



**VEIRANO**  
ADVOGADOS

# COVID-19 RESOURCE KIT

FOR COMPANIES DEALING WITH THE OUTBREAK

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## LABOR LAW ISSUES

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### PREVENTION AND CONTAINMENT: EMPLOYER'S DUTIES

#### Government restrictive measures - workforce impacts:

- Government acts: Law 13,979/20 provides measures for combatting the coronavirus consisting of social distancing, quarantine, travel bans, compulsory testing, immediate notification of contacts with potentially infected persons or circulation in contaminated regions, sharing of information on persons infected.
- Companies are not at liberty to apply these measures freely.
- The duty to notify and share information lies with occupational health physicians, and not with the company, and shall consider Regulations on laboratory tests and the duty of professional secrecy that physicians owe companies.
- Law 13,979/20 also provides that work absences due to restrictive measures imposed by the government are justified and in line with the business risk theory.

#### Provisional Measure 927/2020:

- “Provides for the labor measures to be adopted by employers to preserve jobs and wages and to face the state of public calamity.”
- Individual agreements will prevail over collective ones, with due regard for constitutional provisions.

#### Force Majeure recognized by PM 927:

- Labor Code (CLT), art. 501: “an unavoidable event vis-à-vis the employer's perspective, and for which the latter did not, directly or indirectly, contribute,” capable of “substantially affecting the (...) economic and financial situation of the company.”
- The employer's lack of care excludes force majeure; for instance, travelers to and from endemic locations, ignoring government recommendations/orders.
- Once force majeure is characterized, salaries may be temporarily reduced (CLT art. 503)
- Extreme situations: contract termination due to act of the state - CLT486: “In case of temporary or permanent suspension of work motivated by acts from municipal, state or federal authorities, or by enactment of law or resolution making impossible the continuation of the activity, payment of the indemnification will survive, to be made by the government in charge.”

## **PROVISIONAL MEASURE (“PM”) 927/2020 - INTERIM MODIFICATIONS**

Innovations brought by PM 927 during the calamity period and solely during the state of calamity according to Legislative Decree 6/2020, with due regard for constitutional limits, which may raise discussions:

**Teleworking, remote work or other manner of remote-access work per unilateral decision, with no prior recordation of the modification, but upon 48 hours prior notice:**

- All of the above manners are exempt from control of working hours, per item III of article 62 of CLT.
- Equipment and expenses to be foreseen in individual agreements.
- Messages outside regular working hours will only be considered standby if set forth in written agreement.

**Granting of advance vacation upon 48 hour-notice, including vacation periods not yet accrued:**

- Partition of vacation periods shall be of a minimum of 5 days.
- Advance of future vacation periods only upon written agreement.
- Call of those on vacation to perform essential activities (Decree 10,282/2020).
- Payment of the 1/3 vacation premium postponed to the date of payment of the Christmas bonus.
- Conversion of part of the vacation in indemnification depends on approval from the company.

**Shutdown upon 48 hours prior notice to the employees:**

- Waiver from notice to the government and union.
- All limits of annual periods and minimum business days cited in the CLT are waived.

**Advance of non-religious holidays upon 48 hours prior notice:**

- Use of compensatory time.
- Religious holidays depend on consent.

**Special compensatory time regime (hour account):**

- Time-off by decision of the company.
- Compensation within 18 months by decision of the company.
- Working hours limits maintained.

## **Administrative occupational health and safety routines:**

- Medical exams may be suspended and shall be carried out within 60 days after termination of the state of calamity. The occupational physician will determine the risk cases subject to examining. Termination exams may be skipped if the last exam was performed within at most the past 180 days.
- Possibility to suspend training and provide it remotely.
- Extension of CIPA term and suspension of elections.

## **Delayed payment of FGTS (Government Severance Indemnity Fund) in March, April and May:**

- Payment in six installments, beginning in July, with no charges but with declaration of the amounts paid.
- Advance payment in case of dismissal.
- Late payment charges accrue.
- Suspension of the statute of limitations for 120 days.

## **Special working hours for health services.**

**Suspension of procedural and administrative deadlines. Supervision may only issue notices for lack of registration, imminent danger or slave/child labor.**

**COVID-19 shall only be considered occupational disease if causal relation is established (see item “TRAVEL”).**

**Expired collective bargaining agreements or those expiring within the next 180 days are extended for 90 days.**

## **TRAVEL**

### **Inbound - Precaution and reasonableness:**

- The company shall observe a healthy environment and act to mitigate contamination risks.
- Thus, even if it cannot spontaneously apply restrictive measures which lie exclusively with the government (such as quarantine), it may and should determine that employees coming from risk areas work from home. Precedence of community interests over individual ones.
- However, it is advisable to obtain the employee's consent, and, in case of refusal, the alternative is paid leave (business risk theory).
- The employer should also recommend tests but cannot compel those.
- Mendes Junior law - employees have the right to return to Brazil.

**Outbound - Prohibition to order employees to visit countries in grave situations or under monitoring according to the WHO (i.e., China, Spain, Italy, South Korea, Iran, Japan):**

- Employees are not obliged to work in risk areas. Employee's right to just refusal and indirect termination (CLT 483, c: "clear danger of considerable harm").
- In this case, contamination is treated as an occupational disease.
- Duty to indemnify if employer's guilt is proved, i.e., prior knowledge of the risk. In line with PM 927.
- Tenure.
- Pandemic: would any travel be considered a risk, equivalent to a considerable harm?

## **LIMITATIONS TO THE DIRECTIVE POWER**

**Home office as preventive measure (no diagnosis):**

- Work from home (home office) is not teleworking. Teleworking is an alternative regime, while home office does not alter the regime. However, PM 927 grants equal treatment during the state of emergency.
- Once refused, paid leave or paid absence should be carefully considered.
- Prevention vs discrimination: is removal from work without justifying circumstances, or in an arbitrary manner, considered discrimination? This should be handled carefully, such as in a rotation system.

**Compulsory medical examinations (periodic examinations):**

- The occupational physician will determine if those are necessary, search for symptoms and, if such are present, notify the authorities.
- To the company, the physician will only notify the removal. Medical confidentiality and privacy.

**Other actions recommended:**

- Information and awareness campaigns,
- Crisis Committee,
- Physician on Duty.

## REACTIONS

If an employee has symptoms (fever, cough, sneezing, lethargy), the company shall direct this person to the care of occupational physicians/outpatient and grant medical leave. See previous comment on the duty to observe the work environment and employee's health. Some topics:

- Medical certificates issued by private or occupational physicians are valid for company-paid sick leave for 15 days.
- After 15 days, forwarding to the Social Security Authority.
- The end result is no different from other types of contagious illnesses, such as other types of flu, measles or even conjunctivitis.

### Lack of materials and supplies:

- Individual vacation, advanced holidays and compensatory time.
- Blanket vacation (CLT 139 and PM 927): the prior notice of 15 days was altered to 48 hours.
- Alternatively, recess: shut down, no payment of 1/3 bonus or deduction from vacation days.
- Reduced salary and working hours (see force majeure).
- RIF and PDV subject to collective negotiation (see force majeure).

### Suspension of the employment contract for 2 to 5 months for professional qualification:

- Collective agreement and Individual application.
- Allowance and maintenance of voluntary benefits.
- Suspension is repealed if the training does not take place or if the employee works.

## PRIVACY

Sensitive data: LGPD:

- Storage and confidentiality: records are maintained by the occupational physician, but the company keeps other information such as travels.

Government sharing if requested (Law 13,979/20).

## MIGRATION ISSUES

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With the spread of the pandemic, and aiming at preventing the dissemination of COVID-19 in Brazil, since the 17th of March the Brazilian Government has issued several Ordinances restricting, exceptionally and on a temporary basis, the entry of **foreigners**, and as of March 30 the rules apply irrespective of where they are coming from, there being, however, a few exceptions.

Brazilians, both born and naturalized, are not subject to any type of restrictions.

With the exception of Ordinance No. 158, which regulates the entrance of foreigners coming from Venezuela, the other Ordinances presently in effect also exempt the following foreigners from restrictions:

- Immigrant with a definite residence authorization to reside in the Brazilian territory, for a fixed or an indefinite term;
- Foreign professional in a mission in the service of an international organization, as long as duly identified;
- Foreign employee accredited to the Brazilian Government;
- A foreigner:
  - Who is a spouse, partner, child, parent or guardian of a Brazilian citizen;
  - Whose entry is specifically authorized by the Brazilian Government in view of the public interest; and
  - Who holds a National Migration Registry Card.

In the case of land transportation, there are some specific exceptions: for foreigners from Venezuela, in the event of carrying out cross-border humanitarian actions previously authorized by the local health authorities; for foreigners from Uruguay, in the event of traffic by border residents, upon presentation of a border resident document or other supporting document; for the other countries, in the event of traffic of residents of twin cities with an exclusively land border line.

In the case of water transportation, disembarkation may be exceptionally authorized if medical assistance is required or to take a connecting flight to the foreigner's country of origin.

In the case of air transportation, the access of passengers in international transit is also permitted, as long as they do not leave the international area of the airport and the country of destination admits their entry.

Regarding cargo transportation, there are no restrictions whatsoever.

Restrictions on entry by land are set forth in Ordinance No. 158, valid for 30 days as of March 31, for foreigners coming from Venezuela; Ordinance No. 8, valid for 30 days as of April 2, for foreigners coming from Argentina; Bolivia; Colombia; French Guiana; Guyana; Paraguay; Peru; and Suriname; and Ordinance No. 132, the validity of which was changed by Ordinance No. 8 for 30 days as of April 2, for foreigners coming from Uruguay.

Restrictions by sea are contemplated in Ordinance No. 147, valid for a 30-day period counting from March 26.

Restrictions on entry by air are presently those imposed by Ordinance No. 152, which is valid for a 30-day period as of March 30, when restrictions began being imposed to all international flights.

A foreigner who is in Brazil with a visitor's visa and with an ongoing process to apply for a prior residence authorization for a work visa may consider changing the request to one for a residence authorization, thus avoiding international trips.

At this moment, services at the Federal Police are suspended, except for emergency cases.

Several other countries (among others, Albania, Algeria, Angola, Argentina, Antigua & Barbuda, Armenia, Aruba, Australia, Austria, Bahamas, Bangladesh, Belgium, Belize, Bermuda, Bhutan, Bolivia, Bosnia-Herzegovina, Botswana, Bulgaria, Cambodia, Cameroon, Canada, Cayman Islands, Chile, China, Colombia, Congo, Costa Rica, Cote D'Ivoire, Croatia, Cuba, Curacao, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, El Salvador, Ecuador, Egypt, Estonia, Ethiopia, Falkland Islands (Malvinas), Fiji, Finland, France, French Polynesia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guyana, Haiti, Honduras, Hong Kong, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kosovo, Kuwait, Latvia, Lebanon, Lithuania, Luxembourg, Macao, Madagascar, Malaysia, Maldives, Malta, Marshall Islands, Mauritania, Moldova, Mongolia, Montenegro, Montserrat, Morocco, Myanmar, Namibia, Nepal, Netherlands, New Caledonia, New Zealand, Nigeria, North Korea, North Macedonia, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russia, Saint Helena, Saint Lucia, Saint Marteen, Saudi Arabia, Senegal, Serbia, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, South Korea, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Taiwan, Tajikistan, Tanzania, Thailand, Tonga, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, United States, Uruguay, Vietnam, Virgin Islands and Zambia) are imposing traveling restrictions to enter into their territories, depending on the place from where the individual is traveling, and in many cases already banning any kind of international traffic.

**The rules vary from one country to another and are constantly being altered; therefore, they need to be checked all the time.**

## IMPACT ON M&A TRANSACTIONS - MAC

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M&A transactions are usually embodied in complex agreements that contain not only the strict purchase and sale provisions, but also other obligations and conditions specific to the very transaction, such as obtaining antitrust clearance, consent from third parties, achievement of specific milestones, etc. The Material Adverse Change clause (MAC, also termed Material Adverse Effect, MAE) is one of those provisions and has the purpose to ensure that, on closing, the seller will sell and the purchaser will purchase assets or shares representing a business that substantially corresponds to the business at the time of signing of the M&A agreement. Absent satisfaction of those conditions, theoretically closing does not occur.

The MAC concept is usually adopted not only in conditions precedent (absence of MAC), but also in other provisions related to the conduct of business prior to closing and in representations and warranties and indemnity obligations.

The ways MAC provisions are worded and the instances in which it may be relevant vary considerably. Sometimes they are designed in a broad manner and refer generically to certain events, such as change in financial conditions, change in law, etc., sometimes they refer to events affecting generally the sector in which the business operates. In some other cases they adopt an objective approach and define specific circumstances as falling into the MAC definition, including in financial terms (changes or events involving a certain minimum amount).

Interpreting a MAC provision from a pandemic situation perspective may be challenging, not only due to potential shortcomings of its wording, but also because it will be hard to identify the parties' intent at the time of negotiation in relation to an event that, until recently, none of them would have expected. Adding insult to injury, the lack of precedents from Brazilian courts on the matter does not head to any more familiar terrain<sup>1</sup>.

Given the particularities of the matter, construction of a MAC provision in light of the COVID-19 Pandemic and its effects seem to depend largely on the specifics of the case, including, among other aspects:

- If the wording of the MAC provision is clear and objective enough to include the event,
- Whether the event caused a direct impact on the business being purchased (as opposed to an event of general, diffused effect), and
- The ability of a party to show evidence of such impact.

It would therefore be advisable to any party concerned with the existence of a MAC following to COVID-19 Pandemic to consider at least those aspects above. Obviously, the more one party knew of a potential MAC and its effects on the business to be purchased, the feebler will be such party's ability to defend any right based on the occurrence of a MAC. This is especially the case of recent agreements or M&A transactions that still are in the making.

<sup>1</sup> - Due to the usual confidentiality of arbitration proceedings, precedents from arbitral awards remain largely inaccessible and, therefore, unknown.

## IMPACT ON GOVERNANCE/PUBLICLY LISTED COMPANIES' DISCLOSURE

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Given the extreme measures that are being taken by certain countries (lockdowns, restrictions on flights, etc.), all companies should evaluate - together with their boards and auditors, as applicable - the potential impact of the COVID-19 Crisis in their businesses, prospects, liquidity and financial prospects.

Public companies, in particular, must observe the guidelines set forth by CVM Circular Letter SNC/SEP 02/2020. Such circular letter requires the investor relations officer (and independent auditors) to carefully consider the impacts of COVID-19 on their business and report in the financial statements the main risks and uncertainties arising from this analysis, in compliance with accounting and auditing standards applicable. In addition, it is recommended that companies assess, in each case, the need to disclose material facts and forecasts and estimates related to COVID-19 risks in the preparation of the reference form.

## CONTRACTUAL ISSUES

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Coronavirus (COVID-19) is now considered a pandemic disease around the world. Even though commonly an outbreak of an infectious disease is an event of force majeure, in Brazil, however, until today, there are doubts about its being considered as an event of force majeure or act of God that fully exempt the contractual parties of their responsibilities based on agreement provisions or applicable laws.

Such doubts rely on the fact that, on the one hand, the Brazilian Government ruled a provisional measure declaring that the coronavirus epidemic was a Public Health Emergency of International Importance ('Medida Provisória' n. 921, dated February 7th). On the other hand, on March 6, 2020, the Ministry of Justice issued a Technical Note No 2/2020 / GAB-SENACON / SENACON / MJ, indicating that *"the (Brazilian) context does not offer, at this moment, a situation that can be classified as act of God or force majeure"*.

The situation regarding the Coronavirus (COVID-19) pandemic disease is rapidly increasing in number of contaminated people around the world and also in Brazil, with serious consequences to people's lives and businesses. In this sense, even though the classification of acts and facts as force majeure and acts of God shall be made upon a case-by-case perspective, considering the specific situation of each case, we most likely face the situation in which the Coronavirus (COVID-19) outbreak will most likely be treated as force majeure considering the application of the Brazilian Civil Code (agreements in general).

Pursuant to the Brazilian Consumer Defense Code ("CDC") and the related case law, epidemics and health problems are considered to be force majeure events that allow, i.e., cancellation of reservations and travel packages.

Therefore, the company or person shall analyze the agreements and relationships on case-by-case basis in order to verify if the Coronavirus (COVID-19) can or cannot fully exempt the contractual parties of their responsibilities based on the force majeure or Act of God event based on the agreement or applicable laws.

## CONSUMER RELATIONS

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### **DUTY TO INFORM - Impacts of COVID-19 on the Consumer Relations and measures arising from them**

The supplier must inform consumers not only about the direct impacts that the coronavirus may have on products and services, but, as far as possible, the exceptional measures that it will adopt during the period in which the pandemic state remains.

Depending on the market in question and on the extent of the impact on the supplier's activities, whether from a practical, economic, production or other perspective, the policies adopted regarding flexible payments, delays, reimbursement, postponement, etc. must be clearly and ostensibly informed to the consumer, as well as the consequences of each case.

### **SUPPLIER LIABILITY AND ITS POSSIBLE EXCLUSIONS (in the context of the coronavirus) - Force majeure and fortuitus event vs. situation inherent to the supplier's activity**

Under the general rule of the Consumer Defense Code (the "CDC"), the supplier is responsible for the products / services that they place in the market, regardless of fault (the so-called strict liability). This rule of full liability is softened in the event of force majeure or fortuitus event, which are unpredictable and inevitable events that can be derived from the force of nature (such as lightning, flood or earthquake) or resulting from the act of others (act of third parties), being examples: war, strike, revolution, invasion of territory, etc.

Coronavirus, as an unpredictable and inevitable event, which affects / prevents the fulfillment of obligations, can be an exclusion of liability factor and exonerate the supplier from certain obligations, provided that an adequate level of consumer protection is fulfilled and maintained, even in view of the extraordinary context.

However, it is important to keep in mind that events of unforeseeable circumstances (fortuitus events or force majeure) will only be able to exempt the Supplier's liability when they are not inherent to the activity developed by the company and, therefore, are not inserted in the risk of the activity - which is why it is important to carry out an assessment on a case-by-case basis.

## **SUSPENSION OF BUSINESS ACTIVITIES AND CONSUMER LAW - Preventive or mandatory suspension and alternatives to meet demands in times of isolation**

Regardless of the reason for the suspension of the supplier's activities, whether preventive (as an option of the company) or mandatory (by order of the Government), the supplier must be prepared to continue meeting the demands of consumers in times of isolation. Consumers may still be interested in exercising the right to exchange a product, or their right of regret, for example, and the supplier must implement measures to ensure that customer service is maintained in the most agile and helpful way possible to avoid future conflicts, disputes or complaints.

An alternative is to evaluate the possibility of offering electronic means of fulfilling the supplier's obligations towards consumers - as is already done in e-commerce sales, under the Electronic Commerce Decree - for all types of products and services (and not just those that are marketed online). This way, the chances of offering an adequate and effective service that enables consumers to resolve their demands on information, doubts, complaints, suspension or cancellation of orders are increased. If it is not possible to maintain an effective customer service structure, for companies that are unable to maintain it remotely, services can still be facilitated via social networks, for instance.

## **REIMBURSEMENT REQUESTS, RESCHEDULING, CONTRACT EXTENSION AND GRACE PERIOD - How to behave in view of the requests in order to avoid non-compliance with the CDC, reputational damage, penalties and disputes**

Suppliers must evaluate possibilities of maintaining the offer of their products and services electronically. Product suppliers can maintain online sales or sales by phone, for example. Service providers can use their creativity to keep offering services in another modality (gyms and courses can also assess the feasibility of making online classes available, for instance).

Companies must also carefully assess the requests for refunds, rescheduling, as well as the possibility of contract extensions - by granting a grace period for the current moment - as the occasion is also sensitive for consumers. Companies must be prepared to respond to all these requests in their customer service channels. Possible denials can generate complaints in social networks and trigger major problems. Suppliers also need to assess whether rescheduling will be done at the discretion of the consumer or supplier, for example (please see item "V", below).

## **IMPOSITION OF PENALTIES TO THE CONSUMER FOR CANCELLATION - Legality, reduction of percentages of the fines, other alternative measures**

In view of the context of the Coronavirus outbreak, requests for cancellation of services by consumers have become increasingly recurrent. In certain contracts, a contractual fine for cancellation is provided, but the consumer wants the cancellation to occur without any additional charge/fine or by full refund of the amounts already paid. Does the Coronavirus context support these (no fines) claims? In certain cases, yes.

For example, epidemics and health conditions may be considered Act of God/force majeure events that allow for the cancellation of reservations and travel packages. Despite isolated judicial decisions to the contrary, the Court records/precedents understand that, in these cases, the total amount must be reimbursed to the consumer; or no cancellation fine should be charged, even if contractually provided. On the other hand, depending on the circumstances in which the cancellation request occurred (e.g. services not affected by government restrictions, services that could still be safely provided, but that the consumer chose to cancel) and on the existence of a reasonable motive to support the maintenance of the fine, the penalty may be kept, even if in a lower percentage than the contracted one.

It is important to be very careful to determine the alternative to be adopted by the company in each case, as any fine charged could potentially be reversed in court, with the determination of a refund of double the amount, if it is understood that there was no support for such collection.

## ISSUES IN HEALTHCARE

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Federal Law #13,979 was approved on February 6, 2020 so as to provide federal and local authorities with means to address the COVID-19 crisis. It allows public officers to order (i.) isolation, (ii.) quarantine, (iii.) compulsory medical examinations, laboratory tests, collection of biological samples, vaccinations, or specific medical treatments; (iv.) the execution of epidemiological studies, (v.) exhumation, necropsies and cremations; (vi.) exceptional and temporary border restrictions; (vii.) compulsory seizure/employment of assets or services from private parties, upon the subsequent payment of a “*fair price*”; and (viii.) exceptional and temporary introduction, within the country, of products that would be subject to sanitary surveillance - regardless of previous registration at the Federal Sanitary Surveillance Agency (“ANVISA”).

Administrative Order #356, issued by the Ministry of Health on March 11, 2020, explains in further detail how Federal Law #13,979 is to be executed - and indicates that administrative authorities will be able to rely on the prerogatives established therein as long as Brazil is considered to be under a “*National Public Health Emergency*”. Nevertheless, so as to prevent arbitrary and capricious administrative action, Federal Law #13,979 states that any of the aforementioned measures [A.] “*shall only be ordered if grounded in scientific data*”; and [B.] “*shall be limited, in time and space, to the minimum level deemed necessary for the promotion and preservation of public health.*”

In order to guarantee that such measures will be promptly and fully complied with, Federal Law # 13,979 provides that violation of the fore mentioned orders “*shall entail liability*” for those responsible for their breach. Further, the federal statute also sets forth that individuals who are prevented from attending their workplaces will have their absences recognized as “*justified*” - and that all people affected by the compulsory health measures provided therein will be entitled to “*free medical treatment.*”

## TELE-MEDICINE AND THE CORONAVIRUS

The World Health Organization statement on the coronavirus pandemic, the increase of confirmed cases in Brazil, together with measures adopted by public authorities and private organization aiming to control contamination and the number of people affected by Covid-19 qualify as urgency and emergency. In these situations, online treatment (without direct examination of the patient) is allowed pursuant to the Medical Code of Ethics and other resolutions issued by the Federal Medical Board. In fact, on March 19, 2020, the Federal Medical Board issued Statement CFM No. 1,756/2020, in which it expressly authorizes certain telemedicine practices on an exceptional basis in view of the Covid-19 situation.

## CRIMINAL LAW IMPLICATIONS

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Certain conducts can be considered criminal offenses in a scenario of public health emergency associated with COVID-19:

- Offenses against public health;
- Offenses against labor organization;
- Offenses of danger against life and health;
- Offenses against honor and discrimination; and
- Offenses against consumer relations.

### OFFENSES AGAINST PUBLIC HEALTH

Pursuant to **article 268 of the Brazilian Penal Code**, it constitutes an offense to violate preventive sanitary measures ordered by public authorities aimed at preventing the introduction or spread of contagious disease. This offense is punishable by imprisonment, from 1 month to 1 year, plus fine.

It is also an offense to omit the notification of diseases (**article 269 of the Brazilian Penal Code**). This conduct is punishable against physicians who fail to report cases of disease whose notification is mandatory. This offense is punishable by imprisonment, from 6 months to 2 years, plus fine.

### OFFENSES AGAINST LABOR ORGANIZATION

According to **article 197 of the Brazilian Penal Code**, it constitutes an offense against freedom of labor to force someone, through violence or serious threat, to work, or not work, against their will, during a certain time, or on certain days. This offense is punishable by imprisonment, from 1 month to 1 year. The penalty for violence, if applicable, is cumulative.

It is also an offense against freedom of labor, pursuant to **article 197 of the Brazilian Penal Code**, to force someone, through violence or serious threat, to open or close their workplace/place of business. The offense is punishable with imprisonment from 3 months to 1 year and fine, apart from the penalty for violence, if applicable.

## OFFENSES OF DANGER AGAINST LIFE AND HEALTH

**Article 131 of the Brazilian Penal Code** sets forth the crime of danger of infection of serious disease, which consists of practicing an act capable of producing an infection, with the intent of transmitting to others a serious disease with which the agent is infected. This is punishable by imprisonment, from 1 to 4 years, plus fine.

**Article 132 of the Penal Code** contemplates the offense of exposing life or health of others to direct and imminent danger. It is punishable with detention, from three months to one year, unless the act constitutes a more serious crime. The penalty is increased by 1/6 to 1/3 if the conduct corresponds to providing people transportation/remotion services violating the applicable regulations.

It is also an offense (**article 135-A**) to make emergency medical-hospital service conditional upon a pledge cheque, promissory note, bond or similar guarantee, or upon the filling out of administrative forms. This is punishable by detention, from three months to one year, plus fine. The penalty is increased up to double if bodily injury of serious nature results, and up to triple if death results.

## OFFENSES AGAINST HONOR AND DISCRIMINATION

It may constitute slander, an offense provided in **article 140 of the Brazilian Penal Code**, to attack someone's dignity for carrying an infectious disease. The penalty is imprisonment, from 1 to 3 years, plus fine.

**Law n. 7716/89** contemplates offenses associated with ethnic prejudice, v.g. against the victim's national origin. Penalty varies depending on the particular offense crime, from imprisonment ranging from 1 to 3 years, to imprisonment ranging from 3 to 5 years.

## OFFENSES AGAINST CONSUMER RELATIONS

Several conducts can constitute offenses against consumer relations, such as favoring or preferring, without a fair cause, a buyer or customer to another; withholding raw materials or finished goods, or retaining them for speculation. Such offenses are provided in **article 7 of Law n. 8137/90**, punishable with imprisonment from 2 to 5 years or fine.

## INSURANCE ISSUES

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Many different insurance lines may be implicated by the COVID-19 outbreak, including the following ones:

- Events cancelation insurance;
- Business interruption;
- Travel insurance; and
- Health plans.

### EVENTS CANCELATION INSURANCE AND OTHER SIMILAR LINES

This type of insurance is still relatively unknown in Brazil and not commonly purchased, even though it is available in the portfolio of quite a few Brazilian insurers.

The risks of event cancelation, suspension, postponement or location transfer due to external reasons outside of the policyholder's control is typically included as an endorsement in a much broader comprehensive policy intended to cover a myriad of perils in connection with a given event or a series of events.

Those policies usually provide first party (i.e., cover insured's own losses) and third party (i.e., liability) coverage.

Insurers also offer separate cover for event postponement, suspension or abandonment key individuals designated in the policy cannot make it to the event (non-attendance coverage) for external causes beyond the control of the policyholder.

These policies provide common coverage for, among other things, net costs (i.e., costs incurred with setting up the event, including advertising costs, deducted of gross revenue and any savings obtained to mitigate the loss) plus expected profits lost.

Certain policies exclude losses resulting from influenza, H1N1, SARS and any type of pandemic so classified by the World Health Organization - WHO. On March 11, 2020, the WHO declared Covid/19 a pandemic; up until this moment it was not. Therefore, whether the insurers will respond to events cancelled before such date under those policies excluding pandemics is still a question mark. Other policies do not refer to pandemics as an exclusion of coverage and thus are supposed to cover the losses resulting from cancelation.

Specific exclusions of the non-attendance coverage include failure to show up as a result of a disease she/he under treatment for prior to the announcement of the event.

Since the language of the policies will vary, one should look closely and in detail the specific wording of its own policy to determine the prospects of an insurance claim.

## **BUSINESS INTERRUPTION INSURANCE**

Since the Covid/19 outbreak has begun, more and more companies in Brazil have been implementing home office and many of those that cannot do it have been directing workers to stay home until further notice. An increasing number of international flight routes are being suspended, causing massive disruption and severe economic losses. Logistics and transportation of people and cargoes are suffering the effects of such preventive measures. Supply chains are being dismantled by the crisis. Companies are unable to source raw materials, parts and components from original suppliers in order to keep production/assembly lines active.

A growing issue is whether business interruption policies (BI) provide coverage to such losses. BI policies are classified in Brazil as “lost profits insurance” and aims at compensating the losses resulting from the interruption or disturbance of the policyholder’s business flow as a consequence of the event specified in the policy.” (SUSEP Circular no. 560/17, art. 2nd).

It turns out that BI coverage available in Brazil will hardly respond to such losses, except in some very narrow cases.

BI coverage is typically sold ancillary to property policies as an endorsement. Because of such traditional architecture, the triggering event of the policy is damage to an insured property, in the sense of physical damage to a tangible property (usually defined as danos materiais within the specific - and rather narrow - meaning of the policy), rather than “physical injury” to one or more individuals.

One may wonder whether the contamination of an insured location by Covid/19 (such as an office, a store, an entire building or even a vessel or an oil rig) would amount to physical damage to said property for the purposes of the policy. Also, whether the insurer could be required to clean up the place, as coverage typically includes “repair or replacement of the insured property in such a way as to allow it to continue to work or operate normally”, is a sensible question. Both are issues of first impression in Brazil and therefore has never been tested before our courts.

However, an insured holding BI insurance must review carefully the policy to determine whether its language allows enough room to grant coverage or not.

The rule of thumb will suggest falling short of meeting the physical damage to property test. However, insurers are free to sell non-standardized property insurance in Brazil, which leads to variations in policy wording. For instance, some policies require an accident (i.e., a sudden and unexpected event) also as a threshold issue, which add even more complexity to the underlying determination. Others do not. Therefore, there is no one-size fits all answer; the ultimate investigation must be made on a claim-by-claim basis in light of the specific wording of the policy.

## TRAVEL INSURANCE

Travel insurance. Covid/19 is an “imported” disease and many Brazilians have contracted it during international trips. Travel insurance sold in Brazil generally provide basic cover for hospitalizations, medical and dental expenses during the trip. Additional coverage for cancelation, interruption or extension of the trip due to global outbreak is available as an endorsement.

Nevertheless, most travel insurance policies exclude pandemics from coverage. In such cases, the policies will typically cover emergency care at least until the insured is diagnosed with Covid/19 - from that point onwards, the insured might be by him/herself and may have to resort to the public health system for assistance. For those policies that do not exclude pandemics, costs with medical treatment shall be deemed covered in principle.

The date of the trip also matters. Insurers have been denying coverage for trips initiated after public knowledge of the international risk of Covid/19 became widespread. Denial is grounded on that the policyholder knew the risk (and took it) or consciously aggravated it. There might be ways around it, but legal advice in a foreign jurisdiction would be necessary for appropriate counseling.

## HEALTH PLANS

Health plans. Brazilian health maintenance organizations (HMOs), including health insurers, are expected to be hit heavily by the Covid/19 outbreak.

On 12 March 2020, the Board of the Brazilian Supplementary Health Agency (ANS) approved a regulation (published in the Official Gazette on 13 March 2020) that introduces Covid/19 diagnosis tests in the list of medical proceedings mandatorily provided by HMOs to insureds. Treatment to the disease was already covered under the health plans according to their specific types (ambulatory or hospital care).

In Brazil, HMOs are also required to reimburse the public health system (SUS) for any medical expenses incurred with covered patients.

The loss ratio under the healthcare plans is expected to increase dramatically due to Covid/19, leading to claims by HMOs to eliminate the imbalance of contracts. Those claims will arise either in the months to come (during the health plan period) or upon renewal of the plans, which will occur in less than a year-time. The stop loss insurance provides coverage for losses in great excess of the estimated loss ratio under the health plan, mitigating economic losses of the group of insureds (including the sponsoring company) related to the unexpected and severe increase in claims (medical expenses). Very few companies have taken out the product though.

On March 4, 2020, the National Council of Private Insurance (CNSP) enacted a regulation that allowed HMOs in general to transfer risks through reinsurance. Prior to that only health insurers, which are just one not prevalent type of HMO, were allowed to do so due to lack of legislation enabling non-insurers to cede risks in reinsurance.

Insurance authorities are in the hope that such regulatory change will increase significantly the capacity of domestic HMOs to cover and cope with health-related risks in the near future.

## DATA PROTECTION

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Data protection and privacy laws are relevant to the current responses to stop the spread of the coronavirus. An important response to limiting the spread of infection is the practice of identifying and monitoring anyone who may have been in contact with an infected person. This necessarily involve obtaining and potentially sharing personal information, including data about an individual's health, which is considered sensitive personal data, as well as, travel, personal contacts, and employment details.

There is an undeniable need to balance personal privacy with public interest and the collection and processing of personal data may create discussions around data protection limitations. The increasing use of AI and big data to handle the outbreak will, at the same time, require a responsible and limited collection and use of data during this public health crisis.

The Brazilian Data Protection Law (Law no. 13,709/18 or LGPD) will enter into force on August 16, 2020. Notwithstanding, the LGPD has been used as legal basis for enforcement of data subjects' rights by a number of consumer protection bodies (PROCONs, for example), the Attorney's Office in Brasilia (through an Especial Unit for Data Protection and Artificial Intelligence) and by lower courts in Brazil. Thus, companies and individuals collecting and processing personal data (and sensitive personal data) will have to abide by the rules of the LGPD.

The Brazilian Data Protection Law has an important exception to its applicability whenever data treatment is performed for the exclusive purposes of public security (to be further regulated). This exception could be used to avoid the applicability of the LGPD during a public health crisis, for example, but no measures have been yet taken in this regard.

If we consider the LGPD still applicable to the treatment of personal data, the Law allows data to be treated (without consent) for health tutelage, in procedures undertaken by health professionals, health services or sanitary authorities. The Law also allows data treatment for the protection of the life of the data subject or of another natural person. Those legal bases also apply to the treatment of sensitive personal data.

It is important to note that the rights of data subjects and the principles of the LGPD shall be at all times observed: data should be processed for health-related purposes only where necessary to achieve those purposes, for the benefit of natural persons and the society as a whole, with the State providing specific and suitable measures to protect the data. Thus, such processing should not result, for example, in the data being processed for other purposes by third parties, even by employers themselves or by insurance companies.

## CYBERSECURITY

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In all the world 4,000 new domain names related to the coronavirus have been registered so far. A big chunk of them will have malicious content.

From a cybersecurity standpoint, users will have to take additional precautionary measures to work from home or work remotely in a safe way. Although the practice of home office is largely adopted as applications are available in the cloud, companies will have to consider that the level of protection in employees' homes is usually much lower than the one in the office.

Companies shall provide employees with the necessary training and resources for them to perform their tasks outside the work environment.

Some of the best practices for users include:

- Review and establish robust passwords to access work resources; keep the wi-fi not accessible to intruders.
- Avoid clicking in suspect links (phishing) and only download content from verified sources.
- Use tools as antivirus even when using a personal computer.
- void the use of public wi-fi to access corporate e-mail or corporate files.

In crisis situations, companies shall use multiple authentication methods, levels of permission per user, increased monitoring of all endpoints and mobile access. As it is likely that employees will be using personal devices, companies shall establish a management plan against threats and attacks originated from those devices aiming at the corporate networks. Companies shall also perform infrastructure testing in order to be prepared for the increased network traffic and establish and review privacy and cybersecurity policies in order to minimize risks.



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