



International Employment Lawyer

New Ways of Working

Portugal 

Contributor:



CUATRECASAS

Portugal

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Remote working

1. Has the government introduced any laws and/or issued guidelines around remote-working arrangements? If so, what categories of worker do the laws and/or guidelines apply to – do they extend to “gig” workers and other independent contractors?

The Portuguese Labour Code established the legal regime for remote working, in particular teleworking, in 2003. This provided employers with a general framework for this kind of arrangement. During the covid-19 pandemic and its successive lockdowns, a vast array of legislation on telework was issued, given the specificity of the situation.

Back in March 2020, the teleworking regime could be unilaterally imposed by an employer or requested by employees, without the need for an agreement of the parties provided that it was compatible with the employees' functions. Independent contractors were excluded from the scope of this regime.

Due to the evolution of the pandemic, it was then determined that teleworking should be mandatory, regardless of the employment relationship (including contractors), whenever employees' functions allowed it. In this context, measures were also adopted to promote the compulsory implementation of teleworking within the scope of civil servants, whenever this was compatible with the functions being performed.

With the reduction in the number of covid-19 cases, in summer 2020 teleworking was no longer mandatory and the legal regime foreseen in the Portuguese Labour Code was solely applicable.

However, the increase of covid-19 infections led to the adoption of new measures in October 2020, which determined the promotion of teleworking whenever the nature of the activity allowed it. Considering the number of outbreaks, it quickly evolved to a point when teleworking became mandatory in the regions with a higher risk of infection.

It was only in November 2020 that teleworking was established as mandatory for companies that were the final users or beneficiaries of services provided by independent contractors, service providers and temporary employees.

After Christmas 2020 and with the new lockdown, teleworking once again became mandatory across the country. Despite a government announcement in March 2021 that teleworking would be mandatory until the end of the year, due to the success of the national vaccination programme teleworking ceased to be mandatory from 1 August 2021.

Council of Ministers Resolution No.181-A/2021 decreed mandatory teleworking between 25 December 2021 and 9 January 2022, which was then extended until 14 January 2022.

Other than this period of mandatory teleworking, at the end of

2021 Law No. 83/2021 was passed, which entered into force on 1 January 2022. This law modified the teleworking regime, introducing several changes to the Labour Code and to Law 98/2009 on work accidents and occupational diseases.

This new law states that provisions on equipment and systems; organisation, direction, and control of work; special obligations; privacy; and health and safety at work apply to all situations of remote work without legal subordination, but with economic dependence. The extension and scope of such obligations are unclear, but it is doubtful that this new teleworking regime was intended to accommodate “gig economy” workers and other independent contractors. It is more likely to have a residual character, to prevent situations where it is unclear if one is dealing with an employment contract or a service provision (eg, home workers), as this may change crucial rules on privacy or health and safety.

2. Outline the key data protection risks associated with remote working in your jurisdiction.

Until the pandemic, teleworking was used rather infrequently, and most Portuguese employers were not prepared – namely in terms of technology and data storage – to suddenly have their workforce almost entirely and permanently working from home or remotely.

For those reasons, teleworking mainly raised – and continues to raise – concerns regarding the employer's capacity to ensure that information is protected and that it stays confidential despite being remotely accessed and processed. Remote working enhances security vulnerabilities, which can lead to data breaches.

We would also like to highlight the use of technological solutions that, on one hand, allow employers to exercise their powers of management and control over work performance, but that, on the other, do not violate the general rule prohibiting the use of remote surveillance to control employees' professional performances, or that do not cause excessive restrictions on employees' private lives.

3. What are the limits on employer monitoring of worker activity in the context of a remote-working arrangement and what other factors should employers bear in mind when monitoring worker activity remotely?

In terms of privacy, the teleworking regime establishes that employers must respect employees' privacy and time with their families, as well as provide them with good working conditions, both physically and psychologically. This was made even clearer with the new teleworking law.

Whenever remote working is carried out at an employee's home, visiting the workplace should only be necessary to check work performance or equipment and can only take place during the employees' working hours, in the presence of the employee or a person designated by the employee, with prior notice of at least 24 hours and the employee's consent.

Regarding limits on employers monitoring employee activity, the Portuguese Labour Code prohibits the use of remote surveillance in the workplace to monitor the professional performance of employees.

Especially during the pandemic, when remote working and teleworking, in particular, were normalised, concerns arose regarding the limits of monitoring and how to adequately

safeguard employees' privacy.

On 17 April 2020, the National Data Protection Commission (CNPD) issued guidelines on remote control during teleworking, especially the need for monitoring working time and the fact that, in several companies, employees were using their own devices to work.

In these guidelines, the National Data Protection Commission clarified that, regardless of who owns the work equipment, under the teleworking regime employers retain powers to direct and control the execution of work by employees. However, since there are no special provisions on remote control during teleworking, the National Data Protection Commission believes that the general rule prohibiting the use of remote surveillance fully applies.

Therefore, technological solutions for remote monitoring of employee performance are not allowed. For example, software that, in addition to tracking working times, records websites visited; tracks equipment locations in real-time; monitors the use of peripheral devices; captures screenshots; records when access to applications is initiated; controls the document being worked on; or records the time spent on each task are all prohibited.

Please note that, during the pandemic, when remote working was most widespread, the National Data Protection Commission and Trade Unions reported a significant increase in employees' complaints about illegal monitoring taking place.

Also, since Portuguese labour law imposes an obligation to register working time (eg, start, pauses, end of work time), in teleworking this can be done through technological solutions. Applications specially designed for this purpose are allowed provided data protection principles are respected.

Concerns regarding these technological solutions were partially addressed by the new teleworking law, which states that when controlling the performance, the employer must respect the principles of proportionality and transparency, notably the employer cannot impose a permanent connection on employees through image or sound. Also, it is forbidden to capture and use images, sound, keystrokes, browsing history, or other information that may affect the employee's right to privacy.

4. Are employers required to provide work equipment (for example, computers and other digital devices) or to pay for or reimburse employees for costs associated with remote working (for example, internet and electricity costs)?

Yes, under the new teleworking law employers are responsible for providing employees with the equipment and systems required for the performance of their work and employee-employer interaction. The teleworking agreement must indicate whether such equipment is directly provided by the employer or acquired by the employee with the employer's approval regarding its characteristics and prices.

Furthermore, employers may define the usage conditions of the equipment in the teleworking agreement or the company's internal regulations; if the employer does not, it is assumed that there are no limits to the use of such equipment.

As mentioned above, under the general provisions on teleworking, employers should pay any extra costs related to

teleworking. As specified by the new teleworking law, employers will fully reimburse all additional expenses that the employee incurs as a direct consequence of acquiring or using the equipment and computer or telematics systems necessary for the performance of the work, which includes any additional energy and internet costs, as well as the maintenance costs of the equipment and systems. Such reimbursement is considered, for tax purposes, a cost for employers and does not constitute income for employees.

5. What potential issues and risks arise for employers in the context of cross-border remote-working arrangements?

The analysis of potential issues associated with cross-border remote working depend on whether employees are working in Portugal or abroad and if there are one or multiple employers involved and where they are located.

However, cross-border remote-working arrangements mainly raise issues regarding the definition of applicable law. The correct definition of the applicable law allows for compliance with labour and social security obligations that otherwise, if breached, pose significant risks to employers.

Even if there is an agreement through which the parties choose the applicable law, a set of mandatory provisions of Portuguese labour law would still apply if the work is mainly performed in Portugal, namely in key areas such as termination, health and safety obligations, and insurance for workplace accidents. Failure to correctly identify the applicable law may have serious consequences, for instance, employers may be entirely and solely responsible for all liabilities deriving from a work accident.

6. Do employers have any scope to reduce the salaries and/or benefits of employees who work remotely?

Teleworking employees have the same rights and obligations as any other employees, which implies that no reduction in salaries or benefits is admissible, in principle. Under Portuguese labour law, employers cannot reduce basic remuneration unless expressly and exceptionally authorised by both the employee and the Authority for Working Conditions (ACT).

Reducing or cancelling any other payments to remote workers would be deemed discriminatory, and therefore illegal, except for situations where valid grounds could justify it.

Moreover, concerning reducing or suppressing benefits, the fact that benefits have been granted regularly over the years may lead to their qualification as acquired rights of the employees and part of employees' remuneration, which would mean restrictions on the termination, reduction or alteration of such payments.

During the beginning of the covid-19 pandemic, there was debate over whether employees were still entitled to a meal allowance if they were teleworking, since the cause for payment would cease to exist (ie, employees would no longer be forced to spend money on out-of-home meals). However, the government clarified that, under the special compulsory teleworking regime (whenever the nature of the functions being performed was compatible with it), employees retain the right to a meal allowance, based on the principle of equal rights for on-site employees and teleworkers. It is now fairly and widely accepted that such meal allowances cannot be withdrawn based on the circumstances of teleworking employees.

The return to work and vaccinations

7. Do employers have a legal duty to provide covid-19-safe working environments? If so, what practical steps can employers take to satisfy this duty?

Yes, employers must protect the health and safety of employees; adopt health and safety measures that arise from the law or collective bargaining agreements in the workplace; and provide employees with information and training to prevent work accidents or illness. Besides these general obligations in the Portuguese Labour Code, there are also specific obligations imposed on employers to prevent the spread of covid-19.

The ACT released a set of recommendations to employers to adapt workplaces and protect employees during the covid-19 pandemic. It is recommended that employers consider measures such as staggering schedules as much as possible, redistributing tasks, teleworking, employee rotation or setting different break times if the workspace does not allow for social distancing.

Furthermore, according to the ACT, it is important that indoor workplaces are ventilated, preferably by strengthening natural ventilation, and that the maintenance and cleaning of ventilation and air conditioning systems are guaranteed. Employers should also ensure, whenever necessary and possible, that the layout of workstations is changed to maintain social distancing and reduce contact between employees. If this is not possible, the ACT recommends creating a physical barrier between employees using, for example, partitions.

Employers must also ensure that employees have access to personal protective equipment to prevent occupational risks. Moreover, employers must maintain an updated contingency plan.

8. Can employers require or mandate that their workers receive a covid-19 vaccination? If so, what options does an employer have in the event an employee refuses to receive a covid-19 vaccination?

No, vaccination against covid-19 is not compulsory in Portugal, not even for so-called risk groups such as medical personnel or social workers. For the time being, employers cannot force employees to be vaccinated or ask them to provide information on their vaccination status; they can only recommend vaccination. Without the Portuguese parliament passing a law making vaccination compulsory, no private or public entity can force its employees to get vaccinated.

Furthermore, to implement a compulsory policy, employers would most likely have to obtain vaccination certificates from their employees, which would be unlawful under the Portuguese labour law.

9. What are the risks to an employer making entry to the workplace conditional on an individual worker having received a covid-19 vaccination?

Employers cannot require employees to provide information regarding their health – namely but not exclusively regarding their vaccination – except when it is strictly necessary and relevant to assess their suitability for work and the stated purpose is provided in writing to employees. Please note that even in such cases, health data would be provided to the

occupational doctor – ie, not directly to the employer – who in turn can only communicate to the company an employee's fitness to perform their role.

Therefore, it is unlawful to make entry to the workplace conditional on employees having an optional vaccine such as covid-19, both from a labour and a data protection perspective. Such behaviour can be deemed a very serious breach of labour laws, leading to penalties, orders to cease such conduct, and damages under general civil law principles.

10. Are there some workplaces or specific industries or sectors in which the government has required that employers make access to the workplace conditional on individuals having received a covid-19 vaccination?

No, there are not.

11. What are the key privacy considerations employers face in relation to ascertaining and processing employee medical and vaccination information?

See question 9.

In addition to the aforementioned rules for processing employee's health data, from a personal data perspective, the processing of special categories of data (vaccination data qualifies as health data) is generally forbidden unless one of the exceptions foreseen in article 9 (2) of GDPR applies. Therefore, this processing would only be lawful if this data is necessary for preventive or occupational medicine or for assessing the working capacity of the employee.

Health & safety and wellbeing

12. What are the key health and safety considerations for employers in respect of remote workers?

According to the Portuguese Labour Code, teleworking employees have the same rights and duties as other employees, namely concerning working conditions, health and safety, and medical care arising from work accidents or occupational illnesses. Employers must also be mindful of the isolation of remote employees by ensuring regular contact with the company and other employees.

Employers are responsible for the identification and management of risks in teleworking and on-site work alike. When addressing the health and safety risks of remote working, employers must pay particular attention to psychosocial risks and ergonomic factors.

Employers must organise, in specific and adequate terms, and with respect for employee privacy, the means necessary to fulfil their responsibilities regarding health and safety at work. Employers must provide employees with good working conditions both physically and psychologically; and carry out occupational health examinations before the implementation of the teleworking policy, and annual examinations thereafter to assess the physical and mental aptitude of employees to perform their work, the impact of the activity and the conditions in which it is provided on their health, as well as any preventive measures that may be appropriate.

Employees must give access to the place they telework to professionals designated by their employer to evaluate and control the health and safety conditions at work, at a previously

agreed time, between 9am and 7pm, and within the employee's working hours.

Employers must also keep insurance companies informed of the specific workplace of remote or teleworking, to ensure that their policy will cover any work accident that might occur.

13. How has the pandemic impacted employers' obligations vis-à-vis worker health and safety beyond the physical workplace?

Before the pandemic, teleworking and remote working were rather infrequent, hence there was little guidance on what specifications should be considered in terms of health and safety at work when employees were not onsite.

With teleworking became mandatory during a large part of the pandemic, employers had to consider many new health and safety challenges: particular attention was paid to equipment and conditions at home, with many companies paying for office chairs, monitors and other tools compatible with ergonomic standards. Also, due to the isolation and stress of successive lockdowns, employers enhanced their focus on mental health and well-being.

In terms of legal discussion, there was a significant debate around work accidents when employees are working remotely, due to the lack of specific provisions in the law.

With the new teleworking law, it was clarified that the legal policy for compensation for accidents at work and occupational illnesses applies to teleworking. The law considers the relevant 'workplace' to be the one chosen by employees to usually carry out their activities and 'working time' as all time during which, demonstrably, employees are working.

14. Do employer health and safety obligations differ between mobile workers and workers based primarily at home?

As far as Portuguese labour law applies to employment relations, health and safety obligations on employers are the same for employees working on-site, from home, remotely, or "mobile" employees, with the latter understood to be employees working in more than one place or travelling frequently as part of their job.

What differs is the evaluation of health and safety risks according to the specific circumstances of each employee (ie, even though the employers' obligations are the same irrespective of the type of employee, the assessment and specific measures to be applied to ensure compliance will vary in accordance with the way each job is performed).

15. To what extent are employers responsible for the mental health and wellbeing of workers who are working remotely?

According to the Portuguese Labour Code, employers must provide good working conditions, both physical and mental. Health obligations should be understood holistically, encompassing both mental and physical health and wellbeing. Since these obligations apply to employers regardless of the type of employment relationship, they will also include teleworking and remote-working employees.

In practical terms, this implies that, when the health and safety services assess risks, they will identify and analyse those

specific to the circumstance of not working onsite, such as stress, fatigue or sedentariness.

16. Do employees have a "right to disconnect" from work (and work-related devices) while working remotely?

With this new law on teleworking, the "right to disconnect" is now expressly established in the Portuguese Labour Code.

Therefore, employers must not contact employees in their rest period, except in cases of force majeure. Moreover, it is considered discriminatory to treat less favourably any employee that exercises their right to not be contacted during a rest period.

Notwithstanding this, such a right already be derived, namely from the duty – already expressly established in the Portuguese Labour Code – of the employer to respect employees' privacy and rest times and of the limits on daily and weekly working hours (ie, based on a combination of several rules, namely labour and constitutional, employees already had a "right to disconnect", both while onsite or working remotely).

Unions and/or work councils

17. To what extent have employers been able to make changes to their organisations during the pandemic, including by making redundancies and/or reducing wages and employee benefits?

During the pandemic, the government created a special and simplified lay-off system, aimed at maintaining jobs in companies that were totally or partially closed due to the imposition of the law. Under this system, employers could, in short, reduce the normal working time (daily or weekly) or suspend employment contracts.

Within this system, employers could reduce remuneration within certain limits: employees could earn at least two-thirds of their regular monthly remuneration, with a minimum amount of 635 euro in 2020 and 665 euro in 2021 and a maximum limit of 1,905.00 euro in 2020 and 1,995.00 euro in 2021.

Payments to employees were made by the employer, who received aid from Social Security corresponding to 70% of the costs. Employers were also exempt from social security contributions regarding employees under the simplified lay-off regime.

Other measures allowed for the reduction of salaries, namely extraordinary support for the progressive resumption of activity for companies with a temporary reduction of normal working times, which applied to companies not subject to facility closures, but that still had losses of 25% or more in a calendar month prior to the calendar month of the initial application or extension, compared with the same month of the previous year or 2019, or compared with the six-month average prior to that period.

Regarding the hours not worked under this scheme, employees were entitled to compensation of 80% of their gross pay paid by employers. If this sum represented a monthly amount lower than the employee's normal gross pay, the amount paid by Social Security would increase to cover the difference, capped at 1,995 euro.

Seventy per cent of the said compensation was borne by Social Security, with the employer responsible for the remaining 30%. Where the reduction in working time was more than 60%, Social Security support corresponded to 100% of compensation.

Please note that accessing these and other state support measures – not only labour and social security-based relief, but also some tax measures and tenancy benefits – meant employers could not terminate employment contracts based on collective or individual dismissal during the period they availed of said benefit and within 60 or 90 days after its end. Some support measures also forced employers to maintain current employment levels, and also limited, among other things, the right to terminate employment contracts by agreement (ie, in such cases, employers would have to repay the benefit that they were granted, either partially or entirely, depending on the situation).

18. What actions, if any, have unions or other worker associations taken to protect the entitlements and rights of remote workers?

Until the pandemic, unions in Portugal were not particularly focused on remote-working and teleworking employees or their working conditions and rights.

Nevertheless, during the pandemic, unions played an important role in shaping the contours and content of the special teleworking regime, namely through pressuring the government to address or clarify some key issues, such as the payment of meal allowances and other expenses to teleworking employees, but also to report some misconduct, such as illegal monitoring of teleworking employees.

Employers did not give unions a particularly relevant role in the adoption of covid-19 measures; the simplified lay-off regime meant there was a duty to consult with trade union delegates and workers' councils, when applicable, but not to negotiate with the unions.

19. Are employers required to consult with, or otherwise involve, the relevant union when introducing a remote-working arrangement? If so, how much influence does the union and/or works council have to alter the working arrangement (for example, to ensure workers' health and safety is protected during any period of remote work)?

No, this level of intervention regarding remote-working and telework arrangements is not available to unions.

At the most, unions can ask for information on general teleworking regimes that employers may wish to agree with employees under the general guidelines of the Portuguese Labour Code, since unions are entitled to be informed about decisions that are likely to trigger substantial changes in the organisation of work or employment contracts.

Nonetheless, please note that collective bargaining agreements may introduce specific terms regarding teleworking and remote-working regimes.

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