

## SANTOS BEVILAQUA - NEWSLETTER - March/16



This is our Newsletter covering several recently published regulations that impact the Brazilian insurance, health and pension market.

If you have any questions, please do not hesitate to contact us.

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## Market

**1) PENSION FUNDS AND INVESTMENT FUNDS, INSURANCE AND SAVINGS BOND COMPANIES WILL NO LONGER HAVE FGC GUARANTEE OF R\$250,000:** This decision was taken by the CMN and now only account holders of financial institutions such as banks, savings and loan associations and credit unions will be entitled to R\$250,000.000 reimbursement per depositor in the event of extrajudicial liquidation by the Central Bank or bankruptcy being adjudicated.

According to the Central Bank, since the companies mentioned are capable of analyzing a financial institution's risks, guarantees will now be for small investors only.

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## Insurance

**1) DECREE OF 02.16.2016 AND PROVISIONAL MEASURE No. 719/16 OF 03.29.2016:** the Decree authorizes capital increase for Agência Brasileira Gestora de Fundos Garantidores e Garantias (Brazilian Agency Managing Guarantor Funds and Guarantees, or ABGF), which recently took over management of Fundo de Estabilidade do Seguro Rural (the Rural Insurance Stability Fund, or FESR). The Provisional Measure, in turn, amends Law No. 8374 of December 30, 1991, to provide for the Compulsory Insurance for Personal Injury caused by vessels or their cargo.

The purpose of this authorization, as unofficially noted, would be to enable the use of these funds to back compulsory insurance for personal injury caused by vessels and their cargo

(local acronym DPEM). This would be one of SUSEP's alternatives to support this insurance if there is a disappointing outcome of negotiations to encourage insurers to show interest in its offer. This was confirmed by Provisional Measure No. 719/16, which amended article 10 of Law No. 8374 of December 30, 1991, by establishing that indemnification in case of death or permanent disability or medical assistance and supplementary expenses exclusively caused by vessels that were not identified or that are in default on the payment of the insurance provided for in the Law shall be due by a private law fund organized, administered, managed and represented by ABGF.

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**2) NEW LAW ENDS SUSEP FINES AMOUNTING TO BILLIONS:** since the fines were not going to be paid and often exceeded the equity of the companies cited, Law No. 13195/15 amended Decree 73/66 to set a limit of R\$3,000,000.00 when fining companies that sell insurance without SUSEP's authorization to operate in Brazil. The fine previously legally stipulated was the amount insured without an absolute limit, which made their actual recovery impossible in some cases.

This law may prompt SUSEP to review more than 200 cases involving a total of R\$28,300,000.00 in fines as punishments that have not yet been approved by SUSEP's board. The cases awaiting judgment of appeals by the board of the National Private Insurance System Funds (CRSNSP) will also be assessed from the angle of the new law to the extent that, pursuant to the board's reiterated precedents, more

beneficial administrative penalties must be applied retroactively.

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**3) CGSR RESOLUTION No. 44 of 02.22.2016:** amends Item XIII of the Three Year Rural Insurance Plan (PTSR) of the Rural Insurance Premium Subsidy Program for the 2016-2018 periods.

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**4) CGSR RESOLUTION No. 45 of 02.22.2016:** amends the exhibit to Resolution No. 40 of November 18, 2015, and Exhibit II of Resolution No. 13 of July 4, 2006.

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**5) REGULATIONS FOR FUNERAL PLAN MOVE ON TO PLENARY SESSION AND SENATE VOTES REGULATIONS FOR FUNERAL PLANS:** probably in response to SUSEP'S public consultation notice No 1 of 01.15.2016, and as our Newsletter predicted, bill (PLC) No 50/2014 would introduce rules for marketing funeral plans. The bill was voted by the Committee on Environment, Consumer Protection and Supervision and Control (CMA) on 02.23.2016 and by the Senate on 02.25.2016. Law No. 13261/16, published on 03.23.2016, covers regulations, supervision and marketing of funeral plans.

Under Article 2 of the Law, the sale of funeral plans will be under the responsibility of companies managing duly constituted funeral plans, and funerals will be held directly by them when legally authorized, or through registered funeral companies or contractors.

With the exception of micro-enterprises, these companies must have minimum assets and capital, settle all taxes, follow solvency rules and submit annual balance sheet and public auditor's report.

The bill set forth that supervision of companies marketing funeral plans is incumbent on member entities and institutions of the National Consumer Protection System. However, the bill's supervision provisions were vetoed by the President because they characterized arrangements made for funeral plans as being consumer relations, which could lead to the interpretation that any private insurance operation conducted in the ambit of the bill would be outside the regulatory reach of the CNSP and SUSEP. Additionally, even with the veto, all the guarantees stipulated for cases of consumer relations remain assured.

The publication of Law No. 12261/16 is a clear reaction to SUSEP's attempt to convert funeral plans to insurance policies that could be marketed by insurers only. The publication of this law, combined with the possible issuing of the regulations now being submitted to public consultation, leads to a confused situation for marketing these plans and in particular for supervision of commercial activity by the agencies involved.

This is clearly a step backwards and an unfavorable piece of news for the insurance industry due to (i) the structure of the law, which is defective and doomed to generate a market lacking minimally acceptable prudential

rules and supervision and (ii) the very negative precedent posed by an activity that should be insurance being legalized as a service.

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**6) SUSEP CIRCULAR No. 526 of 02.25.2016** determines procedures relating to the instruction of the processes of election, appointment, removal and resignation of positions in statutory or contractual bodies of insurance companies, savings bond companies, local reinsurers, admitted reinsurers' offices of representation, open private pension plans and reinsurance brokerage and the consultation referred to in § 1 of Article 1 of Exhibit II of CNSP Resolution No. 330 of 2015.

In general the rule is positive, since it consolidates the rules that existed for the various subjects covered in a technically adequate manner.

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**7) SUSEP CIRCULAR No. 527 of 02.25.2016:** determines procedures for obtaining prior authorization for setting up an office of representation, registration, record data updating and other alterations of admitted and occasional reinsurers.

In general the rule is positive, since it consolidates rules that existed for the various subjects and does so in a technically adequate manner.

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**8) SUSEP CIRCULAR No. 528 of 02.25.2016** determines procedures relating to the instruction of processes relating to authorization to operate,

alterations of shareholder control, corporate restructuring, acquisition or expansion of qualified holding, transfer of headquarters, opening or closing branches, conversion of legal form, suspension or cancellation of authorization to do business and any amendment to bylaws, articles of incorporation or association of reinsurance brokers.

In general the rule is positive, since it consolidates rules that existed for the various subjects and does so in a technically adequate manner and also resolves specific problems of interpretation that existed before.

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**9) SUSEP CIRCULAR No. 529 of 02.25.2016:** determines procedures related to the instruction of process for incorporation, authorization to operate, alterations of shareholder control, corporate restructuring, acquisition or expansion of qualified holding, transfer of headquarters, opening, altering or closing of branches or offices of representation, cancellation of authorization to do business, increase or decrease of capital, amendment to bylaws, of all kinds, of insurance companies, savings bond companies, local reinsurers and open pension plans (EAPC).

These rules were issued by SUSEP to regulate CNSP Resolution No. 330/15.

In general the rule is positive, since it consolidates rules that existed for the various subjects and does so in a technically adequate manner and also resolves specific problems of interpretation that existed before.

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**10) CMN RESOLUTION No. 4.469, OF 02.25.2016:** amends resolutions Nos 4222 of May 23, 2013 and 3792 of September 24, 2009, and amends and consolidates rules governing the bylaws and regulations of the Credit Guarantor Fund (FGC).

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**11) SUSEP/CGRAT CIRCULAR LETTER No. 001 of 02.29.2016:** related to CNSP Resolution No. 330 of 2015 and SUSEP Circulars Nos. 526 –529, dated 2016, determines exemption from the prior consultation referred to in Paragraph 1 of Article 1 of Exhibit II to CNSP Resolution No. 330/15 for persons nominated to statutory positions of insurance companies, local reinsurance companies, offices of representation of admitted reinsurers, savings bond companies, open private pension entities and reinsurance brokers, who hold statutory positions in any of these entities, or have done so in the last six months.

It also informed which boards correspond to functions of an executive or operational character and which to supervision or control under Article 11 of Exhibit II to CNSP Resolution No. 330/15.

Finally, there are some procedural information related to requirements dealt with by SUSEP Circulars 526-529 and templates for registration forms, declarations, and authorizations, revoking SUSEP/DECON Circular Letter 01 of February 3, 2005.

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**12) SUSEP CIRCULAR No. 530, DE 03.03.2016:** governs tariff conditions for compulsory insurance of personal injury caused by vessels or their cargo - DPEM insurance. SUSEP shall inform in advance the amounts of the Provision for Claims Incurred but not Reported (IBNR) to be recognized by insurance companies. This Circular shall come into effect on April 1, 2016.

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**13) CGSR RESOLUTION No. 46 of 03.03.2016:** amends Item XIII of the Three Year Rural Insurance Plan (PTSR) of the Rural Insurance Premium Subsidy Program for the 2016-2018 period.

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**14) CGSR RESOLUTION No. 47 of 03.03.2016:** approves distribution of the Rural Insurance Premium Subsidy Program budgetary funds (PSR) for the 2016 period.

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**15) CGSR RESOLUTION No. 48 of 03.15.2016:** approves the experimental project for collective trading of soybean crops under the Rural Insurance Premium Subsidy Program (PSR) in the 2016 period.

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**16) CGSR RESOLUTION No. 49 of 03.15.2016:** governs eligibility for the Rural Insurance Premium Subsidy program insurance to admit the possibility of returning amounts to policyholders and determines the payment of amounts to the Federal Authority in the cases specified.

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**17) IBA RESOLUTION No. 02 of 03.16.2016:** provides for the creation of Actuarial Pronouncement CPA 003 - Classification of Actuarial Cases.

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**18) IBA RESOLUTION No. 03 of 03.16.2016:** provides for the creation of Actuarial Pronouncement CPA 004 - TECHNICAL SURPLUS RESERVE - SUSEP SUPERVISED companies.

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**19) IBA RESOLUTION No. 04 of 03.16.2016:** provides for the creation of Actuarial Pronouncement CPA 004 - TECHNICAL SURPLUS RESERVE - (GUIDANCE) - SUSEP SUPERVISED companies.

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**20) Law No. 13262 of 03.22.2016:** authorizes Banco do Brasil S.A. and Caixa Econômica Federal to set up subsidiaries and acquire holdings under the terms and conditions set forth in article 2 of Law No. 11908, of March 3, 2009; reopens the period established in article 9 of Law No. 13155 of August 4, 2015; amends the date for requiring the provisions of item II of paragraphs 1 and 3 of article 10 of Law No. 10671 of May 15, 2003; and other measures.

Banco do Brasil S.A. and Caixa Econômica Federal may set up companies or acquire interests in companies directly or through their subsidiaries, including in the field of information technology. This authorization is valid until December 31, 2018.

The Exclusive Instant Lottery (Loteria Instantânea Exclusiva or “Lotex”) may have additional themes to facilitate

marketing of popular events, commemorative dates, cultural references, licensing marks or characters and other graphic or visual elements that may add to the commercial attractiveness of the product.

Caixa Econômica Federal may also be associated with the sports entities mentioned in article 28 of Law No. 13155 of August 4, 2015 in procedures for direct sale of Lotex products to the public, upon remuneration at market rates.

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**21) DECREE No. 8690 of 03.11.2016:** provides for the management of payroll deduction loans in the Federal Executive Power's personnel management system. Under the Decree, contributions to pension plans are considered deductions and no longer optional.

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#### **Public consultations**

**1) NOTICE OF PUBLIC CONSULTATION No. 2 of 02.17.2016** concerning Susep Circular that determines codification of classes of insurance and provides for classification of insurance plan coverages for accounting recognition purposes.

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**2) NOTICE OF PUBLIC CONSULTATION No. 3 of 02.17.2016** concerning Susep Circular that determines the sending of information of agreements with foreign insurers referring to Carta Verde [Green Card],

Carta Azul [Blue Card] and RCTR-VI-C insurance plans.

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**3) PUBLIC CONSULTATION OF ACTUARIAL PRONOUNCEMENTS COMMITTEE (CPA) No. 005 - SUSEP Supervised Entities/unearned premium reserve (UPR).**

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**4) NOTICE OF PUBLIC CONSULTATION No. 004 OF 02.25.2016:** the draft was published with suggestions and comments from the National Council of Private Insurance (CNSP) amending CNSP Resolution No. 279/2013, which provides for insurance companies, open private pension plans and savings bond companies to instate an **Ombudsman Office**.

The changes are intended basically to amend Article 4 of Resolution No. 279/2013, which deals with the Ombudsman Office's duties.

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### Pensions

**1) Higher Court of Justice (STJ) - CANCELS PRECEDENT No. 321,** according to which the Consumer Protection Code is applicable to the legal relationship between a private pension entity and its participants. This cancellation is in line with the Higher Court's consolidated case law on the subject;

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**2) PREVIC INSTRUCTION No. 26 of 03.10.2016:** determines guidelines and procedures to be adopted by private

pension plans for the calculation of income, allocation and use of surplus and deficit for the settlement of pension-type benefit plans managed by them.

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### Public consultations

**1) PREVIC EXTENDS PUBLIC CONSULTATION ON CERTIFICATION, ELIGIBILITY AND QUALIFICATION OF PENSION FUND MANAGERS;**

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**2) PREVIC HAS A NEW PUBLIC CONSULTATION ON INSURANCE FOR RISK SHARING;** the proposed rule aims to increase possibility and security in Risk-transfer operations by closed pension entities and to the insurance market.

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### Health

**1) ANS NORMATIVE RESOLUTION No. 388/15 CAME INTO EFFECT on 02.15.2016:** concerning procedures adopted by the National Health Agency (ANS) for structuring and conducting its supervision measures. The benefits provided by the rule include the 40% discount off the amount of the fine if the operator does not submit a defense and applies to make payment in cash in advance. For demands arising from the Preliminary Investigation Notice (NIP) procedure - if the party concerned takes the measures necessary for their solution within 10 business days as of the ending date of the Voluntary Reparation and Efficacy (RVE) period, proves them unequivocally and notifies the beneficiary, it will be entitled to a discount of 80% off the amount fined.

These discounts have prompted different reactions in the industry. Some believe the rule benefits those who break rules. Others believe that reduced fines as set forth in ANS Normative Resolution No. 388/15 speed administrative procedure before ANS and make them more efficient while not undermining the primary purpose of the fines, which is to prevent repeated infringement.

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**2) ANS NORMATIVE RESOLUTION No. 400 of 02.25.2016:** concerns parameters and economic and financial monitoring procedures for private health plan operators and strategic monitoring of the private health market.

This rule comes into effect as of 05.02.2016 and shows ANS concern to ensure proper conduct of the operators, with the quality and continuity of health care, with the implementation of projects to improve regulatory practices and with analysis for granting authorization to operate.

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**3) ANS NORMATIVE RESOLUTION No. 401 of 02.25.2016** amends RN Normative Resolution No. 316 of November 30, 2012, which provides for special regimes for tax management and extrajudicial liquidation of private health care plan operators and RN No. 197 of July 16, 2009, which establishes ANS's internal rules.

The amendments made by ANS with respect to the special regimes for tax management and extrajudicial liquidation of private health care plan

operators are important in this period of economic crisis, especially considering the increasing number of health care plan operators that are being liquidated or under the tax management arrangement.

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**4) ANS NORMATIVE RESOLUTION No. 402 of 03.04.2016:** amends Normative Resolution No. 237 of October 21, 2010, which deals with the internal regulations of the Supplementary Health Chamber, to include a representative of the Federal Prosecutor appointed by the Federal Attorney-General pursuant to Supplementary Law No. 75 of May 20, 1993 in the membership of the Supplementary Health Chamber.

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**5) ANS NORMATIVE RESOLUTION No. 403 of 03.09.2016:** amends Normative Resolution No. 307 of October 22, 2012 on procedures to ensure economic and financial adequacy of private health care plan operators.

This is another important alteration in Brazil's current economic and financial scenario.

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#### **Tax**

**1) RFB NORMATIVE INSTRUCTION No. 1628 of 03.17.2016** RFB Normative Instruction No. 1628 of August 13, 2012, which deals with PIS/PASEP and COFINS taxes owed by legal entities listed in § 1 of article 22 of Law No. 8212 of July 24, 1991.

The amended instruction provides for PIS/PASEP and COFINS taxes owed by financial institutions, credit unions, private insurance and savings bond companies, private pension funds and savings and loan associations subject to accrual accounting. This amendment is to exclude insurance brokers from the list of entities for which PIS/PASEP and COFINS tax liability is regulated by IN RFB No. 1285/2012.

The purpose of the updated Article 1 of IN RFB 1285/2012 is to adjust the legislation to Higher Court of Justice (STJ) case law in Resp. 1400287 of November 3, 2015, which removed insurance brokers from the concepts of "brokers" or "autonomous private insurance agents."

This means that insurance brokers are now taxed as corporate entities in general, that is, by applying the cumulative system set forth in Law 9718/98 and combined rates of 3.65%, if they are taxed under the "Deemed Profit" arrangement, or the non-cumulative system set forth by Laws Nos 10637/03 and 10833/04, and combined rates of 9.25%, if they are taxed under the "real profit" arrangement.

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## **2) SOLUTION TO CONSULTATION No. 013 of 02.15.2016:**

**SUBJECT: WITHHOLDING INCOME TAX (IRRF) SUMMARY:** The cancellation of enrollment in private pension plan by participants who subsequently rejoin the same plan does not amount to portability or migration and does not characterize a case of reopening the

period and possibility of adopting a tax arrangement other than that chosen when the canceled membership took place.

COSIT recently referred to the possibility of an individual canceling their pension plan and then rejoining the same benefit plan, but then altering, without reaching the reserve so far accumulated, the tax arrangements applicable to private pension redemptions and benefits under Law No. 11053/04.

Initially, COSIT pointed out that (a) portability means the transfer of reserves accumulated with one institution to another during the accumulation stage; (b) migration enables a participant to migrate to another more attractive one offered by the same institution; and (d) redemption is the arrangement that enables a participant to receive the amount due on leaving their benefit plan.

In this respect, considering that the de facto situation described was characterized by cancelling a plan and subsequently adhering to the plan again, there would be no occurrence of any of the above, meaning there would not have been portability, migration or redemption.

In light of Article 1 and paragraphs 5 and 6 of Law No. 11053/04, which determines tax arrangements in situations such as the one analyzed here, and considering that for the effects of the option, returning to the original plan does not constitute joining a new plan, cancelling registration and subsequently rejoining the same plan does not characterize a case of

reopening the period, or the possibility of opting for a tax arrangement other than that exercised when enrollment was canceled.

LEGAL PROVISIONS: Article 1, main section and paragraph 6 of Law No. 11053, of December 29, 2004, MPS/CGPC Resolution No. 6 of October 30, 2003, articles 9, 10, 19 and 20;

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**3) RFB NORMATIVE INSTRUCTION No. 1627 of 03.11.2016:** Provides for Special Currency and Tax Settlement Arrangements.

RFB Normative Instruction No. 1627/2016 regulated the Special Arrangement for Currency and Tax Settlement (RERCT) introduced by Law No. 13254/2016. This arrangement allows voluntary declaration of funds, assets or rights of lawful origin, undeclared or incorrectly declared, remitted or kept abroad or repatriated by residents or persons domiciled in Brazil.

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**4) LAW No. 13259 of 03.16.2016:** amends Law No. 8981 of January 20, 1995 to provide for income tax on capital gains from the sale of assets or rights of any nature, and Law No. 12973 of May 13, 2014, to enable the option of taxation of related companies abroad in the form of subsidiaries; and regulates item XI of article 156 of Law No. 5 172 of October 25, 1966 - the National Tax Code.

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**5) CGSN RESOLUTION No. 126, DE 03.17.2016:** amends Resolution No. 94

of November 29, 2011, which provides for the simplified tax (Simples Nacional) and other measures.

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**6) CENTRAL BANK CIRCULAR BACEN No. 3787 of 03.17.2016:** covers matters under the authority of the Central Bank of Brazil related to regulations for Law No. 13254 of January 13, 2016, which deals with the Special Arrangement for Currency and Tax Settlement (RERCT) and amends Circular No. 3690 of December 16, 2013.

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#### **Labor - Law No. 13257/2016**

Law No. 13257, known as the Legal Framework for Early Childhood, was published on March 9, 2016. Among other changes, it amends current labor and employment legislation for the possibility of extended paternity leave and including new types of excused absences.

In relation to parental leave, companies that adhere to the Corporate Citizen Program (Law No. 11770/2008) should allow employed parents or adopters to extend paternity leave for another 15 days (in addition to the 5 days required by the Temporary Constitutional Provision Act). This means paternity leave will last twenty (20) days unless the employee requests an extension within 2 (two) days of birth and proves participation in the program or activity of guidance on responsible parenthood. For legal entities taxed on the basis of "real profit," the total pay of an employee corresponding to the number of days of extension of their license

may be deducted from tax due in each period of ascertainment.

However, contrary to certain news reports on the subject, longer paternity leave periods are **not yet in effect**, since Law No. 13257/2016 states that such a provision shall only have effect after the Executive Power has regulated the amount of tax relief resulting from this extension.

Amendments to Article 473 of the Labor Code (CLT) **are now in effect** to include two new cases in which an employee may be absent from work without loss of their remuneration, namely, (a) up to two (2) days to attend medical appointments and supplementary examinations during the pregnancy of his wife or partner and (b) one (1) day per year to accompany children aged up to six (6) years to medical visits.

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