

Teleworking: from the employment reform through the covid-19 pandemic to PM 1108

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Aluxury item in employment relations until March 2020, teleworking came into the spotlight when the covid-19 pandemic radically changed companies' daily routine and sent employees home to work.

In Brazil, remote work was first introduced into Brazil's Consolidation of Labor Laws (CLT – *Consolidação das Leis do Trabalho*) in 2011, by Law 12.551, which amended article 6 CLT. The provisions introduced by Law 12.551 were simple, and did not establish solid legal ground for employers and employees.

This situation changed with the Employment Reform of 2017, which added articles 75-A to 75-E to the CLT and created a rigid legal framework for teleworking. The new provisions defined the legal concept of teleworking, established limits on its application, governed how employers and employees could agree on teleworking, and dealt with the technological tools involved in the process.

Among the various legal issues related to teleworking dealt with by the Employment Reform, the new legislation defined teleworking as work performed preponderantly away from the employer's premises using information and communication technologies, and which is not subject to fixed working hours.

Despite the advantages of teleworking, with its flexible workspace (since teleworkers can work from home, coworking spaces, cafés and other locations), the time saved by not having to travel to and from the employer's premises, and the possibility of hiring professionals from different locations, teleworking only really took off at the beginning of 2020, when the covid-19 pandemic made social distancing necessary.

Teleworking grew rapidly starting in the first quarter of 2020 and soon more than eight million Brazilians were working remotely, representing 12.5% of the country's working population¹. In this scenario, the federal government issued Provisional Measure 927, containing specific rules for the public health emergency, and extending teleworking to interns, apprentices and facilitating implementation of remote work.

The Employment Reform is too recent for the Labor Courts to have established a settled position on teleworking. Nonetheless, there are decisions which recognize the employers and employees are free to agree which party will bear infrastructure costs, such as internet service², holding that article 75-D CLT is valid, and that telework does constitute an exception to the general rule that employers must record the time worked by their employees, as provided for in article 62(III) CLT³, although some labor judges showed resistance on this issue⁴.

More recently, in March of this year, the federal government issued Provisional Measure 1108, establishing new rules on teleworking.

In its attempt to address gaps left by the Employment Reform, the Provisional Measure raises more questions than it solves, since it changes the very concept of teleworking by removing the term “preponderantly”, making teleworking the same as remote work. In other words, with the changes made by PM 1108, employees may spend time at their employer’s premises, even on a habitual basis, and still remain subject to the rules governing teleworking or remote work.

The Provisional Measure also changes the exception under article 62(III) CLT, which provided that employers are not required to record the time work by teleworkers. Now, the exception applies only to teleworkers and remote workers who provide task-based or production-based services.

The Provisional Measure also addresses other issues of interest to teleworking, such as the law applicable when employees telework from other countries.

As it stands, the legislation governing teleworking raises more questions than it answers. A degree of caution is therefore advisable until National Congress provides a solution, by voting to convert Provisional Measure 1108 into ordinary legislation, either on its original terms or with modifications, or by letting the Provisional Measure lapse, so that law returns to the status quo established by the Employment Reform.

NOTES:

¹ Available in Portuguese only at <https://agenciadenoticias.ibge.gov.br/agencia-sala-de-imprensa/2013-agencia-de-noticias/releases/28261-pnad-covid19-13-3-da-populacao-ocupada-estava-afastada-do-trabalho-devido-ao-distanciamento-social-entre-14-e-20-de-junho>

² TRT-2 10005555620215020204 SP, published 10 December 2021; TRT-2 1001034-30.2021.5.02.0372, judged 25 April 2022; TRT-2 10009121620205020028 SP, published 8 September 2021.

³ TRT-2 1000325-95.2021.5.02.0080, judged 17 February 2022; TRT-2 1000813-58.2020.5.02.0024, judged 29 July 2021.

⁴ TRT-2 1000160-23.2021.5.02.0056, judged 18 February 2022; TRT-3 0010132-05.2016.5.03.0178, published 14 March 2017; TRT-2 1000111-50.2021.5.02.0001, published 21 January 2022.