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## **THE END OF THE HEALTH EMERGENCY AND THE DIFFICULTIES OF RETURNING TO THE WORKPLACE**

With the decrease in COVID-19 infections and the relaxation or elimination of the sanitary measures imposed by the authorities, a new complication arises for the legal and human resources areas: how to implement the return to the workplace without generating legal risks?

Sanitary measures forced employees to work from home (or from the place they decided); however, these extraordinary measures caused by the health emergency generated by the transmission of COVID-19 preceded the regulation that currently exists regarding teleworking, which was published in the Official Gazette of the Federation on January 11, 2021. Nevertheless, this Firm has considered that, regardless of the date of publication and entry into force of the legal regulations, they were and are applicable to the teleworking modality implemented due to the COVID-19 pandemic.

In accordance with the Federal Labor Law, there is a teleworking modality when more than 40% of the working time is carried out at the employee's home or at the place chosen by the employee. Article 330-G of the law states that the change from the on-site modality to the teleworking modality will be voluntary, except in cases of duly accredited force majeure, in which case it will be mandatory. Similarly, it establishes that both parties, employer and employees, will have the reversibility right to the on-site modality.

The pandemic constituted a situation that forced teleworking and, now that the sanitary measures begin to be relaxed or eliminated, the companies are implementing plans to return to the workplace, either totally or partially. However, the change may not be easy, since assumptions not regulated by law arise, such as the following:

- a) The employee argues that he cannot return to the workplace, because during the health emergency, he changed his address (either within the national territory or even abroad).
- b) The employee refuses to return for fear of contagion.
- c) The company intends to make distinctions between vaccinated and non-vaccinated employees and/or require the presentation of the vaccination certificate to allow them to return to the workplace.
- d) The employee argues that teleworking has become an acquired right and, therefore, the employer cannot obliged him to come back to the workplace, since this would imply a unilateral modification of the working conditions.

Companies will always have the opportunity to agree with employees on the best solutions for these cases; however, it should not be forgotten that (i) unless it has been agreed for another reason, the teleworking modality derived from the health emergency, so now that the sanitary measures are relaxed, the company has the right to request the return to the workplace, and (ii) the right of reversibility to come back to the workplace is a right of both parties, so now companies can request employees to return to it.



At all times, companies may send a communication to employees establishing the date as of they will have to return to the workplace, indicating the mechanisms and processes necessary for this, remembering that various health measures continue to be in force in practically the entire national territory, which must be complied with, such as the use of face masks, alcohol, among others.

The fact that the employees had decided to change their place of residence is not a legal excuse to avoid returning to the workplace, nor is the fear of becoming infected, as long as the company complies with the sanitary measures established by the authorities. Also, if teleworking modality resulted from the health emergency, this does not constitute a working condition, unless it has been agreed before the emergency or the parties have waived the right of reversibility, situations in which it would be a working condition that, to be modified, must be agreed by both parties.

In the event that hybrid modalities are established, regardless of whether or not the percentage of time for teleworking is exceeded, it is advisable to execute agreements with employees to establish the applicable rules.

Finally, as has already been expressed by this Firm, it is not possible to force employees to be vaccinated or show vaccination certificates, unless the employees voluntarily wish to do so.

This is the beginning of a new stage in which people will have to adjust their behaviors and ways of working to continue with a personal and professional life that is as normal as possible. The project of the Official Mexican Standard is currently being discussed, which will further regulate the teleworking modality, so at the time it will be necessary to comply with the obligations derived from the regulation, both for employees and for companies.

Farell and Yañez, S.C. has advised its clients on the return to work centers, generating the necessary documents, so, if you require additional information on this matter and/or on other legal services in labor, social security and migration, please contact the lawyers Arsenio Farell Martínez and/or Mario Alberto Yañez Cariño at the email [contacto@fyabogados.mx](mailto:contacto@fyabogados.mx)

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