

## Employment

# Amendments to the Portuguese Labour Code: telework and duty to avoid contacts

On 5 November 2021, the Portuguese Parliament approved a set of legal amendments to the Labour Code which relate to teleworking matters and to the employer's duty to refrain from contacting the employee during rest periods. These amendments are not yet in force and are now pending promulgation (or veto) by the President of the Republic. This briefing note aims to provide a brief overview of the envisaged amendments which, in any event, should not yet be deemed as final.

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**1. Amendments to the telework regime****1.1. Teleworking agreement**

Telework shall continue to require a written agreement between the employer and the employee, either in the employment agreement or in a separate document. Pursuant to the latest amendments, the statutory content of the teleworking agreement will be widened.<sup>1</sup>

**1.2. Teleworking proposal**

The employee may refuse a telework proposal made by the employer without the need to justify such refusal, which shall not constitute grounds for a disciplinary dismissal or even for the imposition of any other minor disciplinary sanction.

If the telework proposal is submitted by the employee and his activity is compati-

<sup>1</sup> In particular, the teleworking agreement will include the following additional information: the place where the employee will usually render his duties, the working schedule, all the component elements of the employee's remuneration.

ble with the telework (considering the company's operating process and its available resources), the employer will only be allowed to refuse the telework proposal by justifying in writing the grounds for the refusal.

### 1.3. *Duration of teleworking*

Pursuant to the latest amendments, the teleworking agreement may be valid for a certain period (which should not exceed 6 months, subject to automatic renewals for equal periods, unless cancelled by either of the parties with a prior notice of 15 days) or for an indefinite period (in this case, it may be terminated by either party with a 60-days prior notice).

### 1.4. *Internal regulation*

The employer will be able to define by internal regulation the activities and the conditions under which it may accept the provision of telework.

This internal regulation may also refer to the conditions for the private use by the employees of the teleworking equipment and systems provided by the employer. If this is not regulated by internal regulation or eventually in the teleworking agreement, the employer will not be authorised to sanction the employee for a misuse of such equipment and systems.

### 1.5. *Equipment and teleworking expenses*

With regards to the telework equipment and payments to cover teleworking expenses, the following amendments have been approved:

- The employer is responsible for making available to the employee the

equipment and systems that are necessary for the performance of his activity and for their interaction.

- The telework agreement should specify if the systems and equipment are provided by the employer or instead acquired by the employee with the employer's prior approval of its features and prices.
- All proven additional expenses incurred by the employee with the direct acquisition or with the professional use of the IT equipment and systems should be fully reimbursed by the employer, including any increased costs with electricity and the network installed in the workplace with a speed that is compatible with service communication needs, as well as those additional costs with the maintenance of those equipment and systems. For this effect, additional expenses are those corresponding to the acquisition of goods and/or services that the employee did not have before the teleworking agreement, as well as those costs determined by comparison with the employee's monthly expenses in the same month of the year preceding the execution of the telework agreement.
- The amounts paid to the employee to defray teleworking expenses are regarded as an employer's cost for tax purposes and do not qualify as earnings from employment.

Where compatible, the rules referred to in this section also apply to the provision of remote work by those who are not employees of the contracting entity/person

but are economically dependent on the latter.

#### 1.6. *Right to telework*

##### *Parents with children up to 8 years old*

The Labour Code currently sets forth that employees who are victims of domestic violence or with children up to 3 years old are entitled to perform their activities under the telework regime, provided that certain conditions are met.

The envisaged amendments extend the right to telework to parents with children up to 8 years old if the employee's activity is compatible with telework and the employer has the necessary resources and means, in the following cases:

- If both parents meet the conditions to perform their activity under the telework regime, provided that this right is exercised by both in successive periods of equal duration within a maximum reference period of 12 months (e.g., 6 months taken by the mother and another 6 months by the father).

- Single-parent families or situations in which only one of the parents is demonstrably capable of performing the activity in the form of telework.

The employer cannot oppose the request submitted by the employees who fall under the situations listed above. However, this right does not apply to employees of micro companies (i.e., those that employ up to 9 employees).

##### *Informal caregivers*

An employee who proves having the legal status of “non-principal informal caregiver”<sup>2</sup> is entitled to perform his activity under the telework regime for a maximum period of 4 years (either consecutive or not) if the telework is compatible with his activity and the employer has the necessary means and resources.

In this case, the employer may oppose the employee's request to work from home not only when the respective requirements are not met, but also based on the company's overriding operational needs. If the employer refuses the employee's request to work from home, a specific process with legal deadlines shall apply.<sup>3</sup>

<sup>2</sup> “Non-principal informal caregivers” are the spouse or unmarried partner, relative or related in line up to the 4<sup>th</sup> degree in the direct or collateral line with the person who is cared, who accompanies and takes care of the latter on a regular basis, although not permanently, and that may be remunerated or not for a professional activity or for the care that such informal caregiver provides.

<sup>3</sup> The employer shall inform the employee of its decision, in writing, within the term of 20 days fallen from the date of the employee's request. In the event of refusal, the employer should justify it and the employee may submit his written opinion within the 5 days fallen from the date he received the employer's decision. Once this deadline is expired, the employer should submit the process to the Commission for Equality in Labour and Employment (“CITE”), which notifies the employer and the employee of its reasoned opinion within 30 days following. If CITE fails to issue its opinion within the 30-days deadline, it shall be deemed favourable to the employer. If CITE's opinion is favourable to the employee, the employer can only refuse the request after being provided with a favourable judicial decision.

The right to telework granted to informal caregivers is applicable to micro companies. Failure to comply with any of these obligations may render the employer liable for a serious infringement.

#### 1.7. *Organization, direction, and control of work*

The set of amendments approved by the Portuguese Parliament also include the following rules:

- Remote work meetings and other tasks that should be carried out in specific moments and in coordination with other employees should take place within the employee's work schedule and, preferably, be scheduled 24 hours in advance.
- The employee is required to commute to the employer's premises or to a different place designated by the employer to attend to meetings, professional training sessions and other situations that require his presence and for which he has been requested to attend at least 24 hours in advance. The employer is obliged to cover the travel cost of the commuting that exceeds the usual transportation cost between the employee's residence and his usual presential workplace.
- The powers to direct and supervise employees who are working remotely should preferably be exercised through IT equipment used in the employee's activity in accordance with the procedures previously known by the employee and that are compatible with his privacy. Under no circumstance the employer can require the

employee to be permanently connected through image or sound.

Failure to comply with each of these obligations may render the employer liable for a very serious infringement.

Where compatible, the rules referred in this section also apply to the provision of remote work by those who are not employees of the contracting entity/person but are economically dependent on the latter.

#### 1.8. *Special duties applicable to teleworking*

##### *Employer's special duties*

- To inform the employee, when necessary, of the features and manner of using all equipment, programmes and systems adopted to monitor his activity from a distance.
- To refrain from contacting the employee in his rest periods, except in force majeure situations.
- To use best endeavours to reduce the employee's isolation by promoting presential contacts between the employee and his superiors and colleagues with the periodicity set forth in the telework agreement or, in the absence thereof, at least every 2 months.
- To guarantee or cover the costs of maintenance and repair of equipment and systems used in the telework, regardless of ownership.
- To consult the employee, in writing, before introducing changes to the equipment and systems used in

the provision of work, in the tasks assigned or in any other feature of the activity contracted.

- To provide the employee with the training that he may need for the proper and productive use of the equipment and system used in the telework.

Failure to comply with any of these obligations may render the employer liable for a serious infringement.

#### *Employee's special duties*

- To inform the employer, in a timely manner, of any failure or malfunctioning of equipment or systems used in the provision of work.
- To comply with the employer's instructions as regard the safety of the information used or produced whilst carrying out the contracted activity.
- To respect and observe the restrictions and constraints previously defined by the employer regarding the private use of the equipment and systems provided by the latter.
- To comply with the employer's guidelines in respect of health and safety matters.

In addition to being grounds for a disciplinary action, failure to comply with these duties may trigger the employee's civil liability.

Where compatible, the rules referred in this section also apply to the provision of remote work by those who are not em-

ployees of the contracting entity/person but are economically dependent on the latter.

#### *1.9. Health and safety at work*

In respect of health and safety at work, the following rules were approved:

- Telework is not allowed in activities that involve use or contact with substances and materials that are dangerous for the employee's health and physical integrity, unless the activities are carried out in premises certified for that purpose.
- The employer should promote medical check-ups before the telework is implemented and should ensure that the employee is subject to annual medical check-ups, notably for an assessment of their physical and psychic fitness for the activity and to adopt suitable risk prevention measures.
- The employee should provide the health and safety practitioners designated by the employer with access to the site where he carries out his activity, between 9 am and 19 pm, within the work schedule.
- The provisions concerning work-related injuries and illnesses apply to teleworking cases. For coverage purposes, workplace is the place chosen by the employee to usually carry out his activity and as working time is the period when the employee is demonstrably providing his work to the employer.

Failure to comply with each of these obligations may render the employer liable for a very serious infringement.

Where compatible, the rules referred in this section also apply to the provision of remote work by those who are not employees of the contracting entity/person but are economically dependent on the latter.

## 2. Duty to avoid contact with employees

As per the new amendments, the employers should avoid contacting the employees during their daily rest periods, except in force majeure situations.

The current wording of the relevant provision does not include exemplificative situations of what should be considered to be force majeure situations. In any event, it is possible that this concept will be construed and limited to unforeseen or urgent situations only.

An employee cannot be subject to a less favourable treatment (notably in terms of working conditions and career progression) as a result of the exercise of his right not to be contacted during rest periods. This would be deemed a discriminatory action and may

render the employer liable for a very serious infringement.

## 3. Final approval and entry into force

The above-mentioned legislative amendments were approved in a final plenary vote at the Portuguese Parliament last 5 November 2021 and should now be submitted to the President of the Republic, who may approve or veto them. Therefore, these amendments are not yet in force and this briefing note should not be construed as containing the final and definitive amendments to the employment law currently in force.

This Briefing Note was prepared in 18 November 2021, in accordance with the wording prepared by the Labour and Social Security Committee in the Portuguese Parliament and approved in a final plenary vote at the Parliament and still subject to approval by the President of the Republic and subsequent publication. This Briefing Note is not a substitute for obtaining legal advice. This Briefing Note is intended for clients and contains general and abstract information updated to the present date. The information provided herein does not nullify qualified professional assistance tailored to the specific case.

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