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REMOTE WORK IN CALAMITY TIMES DUE TO COVID19: IMPACT OF EMERGENCY LABOR MEASURES

TRABALHO REMOTO EM TEMPOS DE CALAMIDADE DEVIDO AO COVID-19: IMPACTO DAS MEDIDAS DE TRABALHO DE EMERGÊNCIA

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RESUMO

Objetivo: Análise do trabalho remoto no contexto da Pandemia (Covid-19), seu conceito e previsão legal a partir da Lei nº 13.467/2017, que alterou a CLT. Examina as alterações trazidas pelas Medidas Provisórias nº 927 e 936 (Lei nº 14.020/20) editadas em razão do Decreto Legislativo nº 06/2020 (Estado de Calamidade), que autorizou uma séria de medidas na área. Por fim, examinam-se os direitos sociais "saúde" e "trabalho" no contexto da pandemia.

Metodologia: Trata-se de pesquisa baseada nas técnicas de revisão legislativa, bibliográfica e documental.

Resultados: As alterações levadas a efeitos pela reforma trabalhista no que diz com o trabalho remoto, foram salutares para uma garantia de direitos dos teletrabalhadores. As alterações do período de pandemia (especialmente 2020), tiveram o objetivo de preservar a saúde e o trabalho. A Essa é a conclusão.

Contribuições: A principal contribuição do trabalho consiste em identificar os resultados positivos e negativos do trabalho remoto, especialmente no contexto de pandemia.

Palavras-Chave: Teletrabalho. COVID19. Coronavírus. Estado de Calamidade.

ABSTRACT

Objective: Analysis of remote work in the context of Pandemic (Covid-19), its concept and legal provision based on Law No. 13,467 / 2017, which amended the CLT. It examines the changes brought about by Provisional Measures No. 927 and 936 (Law No. 14,020 / 20) edited due to Legislative Decree No. 06/2020 (State of Calamity), which authorized a series of measures in the area. Finally, the social rights "health" and "work" in the context of the pandemic are examined.

Methodology: This is a research based on the techniques of legislative, bibliographic and documentary review.

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Results: The changes brought about by the labor reform with regard to remote work, were beneficial for guaranteeing the rights of teleworkers. The changes in the pandemic period (especially 2020), were aimed at preserving health and work. This is the conclusion.

Contributions: The main contribution of the work is to identify the positive and negative results of remote work, especially in the context of a pandemic.

Keywords: Teleworking. COVID-19. Coronavirus. State of Calamity.

1 INTRODUCTION

Remote Work is a form of service provision that is unmistakably flexible: it makes working time and space flexible against the classic model, coined during the Industrial Revolution.

With remote work, which is not only aimed at employment relationships - but which will be studied here exclusively from this point of view - it is no longer necessary to cohabit the employer and their employees, on the other hand, their assumption is the distance between them. In the same way, with remote work, it is possible to work - whenever the activity allows - at random times, different from the factories or even the social standard, observing biorhythms, family responsibilities or other conditioning factors that limit the worker's time, as long distance mediation is carried out via information and communication technologies.

Remote work was a phenomenon built in the Space between business administration and information technology. Perhaps, for this reason, its concept was imported from there and the legal treatment of the institute was slow to settle. In the last two decades, in Brazil, although it was already thought about the subject as a legal fact, few articles were written about it, reflecting this in the absence of legislation about this type of work.

In Brazil, in the 2000s, some legislative proposals were suggested and Law No. 12,551/2011 gained strength, which only slightly dealt with the theme, changing Article 6 of the Labor Law Consolidation (CLT) to modify its *caput*, equating face-to-

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face work with “distance work” (where remote work, as will be seen below), also adding a paragraph in which it gave the telematic commands and controls the same effectiveness as in person, especially for the purpose of identifying the subordinate element, which characterizes the employment relationship. Based on this, some people understood that remote work, in Brazil, would be sufficiently regulated, however, for that, Brazilian society should be used to govern its relations in the light of open standards, which (still) is not the case.

Thus, there was a need for greater verticalization in the legislative detail of the agreement. The international experience was and still is unequivocal in demonstrating this need: Portugal, Spain, Colombia, Italy, among others: everyone already has some regulation for remote work. While Brazilian legislation does not come, some companies or categories filled the legal gaps with corporate regulations and collective instruments.

In December 2016, the federal government proposed Bill 6,787/2016, which was sent to the Chamber of Deputies and studied and reworked by a Committee of Deputies for about 4 months. The original proposal did not include remote work. It arose during the period of popular consultation, it is believed that, in particular, due to the various meetings (all registered and available on the Chamber of Deputies website - progress of PLC No. 38/2017) that social actors had with this Commission, among which stands out the SOBRATT - Brazilian Society of Remote Work and Remote Activities. In the proposal sent to the Senate, approved and sanctioned by the President of the Republic, there are now some provisions that expressly mention remote work, which then has a formal and positive existence in national territory.

In March 2020, upon the arrival of the coronavirus pandemic in Brazil, remote work was one of the alternatives for business continuity and job preservation. During the term of Legislative Decree N. 06/2020, which determined the State of Calamity in Brazil, it is estimated that a large part of the Brazilian working population will change the profile of their agreement for the remote provision of services, giving rise to a series of questions and developments. Even before Provisional Measure N. 927/2020 came

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into force, experts warned[1] of the potential of remote work as a mechanism that would allow for the reconciliation of continuity of work with policies of social isolation.

The study is carried out on a scientific basis, using the deductive approach method, historical, comparative, typological and structuralist methods and systematic interpretation method. The research was essentially bibliographic-documental.

Anyway, it is about remote work and its use in times of the Coronavirus pandemic in Brazil that this study deals with, hoping to contribute to the understanding of the topic and, providinge a better application of the standard.

2 HISTORY OF REMOTE WORK[2]

Revolving the history of remote work means immersing in the interactions between technology and work throughout the evolution of humanity, especially the technology that allows work to be sent to the worker, which deterritorializes the employment relationship, at least in one of its traffic routes.

In this topic, this study goes beyond the ordinary references on the topic, which fix the appearance of remote work of Jack Nilles and attribute to him the “invention” of this work modality. In verticalization, it is observed that the phenomenon has an intense and visceral relationship with a significant object, the result of technological evolution: **the optical telegraph** also called **signal telegraph**, invented by *Claude Chappe*[3].

In Brazil, the theme took time to settle, both at the theoretical and practical levels[4] even more, for legal purposes. As already noted, telematic work was only

[1] In this sense, see: https://politica.estadao.com.br/blogs/fausto-macedo/covid-19-e-relacoesde-trabalho-planejando-a-parada/

[2] More information on the history of remote work at: FINCATO, D.P.; CRACCO, H.B; SORIA, J.S. 2013, p. 109-122

[3] Claude Chape: French abbot, engineer and inventor, born in the city of Brûlon. From a typical and rich family of the French nobility, he came to embark on a religious life, but was affected by the revolution and the financial instability generated by it. More out of necessity than vocation, he joined his four brothers, all then equally unemployed: they intended to give new directions to their lives and, as a side effect of their performance, they also gave new directions to engineering and the world of work. About Chappe's biography and work, see more at: http://www.telegraphe-chappe.com/chappe/portail.html

[4] SERPRO is cited as one of the first companies to officially use remote work as a way of providing services in Brazil. In this sense, see: PINTO, J. O. 2003

admitted by Brazilian law in 2011 and remote work was only formally recognized and regulated in the Labor Reform in 2017. Upon the Covid-19 pandemic, it gained popularity and prominence, deserving emphasis in Provisional Measure No. 927, dated 2020, currently in force.

3 THE CONCEPT OF REMOTE WORK

Greek etymological origin, *tele* means distance. Teleworking (remote work) is a special type of distance work, a specific type, contained herein. Not by chance, the reformist legislator placed him with specific requirements and formalities intrinsic to the hiring, which make him a special type of agreement.

In remote work, elements combine to identify something beyond mere work outside the establishment (physical headquarters) of the employer. There is a mandatory presence of communication and information technology, either as a work tool, as a mediator of relational distance, or even as a (virtual) work space.

It cannot, as seen, simply be equated with distance work and neither, as will be seen, be equated with home office, thus constituting a *sui generis* figure.

Remote work is a labor modality that goes beyond the concepts and work experiences of the Industrial Revolution, being situated in the so-called Information Revolution. Based on this (and many other contemporary phenomena), several paradigms need to be reworked, since current and future work is already and will increasingly be deterritorialized and timeless.

In remote work, the protagonists of the employment relationship act via video mechanisms most of the time, being physically distant, with the presence of information and communication technology as essential elements of their concept and verification.

Remote work does not remove the subordinate relationship, as was suspected at the beginning of the studies. The issue, moreover, was resolved legislatively in Brazil in 2011, upon the amendment of Article 6 of CLT, which admitted the same face-to-

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face effectiveness to command, supervision and control exercised in a telematic way[5], not without first equating face-to-face work with distance work (remote work being part of that type). Such legal-formal equalization, however, did not satisfy the peculiarities of the specific labor modality, so that, the productive environment, continued to demand better legal definitions and, while these did not come, bet on corporate policies (regulations) and collective instruments for suppression of the legal gap.

Remote work was not contained in Project of Law (PL) No. 6,787/2016. It was added by the Commission of Deputies that prepared Project of Complementar Law (PLC) No. 38/2017, now sanctioned and on the eve of coming into force. From the analysis of the Commission's report, it is possible to verify the effective performance of SOBRATT - Brazilian Society of Remote Work and Remote Activities, which held a meeting with the aforementioned Legislative Commission in the intervening period of the processing and preparation of the text of the Labor Reform, very possibly contributing content of the articles that will be analyzed below.

Its concept, in Brazil, was established in the legislation (Article 75-B of the CLT) and, given the focus of this study, reiterated in Chapter II (Article 4 paragraph 1) of Provision Measure (MP) No. 927/2020.

4 REMOTE WORK IN THE BRAZILIAN LEGISLATION: GENERAL RULES

In this topic, annotations are made to each of the provisions of the Labor Laws Consolodation that specifically deal with remote work. Following:

Article 75-A. The provision of services by the teleworking employee shall comply with the provisions of this Chapter.

[5] Set of computer services provided through a telecommunications network. **Online Portuguese Dictionary**. Available at: https://www.dicio.com.br/telematica/.Accessed on October 31, 2017.

Law No. 13,467 / 2017 alters the *status quo* of generic equalization previously established by Article 6 of the Labor Laws Consolidation - CLT[6] between distance work and face-to-face work. A chapter opens to accommodate the standardization of remote work, as Portugal did in 2003[7] in its Labor Code. There are also two other references to remote work in the reformed text of the CLT: Articles 62, III[8] and 611-A, VIII. The first, to locate remote work among the forms of subordinated service provision excluded from the control of the duration of the day, and the second to say it is a feasible subject of collective bargaining.

Article 75-B. Remote work is considered to be the provision of services predominantly outside the employer's premises, upon the use of information and communication technologies that, by their nature, do not constitute external work.

Sole paragraph. Attendance to the employer's premises to perform specific activities that require the employee to be present at the establishment does not detract from the remote work regime.

Following the example of foreign ordinances and the very custom of the CLT, the legislator is concerned about making positive the concept of remote work, correctly identifying it as a mere differentiated way of providing services. Base on this, the idea that teleworkers would occupy a differentiated professional category is removed, for example, since any activity in which transmission/carrying out work by information and communication technologies is possible becomes subject to remote work.

The legal provision links the elements that characterize remote work, which have already been repeatedly presented by the doctrine in a systematic way and, in

[6]Article 6. No distinction is made between the work carried out in the employer's establishment, the work carried out at the employee's home and that carried out at a distance, provided that the conditions of the employment relationship are characterized. (As amended by Law No. 12,551 in 2011)
Sole paragraph. The telematic and computerized means of command, control and supervision are equivalent, for the purposes of legal subordination, to the personal and direct means of command, control and supervision of the work of others.

[7]Portuguese Labor Code, available at http://cite.gov.pt/pt/legis/CodTrab_LR1_004.html#L004S14, accessed on September 27, 2017. The remote work legislation was changed again in 2009.

[8]Due to their exclusion from the regime for controlling the duration of work, some indoctrinators have understood that remote work contracts are not susceptible to reduced hours/wages (MP No. 936/2020). In this sense, see BOMFIM, Volia. MP 936 – Medidas Trabalhistas para o enfrentamento da crise. Available at: https://www.youtube.com/watch?v=TJ-YytPp6Mw. Accessed on: April 15, 2020.

its sole paragraph, points out that the fact that the remote employee comes to the company to perform specific tasks does not change the nature of the agreement. This can happen even routinely, as is natural in remote work[9], and should only be provided for in the contract between the parties.

It is important to remember that remote work can take place based on modalities that take into account the location where the remote worker is **predominantly** located and the intensity of the telematic contact between them and their employer. Thus, regarding the location, remote work can be classified as[10]:

- from home (*home office*): when the worker establishes the place of work at home, installing a small station there with access to means of communication and using its own structure or provided by the company to provide the contracted services.

- in satellite centers: workplaces belonging to the employer, which are not subsidiaries (in their civil-fiscal concept). These places do not have an organizational structure (there are no bosses, subordinates, etc.), being mere support spaces for the provision of services belonging solely to the employer.

- in telecentres: which differ from the previous ones in that they are shared (structure and resources) between two or more companies.

- in *telecottages*: spaces (also) for work, located in rural or difficult to access regions and, normally, with less education, almost confused with the telecenters, were it not for the particular location and the possibility of public-private partnerships for its installation (since the structure may also serve the education and training of the regional population, contributing to the development of public employment policies, for example, notably in the distance learning modality). Its virtue is to attract qualified labor, naturally migrant to large urban centers, to regions that potentially suffer from the labor exodus.

[9] When trying to tangent the effects of isolation and structural marginalization of the remote worker via meetings, integration activities and face-to-face corporate training or even admitting flexibility to provide the service at the employer's physical headquarters, if the employee so desires, whenever he wants.
[10] FINCATO, D.P. 2011, p. 36-48, p. 41-42.

- *mobile* (or nomadic): there is no determination as to where the service will be provided. Any place can be a work space, as long as the remote worker has the necessary tools to do so (currently, a *smartphone* meets these needs well).

Regarding the degree of connection between remote worker and employer, remote work can take place in three modalities:

- *offline*: for some, no longer understood as remote work, technology would not be at the service of work traffic, but only for the treatment and storage of data and information (raw material for remote work), essentially de-characterizing it. Work in these conditions could be given the protection of home work.

- *one-way line*: hypothesis in which the communication is unilateral, that is, only for sending or receiving the task/work. The worker, for example, receives the task by e-mail, *WhatsApp* or another electronic system and delivers it in person, by messenger or by the traditional postal system.

- *online*: it is remote work based on excellence. In this mode, interactivity can be immediate, synchronous and simultaneous. Sometimes, opening new debates about the workspace, the work is developed in corporate "*webspaces*" (remote access intranets). It should be noted, since there are already numerous studies and demonstrations in this sense, that in this type of remote work it is possible to manage ways of controlling the length of the day, despite the legislator having chosen to exclude from remote work, creating presumption *juris tantum* (Article 62, III).

Article 75-C. The provision of remote work services must be expressly included in the individual employment agreement, which will specify the activities to be performed by the employee.

Paragraph 1. The change between face-to-face and remote work regime may be carried out, provided that there is a mutual agreement between the parties, registered in a contractual amendment.

Paragraph 2. The teleworking regime may be changed to face-to-face by the employer's determination, guaranteeing a minimum transition period of fifteen days, with corresponding registration in a contractual amendment.

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Assigning a special character to the contractual modality, the legislator imposes a form for the contracting of teleworking: express and, to conclude with the analysis of the following articles. Therefore, unlike the ordinary employment agreement, remote work (and its benefits, such as the exclusion from the regime for controlling the duration of work) will not be accepted by the tacit way. The express written[11] form is justified by the number of themes that must be unequivocally regulated by the parties, as will be seen below. In the agreement, the activities to be carried out by the employee under teleworking must be recorded as accurately as possible. It is recommended, already contained in the previous provision, the forecast about the circumstances in which the remote work will be admitted or will require services in person, stipulating the preponderance of remote activity as the installment rule to be in force between the parties and making it clear that such episodes will not de-characterize the agreement.

The paragraphs provide for a hypothesis of variation in the contractual conditions, assuming that remote work may emerge as an option in the course of the employment relationship or providing for the eventual need to revert the original telematic regime during the hiring, turning it in person.

In this case, unlike Portugal, in which the adoption of the remote regime will sometimes take place in an imposing way on the employer[12], in Brazil it will take place

[11]Because, by registering only "express form", the legislator leaves room for the possibility of its verbal expression.

[12] From the Portuguese Labor Code: "Article 166 [...] 1 - An employee of the company or another admitted for the purpose may exercise the activity under remote work, by means of the signing of a agreement for the subordinate provision of remote work. 2 - Once the conditions foreseen in paragraph 1 of article 195 **have been verified, the worker has the right to start exercising the activity in remote work regime**, when this is compatible with the activity performed. 3 - In addition to the situations referred to in the preceding paragraph, **the worker with a child aged up to 3 years has the right to carry out the activity on a remote work basis**, when this is compatible with the activity performed and the employer has the resources and means to do so. 4 - **The employer cannot oppose** the worker's request under the terms of the previous numbers." "Article 167 [...] 1 - In the case of a worker previously linked to the employer, the initial agreement duration for subordinate remote work cannot exceed three years, or the term established in a collective labor regulation instrument. 2 - Either party may terminate the contract referred to in the preceding paragraph during the first 30 days of its execution. 3 - Upon terminating the agreement for the subordinate provision of , the worker resumes the provision of work, under the terms agreed or as provided for in a collective labor regulation instrument." Available at: http://cite.gov.pt/pt/legis/CodTrab_LR1_004.html#L004S14 Accessed on September 28, 2017 (crossed)

by mutual agreement, contained in a contractual amendment (evidently expressed and written, by systematic logic). It is understood that this change must respect the labor principle (*tuitiva*), contained in the command that imposes to maintain the most beneficial condition to the worker (Article 468 of the CLT[13]), not affected by the Labor Reform.

The change[14] by the employer in the remote work regime for face-to-face work does not presuppose a mutual agreement[15], but a minimum notice period of 15 days, to be expressed and written in a contractual amendment and with the purpose of allowing "transition" time, according to the legal text. This situation seems to be close to the logic of "reversing" the position of trust to the previous activity, a circumstance provided for in the sole paragraph of Article 468 of CLT (mentioned above), obviously hermeneutics does not apply to the hypothesis of original remote work. In other words, due to the legal provision, the exercise of remote work does not generate an acquired right, does not permanently incorporate conditions and is reversible within the limits of business need and interest. There is a glimpse of possible tension here in eventual legal demands, due to the provisions of Article 468 of CLT which, given a specific case, may reveal a circumstance in which remote work will be the most beneficial condition for the worker or that its reversal by employer initiative will generate losses (direct or indirect, in the normative statement) to the employee. It is understood that the aforementioned retro hermeneutics, of imperative protection, with regard to employees who fall under the profile of Article 444 single paragraph of CLT (the so-called hypersufficient), will be weakened due to the emancipation that is attributed to them in

[13]Article 468 - In individual employment agreements, it is only lawful to change their terms and conditions by mutual consent, and only provided that they do not result in direct or indirect losses to the employee, under penalty of the clause in breach of this guarantee being deemed null and void. Sole paragraph - The determination of the employer to revert to the previous position, previously occupied, leaving the exercise of a trust function is not considered a unilateral change.

[14] According to the wording, it cannot be said that this change is a reversal to the face-to-face work previously performed by the remote worker. On the other hand, it is understood that the employer may, if it considers it pertinent to the arrangement of its productive means, extinguish remote jobs, the remote mode of work in his enterprise or determine that a specific remote worker provides services in person.

[15] As it happens in Portugal, Article 166 "[...] 6 - The telecommuting worker can start working under the other workers of the company, either permanently or for a determined period, **by means of a written agreement with the employer**". Available at: http://cite.gov.pt/pt/legis/CodTrab_LR1_004.html#L004S14. Accessed on September 28, 2017 (crossed)

the Labor Reform (with the prevalence of the autonomy of the individual will), unless proven vice will.

Article 75-D. The provisions relating to the responsibility for the acquisition, maintenance or supply of technological equipment and the necessary and adequate infrastructure for the provision of remote work, as well as the reimbursement of expenses borne by the employee, shall be provided for in a written agreement.

Sole paragraph. The utilities mentioned in the *caput* of this article do not integrate the employee's compensation.

The legislator attributes to the parties the right-duty to provide for the acquisition, maintenance or supply of equipment and infrastructure for remote work, and these clauses must be mandatory in the respective agreements. It is understood that if the parties do not dispose of it, due to the labor protection logic, allied to the fact that, generally speaking, it is the employer's risk, in an eventual judicial demand the employer will be assigned the duty to reimburse the costs eventually borne by the remote worker in the composition of the infrastructure necessary to provide remote work, including the acquisition and maintenance of computer equipment.

The legislator also refers to the expenses eventually borne by the employee, pointing out that they can be reimbursed by the employer. What expenses would these be? The doctrine tends to point out, as most commonly objectionable, the increases in ordinary household charges to which the remote worker will be subjected for starting to work from home. As an example, there are increases in electricity costs, gas consumption, telephony and internet use. As extraordinary expenses, there is the cost of tickets and accommodation necessary for the remote worker's participation in mandatory face-to-face work moments (meetings, training, integration). It should be noted that also in this case, the contracting must be sufficient and exhaustive: in addition to providing for the maximum possible expenses, it is also necessary to estimate cap values and a refund system, if this is the case between the parties (as can be agreed that the company will not reimburse them).

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In any case, if goods are delivered, services are paid or expenses are reimbursed to the employee, such "utilities" will not be considered as wages and will not be part of the worker's compensation, as is already the case with the benefits provided for in Article 458 paragraph 2 of CLT or with Participation in Profit Sharing disciplined by Law No. 10,101/2000.

Article 75-E. The employer must instruct employees, in an express and conspicuous manner, as to the precautions to be taken in order to avoid illness and accidents at work.

Sole paragraph. The employee must sign a term of responsibility committing himself/herself to follow the instructions provided by the employer.

One of the major concerns on remote work is the issue of controlling the good working environment, which must follow the dictates of balance and wholesomeness identical to the face-to-face space, traditionally attributing the responsibility to the employer. In this perspective, there is already a ruling from the Regional Labor Court of the 3rd Region (Minas Gerais)[16] in a lawsuit that involved work at home and occupational disease (not remote work, the paradigm being valid for didactic purposes).

[16] SUMMARY: DAMAGES FOR EMOTIONAL DISTRESS. OCCUPATIONAL DISEASES. EMPLOYER FAULT. HOME EMPLOYEE. The fact that the employee works at home does not in itself constitute a reason to exempt the employer from complying with the rules of safety and occupational medicine, placing the worker outside the **legal protection that should cover "all workplaces", without distinction** (Article 154 of the CLT). It is true that there is no way to demand from the employer, in such a circumstance, the daily inspection of the services provided, including regarding the effective observance of the safety and medical rules by the employee, even because the house is the individual's inviolable asylum, nobody can penetrate it without the consent of the resident, except in the case of flagrante delicto or disaster, or to provide relief, or, during the day, by judicial order, under the terms of the guarantee provided for in Article 5, item XI, of the Federal Constitution. This particularity undoubtedly constitutes an element that will interfere in the gradation of the employer's guilt in relation to the eventual professional illness found, but it does not allow exemption from the fulfillment of minimum obligations, such as instructing employees on the precautions to be taken in the sense to avoid accidents at work or occupational diseases, under the terms of Article 157, II, of the CLT, in addition to providing adequate furniture, guiding the employee as to the correct posture (Article 199 of the CLT), rest breaks, etc. Once the employer has failed to comply with these essential obligations, due to his negligent omission in relation to the employee's health care, his guilt in the emergence of the observed professional illness is undeniable, with his responsibility for compensating the moral damage suffered by the worker. (Crossed out) - TRT-00208-2006-143-03-00-2-RO – Available at https://trt-3.jusbrasil.com.br/jurisprudencia/129546658/recurso-ordinario-trabalhista-ro-1626808-00208-2006-143-03-00-2 Accessed on 28 set 2017.

It is clear that the reformist legislator follows the logic of CLT, which in Article 157 determines that the employer instructs its employees about the risks of work and the work environment, educating them for precaution.

However, this duty of orientation for hygiene, health and safety at work cannot be reduced to the drafting and delivery to the employee of a manual of good practices, generic and static. On the other hand, the instruction to which the provision refers must be understood in a more comprehensive and protective way to the relationship, generating guarantees for the employee and the employer. Instruction should be understood as a dynamic and constant concept, with a mutant content, as well as the environment and working methods. Hence, it is concluded that, from time to time, the employer must carry out some inspection of the work environment, as well as take precautions against accidents and illnesses arising from it, foreseeing and recording necessary attitudes in this regard in a wide range of documents, such as the Environmental Hazard Prevention Program - PPRA and the Medical Control and Occupational Health Program - PCMSO, amongst others.

Based on the comments above, as well as full control over the history and regulation of remote work in Brazil, it is possible to draw some conclusive lines about its operation in national Territory.

5 REMOTE WORK IN COVID-19 TIMES: IMPACTS OF "EMERGENCY LABOR LAW"

Historical and conceptual issues on remote work have been overcome, and after

examining its general rules in the Brazilian legal system, remote work starts in times of public calamity, resulting from COVID-19.

First, it is necessary to draw an overview of the disease.

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According to the Ministry of Health of Brazil[17], COVID-19 is a disease caused by the SARS-CoV-2 coronavirus, which presents a clinical picture ranging from asymptomatic infections to severe respiratory conditions. According to the World Health Organization (WHO), the majority of COVID-19 patients (about 80%) may be asymptomatic and about 20% of cases may require hospital care because they have difficulty breathing and, of these cases, 5 % may need support for the treatment of respiratory failure.

Coronavirus is a family of viruses that cause respiratory infections. The new coronavirus agent was discovered on October, 31 2019, after cases registered in China. It causes the disease called coronavirus (COVID-19).

The first cases in Brazil occurred in late January 2020[18]. On February 6, 2020, Law No. 13,979 was published, which provides for measures to deal with the public health emergency of international importance resulting from the coronavirus responsible for the 2019 outbreak.

The law conceptualized “isolation”, as the separation of sick or contaminated people, or luggage, means of transport, goods or affected postal parcels, from others, in order to avoid contamination or the spread of the coronavirus (Article 2, I). “Quarantine” was also defined as restriction of activities or separation of persons suspected of being infected by persons who are not sick, or of luggage, containers, animals, means of transport or goods suspected of being contaminated, in order to avoid possible contamination or spread coronavirus (Article 2, II). The law followed the definitions established in the International Health Regulations.

As a labor reflex, the law defined that the absence period resulting from the measures provided for in the law (Article 3, paragraph 3) is considered justified absence to public service or private labor activity.

On March 20, 2020, the National Congress issued Legislative Decree No. 6, recognizing the state of public calamity, pursuant to the request of the President of the Republic.

[17] More information on the Ministry of Health website.
[18] More information on the Ministry of Health website.

The Special Department for Social Security and Labor of the Ministry of Economy, issued SEI Circular Letter No. 1088; 2020 ME, on March 27, 2020, containing general guidelines for workers and employers due to the COVID-19 pandemic. Such measures include issues such as good hygiene and conduct practices, practices regarding meals, practices related to the Internal Accident Prevention Commissions (CIPAs) and Specialized Services in Safety Engineering and Occupational Medicine (SESMT), practices related to masks, suspension of administrative health and safety requirements, such as medical examinations and practices related to workers belonging to the risk group.

From these basic and initial documents, several other acts of the Public Power came to light in order to regulate and define public policies in the different areas.

With regard to Labor Law, the Emergency Employment and Income Maintenance Program was created (PEMER). The objective, as defined by the Special Department for Social Security and Labor (BRASIL, 2020), was to preserve 8.5 million jobs, in addition to requesting 3.2 million other benefits, with a total of 24.5 million beneficiaries, workers under CLT regime.

The general idea was to preserve employment and income, make economic activity feasible, given the reduction in activities and reduce the social impact due to the consequences of the state of public calamity and public health emergency.

In this context, several Provisional Measures were issued, since the requirements of relevance and urgency provided for in Article 62 of the Constitution of the Republic[19].

In relation to Labor Law, the main Provisional Measures issued were 927, of March 22, 2020 and 936, of April 1, 2020.

MP No. 927/2020 states, in its Article 1, that it provides for labor measures that may be adopted by employers to preserve employment and income and to cope with the state of public calamity recognized by Legislative Decree No. 6, of 20 March 2020, and the public health emergency of international importance resulting from the

[19] Article 62. In case of relevance and urgency, the President of the Republic may adopt provisional measures, with the force of law, and must immediately submit them to the National Congress, which, being in recess, will be extraordinarily summoned to meet within five days.

coronavirus (COVID-19), decreed by the Minister of State for Health, on February 3, 2020, under the terms of Law No. 13,979, of February 6 2020. The application of the aforementioned MP will take place during the state of public calamity and, for labor purposes, it constitutes a hypothesis of force majeure, under the terms of Article 501 of CLT.

Referred to MP, established in its art. 3rd that, in order to face the economic effects resulting from the state of public calamity and to preserve employment and income, the following measures may be adopted by employers, among others, remote work, anticipation of individual vacations, collective vacation concession, use and anticipation of holidays, hours of work, suspension of administrative requirements for safety and health at work, directing workers to qualify and defer payment of the Government Severance Indemnity Fund (FGTS).

Provisional Measure No. 936, dated April 1, 2020, instituted the Emergency Employment and Income Maintenance Program and provided for complementary labor measures to deal with the state of public calamity recognized by Legislative Decree No. 6/20 and the emergence of public health of international importance due to the coronavirus (COVID-19), which Law No. 13.970/2020 deals with.

As previously mentioned, MP No. 936/2020 aims to preserve employment and income, guarantee the continuity of work and business activities, and reduce the social impact resulting from the consequences of the state of public calamity and health emergency public (Article 2).

The measures of the Emergency Program for the Preservation of Employment and Income, defined in Article 3 of MP 926/2020, are as follows: payment of Emergency Benefit for Preservation of Employment and Income, proportional reduction of working hours and wages, and temporary suspension of the employment agreement.

The MP was the object of Direct Lawsuit of Unconstitutionality No. 6,363 DF, filed by the political party *Rede Sustentabilidade*. In short, the applicant maintained that the MP violates Articles 7, items VI, XIII and XXVI, and 8, items III and VI, of the Constitution of the Republic. A precautionary measure was requested, granted in part

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by Minister Ricardo Lewandowski, on April 6, 2020, and confirmed after the admission of Declaration Embargos by the Federal Attorney General. The plenary session was designated for April 16, 2020 and, after the vote of the Rapporteur, the session followed on April 17, 2020, with a majority decision (7X3), due to the constitutionality of the Provisional Measure in its entirety. Ministers Alexandre de Moraes (who opened the dispute), Luís Roberto Barroso, Luiz Fux, Carmen Lúcia Antunes da Rocha, Gilmar Mendes, Marco Aurélio Mello and the President of the Court and, voted for constitutionality.

Having made the preliminary considerations of a juridical and labor nature about the public calamity and the resulting legal panorama, we proceed to the examination of telework provided for in MP No. 927/2020, in Articles 4 and 5, Article by Article.

It is important to note that there is no incompatibility between CLT, in its Articles 75-A to 75-E and Articles 4 and 5 of MP No. 927/2020. The general rule of teleworking remains being the CLT. The remote work provided for in MP 927/2020 concerns only the change of the face-to-face work for telework and vice versa during the period of public calamity resulting from Covid-19.

The MP provides that dealing with remote work are as follows:

Article 4. During the state of public calamity referred to in Article 1, the employer may, at its discretion, change the face-to-face work regime for remote work, home office or other distance work and determine the return to the face-to-face work regime, regardless of the existence of individual or collective agreements, waived prior registration in the individual employment agreement.

The provision is examined by parts. It should be noted that the provisions regulated therein may occur only and only during the state of public calamity. In this case, the employer's potestative right prevails. Under Article 2 of[20] CLT, the employer directs the personal provision of services. There is no mention of harmful agreement

[20] Article 2. An employer is considered to be a company, individual or collective, which, assuming the risks of economic activity, admits, hires and directs the personal provision of services.

changes[21], since the authorization stems from public policies[22] that aim to contain the possible contagion of employees with the virus in environments with many people.

The change, at the employer's discretion[23], concerns the work regime, from face-to-face to remote work, remote work or other type of distance work, as well as determining the return to face-to-face work[24].

It is important to note that the change referred to above does not depend on the existence of individual or collective agreements or on the prior registration of the change in the individual employment agreement. This is because the period is short and the needs are urgent, and any bureaucracy that hinders the desired efficiency must be removed.

Paragraph 1. For the purposes of the provisions of this Provisional Measure, remote work or distance work is considered to be the provision of services predominantly or entirely outside the employer's premises, with the use of information and communication technologists who, by their nature do not constitute external work, the provisions of item III of the *caput* of Article 62 of the Labor Laws, approved by Decree-Law Consolidation No. 5,452, dated 1943.

The Provisional Measure is calling remote work any and all work performed outside the employer's premises, even that work that technically is not.

[21]Inapplicable, in this case, the rule of Article 468 of the CLT, which provides as follows: In individual employment agreements, it is only lawful to change the respective conditions, by mutual consent, and even so, as long as they do not result, directly or indirectly, losses to the employee, under penalty of nullity of the clause in breach of this guarantee.

[22] Law No.13,979/20, Legislative Decree No. 5/20 and, specifically, MP No. 927/20.

[23]A peculiar case is verified in Public Civil Action No. 0020269-39.2020.5.04.0029, filed by the Union of Employees in Accounting Offices and Companies of the State of Rio Grande do Sul (SINDESC/RS) against RSO Serviços Contábeis EIRELI, with the objective of forcing the defendant to implement the remote work system. The request was granted a preliminary injunction, which was based on the current federal legislation and, even more, the set of specific municipal regulations for COVID-19 (especially in Municipal Decree-Law No. 20.525/2020, Article 2 paragraph 4, provides: "*Paragraph 4. Accounting offices that are unable to carry out all their activities immediately remotely, may, until March 27, 2020, operate with up to 30% (thirty percent) of the total of their employees in person.")* . In particular, the judge understood that art. 4th *caput* of MP No. 927/2020 did not exclude the possibility of the employees' initiative to change the work regime (from on-site to remote work).

[24]As seen in topic 2 of this article, remote work consists of providing services **predominantly** outside the employer's premises, using information and communication technologies that, by their nature, do not constitute external work.

Distance working and working from home, as well as *home-office*[25], do not necessarily constitute remote work.

Despite item III, Article 3, of MP No. 927/2020 having used the expression "remote work", a type of distance work, in fact, any and all types of distance work, even if working at home in the strict sense[26], can be used as an alternative to coping with the Covid-19 pandemic[27].

Paragraph 2. The change referred to in the *caput* will be notified to the employee at least forty-eight hours in advance, in writing or by electronic means.

It is true that, in view of public calamity, as already mentioned, the employer's potestative right, who directs the provision of work, to change the work regime of its employees from on-site to work remotely[28] and vice versa prevails.

On the other hand, the direction of work by the employer is not to be confused with the fact that the change must be reported within a reasonable time. Given the pressing need, the MP set this deadline at least forty-eight hours. Both the change of the face-to-face work regime to remote work, and the return to face-to-face work, do not follow the general rule of CLT, of fifteen days (Article 75-C, paragraph 2). In this case, due to the public calamity, it is reiterated, the period must necessarily be reduced.

Paragraph 3. The provisions relating to the responsibility for the acquisition, maintenance or supply of technological equipment and necessary and adequate infrastructure for the provision of distance work, remote work or work from home and the reimbursement of expenses borne by the employee will be provided for in a written contract, previously signed or within thirty days, counted from the date of change of the work regime.

[25] See Article 6 of the CLT: No distinction is made between the work carried out in the employer's establishment, the work carried out at the employee's home and that carried out at a distance, provided that the conditions of the employment relationship are characterized.

[26] In this sense: Seamstresses from São Paulo favelas work in a "*home office*". Available at: http://www.anf.org.br/costureiras-de-favelas-paulistanas-trabalham-em-home-office/. Accessed on April 20, 2020.

[27] In this sense, see Souza Júnior, Antonio Umberto; Gaspar, Danilo Gonçalves; Coelho, Fabiano; and Miziara, Raphael, 2020, p. 61.

[28] Once the necessary conceptual explanations have been made, it is called remote work, distance working, as provided for by MP No. 927/20.

The Provisional Measure clearly determines that the acquisition, maintenance and supply of equipment and infrastructure for remote work must be provided for in the agreement. Such provision is not to be confused with the contractual amendment. The case is to make it clear who is responsible. Of course, as a rule and even for reasonability, special equipment and infrastructure, which are not common, must be provided by the employer. In any case, such provisions must be expressed in the agreement.

On the other hand, the Provisional Measure determined that the agreement that deals with the provisions related to equipment and infrastructure, must have its form in writing, previously signed, within thirty days, counted from the change of the work regime.

Paragraph 4. In the event that the employee does not have the technological equipment and the necessary and adequate infrastructure to provide distance work, remote work or home office:

I - the employer may supply the equipment on a lending basis and pay for infrastructure services, which will not characterize funds of a salary nature; or

II - if it is impossible to supply the lending regime referred to in item I, the period of the working day will be counted as working time available to the employer.

Paragraph 4 is examined together with Paragraph 3, but in parts. In this provision, the possibility is opened that the employee does not have the technological equipment and the necessary and adequate infrastructure to provide teleworking, which is not uncommo. In such cases, the employer may (shall not) supply the equipment on a lending basis[29], as well as, may (shall not) pay for infrastructure services, such as electricity, internet, etc., not characterizing such payment, a salary

[29] Civil Code, Article 579. Lending is the free loan of non-fungible things. It makes up for the tradition of the object.

amount , which is logical because these are values received for work and not due to work[30].

However, it may happen that the employer is also unable to offer equipment on loan to its employees. In this case, even if there is no way to carry out the necessary activities, the period will be characterized as time available to the employer. It could not be otherwise, since the risk of economic activity is attributed the employer. In this sense, Article 4, of CLT, provides: “Effective service is considered to be the period in which the employee is at the employer's disposal, awaiting or executing orders, unless a special provision is expressly assigned.”

Paragraph 5. The time spent using applications and communication programs outside the employee's normal working hours does not constitute time available, a standby or a warning system, unless there is a provision in an individual or collective agreement.

It should be noted that the provision deals with the use of applications and communication programs outside the employee's normal working hours. In any case, considering that remote workers are not subject to the rules of working hours limits, payment of overtime[3132], payment of alert or hours of readiness[33], unless provided for in an individual or collective agreement, paragraph 5 appears unnecessary and ineffective.

On the other hand, it is possible to interpret the command in a reverse way, that is, the employment agreement or the collective norm may provide for the payment of the addition referred to therein, even if there is a waiver under Article 62, item III of the CLT.

[30] CLT, Article 458, paragraph 2. For the purposes set out in this article, the following benefits granted by the employer will not be considered as salary: I - clothing, equipment and other accessories provided to employees and used in the workplace for the provision of the service.
[31] CLT, Article 244, paragraph 3. An employee is considered to be on standby who stays on the Estrada's premises, awaiting orders. The “readiness” scale will be a maximum of twelve hours. The hours of "readiness" will, for all purposes, be counted at the rate of 2/3 (two thirds) of the normal hourly wage.
[32] Although in Section V of Chapter I, Title III, of the CLT, which deals with railroad workers, readiness extends, by analogy, to other activities
[33] Although in Section V of Chapter I, Title III, of the CLT, which deals with railroad workers, the caution extends, by analogy, to other activities.

Article 5. It is permitted to adopt the home office, remote work or distance work regime for interns and apprentices, in accordance with the provisions of this Chapter.

CLT's general rule on remote work does not exclude trainees and interns. Although an intern is regulated by its own law and the existing relationship[34] cannot even be called labor[35], there are aspects of subordinate work that apply to it. The apprentice, on the other hand, is regulated in CLT itself, in articles 428 to 435.

It is, in this case, overzealous. If there was no such prediction, apprentices would still be able to telework. One might, perhaps, have doubts about the intern. Anyway, as mentioned in the legal command, interns will be able to carry out their activities on a teleworking basis.

MP 927/2020 did not address the precautions that the employee must take to avoid illness and accidents at work. Thus, it applies to teleworking cases resulting from public calamity by Covid-19, the general rule contained in Article 75-E and single paragraph, of CLT.

Article 33. Remote work and telemarketing regulations, as provided for in Section II, Chapter I, Title III, of the Consolidation of Labor Laws, approved by Decree-Law No. 5,452, do not apply to remote workers, pursuant to the provisions of this Provisional Measure.

The provision is contained in Chapter X of Provisional Measure No. 927/2020,dealing with other provisions in labor matters.

It is clear that remote work is not to be confused with activities related to remote work and telemarketing work. The normative discipline of these activities is regulated in Articles 227 to 231 of the CLT and it is presumed that the MP intended to rule out any possible and aberrant understanding that remote workers would apply the daily workload of 6 hours, as well as the special rest periods contained in CLT.

Article 62 - The regime provided for in this chapter does not include: [...] III - remote work employees.

[34] Article 1 of Law 11,788/2008: "Internship is a supervised school educational act [...]" crossed..
[35] Law No. 11,788/2008.

The command of Article 62, item III, of CLT, applies to remote work provided for in the general rule (Articles 75-A to 75-E, of CLT) and also to remote work of the exception regime resulting from public calamity by Covid-19 and standardized in MP No. 927/2020.

Although it was not necessary, paragraph 1, of Article 4 of MP No. 927/2020, already examined, expressly provides for the application of Article 62, item III, of CLT, in this case.

Thus, the remote work employee, due to the coronavirus pandemic, will not record hours and will not be entitled to additional overtime

6 CONSIDERAÇÕES FINAIS

Remote work is a contractual modality as a creation of the Information Revolution. Its foundations are different from the work conceived and governed in the Industrial Revolution and, therefore, it truly lacked its own regulation. In 2011, the national legislator made a mistake when declaring the equal treatment between face-to-face and remote work, which is currently corrected with the correct emphasis on remote work in CLT.

Remote work is similar to distance work while home office is a type of remote work. Therefore, it is concluded that it is not correct to use remote work as a synonym for distance work or work from home (and its home office variant) as they are essentially different institutes.

In teleworking, the center of the findings and consequences of the employment relationship is no longer the workplace and the purchase of hours of the employee's day.

The employer becomes polarized, branches, extends its presence and reach to any place where communication can reach (and, with it, work). The employee begins to effectively sell his work and the remuneration patterns migrate from hourly wages to productivity wages, changing cultures, business dialogues and agreements.

The working time, is no longer so relevant, which can be positive, even for the employee, who starts seeing the achievement of the old vindication viable reconciliation worthy of its various experiential dimensions. In remote work, there is no purchase of time, there is no work hours to fulfill. Remote work is timeless and flexible.

As technology has no geographical boundaries, remote work allows many overflows (municipal, regional, national) and this leads to a rethinking of contractual models and to the need for strong and representative international entities, which guarantee the effectiveness and efficiency of the agreements and of existential minimums.

At the national level, although several years late (including in comparison with South American countries), Brazil finally rules remote work relations, recognizing the phenomenon, when subordinated, as a special type of employment agreement and imposing, for its validity, the written form. Following the reformist logic, it delegates to the parties, at different times, the decision on issues related to the establishment and dynamics of the adjustment (equipment and expenses, for example) and imposes on the employer the duty to instruct the employee in remote work regime on health and safety at (remote) work.

Taking as reference the experiences of other countries, but not copying them, Brazil builds its own model and joins the list of countries that have regulations for remote work through a positive norm.

However, forensic practice indicates that the institute in its new regulation goes through a period of corporate testing and, with regard to the controversies raised before the Judiciary, it is still to be followed the reading that will take place, especially, at the moments of individual adjustments admitted by the legislator, outside the outlines of CLT Article 444 in its single paragraph, which only recommends the continuation of the study.

The model, had to be adapted to the needs of the public calamity period arising from Covid-19, where time is scarce and everything must be carried out more quickly, under penalty of losing effectiveness jobs and lives. That is why it is said that

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MP No. 927/2020 did not create anything in relation to remote work, it only eased CLT formalities (Articles 75-A to 75-E) antagonistic to this moment of urgency.

It is certain, therefore, that there is no incompatibility between the rules on remote work provided for in CLT and the rules on remote work provided for in MP No. 927/2020.

It is the beginning of a new time, a time when it is still possible to realize that "not everything is equal to everything", despite the liquidity of relationships and the speed in technological advances, natural inducers of human massification.

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