Pregnant and nursing employees and health risks at the workplace

20.07.2022 3 min read

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By definition, job duties that involve health risks expose employees to agents that are harmful to health, above the limits permitted by law. According to Health and Safety Standard NR 15, activities that are harmful to health are those that expose employees to continuous or intermittent noise, impact noise, heat, ionizing or non-ionizing radiation, hyperbaric conditions, vibrations, cold, humidity, chemical agents, or mineral dust. Employees who work in such activities are entitled to a health risk premium of 40%, 20% or 10% of the minimum monthly salary, depending on the degree of risk.

By adding article 394-A to the Consolidation of Labor Laws (CLT – *Consolidação das Leis do Trabalho*), the Employment Reform established different consequences for work by pregnant employees, depending on the degree of risk involved. As drafted, the CLT provides that pregnant employees must be removed from high-risk activities during the entire pregnancy. In contrast, removing pregnant employees from medium- and low-risk activities would depend on the employee presenting a medical certificate issued by the employee's physician. Nursing employees must be removed from activities involving health risks on presentation of a medical certificate, regardless of the degree of risk.

Article 394-A§3 provides that if pregnant or nursing employees cannot be reassigned to other work that does not involve health risks, their condition will be treated as a high-risk pregnancy, entitling them to maternity benefits paid by the public social security and pension plan under Law 8.213/1991. Effectively, the provision transfers to the public social security plan the financial burden associated with early and extended maternity leave.

The provisions of article 394-A immediately raised a number of questions, because in almost all situations they put the burden on the pregnant or nursing employee to prove that her condition is not compatible with activities involving health risks.

In 2019, the National Confederation of Metal Workers filed constitutional challenge ADI 5.938, arguing that the words "on presentation of a health certificate issued by a physician chosen by the woman, recommending removal" from activities involving health risks, found in article 394-A(II) and (III) CLT, offend constitutional provisions protecting maternity, pregnant women and newborns, violate the principles of human dignity and the social value of work, and represent a social setback. Brazil's constitutional court, the Supreme Federal Court (STF – *Supremo Tribunal Federal*) agreed, ruling, by a majority, that pregnant and nursing employees should be removed from activities that present health risks, without the need to present a medical certificate.

Two points merit reflection, even five years after the Employment Reform came into force and three years after the STF's decision.

Providing that the pregnant and nursing employees must be removed from activities that present health risks regardless of a medical certificate to prove the necessity, ignores the fact that there are many companies where all jobs present some degree of health risks and consequently a pregnancy will quickly be converted into a high-risk pregnancy and the employee will be on leave throughout the whole of the pregnancy and nursing period. The burden on the social security system will be much greater than originally foreseen, and employers will have employees on job-protected leave for a potentially very long period of time.

Another sensitive point is the extent to which the rule affects the employability of women in jobs involving health risks. Given that employers must put pregnant and nursing employees on leave (if they cannot be transferred to another sector), without proof that leave is medically required, where is the incentive to hire women? Would it not do more to protect women and newborn children to provide for leave from employment only when it is medically required? And to ensure that women do not have to assume the cost of the risk assessment, it could be performed by the employer's occupational physician, or the employer could allow a doctor selected by the employee to have access to the company's Workplace Risk Prevention Program – PPRA and visit the workplace, and assume the cost of the doctor's assessment.

A more balanced approach would a case-by-case analysis: looking at the effective exposure to risks in each case, measured against the pregnant or nursing employee's health, rather than a blanket rule. The fact is, however, that the Employment Reform's efforts in this direction did not prevail, and the general rule applies to all workers engaged in activities involving health risks, regardless of the degree of risk.

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