

Hybrid work arrangements and tracking time worked

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Of the many impacts our society has suffered because of the covid-19 pandemic, perhaps one of the few positive legacies of the pandemic will be the profound restructuring of work in the corporate world. If before the outbreak of covid-19 most companies' employees worked in person, at the company's premises, after a long period of exclusively remote work and the overturning of certain myths – such as the decline in productivity when people work from home – employers are now restructuring their operations.

With the advance of vaccination against the coronavirus in Brazil and the gradual return to in-person activities, the adoption of hybrid or mixed working arrangements, in which employees alternate between in-person work at their employer's establishment and remote work, is already a reality for a majority of Brazilian corporations and a desired outcome for many employees, for whom a hybrid scheme means a better work-life balance.

There is no doubt that mixed working arrangements are here to stay; but it is equally true that the "flex office" model presents challenges for employers, especially given the sparse legislation on the subject and the Brazilian labor courts' highly resistant, conservative attitude toward technological innovations and social changes. Although most judges showed greater sympathy for distance working during the pandemic, there is still a long way to go before companies can achieve legal certainty on the rules that govern remote work and hybrid arrangements.

One of the main challenges relates to tracking time worked when employees are working remotely, either from home or another location. The difficulty is that Brazilian law requires employers that have more than 20 employees to record the time worked by their employees (article 74, Consolidation of Labor Laws), with the exception of those whose work is by nature off-site, who hold a position of trust, or who work remotely in "telework" (article 62, Consolidation of Labor Laws).

Hybrid arrangements are different from "telework" as defined by the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho), because in telework employees' services are rendered "preponderantly away from the employer's premises", which is not necessarily what happens in hybrid work. And although there are still very few decisions by the labor courts on the question, the hybrid model has been increasingly adopted by companies post-pandemic, and many employment law specialists, including some judges, have taken the position that employers are required to track time when the employees are working remotely.

The arguments put forward to support this position range from the assertion that article 62 CLT does not apply to hybrid work arrangements but only to pure telework, to the contention that employers can effectively monitor the time worked by employees, using telematics and computerized means of

communication and control, since employees will use laptops, desktops and possibly smartphones while working remotely.

Thus, at least until the law makes specific provision for the matter or the courts have arrived at a settled position, the prudent choice is for employers to continue recording the time worked by employees under hybrid working arrangements, even when they are working remotely.

In our view, however, one alternative for companies that are willing to take a more assertive position, but still enjoy some certainty as to their legal position, is to take advantage of article 611-A CLT, which allows negotiated provisions to prevail over the CLT's rules. Companies could thus negotiate with the union representing their employees to include a provision in the collective bargaining agreement stipulating that the time worked by employees under hybrid arrangements does not need to be recorded when they are working remotely.

A last point that merits attention is that care should be taken as to how time worked remotely is tracked, since the forms stipulated by law apply: manual, mechanical or electronic records (in the latter case, in accordance with instructions issued by the Labor Ministry's Special Secretariat for Pensions and Labor). Employers that wish to use other ways of tracking time, such as apps, should negotiate the use of the alternative method with the union, as provided for in article 611-A CLT, before implementing it.

***This article can be found in the e-book "**Current Employment Issues: the end of the pandemic and new ways of working**". [Click here to read the whole content.](#)*

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