



GUILHERME MACHADO DRAY

## BODY TEMPERATURE MEASUREMENT: THE DEVIL IS IN THE DETAILS

The protection of public health requires increased care on resume to work that may limit the right to privacy.

The pandemic crisis and the return to work confront the right to privacy and the protection of public health.

The right to privacy means that there is an inviolable sphere of its own, which must be protected from the curiosity of another. Everything that concerns our family life, sexual, affective and state of health, must be preserved. No one can access such information, and no one should disclose it. This rule is enshrined at the Portuguese legal framework – articles 26 of the Constitution; 80 of the Civil Code; and 16, 17 and 19 of the Labor Code.

The protection of public health, however, requires increased care on resume to work that may limit the right to privacy.

Worldwide, special rules have been created to prepare workers and employers for the COVID-19 virus.

In the United States of America, for example, in addition to the Occupational Safety and Health Act, which states that employers must ensure work in safe and healthy conditions, new guidelines on COVID-19 have been published by state agencies, such as, the following: Department of Labor (DOL), Center for Disease Control and Prevention (CDC) and Equal Opportunity Employment Commission (EEOC). Basically, telework, the use of protective equipment, the distance between workers, and the refusal of working from those who show signs of contagion are recommended.

The same happens in Portugal.

In addition to the Legal Regime for Safety and Health at Work, which says that workers have the right to work in safe and healthy conditions, specific rules have been created on COVID-19.

The Decree-Law No. 20/2020, of May 1st, imposed the drafting of contingency plans and allowed body temperature control. The ACT, in turn, has approved new recommendations based on the use of protective equipment, the distancing of workers, and outdated working hours.

Article 13 C states that, in the current context and solely for reasons of protection of the health of the employee and third parties, body temperature measurements may be performed on workers for the purpose of access and permanence in the workplace. It is also said that this measurement does not prejudice the right to data protection, and it is forbidden to register it, unless the worker consents. If the temperature is higher than “normal”, the employee can be prevented from accessing to the workplace.

Essentially, this provision strikes a fair balance between the right to privacy and the safeguarding of public health. Public health justifies temperature measurement. The right to privacy and the fact that health data are sensitive, are protected by the prohibition of recording measurements.

But there are matters that have become ill-defined.



First, the law does not guarantee (as it should) the intermediation of a health professional. Obviously, we should have a doctor at the entrance of each undertaking to measure the workers' temperature, but the responsibility for the system should have been given to an occupational physician and the measurement performed only by a professional subject to the obligation of professional secrecy. Let security contractors in outsourcing doing it, does not seem a good solution.

Secondly, the temperature from which the worker is prevented from working is not defined.

Thirdly, it is not clear whether the worker prevented from working continues (or does not) receiving his salary and who pays him.

Finally, we may have (unfortunately) constitutional problems.

On the one hand, because fundamental rights cannot be compressed without the Parliament authorization. (article 165, 1, b), Portuguese Constitution). So, we may be facing an institutional unconstitutionality. On the other hand because the absence of a doctor's intermediation can generate material unconstitutionality. In the Judgment of the Constitutional Court n.º 306/2003, the Court declared the unconstitutionality of a rule of the Labor Code, precisely because it did not include the intermediation of a doctor. At the time, the Court held that the employer's direct access to information relating to workers' health violates the principle of banning excess restrictions on the fundamental right to reserve privacy.

In a nutshell: being understandable and justifiable, the body temperature measurement provided at the new article 13 C fails in the details.

The law fulfilled the hardest part, which was the justification for body measurement.

But failed in the details.

And the problem, as the people commonly says, is that "the devil is in the details."