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PROENÇA DE CARVALHO

Labour and Social Security Law

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TELEWORKING AND ORGANISATION OF WORK DURING THE SECOND EXTENSION OF THE STATE OF CALAMITY

Resolution of the Council of Ministers 40-A/2020 of 29 May

The epidemiological situation caused by COVID-19 has required the constant approval and reshaping of extraordinary legislative measures with a view toward preventing the transmission of the disease, with continual reassessments carried out in light of the evolution of the pandemic in Portugal.

Between 14 March and 21 March 2020, provided that it was compatible with the functions to be performed, teleworking could be unilaterally implemented by the employer, or requested by the employee, without the need for an agreement between the parties.[1]

With the declaration of the state of emergency and its successive renewals, teleworking became mandatory – regardless of the nature of the employment contract – whenever the employee's functions could be performed remotely.[2] This obligation was maintained after the end of the state of emergency, during both the state of calamity declared throughout the entire national territory as well as its first extension.[3]

In the context of the lifting of confinement measures, the Portuguese Government has passed the Resolution of the Council of Ministers 40-A/2020 of 29 May declaring the extension of the state of calamity throughout the national territory, effective from 1 June to 14 June 2020. Significant measures have been approved in relation to teleworking in this resolution.

As of 1 June 2020, teleworking has ceased to be mandatory and the provisions of articles 165 to 171 of the Portuguese Labour Code are once again applicable. The main consequence of this amendment is the need for the employer to enter into a written agreement with each employee who is to be working remotely.

Exceptionally, teleworking will remain compulsory when requested by the employee and the functions in question can be performed remotely, in the following situations:

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[1] As provided for by article 29 of Decree-Law 10-A/2020 of 13 March, in its original version.

[2] As provided for by Decree 2-A/2020 of 20 March; Decree 2-B/2020 of 2 April; and Decree 2-C/2020 of 17 April, which regulated the state of emergency and its extensions.

[3] As provided for by the Resolution of the Council of Ministers 33-A/2020 of 30 April and the Resolution of the Council of Ministers 38/2020 of 17 May.

(a) employees covered by the exceptional protection regime for immunosuppressed and chronically ill patients, provided for in article 25-C of Decree-Law 10-A/2020 of 13 March, as amended, as long as a medical certificate is presented;

(b) disabled employees with a degree of disability of at least 60%;

(c) employees with children or other dependants under the age of 12 or, regardless of age, with a disability or chronic illness, and to whom they need to provide assistance as a result of the suspension of on-site teaching and non-teaching activities in educational establishments or the suspension of social facilities to support early childhood or situations of disability outside the legally established school-holiday periods (this possibility applies only to one of the parents).

In the situations listed above, the employee may request to work remotely and the employer will be obliged to accept this request insofar as the functions in question are compatible with remote work.

On the other hand, it has also been established that teleworking will be compulsory when physical spaces and the organisation of work do not allow for the guidelines of the General Directorate of Health (*Direção-Geral de Saúde* or "**DGS**") and the Working Conditions Authority (*Autoridade para as Condições do Trabalho* or "**ACT**") on the matter (in particular social distancing between employees and workstations) to be complied with. In these cases, either the employer or employee may unilaterally impose teleworking. The recommendations of the DGS and ACT on the organisation of workplaces can be found in the list of relevant websites below.

Outside these situations, teleworking must comply with the regime established by the Portuguese Labour Code, in particular the following rules:

(i) A written agreement between employee and employer is required;

(ii) The agreement must, among other requirements, indicate to whom the working tools belong as well as who is responsible for their installation and maintenance and for payment of related consumption and usage expenses (when this is not stipulated, the tools are presumed to belong to the employer, who must ensure their installation and maintenance and pay the related expenses);

(iii) In the case of a current employee (i.e. someone who is not directly hired under the teleworking regime):

- the initial duration of the teleworking agreement may not exceed three years (or whatever period is established in an applicable collective bargaining agreement);
- either party may terminate the agreement during the first 30 days, in which case the employee must return to performing his or her normal duties on-site at the workplace.

It should be noted that, when there is a change in the applicable working regime (e.g. from teleworking to working on company premises), that circumstance should be communicated to the insurance company with which occupational accident insurance has been contracted. Therefore, we suggest that the respective insurance entities be contacted in order to guarantee coverage of occupational accidents that may occur, particularly when teleworking is adopted on the basis of a rotating schedule (implying that the employee has two designated workplaces in a single month).

In situations where teleworking cannot be adopted, measures to prevent and mitigate the risks arising from the pandemic may be implemented, respecting the limits on maximum working periods and the right to daily and weekly rest established by law or by an applicable collective bargaining agreement, including measures such as the adoption of daily or weekly rotation schedules, staggered entry and exit times, different break and meal times, etc.

To this end, we would like to recall that, in accordance with article 217 of the Portuguese Labour Code, working schedules that have been individually agreed with the employee may not be unilaterally modified by the employer. When the working schedule was not individually agreed, any changes must be preceded by consultation with the employees concerned and with the employees' representatives (if any) and must be publicly posted in the company's premises seven days prior to the date on which they become effective – or three days in the case of companies with fewer than 10 employees. This procedure need not be followed if the change in the working schedule is effective for less than one week, provided that it is properly recorded in a registry book, stating that the employees' representatives (if any) were consulted and, in any case, only if the employer does not resort to this regime more than three times a year.

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Relevant links

MEASURES TO PREVENT COVID-19 IN COMPANIES

Portuguese version of the guide published by the DGS regarding measures to prevent the spread of COVID-19 in companies.

19 RECOMMENDATIONS TO ADAPT WORKPLACES

Portuguese version of the guide published by the ACT with 19 recommendations to adapt workplaces and protect employees in the context of the COVID-19 pandemic.

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