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Employment Law

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NEW TELEWORKING LEGISLATION AND EMPLOYER'S DUTY TO RESPECT EMPLOYEES' RIGHT TO DISCONNECT

Law 83/2021 of 6 December

Law 83/2021 of 6 December ("**Law 83/2021**") amends the Portuguese Labour Code ("**PLC**") and the legislation on occupational accidents (Law 98/2009 of 4 September). It modifies the regulation of teleworking and introduces a general duty on employers to refrain from contacting employees outside their working hours and **will enter in force on 1 January 2022**.

In this Newsletter we will also address a set of measures with labour impact recently approved by the Council of Ministers, as well as the changes to article 251 of the PLC concerning bereavement leave in case of death of first degree relatives in the direct descending line, which are still pending presidential ratification and publication.

1. NEW TELEWORKING FRAMEWORK

Law 83/2021 makes significant changes to the regulation of teleworking found in articles 165 to 171 of the PLC, namely regarding the definition of teleworking itself.

Under the new wording of article 165(1) of the PLC, teleworking is now considered to be "*the provision of work by an employee under the legal subordination of an employer, in a place not determined by the latter, through the use of information and communication technologies*".

Thus, the requirement of regularity (*habitualidade*) that until now characterised this way of working has been removed, and in making this change Portugal has moved away from the concept of teleworking established by the European Framework Agreement on Telework concluded in July 2002.

This change appears to be intentional and, combined with the other modifications in Law 83/2021, suggest that the new rules are to apply to all remote working arrangements, including hybrid or mixed models (i.e. where only part of an employee's working time is performed remotely).

- **Teleworking agreement**

There is still a requirement to have a written agreement with each employee. This agreement should set out the continuous or alternating periods of working remotely and in the workplace and shall include:

- i. the place where the employee habitually performs his or her work – this is particularly important for the legislation on occupational accidents (Law 98/2009 of 4 September), which is also amended and now sets out that, in the case of teleworking, the concept of

“workplace” should include the place stipulated in the agreement as where the employee teleworks;

- ii. the normal daily and weekly working hours;
- iii. the working schedule;
- iv. the employee’s remuneration, including additional and ancillary payments;
- v. who owns the tools used by the employee to work, as well as the party responsible for installing and maintaining them – the agreement must also specify whether the tools are provided by the employer or acquired by the employee; and
- vi. the frequency and means by which the employee will have personal contact with supervisors and other employees – this is because the employer is obliged to take measures to reduce employees’ isolation and, under the new rules, must ensure that they have in-person contact at least once every two months.

This agreement may be **open-ended** or entered into for a **fixed-term**. Fixed-term teleworking agreements cannot exceed six months and will be automatically renewed for periods of the same length if neither party opposes the renewal in writing at least 15 days before it takes effect. Either party may terminate an open-ended teleworking agreement at any time by giving written notice, with that termination taking effect after 60 days.

In both scenarios, during the first 30 days both the employee and the employer can terminate the agreement (this rule remained unchanged).

Under the new wording of article 167(5), upon the termination of the teleworking agreement the employee has the right to return to work in the employer’s workplace, without prejudice to his or her professional category, seniority and any other rights that employees with identical functions and working hours who are working in the workplace have.

However, the new wording is not clear as to what happens upon the termination of the teleworking agreement when the employee has only ever worked remotely for the employer. In fact, considering that the law refers to the employee’s right to *return* to his or her activity in the workplace, the applicability of this provision to such situation may be questioned.

- **Opposition to teleworking**

Law 83/2021 also regulates situations in which either the employee or employer does not agree to a teleworking arrangement.

If **the employer proposes a teleworking arrangement**, the employee can oppose it without having to offer any justification and such opposition cannot constitute grounds for a dismissal with cause or the application of any other sanction.

If **the employee proposes a teleworking arrangement** and his or her role is compatible with it when considered in the context of the employer's operations as a whole, the employer may only refuse the teleworking request in writing and by providing justification for its refusal.

- **Right to telework**

Law 83/2021 extends the set of situations in which the employer must accede to an employee's request to telework and is not allowed to oppose to such a request.

Besides victims of domestic violence who meet the conditions set out in article 195(1) of the PLC, and employees with children up to the age of three, the following employees also have the right to telework (as long as their roles are compatible with teleworking and the employer has the necessary resources):

- i. employees **with a child up to the age of eight** if **both parents meet the conditions** to telework and they do so on a **rotating basis**; i.e. both parents telework for successive periods of equal duration over a maximum reference period of 12 months (applicable only to employees in companies with ten or more employees);
- ii. employees **with a child up to the age of eight** in **single-parent families** or in situations where **only one of the parents can telework** (applicable only to employees in companies with ten or more employees); and
- iii. employees who are **classed as a non-primary informal carer** (*cuidador informal não principal*), provided they can prove that status, for a maximum period of four consecutive or non-consecutive years.

The employer cannot refuse a request from employees who meet the conditions for exercising their right to telework in the first two categories. A request from a non-primary informal carer may be rejected on the grounds of imperative demands relating to the operation of the company.

- **Expenses**

Law 83/2021 mandates that employers are responsible for providing their employees with the equipment and systems necessary to telework and, as previously mentioned, the teleworking agreement must

specify whether the equipment and systems are provided directly by the employer or acquired by the employee.

Employers must also fully reimburse their employees for all additional expenses that they can **prove to have incurred** as a direct consequence of acquiring or using such equipment and systems to telework, including increased electricity bills, the cost of installing an internet service that ensures connection speeds sufficient to meet demand, and the cost of maintaining the equipment and systems.

Law 83/2021 clarifies that “additional expenses” are those incurred to acquire goods and services that the employee did not have before entering into the teleworking agreement, and increases in equivalent expenses that the employee already had compared to the same month in the year before the teleworking agreement was signed.

For tax purposes, these expenses are costs of the employer and not income for the employee.

These rules apply, when compatible, to all situations of remote work without legal subordination but in economic dependence.

- **Employee’s right to privacy**

Law 83/2021 reinforces the employee’s right to privacy, the duty to respect the employee’s working schedule, his or her rest times (and those of his or her family), and the employer’s duty to provide good working conditions, both from a physical and mental point of view.

If an employee teleworks from home, any visits by the employer to the workplace must respect the following conditions:

- i. be preceded by at least 24 hours’ notice;
- ii. serve only to monitor the employee’s working activity and working tools;
- iii. be carried out only with the employee’s consent and in his or her presence;
- iv. be carried out during working hours; and
- v. be appropriate and proportionate to the employer’s objectives and purposes.

In addition, the employer may not capture or use any images, sound, writing, historic records or use any other means of control that affects the employee’s right to privacy.

These rules apply, when compatible, to all situations of remote work without legal subordination but in economic dependence.

- **Collective bargaining agreements**

Under Law 83/2021, teleworking is now one of the matters to be regulated in collective bargaining agreements and, once so regulated, will take precedence over the statutory provisions, provided that they improve on them and are more favourable to the employee.

In this regard, it is expressly provided that collective bargaining agreements should regulate the conditions for teleworking.

2. GENERAL DUTY TO RESPECT EMPLOYEES' RIGHT TO DISCONNECT

Law 83/2021 adds a new article to the PLC that applies to all employment relationships (not just those of employees who telework), requiring employers to refrain from contacting their employees during their resting periods, except in cases of force majeure. It also stipulates that any less favourable treatment of an employee resulting from him or her exercising the right to rest will be deemed discriminatory. Failure to comply with this duty is considered a serious labour infraction, punishable with administrative fines.

The wording of this article does, however, raise some interpretation issues.

For example, it is doubtful to whom this general duty to refrain from contacting employees applies, given that by referring to the “employer” it is unclear if employees who do not have managerial positions or are not hierarchical superiors of the employees who are potentially being contacted are also bound by this duty.

This new rule is also silent on how this duty works when there is an exemption from working hours arrangement (*isenção de horário de trabalho*) in place.

It is also unclear whether the employer is forbidden from requesting employees to work overtime if there is no force majeure justification.

In our opinion, this duty to refrain from contacting employees should involve, first of all, employers adopting certain rules of conduct, notably ones aimed at guaranteeing that during the employee’s rest periods the employer uses the least intrusive possible means to contact the employee (*e.g.* email or text messages should be prioritised over phone calls). When the subject matter of the communication is not urgent at all, the employer should weigh up whether contacting the employee during his or her rest period is necessary or, alternatively, include a disclaimer in the communication stating that it is not expected that the employee analyse, respond or take any other action on said communication during his or her rest period.

In a nutshell, there should be clear guidelines about the terms and conditions under which employees should act when contacted by their employers outside of working hours (both from the point of view of managers or colleagues who need to make contact, and from that of the employees who are contacted).

The duty to refrain from contacts during resting periods applies, when compatible, to all situations of remote work without legal subordination but in economic dependence.

3. OTHER RELEVANT CHANGES

On 2 December 2021, the Council of Ministers approved a set of measures with labour impact, of which the following are worth highlighting:

- **The national minimum wage (“NMW”) for full-time employees is to be updated to € 705.00** in the mainland, effective as of 1 January 2022.
- A new **exceptional support measure was announced, to grant employers a subsidy** corresponding to a fixed amount per each employee who receives the NMW, provided that the relevant conditions are met, which will be set out in the statute that is yet to be published.
- **In 2022, unemployment benefits will be increased** so as to correspond to a minimum of 1.15 times the Social Support Index (*Índice de Apoios Sociais* or IAS, in its abbreviated form).

At the press conference of the Council of Ministers, the Minister of Labour, Solidarity and Social Security also announced that the Social Support Index for 2022 is to be set at **€ 443.00**. This update will impact social benefits, such as the unemployment benefit and retirement pension, the minimum amounts of internship allowances under the professional internship agreements, as well as the minimum contributory rate for members of corporate bodies.

The abovementioned measures are currently pending their publication in the official gazette, *Diário da República*.

4. BEREAVEMENT LEAVE IN CASE OF DEATH OF CHILD

On 26 November 2021, the Portuguese Parliament approved the Decree-Law no. 215/XIV, which **increases the number of justified absences in case of death of a first-degree relatives in the direct descending line to 20 consecutive days**, thus amending article 251 of the PLC.

This statute also introduces the right to psychological support for parents in case of death of a child or a first-degree relative in the direct descending line and in the event of the death of close family members, namely spouse and parents. Under the terms of this diploma, psychological counselling shall be requested to the assistant physician responsible for the psychological support at an establishment of the National Health Service, which shall be initiated in the five days following the death of the relative.

The decree is pending presidential ratification and shall enter into force on the day following its publication.

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