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TELEWORKING: DID IT COME TO STAY?

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José has more than 25 years of extensive experience and advises on all aspects of legal employment, namely in the negotiation, drafting and termination of employment contracts, remuneration schemes, collective redundancies, corporate reorganizations, and transfer of undertakings.

Due to the pandemic situation caused by the outbreak of the SARS-CoV-2 virus, as well as the successive legislative and governmental measures taken to stop it from spreading, the government decided to implement the adoption (initially mandatory and currently as a recommendation) of the telework policy, which seems to be here to stay.

Before moving on to examine the policy and the consequent challenges and implications at company level, it is considered relevant, as it is impressive,

to make brief considerations on the pre-pandemic policy. In Portugal, the telework policy was initially implemented with the publication of the first Labour Code, which currently remains in force through the Labour Code of 2009.

The Portuguese legislator defines telework as *“the provision of work, in the context of an employment relationship, carried out away from employer's premises on a regular basis through the use of information and communication technologies”*. In Portugal, as an agreement

between the employer and the employee is required, the telework policy is essentially consensual in nature. There are, however, two situations in which the employee is entitled to telework, and the employer may not object to the request:

- If a worker has a child aged up to 3 years old and their duties are compatible and the employer has the tools to allow it;
- In situations of domestic violence.

From the employer's point of view, the Labour Code does not provide for the possibility



of imposing the adoption of this policy.

Before the pandemic scenario, the application of this telework policy was considerably residual and, therefore, had little expression at national level. To that extent, the current challenges that have arisen due to the novelty of the issues triggered by the pandemic scenario did not exist.

The Covid-19 legislative framework has consolidated the policy, so it is worth examining the main aspects that have been consolidated.

Therefore, work equipment must be provided by the employer. If this is not possible, the employee's own equipment may be used, subject to their consent. Although the legislation on this matter does not yet provide a solution with regard to other expenses incurred by the employee in performing their professional activity under the telework policy (e.g. electricity and internet expenses, among others), based on the general policy provided for in the Labour Code, it is considered that they should be borne by

the employer¹. However, for such purpose, the employee must prove these expenses, establishing a direct correlation between them and working under a telework policy.

Moreover, it is considered that the payment of such expenses should be laid down in the agreement between the employer and the employee, and it is not legitimate or even reasonable to provide for the payment of all and any expenses.

The application of the telework policy does not imply the loss of any rights, and the teleworker should have the same rights as other workers, with no reduction in pay (and keeping the meal allowance), the limits of normal working hours and other working conditions, the occupational health and safety conditions and the compensation for damages arising from an accident at work or occupational disease being kept in force.

1. It should be noted that the political parties have already discussed, in plenary, draft bills related to telework where the issue of payment of expenses to the worker is included.

Therefore, in the current legislative scenario that regulates the measures to be adopted in a pandemic context, telework is now only recommended in activities that allow it, and not compulsory as in the last few months, as of 1st August. This means that if the parties wish to maintain this work policy, they must enter into an agreement to that effect. In view of the above, it is urgent to update the policies that currently regulate the provision of telework.

It should be noted that the right to disconnect has been the subject of European parliamentary initiatives and it is one of the most difficult matters to regulate.

Finally, we consider it interesting to make some comments about the most recent news on *Google*², which announced pay cuts for teleworkers. However, considering the legal framework in force in Portugal, this situation would be ruled out due to the principle of the irreducibility of wages.

2. <https://www.bbc.com/news/business-58171716>