 486 OF THE CLT. NO FAULT OF THE STATE IN THE CLOSURE OF THE RESPONDENT'S ACTIVITIES.
For the factum principis to transfer to the State the obligation to pay compensation, it is necessary that the same requirements of force majeure be met, which are, an unpredictable fact without the participation of the employer, and with absolute impossibility of continuity of employment. In the scenario of the case at bar, there is nothing that leads us to conclude that the activities of the respondent company were closed as a result of a governmental act carried out by the Municipality of Belém. The Audit Service of the Municipal Health Bureau – SMS/SUS, in the face of irregularities, found at the respondent Clinic, imposed temporary suspension of services by the SUS, until the end of the audit work performed to ascertain the facts. Any suspension of services by the SUS, in and of itself, cannot be interpreted as impossibility of economic activity so as to constitute a scenario of factum principis, since it the employer company conducts activities in the health area and, since it, by its own will, made the choice to attend to patients exclusively coming from the SUS, evidently there is no interference by the Public Power in this decision, since it constitutes a merely managerial act, whose responsibility must be borne solely by the company, which made this decision. The lack of foresight of the employer/Clinic and contribution to the fault, rule out a finding of force majeure, in the manner set forth in article 501 and its paragraph, of the CLT, there being nothing to be said of factum principis when the action by the government aims to protect the interest of the whole population. The solution adopted by the Circuit Court was tantamount to, without a shadow of a doubt, affront to article 486, paragraph 1, of the CLT. Writ of review heard and granted relief"

(RR-58900-44.2005.5.08.0004, 2nd Panel, Opinion drafted by Justice Vantuil Abdala, published in the Electronic Gazette of the Labor Judiciary on June 13, 2008).

In light of the TST's understanding, the public interest expressed in the government act could supplant private interests, embodied in the maintenance of employment contracts and employers' compliance with their obligations.

It is observed that, thus far, either through the government or its legislative bodies, the government has not resolved on any measure or act that would mandate the closing or closure of certain economic activities that could give rise to a classification of act of state.

In the event that the public authority reports its determination and if it affects the maintenance of certain business operations and, consequently, the employment contracts that depend on them, one must weigh whether the act will trigger the termination of contracts.

However, it is worth pointing out that, in the case of an act that aims to protect the greater interest of the population, that is, contamination by the coronavirus, we believe that the understanding of the Superior Labor Court is applicable, which rules out application of act of state.

In this context, we believe the chances are remote that one may resort to an act of state in the event of shutdown of the activities of the company by order of the government. There will only be arguments to claim an act of state if: (i) the suspension order is specific and directed to the company or its activity; and (ii) such public order results in the termination of employment contracts.

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