

The challenge of overseeing remote work

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Remote work means rethinking Brazilian employment law. The place where employees perform their jobs and the time that they are available for work, which were fundamental pillars for the application of a large number of employment rules and standards, have become ethereal.

This disappearance of the "where" and the "when" of work has left in its place a collection of uncertainties. How can employment rules and concepts, developed to address a different reality, be applied in a world in which work no longer has geographic or temporal limits?

Among the many questions generated by the covid-19 pandemic and the migration from in-person to remote work, one stands out: how can employers oversee work that employees perform in their own homes? Can it be done without injuring employees' constitutional rights, such as the right to privacy and to private life?

Finding answers to these questions is not easy.

On one hand, there can be no doubt that even in remote work, employers still have the right to oversee their employees' work. This right – which includes overseeing the "how much" and "how" of work – emanates directly from employers' power to direct employees, provided for in article 2 of the Consolidation of Labor Laws. At a constitutional level, it derives from the guarantee given to private property and free enterprise.

On the other hand, there can be no question that employees have the fundamental right to the inviolability of their home (article 5(XI), Federal Constitution), along with the right to privacy and private life (article 5(X), Federal Constitution).

The solution to this apparent conflict of the rights held by the parties to an employment relationship is to weigh the conflicting interests to find where each has to give way to the others. After all, no right is absolute in our legal system.

In fact, in an employment relationship various fundamental rights are voluntarily waived.

For instance, when a worker accepts a job offer and agrees to comply with the employer's directions, the worker waives, in part, and during working hours, the full exercise of liberty and self-determination. No one questions the validity of this waiver of a fundamental freedom, which is one of the most precious rights in our legal system.

Following this line of reasoning, when employees agree with their employer to work remotely, and elect their homes as the place of work, it would seem

that they implicitly authorize the employer to oversee their work during the workday, with a partial waiver of their right to privacy and the inviolability of their home.

It's equally true that the right to oversee employees' work is not absolute, and must therefore be exercised in a reasonable fashion, in proportion to the need for oversight, especially in the case of remote work, where it runs up against the rights to private life and to the inviolability of the home, mentioned above.

This intersection between employers' rights and employees' rights generates all kinds of questions: can employers require that their employees leave their computer's camera on during working hours so that the employer can oversee their work? If so, for how long? Can employers require that employees provide proof that they lost internet service, if lack of internet is the excuse given for being unreachable during the workday? And, in an extreme situation, do employers have the right to go to an employee's home to insist on delivery of an assignment?

These are just some of the difficult questions that Brazil's labor courts will be called on to answer in the next few years. Until then, businesses will have to invest time, creativity and care to ensure that they can exercise their right to oversee employees' work without exposing themselves to labor liabilities.

***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.](#)*