iel International Employment Lawyer

New Ways of Working

Brazil

Contributor:

PINHEIRO NETO ADVOGADOS

Brazil

Luís Mendes and Bruno Malfatti
Pinheiro Neto Advogados

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?

Remote-working has been formally incorporated into the Brazilian Consolidated Labour Statutes (CLT) after the enactment of the Labour Overhaul (in November 2017) – until then, the law was silent on the rules on and impacts of such an arrangement, and it was up to employers to set their own policies. In a nutshell, the law sets forth that (i) the employment contract (or amendment thereof) should govern the acquisition, provision and maintenance of technological equipment and infrastructure, and payment of any allowance or reimbursement of expenses; and (ii) employers must give express guidelines on ergonomics for employees to observe at home – and employees must sign a term acknowledging that they are aware of such guidelines. Because Brazilian labour legislation is silent on so many points regarding remote working, the Labour Public Prosecutor has set certain additional guidelines to help companies during the pandemic, as many of them have shifted to a remote model (eg, reinforcing digital ethics and highlighting that employees should receive proper technical support). All such laws and guidelines apply to employees only, meaning that independent contractors or other non-employment models are excluded.

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

In a remote-working environment, employees are more likely to use their personal devices and Wi-Fi and might share their workspace with family members or roommates. In addition, employees are more prone to mix personal and work-related data. These may lead not only to potential issues involving one's privacy but also cyber threats and data leakage. Therefore, employers are strongly advised to implement strict policies on remote working, use of personal devices and data storage, as well as to provide the appropriate training.

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?

Rules on employers' ability to monitor employees' activity tend not to vary from a regular to a remote-working arrangement – but rather depend on "who owns the device". As a general rule, whenever companies grant electronic devices to employees for work purposes, the content and all data stored in such equipment belong to the company, as they are considered "work tools". This means that there is no expectation of privacy – provided that employees are informed on such monitoring in advance. In the case of personal devices, it may ultimately lead to certain ambiguity as to employers' right to have access or monitor activity because of the existence of both professional and personal information. If that is the case, monitoring should be limited to work-related information, apps and files, ensuring, as much as possible, that personal data is preserved and there is no violation of 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)?

Employers are not required to provide work equipment in a remote-working arrangement. The CLT simply establishes that the contract governing that arrangement should be specific as to the provision of any equipment or reimbursement of expenses – if any. Notwithstanding the scant case law addressing this, precedents are inclined to understanding that companies should provide the minimum work tools needed for the rendering of services, eg, a computer and reimburse costs for the internet and power. If the company demands excessive accommodations or adaptations at employees' homes, notably when those imply costs, employees may challenge the company's policies and demand reimbursement – and labour courts would likely hold the employer liable for supporting the costs with excessive requests.

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

Although cross-border remote-working arrangements have become increasingly popular – especially during the pandemic –, up to now there is no specific rule in the Brazilian migratory or labour legislation governing that scenario. From a labour perspective, there is no clarity as to whether employees transferred to work abroad on a remote-working model would still be covered by Brazilian legislation and thus entitled to Brazilian rights and benefits, or by that of the country where they have been transferred to. From a tax and social security perspectives, it is necessary to identify if the workers are deemed as tax residents in Brazil in order to determine the correct taxation on compensation amounts paid in Brazil / by a Brazilian source or paid abroad. There are also potential mechanisms to avoid double taxation on income in International Treaties. Furthermore, there are international agreements specifically for social security purposes, which, under certain situations, prevent Brazilian companies from having to collect social security charges.

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

Employers cannot reduce the salaries or benefits of employees solely because they work remotely. Note that the federal government has introduced certain measures to help companies survive through the pandemic and avoid layoffs (eg, reducing employees' working hours and salaries, suspending employment contracts temporarily, remote working (with fewer requirements than those set forth by the CLT), and delaying the collection of certain labour charges). These alternatives apply to all employees regardless of their work arrangement (ie, remote workers or not). Therefore, it may be the case that employees were shifted to a remote model and have had their working hours and salaries reduced. Other than that, salary reductions would depend on prior negotiation with the applicable union.

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?

Employers have the legal duty to provide a safe and healthy working environment. That said, companies have been advised by public authorities to act preventively, informing their employees and third parties on protective health measures (eg, hand washing, use of hand sanitisers and masks, and keeping a safe distance). In addition, employers may also adopt a remote-working model (or at least a hybrid arrangement) to encourage social distancing. Apart from that, employers could always offer courses, presentations and training providing information regarding the importance of vaccination.

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?

This is still a very controversial matter in Brazil. Recent decisions issued by the Supreme Federal Court have recognised the constitutionality of mandatory vaccination on a federal, state and municipal level in the public system (through the adoption of indirect measures). That being said, it may be possible to apply the same rationale to private work relations. This is mainly because, under Brazilian Law, employers must ensure a safe and healthy work environment that encompasses, for instance, the adoption of preventive measures to tackle covid-19 – including, in a broad interpretation, the vaccine. If on one hand employers must ensure a healthy and safe workplace, then on the other employees must comply with company rules in that regard and cooperate with the company in the implementation of such measures. Thus, considering the Supreme Court's recent decisions regarding compulsory vaccination and laws on health and safety in the workplace, we understand that there may be some arguments to defend disciplinary measures, even termination of employment with cause, if employees refuse to get vaccinated without a medical justification. This possibility has also been considered enforceable by the Labour Public Prosecutor when publishing certain technical guidelines in January 2021. However, the president of the Superior Labour Court has informally indicated that termination with cause should not be applied in the event of refusal – whereas other justices of the Superior Labour Court have agreed with such a measure. Therefore, there is still no consensus as no decision on this matter has been issued so far by the labour courts. In any case, the following recommendations would apply: the adoption of preventive measures such as educational campaigns about the importance of vaccination and the legal implications of an unjustified refusal; and to evaluate the possibility of terminating an employee with cause on a case-by-case basis. In such an instance, the following will be considered: the reasons for the employee's refusal; if the employee is under any type of job protection; if the applicable collective bargaining agreement provides for something specific in that regard; if the employee can be moved to a work-from-home arrangement; and if there is any court decision regarding the matter when such termination is planned to occur.

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

Considering by analogy the Supreme Federal Court's decision on the possibility of federal, state and municipal authorities imposing restrictive measures for citizens who refuse vaccination and health and safety rules in the workplace, we understand that there may be grounds to defend a policy allowing only employees who have been vaccinated to access the office, as long as those who are not vaccinated can still work from home without major consequences (such as termination). That being said, the main risk would be having those employees who have not received a covid-19 vaccination argue that they have been discriminated against and claim for an award of damages for pain and suffering – especially if they are subject to discipline (including termination).

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?

On a state level, some specific sectors considered "essential" (meaning that they continued to operate normally – or were hardly affected – especially at the beginning of the pandemic) had their vaccination schedules prioritised, by the state government, over the rest of the population (eg, health professionals, public transportation drivers and teachers). In spite of that, proof of actual vaccination was not a requirement for individuals in these sectors to keep working during the pandemic.

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

There are two main concerns when dealing with the processing of employees' medical and vaccination information. The first one relates to the processing itself: under the Brazilian General Data Protection Law, the legal basis for processing that information would be either "protection of life" (eg, a safe and healthy workplace) or "compliance with the law or regulatory rules" to the extent that employers have the legal duty to promote a safe and healthy workplace. Moreover, companies are advised to keep access to information concerning one's health as limited as possible and for as long as that information is useful (ie, for a determined period). Companies should also collect that sort of information in an anonymous form to mitigate risks in connection with violation of privacy (eg, an unauthorised person who has access to that information). The second one concerns employers' ability to enquire on an employee's vaccination status: there is still no consensus as to the legality of such a practice; however, taking into account employers' general obligation to ensure a safe and healthy workplace and that labour courts and the Labour Public Prosecutor have considered termination of employees who refused to get vaccinated valid, we understand that there would be grounds to support the legality of ascertaining employees' medical and vaccination information.

Health & safety and wellbeing

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

Employers are still responsible, to a certain extent, for ensuring a healthy and safe workplace even in a remote setting. The CLT establishes that employers must give express guidelines on ergonomics for employees to observe at home, which employees must acknowledge. Furthermore, the Labour Public Prosecutor issued Technical Note No. 17/2020 to guide companies through the pandemic, when many companies have shifted to a remote model. Among such guidelines, employers have been advised to provide training on health and safety.

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

The pandemic ignited a discussion as to the classification of covid-19 as an occupational or general disease. That classification influences the type of social security pension employees are entitled to and most importantly if employees will have job protection after their medical release – as this is limited to occupational diseases or accidents only. Although the law is not clear on such classification – as the understanding has changed throughout the pandemic by the issuance and cancellation of certain regulations – the current stand is that it will depend on proof of the existence of a causal link between work and covid-19 and employers' actions towards preventing covid-19 from spreading in the workplace.

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

Employers' obligations regarding health and safety are generally the same either in a proximate or remote-working environment. The main change is employers' control of and management over employees' remote-working setting and their actual ability to prevent work-related diseases and accidents from happening. As opposed to a physical workplace, where employers are directly liable for ensuring a safe environment, in a remote-working arrangement employers are limited to providing general guidelines and training on health and safety and implementing policies and procedures to avoid occupational diseases and accidents. Normally, employers would require employees' confirmation that their workspace complies with all statutory requirements – photos and videos of their workspace may be required.

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

Irrespective of the workplace arrangement, employers are legally responsible for promoting a safe and healthy working environment, not only to avoid occupational diseases or accidents, but also to enable employees to work to the best of their abilities and thrive in their careers. In a broader interpretation, that would include caring for employees' mental health and wellbeing, as this can be negatively affected by a harmful working environment – to the point of triggering work-related mental disorders such as depression and anxiety, which leads to high absenteeism rates. For those working remotely, companies must promote certain integration actions, such as periodic meetings and constant feedback, as these are likely to go unnoticed when employees are not working at the company's premises.

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

Remote workers are legally exempt from time tracking, meaning that overtime, night-shift pay and other time-related regulations would generally not apply to them. However, employees may still be awarded damages by labour courts if proved that their working schedules were excessive or causing exhaustion – notably if they have been shifted from a physical to a remote-working model. Therefore, employers must be aware of employees overall workload to avoid having them working excessive schedules and instruct leaders and managers not to demand work or reach out to employees (electronically) outside of the company's general working hours – irrespective of such legal exemption.

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?

Employers have adopted different approaches to tackle Covid-19, including by terminating employees, shifting to a remote-working model or adopting one (or more) of the measures implemented by the Federal Government to help companies survive through the pandemic and avoid, to the most extent possible, layoffs. Examples of such measures would include: reducing employees' working hours and salaries, suspending employment contracts temporarily, shifting to a remote model (with less requirements than those outlined in the CLT) and delaying the collection of certain labour charges. The union's involvement in the implementation of these measures would depend on the measure itself (as some of them would not require the union's ratification or participation).

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

There have been no major or reported involvements of unions in challenging the remote-working models adopted by companies. As a general rule, unions in Brazil tend to get involved whenever companies change (or implement) conditions that affect employees' compensation (eg, removal of healthcare benefits or salary reduction), schedules (eg, longer shifts or working weekends), non-compliance with collective bargaining agreements or any other aspect that could ultimately negatively affect employees. The remote-working model was incorporated into the CLT as a form to adjust the law to current needs and the market, ensuring that those working remotely were given the same working conditions, with a few exceptions (eg, time-tracking exemption), as those working at the company's premises.

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)?

Employers are not required to consult with, or otherwise involve, the relevant union when introducing a remote-working arrangement. The CLT establishes, in brief, that: the remote-working arrangement must be part of an employment contract or amendment thereof; the change to a remote model must be made by mutual agreement between the parties; and employers can shift back to the regular model by informing employees with at least 15 days' notice. Considering that the remote model is quite recent in Brazil (as an actual model provided under the law) and that the overall employment rules apply to remote workers regardless, with a few exceptions (eg, exemption for time tracking), unions have neither had any influence nor been active in challenging changes in working arrangements. During the pandemic, some unions have been more focused on ensuring that companies were observing the health and safety measures recommended by the Ministry of Health and the WHO, rather than on the working arrangement itself.

Authors:

Luís Mendes, *Partner*
Pinheiro Neto

Luís Antônio Ferraz Mendes graduated at São Paulo University's School of Law in 1984, where he also earned a specialisation degree (certificate) in labour law.

He was admitted to the Brazilian Bar Association (São Paulo, Rio de Janeiro and Brasília chapters). He acted as intern and attorney for some labour unions (chemists, bank employees and plastics industry workers) and, later on, worked at the Villares Group.

Luís joined Pinheiro Neto Advogados in 1992 and became a partner in 1998; currently, he is the head of the labour practice at the firm.

Luís is a member of the International Bar Association (IBA), where he acts as an officer of the Employment and Industrial Relations Law Committee; he is a director of the Trade Association of Law Firms in the States of São Paulo and Rio de Janeiro (SINSA)

His legal practice spans labour advisory and litigation matters, also encompassing negotiations with labour unions and due diligence work, always on the employer side.

In the administrative area, he has a strong presence in civil inquiries and preparatory proceedings before the Labor Public Prosecutor Office (MPT). He has extensive experience in labour risk assessment for M&A, private equity, asset acquisition deals involving manufacturing, technology, financial, and service companies.

Learn more

Bruno Malfatti, *Senior Associate*
Pinheiro Neto

Bruno is a senior associate of the labor practice. He graduated at Pontifícia Universidade Católica de São Paulo in 2012, and earned specialisation degrees (certificates) in Corporate Labor Law at Fundação Getúlio Vargas (in São Paulo) and Business Management (in Melbourne, Australia). He is mainly responsible for assessing potential labor liabilities resulting from corporate and capital market transactions, as well from HR practices, such as hiring and termination of top executives, employees and contractors. His legal practice also encompasses advising companies on the structuring of HR policies, employment and service agreements, as well as variable compensation plans

Learn more