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International teleworkers: the challenges of distance working from another country

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Telework or telecommuting formally became part of Brazilian employment law with Law 13.467/2017, known as the Employment Reform, which included articles 75-A to E in the Consolidation of Labor Laws (CLT – Consolidação das Lei do Trabalho). Prior to the Reform, telecommuting was possible, but the CLT made only slight mention of it in article 6, which provides that there is no difference between "work performed at the employer's establishment and that performed at the employee's residence, as long as an employment relationship exists."

With the Employment Reform, the CLT now has express provisions allowing the work from home, if certain formal requirements are met: the telework arrangement must be stated in the employment agreement, and the agreement must also provide for acquisition of the technological equipment and infrastructure need for telecommuting, along with reimbursement of expenses, if paid by the employee.

Despite this attempt to set the rules for telecommuting, many aspects are not contemplated by the legislation, leaving both employers and employees in doubt. One question that the Employment Reform did not address is the possibility of hiring employees located outside Brazil to work remotely.

The nation's legislators have noticed this gap in the law, and in 2020 Bill 5581[1] was presented in the Chamber of Deputies. The Bill would include specific provisions in the CLT on international telecommuting, and would provide that the rules under Law 7064/1982 (the Expatriates Law) do not apply to telework. No date has yet been set for voting on the Bill.

In the mean time, both the courts and employment law scholars have been reacting positively to the possibility of hiring professionals located in other countries for telework, and to the possibility of employees hired in Brazil continuing to work for the same employer after moving abroad, as long as the move is not made at the employer's request.[2]

Telework outside Brazil involves a number of questions beyond meeting the requirements under articles 75-A to E under the CLT.

First, on the assumption that employees located abroad cannot attend at the employer's establishment, companies will have to consider how they will fulfil their legal obligation to have a medical examination performed when the employee is hired, as provided for in Regulatory Standard no. 7. Employers also have the obligation to provide for periodic medical examinations during employment, and a final medical examination on termination of employment.

Turning to routine matters, employers will also face challenges in providing certain benefits to teleworkers based in other countries, such as food and meal vouchers, health plan coverage, dental plan coverage, and other benefits that are inherently tied to the company's location, since it may be impossible to provide such benefits to employees residing outside Brazil.

Employers may face yet another challenge if employees outside Brazil suffer a work-related accident or illness that requires them to be away from work for more than 15 days. In such cases, medical leave requires an in-person examination by one of the Social Security Authority's medical experts.

Both employers and employees should also be aware of potential incompatibilities in working hours because of the time difference between Brazil and the country where the employee is located, and local requirements that the employee must meet in order to live and work in the chosen country. Even when the employee already lives outside Brazil, or the move was made at the employee's initiative, it is considered a good practice to confirm that the employee has the legal right to live in the foreign country before authorizing a teleworking arrangement.

Given the lack of legislation, court decisions and scholarly comment on international telework, the recommended approach is to analyze the viability of such arrangements on a case-by-case basis. Through an individualized approach, solutions may be found for the challenges mentioned here, reducing potential problems and employers' exposure to risk.

NOTES:

[1] The Bill proposes to add a new paragraph to article 75-A CLT, as follows: "Unless otherwise agreed between the parties, national legislation, with the exception Law 7064/82 and any legislation that replaces or amends it, applies to employees located in a country other than Brazil under a full-time telework arrangement who were hired by an employer incorporated, established and managed under Brazilian law, and no transfer assistance will be owed in the event of a move from Brazil to another country, or vice-versa, if that move is agreed between the parties." (Our translation).

[2] If the employee's move to another country was requested by the employer, then the provisions of the Expatriates Law will necessarily apply.

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