

WHO IS RESPONSIBLE FOR THE PAYMENT OF THE WAGES FOR PREGNANT EMPLOYEES ON LEAVE, PURSUANT TO ARTICLE 1 OF LAW NO. 14,850/21?

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Law No. 14,151/2021, published on May 13 of this year, establishes in the head paragraph of its article 1 that "during the public health emergency of national importance resulting from the new coronavirus, pregnant employees shall remain away from on-site work activities, **without prejudice to their remuneration.**" In the sole paragraph of the same provision, it is stated that the employee on leave "will be available to perform activities at home, through telework, remote work, or another form of distance work."

Much has been questioned regarding the employer's liability for the payment of wages of pregnant employees in the event of impossibility of performing the activities at a distance, considering that the prohibition on performing the tasks in a face-to-face environment arises from the emergency public health crisis caused by the pandemic and from a legal mandate.

The liability of the employer to bear the burden of remuneration is not questioned, if it is possible to remove the employee from on-site activities, without prejudice to effective work. However, in activities that need to be performed in person, employers have a double burden, when they cannot go without effective work: the payment of the wages of pregnant employees on leave and the hiring, as temporary workers, of another employee for the role.

Various employers have directly challenged the Federal Government regarding this excessive burden and some claims have already been granted when brought to court.

Recently, the Federal Courts (Federal Court of Appeals for the 3rd Circuit - São Paulo/SP) issued two decisions on this matter, in the record of cases No. 5003320-62.2021.4.03.6128 (1st Federal District Court of Jundiaí/SP) and No. 5006449-07.2021.4.03.6183 (14th Federal Civil Court of São Paulo/SP).

In the first suit, by way of a writ of mandamus, an employer sought to advance the maternity leave pay of her domestic servant. The request was granted by the Federal Court, which ordered the INSS to accelerate the maternity leave pay for the period of leave resulting from the impossibility of performing the activities at a distance by the pregnant worker, pursuant to article 1 of Law No. 14,151/21.

The judge relied on the rule provided for in article 394-A of the Consolidated Labor Laws (CLT),^[1] which provides for the prohibition on performance of hazardous activities by pregnant employees.

In the decision, the judge pointed out that the case involved an insured employee who worked as a domestic worker, which would make it impossible to perform remote work or any other form of remote work. He also pointed out that the benefit provided for in article 1 of Law No. 14,151/21 to put the pregnant employee on leave from in-person work, without prejudice to remuneration, in order to prevent the risk of contagion by covid-19, was created by the State. Therefore, it would not be incumbent on the employer to bear the financial burden.

In addition, for the judge, the situation would fit within the rule provided for in paragraph 3 of article 394-A of the Consolidated Labor Laws, which provides for restrictions on work by pregnant employees in unhealthy environments, in the same manner as set forth in article 1 of Law No. 14,151/21.

The granting of advance maternity leave pay was said to be a duty of the State, and cannot be assigned to employers, as it violates the protection of maternity and pregnant women, ensured both by the provision set forth in the Consolidated Labor Laws and article 1 of Law No. 14,151/21.

The second decision stemmed from an ordinary action in the Federal Courts against the INSS and the Federal Government. The action sought direct compensation of the maternity leave pay paid by the employer during the period of leave of pregnant employees due to the impossibility of performing the work at a distance, pursuant to article 1 of Law No. 14,151/21 (Case No. 5006449-07.2021.4.03.6183).

In the case, it was reported that pregnant employees provided urgent and emergency medical care services in emergency rooms and hospital units and, therefore, could not provide remote care.

The difference in this action was the procedure, since, despite the petition for injunctive relief in the action, wages continued to be paid normally, and the employer requested compensation for the remuneration paid.

In the decision, it was emphasized that, since it is nursing work, it would be impossible to perform the activities remotely. Moreover, Law No. 14,151/21 has not defined who is liable for payment of the remuneration of pregnant

employees whose professional activity is incompatible with distance work.

Whereas the Federal Constitution guarantees everyone the right to health, maternity, family, and society (articles 196, 201, II, 226 and 227), it establishes the duty of the State to promote social and economic actions and policies to achieve such purposes, including through the Social Security System, and that it is the Social Security's obligation to fund the coverage of claims, as in the case of unforeseen events arising from the emergency crisis caused by the covid-19 pandemic, the employer's request was granted, including the emergency relief requested.

As can be seen, the creation of an obligation to grant leave for in-person work functions, according to article 1 of Law 14,151/2021, generates much more than just the act of putting the pregnant employee on leave. It also creates a burden, often excessive for the employer. Given this situation, the Federal Courts have taken a position on the State's responsibility to pay the wages during the period of leave, either by advancing the maternity leave pay, under the terms of article 394-A of the Consolidated Labor Laws, or even the compensation of wages already paid by the employer.

To this end, it is essential for it to be impossible for pregnant employees to perform their activities outside the physical environment of the employer, and the company must prove that pregnant employees cannot work at their residence, through telework or remote work or other form of distance work. In the event the request is granted, the employer may not require employees to render any services to it, under penalty of constituting fraud against Social Security (article 171, paragraph 3, of the Penal Code).^[2]

^[1] Article 394-A. Without prejudice to their compensation, including the amount of the health hazard premium, employees must be on leave from: I - activities considered unhealthy to a maximum degree, for the duration of pregnancy;

II - activities considered unhealthy at a medium or minimum degree during pregnancy;

III - activities considered unhealthy to any degree during lactation.

Paragraph 2. The company is responsible for paying the health hazard allowance to pregnant or breastfeeding employees, compensating them pursuant to the provisions of [article 248 of the Federal Constitution](#) at the time of collection of the contributions levied on the payroll and other income paid or credited, for any reason, to the individual providing services.

When it is not possible for a pregnant or lactating employee on leave pursuant the head paragraph of this article to perform their activities in a healthy place at the company, the event shall be considered as a risk pregnancy and shall entitle them to maternity pay, pursuant to [Law No. 8,213, of July 24, 1991](#), during the entire period of leave.

^[2] Article 171 - Obtaining, for oneself or another, an illicit advantage, to the detriment of another, inducing or maintaining someone in error, by means of artifice, trickery, or any other fraudulent means:

Penalty - confinement, from one to five years, and a fine, from five hundred thousand réis to ten contos de réis.

(...)

Paragraph 3 - The penalty is increased by one third if the crime is committed to the detriment of an entity governed by public law or an institution of the popular economy, social assistance, or a charitable institution.