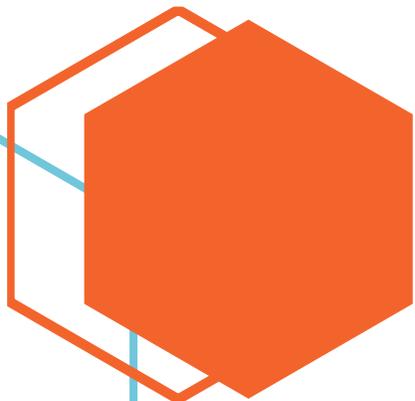




International Lawyers Network

Paid Leave – Latin & South America

The following paper aims to succinctly address the question "Are employees entitled to paid leave due to Covid-19?"





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Brazil

The 1943 Consolidated Labor Law does not have any legal concept regard temporary layoff. However, with the impact of COVID-19, the Federal Government issued Provisional Measure 936 with the objective of preservation of employment and income, guarantee the continuity of the business and labor activities, reduce the social impact from the public calamity state and public health emergency.

The Brazilian Federal Government invested BRL 51 billion for the payment of a social benefit, referred as "emergency benefit", to all employees who execute the individual agreement brought by this Provisional Measure, which has already preserved more than 8 million employment contracts (numbers reported by the Ministry of Economy at <https://servicos.mte.gov.br/bem/>), allowing employees and employers to execute individual agreements to suspend employment contracts or proportionally reduce the workload and salaries. This suspension may be set for a maximum of 60 days while the reduction is limited to 90 days.

A compensatory allowance may be agreed between employees and employers and the respective payment will not be considered part of the salary for any labor or social security charges and will not be subject to income tax deduction.

Employers must inform the Ministry of Economy the temporary reduction or the suspension of the employment contract, within 10 days, counting from the signing of the agreement and the monthly compensation will be paid by the Federal Government as Emergency Subsidy;

The first installment of the "emergency benefit" will be paid by the Federal Government in 30 days, counting from the date of the signing of the agreement and will be paid exclusively during the proportional temporary suspension of the employment contract.

The calculation of the "emergency benefit" will be based on the monthly value of the unemployment insurance program and the monthly amount will be (i) equal to one hundred percent of the Unemployment Insurance program to which the employee is entitled or (ii) equal to seventy percent of the Unemployment Insurance program to which the employee is entitled, if the company's gross income, in the calendar year of 2019, surpasses BRL 4.8 MM, which would only be able to suspend their employees' contracts upon the payment of a monthly compensation grant of 30% of the employee's salary.

A recent decision by the Supreme Federal Court confirmed that this Provisional Measure is in accordance to the Federal Constitution, despite discussions in the sense that suspending employment contracts and reducing salaries could only be negotiated through collective bargaining agreements with trade unions and not through individual agreements. This decision strengthened the content of this provisional measure and contributed to prevent a significant number of employment terminations.

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Chile

This situation is comprised by two scenarios:

a) Suspension with remuneration payments

The employer and the employee may agree to suspend the labour relation and maintain the employee remuneration. This must be recorded in an annex to the contract.

b) Suspension without remuneration payments

The employer and the employee may agree to suspend the labour relation without maintaining remuneration payments. In this case, the employee may access to the benefits of the Unemployment Insurance according to Law N° 21.277.

The payment of this insurance proceeds in the following scenarios:

- i. Suspension of the labour relation ipso facto: the consent of the parties is not required, it is understood that the labour relation is suspended as a result of an authority act or declaration (for example, quarantine, curfew, sanitary restrictions).
- ii. Suspension of the labour relation by mutual agreement: In this case, even though there is not an authority pronouncement, the employer's activities are totally or partially affected by the Covid.19 pandemic. In this scenario, this agreement must be evidenced in a contract annex.

During this period, the employees will be entitled to receive the benefits of their Individual Accounts of the Unemployment Insurance, and once this account is depleted, the employee will receive the benefit from the Collective Unemployment Fund. The terms, percentages and amounts of the benefits will be determined by Law N° 19.728 that establishes the Unemployment Insurance. Notice that the employee will receive a maximum of 70% of his monthly remuneration, percentage that will decrease every month. In this case, the employer will also have to make all social security payments.

The provisions of Law N° 21.277 that regulates these benefits will have effect for 6 months, the maximum term of the agreements that suspend the labour relation.

Grant leaves to the employees

The employer may:

- a) Provide to each employee, individually, their pending vacation days or give days in advance. In this case, the employee must consent to this, and the days must be recorded in the corresponding receipt. During these holidays, the employees receive their full remuneration, or/and,
- b) Provide collective vacation days. According to article 76 of the Labour Code, the employer may unilaterally provide vacations to the whole company, establishment, or area, for a period of 15 working days. For this, the employer may give vacation days in advance to the employees even if they do not have enough days to use. During these holidays, the employees receive their full remuneration.

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Colombia

Colombian labor regulation is very strict regarding the possibility of employers of suspending or canceling their employees' salaries.

Due to the quarantine measures adopted by the Colombian government to mitigate the contagion of the Covid-19, a large number of companies had to suspend their operations unless they provide an essential public service. The MYPIMES (micro, small and medium-sized enterprises) have been the most affected by the quarantine as it will be prolonged until May 11, 2020.

Quarantine measures can be analyzed as a force majeure event that permits the employer to suspend the employment contracts as article 51 of Colombian Substantive Labor Code allows this situation. However, arguing force majeure requires a real impossibility of executing the contract, therefore, if employees can do their jobs remotely, suspension cannot be applied.

Employers aren't entitled to paid leave during the Covid-19 outbreak if:

- The employment contract is suspended.
- The employee requested an unpaid leave (this is important since the Ministry of Labor stated that employers are not allowed to propose unpaid leaves as this can be understood as a violation to the employee's labor rights)
- The employee is in medical leave (Colombian healthcare system will pay this leave)

However, employers should avoid suspensions since cutting the monthly income of their employees can be considered as a violation of fundamental rights leading to a Court's decision of revoking the suspension or the unpaid leave.

Each particular case must be analyzed since the financial situation of the company, plus the impossibility of executing the contract can allow the suspension to avoid paying these leave during the Covid-19 outbreak and the mandatory quarantine measures.

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Panama

Currently, all companies are facing the consequences generated by the "CoVid-19" virus, reason why Quijano & Associates hereby informs about the actions and modifications in labor regulations that you should consider.

As a consequence of the existing health crisis in our country, activities in many companies have temporarily stopped, therefore, these companies do not have the financial resources to pay their workers' wages, but they do not want to terminate the employment relationship.

In this sense, Panamanian Legislation, in Article 199 Number 8 of the Labor Code establishes as one of the causes of temporary suspension of the effects of the contract that entails the non-payment of wages "**any force majeure or fortuitous event when it represents as a necessary, immediate and direct consequence, the temporary cessation of the activities of the company, its establishment or the work of the employer, for a minimum period of one week...**"

The current existing health crisis, in light of Article 7 of the Labor Code, is a force majeure or fortuitous event that, despite being anticipated, it was not possible to avoid, since the presence of the Covid-19 virus could occur at any time in Panama.

To apply the temporary suspension of the effects of the Contract, it will be necessary to present the corresponding request before the General Directorate of Labor, who will examine the request and once the force majeure or fortuitous event has been corroborated, will order the suspension of the effects of the contract for a term of thirty (30) days, extendable for up to four (4) months.

Other Provisions:

As this afflicting situation has evolved, the Authorities have taken actions in this regard, issuing regulations such as Executive Decree No. 71 of March 13, 2020, which temporarily regulates Article 159 of the Labor Code, in which it is established that with the agreement of the workers, the employer may reduce the working hours or the working week, and the way they will be to avoid the spread of the virus.

This agreement must be signed by all workers or the union, if it exists, based on the template included in the Decree itself, and only the hours that were worked, should be paid.

Similarly, the Ministry of Labor through Executive Decree 78 on March 16, 2020, has recommended for health reasons that in the case of those employees who are sixty (60) years old or older, as well as those who suffer of any chronic illness, pregnant women, or any other condition that makes them vulnerable, are sent on advanced vacations. In the practice, there are those who are extending this recommendation to other employees who have expired vacation time, even if they are not considered as vulnerable.

The application of article 197-A of the Labor Code, regarding labor mobility is also urged, mainly to those employees who personally assist clients.

Teleworking, a new trend for our country, which was established and regulated by Law No. 126 of February 18, 2020, thus giving companies the possibility of establishing a new modality in the employment relationship with their workers.

In the face of the existing health crisis due to the presence of COVID-19, it is necessary to **reinvent ourselves** and modify working relationships with our workers, in order to continue providing an effective service to our clients, which is why its implementation is conducive at this time.

Telework: Consists of the provision of subordinate service, without physical presence, through computer means.

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