



Smart Working: A new working scheme? Insights from Portugal

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Premise

Due to the impact of new technologies and the increasing digitalisation of our society, new models of organisation of work are arising. These models frequently result from innovative approaches carried out by those responsible for management or academics. However, since these methods were not conceived under the scope of labour law, their characteristics often collide with elements of traditional labour law. Hypothetical regulation on new working schemes should be cautious at the risk of inhibiting new alternatives.

Smart Working corresponds to a new approach to work that revives the worker's ability to organise provisions of work, enabling them to decide where, when and how work is completed. It also promotes a better work-life balance while allowing for higher efficiency, competitiveness and productivity fostered by new technologies.

This contribution aims to provide a glimpse into how an approach on Smart Working in Portugal could be devised from the current legal framework. Since there is not any current regulation, should Portuguese legislators create a regulation like *Lavoro agile*? Is there an ingenious and efficient way of regulating it?

Smart Working as a new paradigm

The new paradigm for work is to work anywhere and anytime, according to the tasks assigned. Workers should also be able to choose where, when and how to work, to make the most of their capabilities. In exchange, employers must trust in their employees, making them responsible for their actions towards the company development.

When implementing Smart Working, employers must consider workers' well-being within and beyond the limits of the workplace, which is related to the improvement of work conditions. In turn, this implies rethinking processes, spaces and the relationship between employees to increase efficiency and efficacy. The application of technology is needed if the idea is to fully implement a more flexible and efficient workplace, thus promoting worker's mobility and increasing the effectiveness of the use of space. There is also the need to allow greater social collaboration while ensuring network security.

Can Smart Working be implemented without special legislation?

In Portugal, there is still little discussion on this subject, although there has been a greater opening towards new forms of working. Besides this, there have also been increases in concerns regarding workers' well-being and supports, as well as in new and innovative ways of working.

As for the impact in Portugal, legal subordination continues to be the basis for the construction of labour law (e.g. Article 11 of the Portuguese Labour Code). Smart Working presents characteristics typical of independent work, which usually performs in the context of a service contract. Can this

model be applied to a subordinate employment relationship? In some cases, it may be in the interest of the employer to refrain from driving the work exhaustively – without removing the concept of subordination from the relationship.

However, the managerial power of the employer is limited as soon as more autonomy is given to the employee, based on the definition of provision. In doing so, the worker makes a decisive contribution to achieve specific results and can better manage work-life balance. Additionally, the employer can more effectively control the employee's work by using new technologies. This will also result in an extension of the scope of the employee's duties to the employer, namely the commitment to improve the company's productivity.

What are the most appropriate mechanisms for implementing Smart Working?

a) Teleworking

Teleworking is very well regulated in Portugal (e.g. Articles 165 to 171 of the Portuguese Labour Code). It consists of the provision of work performed with legal subordination, usually outside the company, and through the use of information and communication technologies. It is also a regime that seeks conciliation between private and professional life. *Lavoro agile* regulation has numerous similarities with the Portuguese legislation.

b) Flexibilization of working hours

The Portuguese Labour Code also provides various working-time flexibility schemes, among which the most important is, in our perspective, exemption from working hours (e.g. Articles 218 to 219 of the Portuguese Labour Code). This regime can establish the exclusion of maximum working hours, the possibility of an increase in day or week working hours; and, finally, compliance with a schedule set by the parties.


c) Flexibilization of the workplace

Article 193 of the Labour Code grants the parties a broad definition of the workplace. This enables the parties to devise a contract clause with components allowing the worker to freely choose the place of work – provided that it does not contradict any public order value. The importance of the workplace needs to be relativised in situations where the domain of the employer loses relevance, in particular by the will of the parties and new technologies.

Conclusions

1. It is necessary to embrace new forms of work; as to ignore would squander the potential offered by these new technologies.
2. Smart Working is an opportunity, not only for technological companies, but also for more traditional ones as it could represent a revitalisation and modernisation of business activities.
3. The Smart Working concept's dimension and scope make it a new paradigm, especially when considering the central place occupied by the employee.
4. Like other emerging working models, the characteristics contend with some aspects of self-employment that, in this case, allow the employee a better balance between private and professional life – also providing benefits to the employer.

5. In our opinion, the solution to the acceptance of this and other new forms of work will be through the revision of the traditional concept of work and the updating of the operational evidence of the qualification of the work contract.
6. Creating a regulation like *Lavoro agile* does not appear advantageous. On the one hand, some mechanisms allow flexibility in the modelling time, place and method of performing work; while on the other hand, individual and collective bargaining should be enforced, taking into account the interests of both employee and employer.
7. However, we assume that to implement the Smart Working concept entirely, it may be necessary to revise some of the flexibility schemes, such as teleworking arrangements.
8. Besides subordination revision, the government should create policies and measures for the adoption of this model of organisation, for example, by granting tax benefits and supporting business management and reorganisation.

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