The evolution of remote work in Brazilian employment law

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There is no need to go very far back in time to observe how employment relations modify and adapt as society and the economy evolves, and needs change.

Employment relations today are not the same as they were in the industrial era. In recent years, the advance of technology has given rise to new employment relationships and new types of work. Among these changes, in-person work at the employer's establishment has given way to distance working, also known as remote work or teleworking.

According to a survey by SOBRATT (Sociedade Brasileira de Teletrabalho e Teleatividades, or the Brazilian Teleworking and Teleactivities Society) of 325 companies doing business in various regions and economic segments in Brazil, 68% used distance working, and 80% of those companies had adopted the practice in the preceding five years.[1]

Although a number of companies adopted distance working some years ago (although the practice was still in its early stages), Brazil initially lacked legislation dealing with remote work.

Distance working was first introduced into Brazilian law by Law 12.551 (December 15, 2011), which amended article 6 of the Consolidated of Labor Law (CLT – Consolidação das Leis do Trabalho). As amended, article 6 made work performed at the employee's home or at another location equivalent to work performed at the employer's establishment, as long as certain requirements were met.

Law 12.551/2011 added a new paragraph to article 6 CLT, providing that telematics and computer tools, such as corporate e-mail, WhatsApp, Skype, Zoom and Microsoft Teams, which make it possible for employers to direct, supervise and oversee the work their employees perform, are equivalent, for legal purposes, to direct, personal means of direction, supervision and oversight used at the employer's establishment.

Nonetheless, certain matters related to remote work, such as whether distance working should be expressly contemplated in an employment agreement, and whether employers should bear the cost of the equipment and infrastructure employees need to work at home or other off-site location, was not addressed in Law 12.551/2011.

Some of these gaps were filled with the Employment Law Reform under Law 13.467/2017, which created a new section in the CLT dedicated entirely to Distance Working, and defined remote work as work "that is preponderantly performed away from the employer's premises, using communication and information technologies, and that, by its nature, does not constitute off-site work."

The legislator included the word "preponderantly" in the new definition of remote work, and thus it can be concluded that employees who work from home only occasionally do not fall within the scope of the legal concept. Similarly, the Law provides that the fact that employees appear at the employer's premises for specific activities which must be performed in person does not mean that they are not working remotely.

Another aspect that was dealt with by Law 13.467/2017 is that distance working must be provided for in writing, in the employment agreement. Furthermore, by agreement between employer and employee, employees working in person can transition to remote work, as long as the change is recorded in an amendment to the employment agreement. Movement in the opposite direction, however – from remote work to in-person work – can be imposed by the employer, in which case the employer is required to give 15 days' notice.

The provisions on remote work under Law 13.467/2017 represented an important advance in adapting Brazil's employment law to the new realities of the Information Age, giving both employers and employees greater certainty as to their rights and obligations.

At the same time, even with the changes under the Employment Law Reform, some of the legal aspects of remote work are far from settled, and will certainly result in litigation in Brazil's labor courts, particularly with respect to work-related illnesses and accidents (given that the CLT requires employers to instruct employees as to the precautions that should be taken, and makes employees responsible for following those instructions), who should bear the cost of the equipment and infrastructure needed for remote work (an issue the CLT does not address), and the treatment to be given to hybrid work arrangements that mix in-person and remote work (another issue not dealt with by the CLT).

NOTES:

[1] Available at . Accessed October 4, 2021 at 5:09 p.m. Portuguese only.

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