



## Telework in the Labor Reform

*Teletrabajo en la Reforma Laboral*

*Teletrabalho na Reforma Trabalhista*

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### Abstract

This study aims to discuss the requirements that characterize telework with the advent of the Labor Reform. Thus, we seek to understand general aspects inherent to this new form of work organization, such as concept, characteristics, and modalities. To carry out this research, as a methodology, we opted for a literature review on doctrines, laws and jurisprudence that address the topic under analysis. It was seen that telework has advantages and disadvantages for the worker, for companies and for society. Everything indicates that, if the meaning of telework is not distorted and, if it is implemented with due care and minimal observance of the recommended standards, this type of work tends to be beneficial to the integral parts of the labor relationship and to positively impact the society. However, the theme requires further study, considering that there is a large field to raise legal questions, especially regarding working hours under a telecommuting regime. The real effects, benefits and damages to the worker's rights and health, only time can reveal.

**Descriptors:** Labor Reform; Telecommuting; Characteristic Requirements.

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## Resumén

Este estudio tiene como objetivo discutir los requisitos que caracterizan el teletrabajo con el advenimiento de la Reforma Laboral. Así, buscamos comprender aspectos generales inherentes a esta nueva forma de organización del trabajo, como concepto, características y modalidades. Para realizar esta investigación, como metodología, se optó por una revisión de la literatura sobre doctrinas, leyes y jurisprudencia que abordan el tema en análisis. Se vio que el teletrabajo tiene ventajas y desventajas para el trabajador, para las empresas y para la sociedad. Todo indica que, si no se distorsiona el significado del teletrabajo y, si se implementa con el debido cuidado y el mínimo cumplimiento de las normas recomendadas, este tipo de trabajo tiende a ser beneficioso para las partes integrantes de la relación laboral y a impactar positivamente la sociedad. Sin embargo, el tema requiere un mayor estudio, considerando que existe un amplio campo para plantear cuestiones legales, especialmente en lo que respecta a las horas de trabajo en un régimen de teletrabajo. Los efectos, beneficios y daños reales a los derechos y la salud del trabajador, solo el tiempo los puede revelar.

**Descriptor:** Reforma Laboral; Teletrabajo; Caracterización de Requisitos.

## Resumo

O presente estudo objetiva discutir os requisitos caracterizadores do teletrabalho com o advento da Reforma Trabalhista. Assim, busca-se compreender aspectos gerais inerentes a essa nova forma de organização do trabalho, como conceito, características e modalidades. Para a realização dessa pesquisa, como metodologia, optou-se pela revisão de literatura em doutrinas, legislações e jurisprudências que se debruçam sobre o tema em análise. Foi visto que o teletrabalho apresenta vantagens e desvantagens para o trabalhador, para as empresas e para a sociedade. Tudo indica que, se o sentido do teletrabalho não for desvirtuado e, se for implantado com a devida cautela e mínima observância dos padrões aconselhados, essa modalidade de trabalho tende a mostrar-se benéfica para as partes integrantes da relação laboral e a impactar positivamente a sociedade. No entanto, o tema demanda um estudo mais aprofundado, tendo em vista existir um grande campo para suscitar questionamentos judiciais, especialmente no que tange à jornada de trabalho em regime de teletrabalho. Os reais efeitos, benefícios e danos aos direitos e saúde do trabalhador, só o tempo poderá revelar.

**Descriptor:** Reforma Trabalhista; Teletrabalho; Requisitos Caracterizadores.

## Introduction

Telework was conceived mainly as a response to the need for flexibility and decentralization of the production process to meet the demands of the new market and the informational economy, as well because of the technological facilities characteristic of the information society paradigm. In the case of work carried out at a distance, using information and communication technologies, this form of work organization allows for flexibility in hours and in the place where work activities are carried out.

The flexibility indicated can represent an advantage for the worker, guaranteeing him/her full autonomy to self-determine the exercise of tasks related to work, being able to adapt the working day to his/her biorhythm and to his/her own convenience. Paradoxically, however, it may imply the impossibility of measuring the time worked and of establishing a separation between working time and rest time, which can cause the worker to be submitted to exhaustive working hours, excluding free time. to recover and to perform activities not related to work.

The changes resulting from the Information Technology Revolution gave rise to a new social paradigm: the paradigm of the information society. Among the main impacts caused by such changes, the transformation of the

economy and the market is noted, which, therefore, impacted the form of organization and production processes related to companies and work. Telework was conceived in the middle of this period of history, aiming to meet the demands of the new market.

This study aims to discuss the requirements that characterize telework with the advent of the Labor Reform. Thus, we seek to understand general aspects inherent to this new form of work organization, such as concept, characteristics, and modalities.

### The information economy: the new market and company reorganization

The diffusion of information processing and storage technology allowed the connection between computers without spatial limitation. In addition to modifying the concepts of space and time, they generated effects on the economy<sup>1</sup>.

As for the effects of computerization, automation and globalization on the economy, Alexandre Belmonte<sup>2</sup> highlights the increase in production capacity and the corresponding decrease in the cost of this production; lower prices for services and products; an increase in the circulation of capital; the minimization or elimination of



spatial boundaries; the weakening of the National State vis-à-vis multinational and transnational companies; as well as the difficulty in implementing social rights.

Benkler<sup>3</sup> attributes to two movements the origin of the system that it calls Networked Information Economy (Networked Information Economy, in translation). First, the emergence of an economy centered on information (financial services, accounting, software, and science), cultural production (film and music) and symbol manipulation. And second, the change to a communication environment developed on low-cost, high-capacity processors, interconnected to a network (Internet).

This low-cost communication and the development of technologies and information processing enabled individuals to create and exchange information, knowledge and culture in a cooperative, reciprocal, and shared way. In this way, non-proprietary production models become more attractive and effective. It created the possibility of developing sustainable collaborations and sharing resources based on Commons, different from traditional property-based arrangements. This led to the decentralization of production and the development of new creations, as well as the Commons based peer production<sup>3</sup>.

The networked information economy emerged from the breaking of the high-cost barrier characteristic of the organization of production in the industrial model. The production of information and its transmission required a high financial investment in equipment, such as a mechanical printer or a transmission station, for example. The development of new technologies, as well as their consequent cheaper, made this production accessible to everyone<sup>3</sup>.

Thus, an informational, global and networked economy emerged. The term informational refers to the fact that competitiveness, in this new scenario, flows directly from the ability to generate, process, and apply information based on knowledge. Global designates a globalized economy, that is, whose organization of the productive, consumption and distribution sector takes place through a connection network of economic actors on a global scale. In a network, because it refers to the global network of interaction between business networks, which generates productivity and competition<sup>4</sup>.

The economy becomes even more virtualized or deterritorialized because of the use of online databases and other IT tools. There is talk of becoming "even more", because, as is known, the finance sector is "one of the most characteristic activities on the scale of virtualization". This is because the currency itself, the base of the financial sector, is a virtual object, facilitating exchange at the expense of more concrete goods, such as land or services that were used as "exchange currency"<sup>5</sup>.

The insertion of technologies enabled instant communication, without geographic limitations, of markets, finances, and production chains, resulting in this trend in the globalization of the economy. François Chesnais<sup>6</sup> points out two movements that, together, caused the so-called globalization. The first would be "the longest phase of uninterrupted capital accumulation that capitalism has

known since 1914"; and the second would be about "policies of liberalization, privatization, deregulation and dismantling of social and democratic achievements".

This globalization or globalisation stems from the absence of geographic boundaries. In this sense, Manuel Castells emphasizes that this expansion of the scope of the economy was not exclusively due to new technologies, but rather to a set of these with a new way of organization.

One of these organizational factors stems from the specialization of territories, which led to a reduction in the production arena and an increase in the respective area. That is, there is a decrease in the space for the right production process and the respective increase in space for other instances of production, circulation, distribution and consumption<sup>7</sup>.

The specialization of territories led to the separation of production by geographic area, implying concentration of the production process of a given item in a location where its production is more advantageous. This advantage is measured not only by the availability of natural resources, on the contrary, it is due to technical and social criteria rather than environmental ones. Therefore, there was a need for exchange, or "expansion of the area" to circulate the objects of the production process<sup>7</sup>.

The decentralization of the production process means that its stages can occur each in a different location, in a dissociated and autonomous way. The need for "expansion of the area", therefore, is nothing more than the need for complementation or cooperation between different places, causing production circuits and exchange flows<sup>7</sup>.

The new economy is marked by a high degree of internationalization, with a globalization of products, money, credit, debt, consumption, and information. There is, therefore, a homogenization, the search for a single standard. In that regard, Milton Santos<sup>7</sup> highlights the idea of "added value" at the global level. This "added value" would be made possible by unified production and by the action of large organizations that, because of competitiveness, seek to improve their own capacity to innovate and produce, as a means of obtaining greater profit. Thus, "At each moment, the greatest asset is always seeking to surpass itself".

A notorious impact of the new technologies and the globalized economy was the unification of the productive technique. Technical systems were local or regional, diversified around the globe. Although they might be similar, they were usually not similar at the same time (contemporary), even less interdependent on each other. In the new paradigm, however, it turns out that technical systems are broadly the same around the globe. This uniqueness is due to the globalization of impulses that receive technical processes<sup>7</sup>.

The technical uniqueness, therefore, stems from the fact that "current techniques form a global-scale system, each place housing interdependent fragments or pieces"<sup>10</sup>. Thus, even though different places may present different degrees of presence and complexity, they participate in the same global technique.



Cyberspace has given rise to an online marketplace, which is not limited to geographic borders and into whose roles of consumer, producer and intermediary have changed substantially. Ease of access and the diversity of offers presented to the consumer endow the new market with greater transparency compared to the classic market. This transparency results in a differentiated and personalized market, which allows producers to adapt, in real time, to the evolutions and varieties of the demands of consumers<sup>5</sup>.

Thus, there is a gradual advance of a world financial market which, operated through computer networks, is covered by different rules for capital investment and for the valuation of stocks and bonds in general. Pierre Lévy<sup>5</sup> shows that, in this cyberspace, the movements of our attention guide everything, since the passages and returns to websites and mouse click movements are factors that define marketing which, in turn, determines the paths that must be followed by production.

Therefore, there is no need for consumers to effectively buy to determine the specifics of demand and guide production and the economy, since the simple directing of consumers' attention to a particular good or service is sufficient for such a desideratum.

The systems we access on the internet have algorithms with the ability to capture and systematize data. Thus, they can capture information about personal preferences, relationships, careers, habits, etc., systematizing them in profiles and, consequently, getting to know people and their predictions<sup>8</sup>. As a result, the company with the largest database has the possibility of obtaining accurate predictions and potentially will monopolize the market.

In other words, "each moment of personal awareness contributes to directing the world market". This is since virtuality reacts faster than reality to shifts in people's attention, who start to command the organization in the physical world, turning the informational economy into an "attention economy" or "awareness economy"<sup>5</sup>.

Production had to be remodeled to meet an extremely diversified, dynamic, and globalized demand. The mass production model, characterized by automation and standardized production in assembly lines, was abandoned, giving way to the flexible production model, which was developed to overcome the rigidity of the previous model and meet the demands of the new market, through the adapting to your ongoing transformation<sup>4</sup>.

The Internet and other technologies have transformed business practice "in its relationship with suppliers and buyers, in its administration, in its production process and in its cooperation with other firms, in its financing and in the evaluation of shares in financial markets". In this context, the electronic company originated, understood as the company whose place of performance of key operations related to administration, financing, production, distribution, sales, among others, is predominantly the Internet<sup>4</sup>.

This type of virtual business provides the company, due to its five characteristics, "an ability to develop organically with innovation, production systems and market

demand, while keeping attention focused on the ultimate goal of any business: making money"<sup>4</sup>. First, therefore, there is scalability, which refers to the possibility of including in a network as many components as desired, on a global or local scale, which can be reduced or expanded without additional cost, because the production system can be easily reset.

Second, there is interactivity, which enables contact, in real time, between the company and its suppliers, employees or consumers. The third characteristic refers to the administration of flexibility, that is, the possibility of maintaining control of activities while expanding their reach and diversifying their composition, as needed<sup>4</sup>.

The use of a brand is another possibility, which is of notable importance, as it is "a symbol of recognized capacity to create value" in a universe where business projects are the result of a multilateral effort. Finally, customization, which is aimed at an individualized and diversified market demand, adapting production to the consumer's will<sup>4</sup>.

The electronic or virtual company, as opposed to the traditional company, tends to replace the physical presence of employees, at certain times, to insert them into a network or networks of electronic communication and instruments and programs that make this relationship viable. In this way, the productive center is no longer a physical space but an organizational process, its geographical location not being precise, whose importance in this context perishes, as its elements are nomadic and dispersed<sup>5</sup>.

This new configuration of the company, therefore, aims to meet an extremely diversified and unpredictable market demand, seeking to ensure innovation and the achievement of optimal production resulting from accelerated, flexible, cheap, and planned production, thus giving rise to the need for an intellectual work capable of predicting market demand and coordinating production in that direction<sup>9</sup>.

The organization of companies has also become more flexible and specialized, adopting the form of a network company, or network company. This reformulation of the company can be understood as "a new way of organizing and managing these hierarchies, as well as maximizing the possibilities of 'internalizing' the 'externalities' (that is, the external advantages, in Alfred Marshall's sense), provided for the functioning of the network"<sup>6</sup>.

To adapt to the market's unpredictability in the face of new technologies, networks have become a fundamental component of organizations. The ability to expand geographically and the power to allow the circulation of information made possible by new technologies are characteristics of networks that represent a key factor for the operation of a flexible and adaptable model<sup>4</sup>.

Companies organized based on the principle of vertical integration and social and technical division of labor, characteristics of Fordism, which sought to increase productivity from a mechanized process of standardized mass production, became obsolete in view of the characteristics of new economy<sup>4</sup>.



The vertical company, whose work was organized hierarchically, could be represented by a pyramid – the highest positions representing the top, occupied by a few people; and the lowest positions representing the base, occupied by a larger contingent of people. In the informational economy, however, the company does not present itself in this way, it could be represented as a brain, encompassing its synapses and neurons, or a three-dimensional network, disconnected from time and space<sup>10</sup>.

Thus, the Information Society paradigm gave rise to a global, networked, and informational economy, transforming the market into a more dynamic, diversified, and transparent version. Consequently, an organizational restructuring of the companies was necessary to guarantee a faster and more flexible production.

### Labor Reform: general aspects

The year 2017 will certainly be a milestone in labor relations and worker protection. The Brazilian socio-economic and political reality designed a scenario in which discussions about the flexibilization of labor rights and the transfer of State tutelage to the parties involved in these relations, as well as to the unions, took place quickly and outside of democratic principles.

The labor reform in the form of Bill 38, of 2017, under the argument of creating jobs and making the country more competitive, was approved "on the fly" thanks to "agreements" signed between the Chief Executive and representatives of the Power Legislative. Unfortunately, the dialogue with society and the working class was neglected under the pretext of the "urgent need to modernize labor legislation and generate jobs"<sup>11</sup>.

Thus, Law 13,467/2017, published in the Official Gazette of 07.14.2017, entered into force on 11.11.2017, promoting changes in more than 100 articles of the CLT. Marked by a controversial legislative process, it has generated diverse and controversial understandings, regarding damage to labor rights, precariousness of labor relations, weakening of unions and, why not say, deterioration of workers' living conditions and health. In turn, the *vacatio legis* period was insufficient for magistrates, legal scholars, legal practitioners, associative entities, unions and even companies to establish an understanding about its applicability and the constitutionality of the law itself<sup>12</sup>.

Labor reform has an impact on labor relations and on the worker's life. In general, Law 13,467/2017 engendered profound changes in labor relations, with impacts on the worker's health, whose consequences can be identified within a short period of time. The mischaracterization of the working day as a standard of health and safety at work can be considered one of the critical points and, why not say it, a big mistake in the reform.

### Reflections of the Labor Rights Reform

Despite all the changes promoted by the labor reform, it is possible to safely say that these collective bargaining principles were not affected by the amending law.

The Reform makes a decisive option in favor of private autonomy by disposing in the caput of Article 611-A, introduced in the CLT, that the collectively negotiated prevails over the law when it provides for the various themes it has in its 15 items, in addition to marking that the roster would be purely exemplary.

Although the legislative technique of setting a purely exemplary list can be questioned, consigning in the caput a much more open texture by alluding to "among others", what is verified is that this provision marks a decisive moment in the passage of the predominance of the imperative character from the rules of material labor law to a much more device bias, at least from the perspective of collective bargaining.

After the labor reform, and especially in conjunction with both the provisions of Article 611-A, and the change in the criterion for the relationship between collective agreements and collective agreements, it is no longer possible to understand that this "dynamic" construction remains. in which the interpreter would always be applying to the concrete case the norm that he/she deemed most favorable because the derogatory character of the conventional norm is expressed in the CLT. And if this was not already extracted from the literalness of the caput, § 2 included in the same article makes this conclusion even more evident: "§ 2 The lack of express indication of reciprocal counterparts in a collective agreement or collective labor agreement will not give rise to its nullity by not characterize a vice of the legal business"<sup>13</sup>.

This favors a modality of flexibilization of labor rules that can create rights far beyond the legal provisions, but which can also be seen as harmful to the worker, depending on its content and the interpretation of the interpreter, without that, however, it implies any illegality or invalidity of the negotiation.

If, on the one hand, this change effectively breaks with a doctrinal and jurisprudential understanding that, although the majority, had been showing a growing tendency towards moderation and flexibility, on the other hand it cannot be said that it is systematically anachronistic or irritating against the consolidated normative structure<sup>14</sup>.

What changes with the introduction of Arts. 611-A and 611-B is the balance point in this relationship. While by the prevailing interpretation hitherto in force, the balance was skewed in favor of the heteronomous source, which conditioned the validity of autonomous sources to the necessary implementation of higher "sector standards", and required that even in such cases the transaction only focused on portions of relative unavailability, the Reform categorically expands which parcels should be considered available, limiting in its art. 611-B which provisions are considered absolutely unavailable, thus enshrining the device regime, in addition to removing the need for a necessarily more beneficial sectorization, even because the interpretation and apprehension of what is precisely more beneficial cannot always be easily found in any situation of scarcity of resources.

In this case, it is not about defending a supposed "right to reduce rights", even because that would be a





narrow vision of the role that collective bargaining has played in Brazilian law. There are many labor rights that are routinely granted throughout the Brazilian territory not by virtue of legal imposition, but free negotiation between the parties: meal vouchers, food baskets, profit sharing, training and professional improvement courses, allowances, school and daycare costs, life insurance, health plan, dental plan, in addition to the various additions to legally established rights, such as additional amounts greater than those provided for by law or recognition of rest days and holidays that are not considered *ex lege* as such.

What the Reform finds at this point is that all these rights and advantages do not exist in isolation or outside the real world and the economic limitations to which all legal subjects are subject, and that not only the legal immobilization, but also myopia to examine each right in a compartmentalized and isolated way from the whole in which it is inserted, invariably results in damage to economic activity, an obstacle to the development of the enterprise and its capacity to respond and adapt to an economic and commercial environment, and, above all, that all these losses and limitations in no way translate into effective benefits for the workers involved. On the contrary, they fuel unemployment and worker turnover within economic activity, as they encourage and practically impose the periodic need to extinguish old contractual relationships and start new employment relationships that are not burdened by supposedly unalterable contractual or conventional conditions.

Although in theory everything that is not expressly prohibited is allowed, in private relations, the legislator of the reform manifested, as seen in other provisions, a clear distrust regarding the application of the changes promoted by the Judiciary, which is why it sometimes became redundant and sometimes with the clear intention of avoiding a different interpretation.

Before the reform, the collective labor agreements, and conventions, in addition to respecting the minimum legally guaranteed level, aimed to favor the worker in the sense of granting benefits not provided for by law. Thus, the negotiated was subordinated to the legislated. Law 13,467/2017 reversed this understanding by establishing in its art. 611-A the prevalence of negotiation over legislation on issues related to working hours, bank of hours, work breaks, adhesion to unemployment insurance, job and salary plan, company regulation, workers representation, telework, on-call regime, intermittent work, remuneration for productivity, registration of working hours, exchange of holidays, classification of the degree of unhealthy conditions and extension of hours in unhealthy environments, incentives and profit sharing. It is noted that negotiations involve a range of factors that directly and indirectly interfere with worker safety and health.

Although the new law has brought obstacles to the negotiation of some rights as provided for in art. 611-B, when the subject is negotiation, it is necessary to consider the socioeconomic and cultural conditions of Brazilian workers, aggravated in a scenario of political and economic crisis, which weakens the worker and generates insecurity of

various orders<sup>14</sup>. Under these conditions, and taken by the fear of unemployment, the worker may renounce his dignity, becoming more individualistic and prone to “accept” developing activities in conditions harmful to his health to remain employed. In other words, the greater concern of the worker will tend to focus on maintaining employment and meeting basic conditions of subsistence, to the detriment of structural political-economic issues that affect their life, compromising their negotiating conditions.

### Telework

Telecommuting is just a different name for the old-fashioned thing known as homeworking or, more appropriately, telecommuting. The term was already used in the 70s, due to the telegraph<sup>12</sup>.

Teleworking began in the 1970s, when satellite offices were connected to central mainframes, making use of telephone lines. Little by little, costs were reduced, the performance and usability of personal computers increased, and it was observed that many people moved from their offices to their homes. In the early 1980s, it was possible for branch offices and home workers to connect to organizational mainframes using individual computers and terminal emulators. Currently, telework has many other facilities, since there is a diversity of tools such as voice over IP (VOIP) technology, the possibility of conducting videoconferences, private networks and virtual call centers and, especially, due to the better quality and substantial reduction in the cost of portable computers. This added efficiency to the companies, as it made it possible for workers to communicate over long distances, generating savings in time and also costs, as it made it possible for the number of trips to be reduced. As Internet connections have become more popular and have improved quality, employees can use these tools and link their homes to the corporate intranet or internal telephone networks<sup>15</sup>.

Toyotism, based on the idea of minimal waste and on the figure of the multitasking worker, as opposed to the mass and concentrated production of Fordism, raised the inspiration for this model. Socioeconomic reality cannot be ignored. Teleworking should be understood as work performed at home, in a home office or anywhere office, outside the premises and under the control of schedules by the employer, whose method of execution is the use of information and communication technologies<sup>15</sup>.

Work from home was provided for in the CLT, art. 6th, for many decades. In a recent legislative amendment (Law 12,551/2011) the figure of working at a distance (not necessarily at home) was included, and an express provision was established that the telematic means of command, control and supervision do not detract from the typical subordination relationship of the contract of work on behalf of others (art. 6, sole paragraph). It should be noted that legal subordination is not the same as controlling work hours or frequency.

Teleworking can be a great option for both subjects of the employment contract, comprising, on both sides, advantages with costs, economy, practicality, and greater excellence in the results obtained, even though it noticeably



loses the interoperability of the work team that usually learn and develop together, and, in many cases, it is possible that the chances that the worker has to ascend professionally are reduced. However, for certain more isolated, exclusive, or mechanical work activities, the regime should be used more.

The most common form of telework is performed at the employee's home, but it can also be characterized by working in remote telecenters in other business structures other than the employer. The worker may work connected (online) or disconnected (offline), but the work will be associated with the use of information and communication technologies, used in the control and accountability of work, without any compromise on the concept of subordination (CLT, art. 6, sole paragraph)<sup>15</sup>.

The new Chapter created by the legislator (as of article 75-A) may represent a more ostensible incentive for the entrepreneur, but it is full of peculiarities that could cause many problems. The legal text is awfully bad, starting from art. 75-A by stating that the telework regime will comply with the provisions of this Chapter, noting that there are other provisions equally applicable outside this same Chapter. The prediction that teleworking will be configured by working "mainly" outside the company's premises will haunt the Courts' agenda to define how the adjective will be decoded, generating many years with some legal uncertainty.

The legislator could have given a defined formula right away, let's say 60% of the time working at a distance. Not only was it unclear about this, he also preferred to make a fuss by implementing the idea that telecommuting would not be outside work. This is an error, because as already stated in a note to art. 62, III, outside work is that which takes place outside the assisted control of the employer, and not exactly outside the physical premises of the employer<sup>15</sup>.

For the prevalence of the will of only one of the parties, there is no need to speak of a contractual amendment, but a mere notification of an express order, with unilateral imposition. What was a contract and agreement of both parties' wills crumbles due to the employers unilateral. The truth is that whoever hires has the demand for labor and, naturally, directs the conditions to the reality that will serve you. Despite this, it was clear that this contracting does not admit a collective labor contract, but an individual adjustment, solving, case by case, the singularities<sup>15</sup>.

The formalities imposed on labor relations are, as a rule, set aside as a criterion for protecting the worker, and thus need to be considered. Failure to comply with the legal formality requires that a solution be adopted for the benefit of whoever the formality was instituted, not to their detriment. In the case of telework, the absence of a written contract establishing the system makes it impossible for it to be recognized as such for all consequences that may harm the worker<sup>15</sup>.

### The characterizing requirements of telework with the advent of the Labor Reform

The circumstance of a certain worker providing services eventually at home or through information

technology mechanisms alone is not enough to characterize a teleworker (for example, an employee who was on an occasional trip on company service).

The opposite sensu logic is the same regarding the worker who, although hired for telecommuting, eventually appears at the company to perform some specific activity that requires his personal presence in the company to perform some specific activity that requires his personal presence.

The justification for the requirement to formalize the contract is that the conditions of this type of employment contract are effectively sui generis due to the more rarefied nature of subordination and the direction of the worker's activities by the employer.

There is no doubt that from the point of view of the characterization of the employment relationship, the fact that the work is carried out outside the employer's establishment does not constitute any impediment. In fact, this is the main characteristic of any external employee, and this has never been an impediment to characterize the employment relationship in such cases.

§ 1 of art. 75-C, in turn, establishing the possibility of changing the work regime by mutual agreement between the parties does not pose major challenges. In this case, the modification of the regime can meet the interests of both parties, with no element that allows considering that an agreement could imply a change that is harmful to the worker.

The modification brought by § 2, on the other hand, generates more controversy when it provides for a hypothesis for the exercise of *ius postulandi* that directly affects the agreed employment contract.

Notwithstanding, it is understood that the idea that this occurs due to the reflection of the employer's right to conduct their business and the fact that market circumstances may give rise to the need for employees to work in person and not remotely, even thus, there is a manifest breach of what was initially agreed with the worker, which is why the unilateral imposition of this change, even if subject to a prior notice of 15 days, should at least give the employee the opportunity to consider the contract of work, without just cause, in view of the violation of the agreed term in the contract<sup>12</sup>.

### Control of working hours

It is also necessary to address the working hours and the right to disconnect. Rest is essential for the worker's health, as it is during this period that the employee restores his psychophysical health. The increase in working hours, as well as the existence of constant contacts between workers and employers, during rest periods harms the psychophysical recovery of the worker and, consequently, affects their health.

Thus, the right to disconnection is related to these fundamental rights, as the limitation of working hours and the enjoyment of rest demonstrate, according to Oliveira<sup>16</sup>, the greatest concern with the worker, or, better said, with their physical and psychological safety and with the restoration of their energies.



Excessive work, of course, causes damage to the health and life of the worker, compromising the time he would allocate to rest, as well as the performance of activities of a non-labor nature, such as social and family activities, for example. Christian Mañas<sup>17</sup> points out, furthermore, that work during certain rest periods “contributes to the dissolution of society and the stability of the individual; it also has repercussions on production, the economy, crime, etc.”.

This concern with the effectiveness of the right to rest, which has always been latent, as already shown, was expanded due to the inclusion of technologies in labor relations. The technologies have enabled an extension of the work environment to the worker's home, making them permanently linked to interference, requests or contacts coming from the employer, whether it is an individual or even a business enterprise<sup>16</sup>.

Therefore, the mere fact of having a mobile phone device can mean a permanent connection with work, as the teleworker is available, wherever he is, to the employer, whether through calls, chat applications, or even from conventional email. Due to this extension of the work environment, an even more relevant discussion emerged regarding the right to not work, that is, the worker's disconnection from the activities inherent to the labor exercise, in times of rest.

The issue regarding the right to disconnection, although it is related to technological advances, is not limited only to these. Therefore, the right to disconnection must be considered, not only through the connection established between worker and work through technological instruments, but through any other means that prevents them from fully enjoying their right to rest.

A worker who remains at home, during the time allocated to their rest, preparing financial reports, projects or performing activities inherent to the exercise of their work, for example, has been denied their right to disconnect even without being connected through technological devices.

Almeida and Colnago<sup>18</sup> point out that the right to disconnection is intrinsically related to fundamental rights relating to health, hygiene, and safety standards at work, together with the right to have limited working hours, the right to rest, vacations, protection against illnesses and accidents at work and the right to intimacy and private life.

The worker who completes exhausting working hours is more susceptible to incur in work-related accidents. Although work accidents have multiple causes, the worker's submission to long working hours seems to be one of the most relevant causes.

This happens, according to Dellagrave Neto<sup>19</sup> due to fatigue and occupational stress resulting from excessive work. There is even talk of burnout syndrome, a disease that results from the absence of obstacles to the connection established between employees and the company, a hypothesis in which they remain completely exhausted, without the energy to adequately perform any activities.

The right to adequate rest, therefore, has a direct impact on ensuring the health of the worker, as well as on

the safety of the work environment, minimizing the risks inherent to this and ensuring an environment conducive to regulating the development of activities, without any commitment of the psychophysical health of the worker.

That said, the right to disconnect is also based on the right to mitigate work-related risks, through the adoption of health, hygiene, and safety standards, since only with effective disconnection, the worker can obtain rest periods and, therefore, recover from the fatigue resulting from work activities. In this way, both your health will be protected, and your safety will be ensured by reducing the possibility of work accidents resulting from tiredness.

### Final Considerations

The Internet has remodeled the communication process, practically eliminating geographic and temporal limitations, making globalized and instantaneous communication possible. For this reason, it became the structural center of the economy, of social, political, and cultural processes. In this context, a cyberculture emerged, marked by universality and digital technologies inserted in people's daily lives.

Among the transformations inherent in this historical context, one can also highlight the general trend towards virtualization – in the economy, organizations and work itself, which can now be carried out at a distance, through technological instruments. This trend causes the detachment of ordinary geographic space and the clock's temporality, fundamentally modifying the concepts of space and time.

The industrial economy gave way to the informational, global and networked economy. The productive activity needed to be restructured to meet the demand of an extremely diversified and dynamic market, adopting more flexible forms, and aiming to increase production efficiency and reduce the respective costs. As a result of the needs linked to the new market and the insertion of technologies in the production process, business practice was modified. The organization of companies, in this context, turned to flexibilization and specialization of functions, as well as to the decentralization of the production process. The objective was to adapt production to the conditions of the informational economy and make competitiveness viable.

Consequently, the work was also remodeled, observing the preponderance of the service sector and intellectual work, as well as a trend towards flexibilization of work processes, forms of hiring and remuneration. There was a redefinition of the place and time of work, with more flexible and adaptable working hours being adopted and, using ICTs, enabling the exercise of work activities without the necessary physical presence of the worker in the work environment.

It was seen in this study that telework has advantages and disadvantages for the worker, for companies and for society. In general, it is observed that, if the meaning of telework is not distorted and, if implemented with due care and minimum observance of the recommended standards, this type of work tends to be beneficial for the





integral parts of the employment relationship and to positively impact society.

As for the legal nature, it was observed that teleworking can be provided with or without subordination, on behalf of others or on their own. That is, it can be autonomous or subordinate. For the classification of teleworkers as employees, it is necessary to assess, according to the specific case, the presence of the requirements that characterize the employment relationship mentioned above. Thus, if the existence of subordination, habituality, onerousness and personhood is verified, the relationship between teleworker and employer must be recognized as a relationship of subordination and, consequently, the teleworker will be entitled to the rights arising from the employment relationship.

Until recently, the only legislative mention of telework in force in the Brazilian legal system until recently stems from Law No. 12551, of December 15, 2011, which amended article 6, of the Consolidation of Labor Laws. This device, which is understood to be applicable to telework, equates, for purposes of legal subordination, the telematic and computerized means of command, control, and supervision, with the personal and direct means of command, control, and supervision of work.

The recently approved labor reform brought some innovations regarding telework, excluding this category from the working duration regime provided for in the CLT, requiring the written form of employment contract for the implementation of telework, expressing guarantees regarding compliance with health and work safety, among others.

From the above, it is concluded that for the classification of teleworkers as employees, it is necessary to

assess, according to the specific case, the presence of the requirements that characterize the employment relationship mentioned above. The requirements for distance work, of which telework is a species, are the same as those required for work performed on the employer's premises, as can be seen from the wording of the caput of article 6 of the CLT.

In addition to the requirements expressed in the law, other factors that characterize the employment relationship in the telework relationship, even if they are not essential for framing it as an employment relationship. The first is the integration of teleworkers into the economic activity of the service taker, through the execution of tasks linked to the company's core activities that play a vital role in achieving economic purposes.

Another would be the ownership of the equipment that makes teleworking possible – when belonging to the employer, they show the economic dependence character of the teleworker in relation to the company; when belonging to the worker, they do not show, by themselves, a relationship of autonomy. In addition, the responsibility for risks and costs of teleworking, such as equipment acquisition, maintenance, telephone bills, electricity etc., can also be analyzed. Similarly, ownership of equipment, if they are the company's responsibility, show subordination; however, if they are the worker's responsibility, they do not necessarily imply autonomy.

Finally, given the above, the subject requires further study, considering that there is a large field to raise legal questions, especially about the workday under a telecommuting regime. The real effects, benefits and damages to the worker's rights and health, only time can reveal.

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