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TELEWORKING IN THE POST-COVID-19 PANDEMIC SCENARIO - HAS IT CONSOLIDATED OR SHRUNK?

Alba Valéria Gomes de Carvalho

PhD in Business Administration from
FICS-PY (recognized in Brazil by Positivo
University)

Federal Institute of Pernambuco - IFPE

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Abstract: The main objective of this article is to study the institute of teleworking within the Brazilian labor scenario, in particular by addressing the provisions on the subject in the Consolidation of Labor Laws, Provisional Measure No. 927/2020 and recently externalized jurisprudential understandings on the application and practical exercise of teleworking. It is undeniable that teleworking has been increasingly adopted by Brazilian companies, and adherence has increased substantially with the arrival of the COVID-19 pandemic, due to the need for social distancing and isolation around the world, which was no different in Brazil.

Keywords: Teleworking. COVID-19. Consolidation of Labor Laws. Provisional Measure 927/2020.

INTRODUCTION

The main focus of this research, conceived and promoted by this article, will be an in-depth and well-founded analysis of the institute of teleworking and its regulation by the Consolidation of Labor Laws - CLT.

The subject is of great value for in-depth study, especially given the importance of the matter for the daily cases of countless workers who end up adhering to this new model of working practice, needing to adapt to its peculiarities and challenges.

As for the choice of topic, the starting point for the project was precisely the growing number of workers who have started to carry out their jobs via teleworking in the last four (4) years, driven by the need for social distancing and isolation imposed by the pandemic caused by COVID-19.

The teleworking regime had already received special attention in the 2017 Labor Reform, with a specific chapter being inserted to deal with the issue, in articles 75-A to 75-E of the Consolidation of Labor Laws.

Provisional Measure No. 1,108/2022 also added article 75-F to the aforementioned chapter, stating that employers must give priority to employees with disabilities and employees with children or children under judicial guardianship up to four years of age in the allocation of vacancies for activities that can be carried out through teleworking or remote work.

Likewise, Provisional Measure No. 927/2020 brought several rules for teleworking, remote or distance work, while the pandemic lasted.

It can therefore be seen that the institute of teleworking has become a central topic of debate in the labor sphere in recent years, making it essential to study it in depth through this research.

Therefore, the aim of this research is to find out the current status of teleworking in the Brazilian legal system and how it has been practiced in work activities on Brazilian soil.

The research problem, therefore, consists of answering the current size of teleworking in Brazil and what the rules are for its establishment and performance by the worker.

The general objective of the research is to survey the literature and case law on the rules that permeate teleworking, as well as the peculiar situations that arise from this innovative modality, which is increasingly present in labor relations.

The specific objectives are as follows:

- 1 - To conceptualize teleworking according to the legislation and to understand, in a specific and detailed manner, each of its peculiarities and basic characteristics.
- 2 - To understand how the COVID-19 pandemic has influenced the mass adoption of teleworking and the problems arising from this unexpected and unplanned growth.

In summary, this article seeks to establish a broad and complete study of the institute of teleworking in labor relations in the pre- and post-pandemic period.

Finally, for the development of the work, it should be noted that the Inductive Method was used in the Research Phase, the Cartesian Method in the Data Processing Phase, and the results expressed in this article are based on inductive logic.

In the research phases, the techniques of reference, category, operational concept and bibliographical research were used. As for the object of study, it is important to note that it focuses on exposing the legal, doctrinal and jurisprudential understandings pertaining to the subject under study.

TELEWORKING

This first chapter will deal specifically with the institute of teleworking, with all its nuances and specificities according to the governing labor regulations.

TELEWORKING

As seen in the previous chapter, it can be said that the factual and legal elements of the employment relationship are five: a) the provision of work by a natural person to any borrower; b) the provision of work by the worker on a personal basis; c) the provision of work on a non-permanent basis; d) the provision of work on a subordinate basis to the borrower of the services; e) the provision of work on an onerous basis.¹

Initially, it is worth noting that a process of profound technological renewal, led by microelectronics, robotization and microin-

formatics, aggravated the reduction of jobs in various economic segments, especially in industry, and even led to the illusion of a future jobless society. In addition, they created or accentuated forms of work provision (such as teleworking and home-office) that seemed alien to the traditional system of employment contracting and control.²

Thus, distance work is a genus, with teleworking (article 75-A of the Consolidation of Labor Laws) and home work (article 83 of the Consolidation of Labor Laws) as species.³

Teleworking is a type of distance working in which the advance of technology allows the employee to work away from the employer's establishment, keeping in touch with the employer and carrying out work activities through electronic and computer resources, mainly the computer and the internet.⁴

However, teleworking⁵ is more than just working from home. It is a concept of work organization through which the service provider is physically absent from the employer's headquarters, but virtually present, through telematic means, in the construction of the contractual objectives of the enterprise.⁶

Thus, although remote work is usually carried out at the employee's home, it is not restricted to this hypothesis, as there are work centers located outside the employer's establishment, which can also be considered "remote work supply units", and there may be "service centers outside the benefiting companies"⁷.

1. DELGADO, Mauricio Godinho. Labor law course: revised and updated according to the labor reform law and subsequent normative and jurisprudential innovations -Mauricio Godinho Delgado. - 18. ed.- São Paulo: LTr, 2019. p. 337.

2. DELGADO, Mauricio Godinho. Labor law course: revised and updated according to the labor reform law and subsequent normative and jurisprudential innovations. - 18. ed.- São Paulo: LTr, 2019. p. 111.

3. GARCIA, Gustavo Filipe Barbosa. Coronavirus and the Right to Health: repercussions for labor, social security and social assistance. - 1. ed. - São Paulo: Saraiva Educação, 2021. p. 126.

4. GARCIA, Gustavo Filipe Barbosa. Coronavirus and the Right to Health: repercussions for labor, social security and social assistance. - 1. ed. - São Paulo: Saraiva Educação, 2021. p. 126.

5. "Tele" is an antepositive of Greek origin meaning "far away", "in the distance", "at a distance". Thus, in a strict etymological analysis, teleworking would be the designation of work carried out at a distance, regardless of the nature of the means - computerized or not - of command and supervision.

6. MARTINEZ, Luciano. Labor law course. - 11. ed. - São Paulo: Saraiva Educação, 2020. p. 387.

7. NASCIMENTO, Amauri Mascaro. Curso de direito do trabalho. 26. ed. São Paulo: Saraiva, 2011. p. 1010.

Within this employment relationship, the employer's directive powers are subject to some limitations/restrictions, for example in the case of monitoring employee emails, personal searches and intimate searches of employees.

Discrimination and harassment arising from hierarchical and managerial superiority are also forbidden and may even give rise to compensation for moral damages against the employer.

Moreover, the practice of so-called teleworking or home office is possible and fully feasible nowadays, but some fundamental issues must be observed in order for it to be carried out correctly and fully.

It should be pointed out that teleworking and intermittent work, new figures introduced by the 2017 Labor Reform, have not significantly altered the requirement of legal subordination. On the contrary, these institutes reinforce the idea that the concept of subordination has evolved over time, and is currently far removed from the classic concept that requires direct orders to characterize subordination.

Law 13.467/2017 (Labor Reform) added articles 75-B, 75-C, 75-D and 75-E to the Consolidation of Labor Laws, which provide for teleworking in the following terms:

Art. 75-A. The provision of services by employees working remotely shall comply with the provisions of this Chapter.

Art. 75-B. Teleworking is considered to be the provision of services predominantly outside the employer's premises, using information and communication technologies which, by their nature, do not constitute external work. Sole paragraph. Attendance at the employer's premises to carry out specific activities that require the employee's presence at the establishment does not de-characterize the teleworking regime.

Art. 75-C. The provision of services in the form of teleworking must be expressly included in the individual employment contract, which will specify the activities to be carried out by the employee. § Paragraph 1 - Changes may be made between the face-to-face and teleworking arrangements provided there is mutual agreement between the parties, recorded in a contractual amendment. § Paragraph 2. A change from teleworking to face-to-face work may be made at the employer's discretion, guaranteeing a minimum transition period of fifteen days, with the corresponding registration in a contractual amendment.

Art. 75-D. The provisions relating to responsibility for the acquisition, maintenance or supply of technological equipment and the necessary and appropriate infrastructure for remote work, as well as the reimbursement of expenses borne by the employee, shall be laid down in a written contract. Sole paragraph. The benefits mentioned in the heading of this article are not part of the employee's remuneration.

Art. 75-E. Employers must expressly and ostensibly instruct employees on the precautions to be taken in order to avoid illnesses and accidents at work. Sole paragraph. The employee must sign a term of responsibility undertaking to follow the instructions provided by the employer.

In fact, in relation to teleworking, the aforementioned sole paragraph of article 6 of the Consolidation of Labor Laws still applies, according to which *“telematic and computerized means of command, control and supervision are equivalent, for the purposes of legal subordination, to personal and direct means of command, control and supervision of the work of others”*⁸.

In addition, according to article 75-C of the CLT, *“the provision of services in the form of teleworking must be expressly included in the individual employment contract, which will specify the activities that will be carried out by the employee”*.

8. RESENDE, Ricardo. Labor law. - 8. ed. - Rio de Janeiro: Forense; São Paulo: MÉTODO 2020. p. 225.

However, according to article 75-E of the CLT, “*The employer must instruct employees, in an express and ostentatious manner, on the precautions to be taken in order to avoid illnesses and accidents at work*”.

The means and instruments for carrying out the work, therefore, are the responsibility of the employer, as a rule. This is why the dilemma and controversy over the provision in article 75-D of the Consolidation of Labor Laws has arisen.

In light of all that has been said in this chapter, we can see that teleworking is increasingly being used and recognized as valid in our labor market, especially with the advent of the COVID-19 pandemic, as we will see in the next chapter.

This is the understanding that has prevailed in the country’s legal system, but unfortunately many companies and corporations have still been very resilient and resistant to teleworking and its adherence.

TELEWORKING IN TIMES OF COVID-19 - THE PANDEMIC’S CONTRIBUTION TO THE DEVELOPMENT OF THIS TYPE OF WORK

This second chapter will look at the evolution and development of teleworking in times of the COVID-19 pandemic, given that the need for isolation and social distancing has undoubtedly contributed to the mass adoption of teleworking, whether temporarily or permanently.

TELEWORKING IN THE COVID-19 PANDEMIC - PROVISIONAL MEASURE NO. 927/2020

As seen in the previous section, the pandemic caused by COVID-19 caught the whole world unprepared and caused great fear throughout the world’s population, which began to face something hitherto unprecedented for the current generation.

Faced with the unknown, numerous measures to contain the spread of the virus have been adopted by governments and companies, such as isolation and social distancing, as well as teleworking or *home office*.

In the United States, the governor of New York State declared a state of emergency over the weekend after Westchester County was identified as a hotbed of new infections. The decision was announced days after California declared a state of emergency over COVID-19.⁹

The headquarters of the United Nations (UN) closed its doors to guided tours and ordered half of its employees to telework at least three times a week to try to contain the virus. As an emergency measure, there was also a ban on the arrival of people from Europe, as long as they were not resident in the country.¹⁰

In Iran, more than 70,000 prisoners were temporarily released after infections were confirmed among inmates. South Korea actively encouraged companies to adopt remote working, and France announced school and university closures.

In this context, citizens are beginning to feel the deleterious effects of the Coronavirus on the economy and the job market. Social isolation, as a necessary measure to contain this contagious virus, although imperative, is producing damaging consequences of major proportions, and the first manifestations of this social disorder can already be seen in Brazil.

9. MARTINEZ, Luciano; POSSÍDIO, Cyntia. Work in times of coronavirus. Salvador: Saraiva Jur: 2021. p. 16.

10. MARTINEZ, Luciano; POSSÍDIO, Cyntia. Work in times of coronavirus. Salvador: Saraiva Jur: 2021. p. 16.

Closed enterprises have an impact on the lives of workers, who are forced to leave their jobs, in many cases without knowing for sure where it will all lead.

Some sectors are particularly hard hit, generally linked to the entertainment sector, but not exclusively, such as hotels, bars, restaurants, travel agencies, as well as the transportation and fitness sectors, which suffer even more immediate effects in terms of loss of financial capacity.

The workers in these segments are therefore even more vulnerable due to the real possibility of the discontinuation of these ventures, as is often the case in times of serious economic crisis.¹¹

As an important way of preventing contamination by the coronavirus and avoiding its spread among people, the institution of distance work, especially teleworking, has been widely accepted in Brazil.¹²

During the state of public calamity recognized by Legislative Decree 6/2020, the employer could, at its discretion, change the face-to-face work regime to teleworking, remote work or other type of distance work and determine the return to the face-to-face work regime, regardless of the existence of individual or collective agreements, without prior registration of the change in the individual employment contract, under the terms of article 4 of Provisional Measure 927/2020.¹³

This provision said that *“during the state of public calamity referred to in art. 1, the employer may, at its discretion, change the in-person work regime to teleworking, remote working or other types of distance working and determine the return to the in-person work regime, regardless of the existence of individual or collective agreements, with no need for prior*

registration of the change in the individual employment contract”.

In the case of unilateral teleworking arrangements, the employee must be notified in writing or electronically 48 hours in advance, and the change must not be previously registered in the individual employment contract.

According to Provisional Measure No. 927 and the Consolidation of Labor Laws, it is possible to revert to on-call work at any time, and there is no possibility of compensating hours once the alert status has ended.

Electronic equipment and means of working will be part of an individual written agreement, signed in advance or within thirty days of the change in working arrangements.¹⁴

In short, in the last four (4) years, employers and employees have been looking for alternatives to reconcile the continuity of services with isolation, using teleworking, i.e. providing work services remotely, not necessarily at the worker's home, or home working, which turns the employee's home into an extension of the company.

These alternatives, however, will only be possible for certain types of service, usually of a bureaucratic or creative nature. There won't be much of a problem for those who work in accounting, legal advice, consultancy in general, digital marketing, teleclasses, translation, proofreading, remote management, customer service, website updating, software repair and other activities of this kind.

With regard to the permanence of the teleworking regime in the post-pandemic period, the trend that has prospered is that of hybrid work, when possible, in which the worker goes to work at the company some days and works remotely on other days.

11. MARTINEZ, Luciano; POSSÍDIO, Cyntia. Work in times of coronavirus. Salvador: Saraiva Jur: 2021. p. 17.

12. GARCIA, Gustavo Filipe Barbosa. Coronavirus and the Right to Health: repercussions for labor, social security and social assistance - 1. ed. - São Paulo: Saraiva Educação, 2021. p. 126.

13. GARCIA, Gustavo Filipe Barbosa. Coronavirus and the Right to Health: repercussions for labor, social security and social assistance - 1. ed. - São Paulo: Saraiva Educação, 2021. p. 129.

14. MARTINEZ, Luciano; POSSÍDIO, Cyntia. Work in times of coronavirus. Salvador: Saraiva Jur: 2021. p. 27-28.

FINAL CONSIDERATIONS

It should be noted that, throughout this work, some of the main points about the institute of teleworking in current labor relations have been highlighted.

The topic is pertinent and controversial, as employers have been forced, in many cases, to adhere to the teleworking model for their employees due to the emergence of the COVID-19 pandemic and the need for social distancing and isolation.

It can be said that most employers and employees were not prepared to enter the world of teleworking so abruptly and unexpectedly, which caused a series of difficulties and problems in adapting to this hitherto unknown remote working model.

Thus, with regard to the research problem chosen at the beginning of the project, it can be said that the institute of teleworking has made significant progress and improvements in recent years, especially after the 2017 Labor Reform and Provisional Measure No. 927/2020.

The COVID-19 pandemic has accelerated the implementation of teleworking, redefining the way companies and their employees interact and operate. In the post-pandemic scenario, teleworking has been consolidated as a viable option, especially for sectors that demand essentially intellectual and technological activities.

Companies have seen significant advantages, such as a reduction in operating costs and an increase in the productivity of many employees, which has contributed to the permanence of this model in many organizations.

On the other hand, teleworking has also brought challenges, such as an increased sense of isolation among employees, difficulties in separating personal and professional life, and a lack of social interaction, which are essential for team development and innovation. This has led many organizations to adopt hybrid models, mixing remote and face-to-face work.

Although it is not the only solution, teleworking has proved its viability and relevance, consolidating itself in various sectors. However, its widespread application depends on the type of activity and the ability of companies to adapt to new technological and people management demands. Thus, teleworking has not become smaller, but has positioned itself more strategically and selectively in today's corporate environment.

Finally, it should be noted that this research has no intention of exhausting the debate on the subject or establishing closed precepts on teleworking, but should only be seen and analyzed as a bibliographical tool to encourage and enrich legal discussions on the subject.

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