

LABOUR LAW & METaverse

Marta Trindade
Partner



Despite Metaverse being more and more a hype, at least in Portugal it is still quite a recent and seldom addressed topic.

Whenever we face this type of disrupting and significantly different realities still “untouched” directly by our legislator, the concern about the need for it to be quickly regulated comes up, and so does the rise of those who take the view that we should have a detailed set of rules vs those who otherwise believe there should solely be a set of main principles to avoid destructing the fluidity that comes along with less regulated realities.

[1]
This text was prepared for the oral presentation given at the E-Course The Law of the Metaverse (1st edition), from Nova School of Law, which took place Between October 27 and November 24, 2023. Special thanks to Vera Lúcia Raposo, Assistant Professor and Vice Dean and Maria Mariana Soares de Moura, at Nova School of Law, for all the support, to Luís Barreto Xavier at Institute of Knowledge, IdC – Instituto do Conhecimento da Abreu Advogados, for the invitation and to Joana Tavares Pires from the Knowledge Management Department at Abreu Advogados for the support with the research.

In any case, at this stage, the fact is that there is no specific legislation devoted to Metaverse, and for what matters for today session, no employment/labour law provisions expressly regulating the new issues arising; hence, in first instance, we are called to resort to the existing framework.

Fortunately, in our view the existing legal framework and main principles already largely allow us to deal with some of the more important questions. That does not mean, however, that answers to the same become easy...

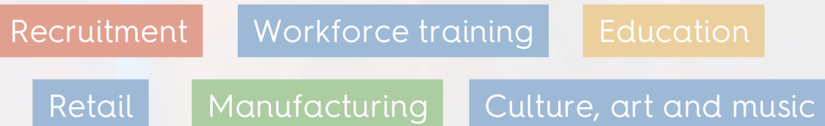
Are you familiarized with the concept of METaverse?

We are talking about a “non-place” at cyberspace, which simulates and amplifies the physical space and the real world allowing social and other different types of experiences through VR, AR (Virtual Reality; Augmented Reality.), 3D and other technologies, a virtual world where physical and virtual merge. And the reason why I am mentioning this is solely to point out that the way this world can be accessed is by creating a virtual representative - the AVATAR - and here is where some of the main employment/labour law related issues start to sprout...

As you also all know, especially further to the full session devoted to it, the AVATAR is a digital representation of a user; such representation can be a digital twin of the user or a completely different new identity, or a mix.

On its end, the Metaverse is of course far from being just another place for videogames and where video gamers would spend their free time. It is already socializing, learning, collaborating, working (metawork), owning real estate, as well as culture and economics (metanomics).

Indeed we see the resort to the Metaverse increasing exponentially for:



Perspectives:

A) “External” - Work because of the Metaverse:

- Technological work in the real world
- New roles
- Recruitment for / job searches

B) Mixed - Work for the Metaverse:

- Employment contract executed in the real physical world with work carried out @Metaverse
- New realities, such as virtual professional training
- Employees represented by Avatars in the performance of respective labor activity as if they

C) “Internal” - Work exclusively carried out @Metaverse (“meta-work”):

- Companies/business lodged @Metaverse and respective employees behaviors
- Employees behaviors in the course of their private lives which impact or may

A) External – Work because of the Metaverse.

Last year, job posting for 'Metaverse related roles' has raised more than 500%. There are hundreds of companies advertising for positions related to the Metaverse and there is a high demand for qualified HR.

Digital artists, designers, programmers and engineers. Jobs created for the design building and maintaining of the Metaverse infrastructure – technical engineering or IT jobs – these are likely to require job candidates to combine their existing IT skills with AI knowledge, machine learning and quantum computing skills.

We see existing industries (such as marketing, law, retail or tourism) already using the Metaverse for some of their activities, but as a platform used “from the outside” in the sense that not so much technical skills are needed.

Here we can say that Labour Law and respective mechanisms operate normally.

Naturally, the ever increasing search for talent with high-end skills and a true worldwide talent pole gaining form, cultural diversity is up, but cultural clashes being reverse of the coin, alongside with tax, Social Security and immigration implications which are always back to back with employment, but generally speaking are quite similar to what we are already seeing with the digital nomads work from home wave.

Also, pressure to have more dematerialized acts and documents, as well as digital signing increases significantly.

B) Mixed – Work for the Metaverse and C) “Internal” – Work exclusively carried out @Metaverse (“meta-work”).

On the other hand, we already see a type of E-commerce where users can try different models and features of cars, buy real estate, visit the house of one's dream as if being there using VR glasses, use the latest fashion, trying out favorite clothes). This can be totally “external”, just an users experience at the platform, or otherwise already imply work for and @Metaverse – who is there to receive and guide them?

Also, resort to virtual onboarding is happening as we speak, as is VR-based professional training on 3D and production tests for higher risk activities and significantly expensive or dangerous scenarios (oil platforms, construction of bridges or dams).

There are work meetings between Avatars taking place, holographic co-presence, conferences and work trips, virtual work environments, fully computer generated spaces, remote collaboration tools, interoperable Avatars, alongside with the development of virtual payment systems.

There is an increasingly larger collection of biometrical data, sensory and tracking technologies, with wearable self-tracking devices, as well as voice and gesture recognition becoming the norm.

We are not just talking about 3D glasses; control of eye movements and cardiac frequency are becoming peanuts in face of the new haptic devices (3).

Productivity software, mobile geofencing technology and behavioral data were already a reality and complete the package.

When these are known characteristics of this XR(4), VR, AR, 3D, immersive world, immediately concerns about particular risk areas strike us:

- 1) Base concepts: employee, employer, place of work, working time, etc.
- 2) Cyber/online/virtual/digital bullying/mobbing/harassment & discrimination. Disciplinary action.
- 3) Physical (eyes, hears; occupational diseases) and mental health.
- 4) Privacy/data protection.

Let us see closer some LABOUR LAW/EMPLOYMENT/WORK related QUESTIONS (5).

1) Base concepts: employee, employer, place of work, working time, etc.

At first sight classic, base concepts seem to blur. But then zooming in shows a bit different.

The concept of Employee. When an Avatar is a sales promoter, who is the employee? The Avatar worker is still the physical person who controls it. However, events that happen to Avatars and between Avatars are/may be relevant for employment law purposes.

If in the in-person work the employee exists solely through his/her physical presence, @Metaverse there is an existence that whilst initially solely electronic or digital, may actually constitute an extension or a representation of the employee.

The Avatar does not have its own free will. Yet...

The concept of Place of Work.

When we see the Metaverse as a place where Avatars can attend meetings or as a digital office, how to determine the place of work, are we in face of a new type of workplace?

Yes and no, we would say. No, in the sense that the place where the employee is carrying out is tasks/doing his/her job is still the specific physical location where the physical person (the employee) creating the work is seated. And this is very relevant notably for purposes of work accidents insurance policies coverage.

3 Haptic devices may incorporate tactile sensors that measure forces exerted by the user on the interface. The word haptic, from the Greek: ἅπτικός (haptikos), means "tactile, pertaining to the sense of touch". Simple haptic devices are common in the form of game controllers, joysticks, and steering wheels. Haptic technology is the use of tactile sensations to stimulate the sense of touch in a user experience.

4 Extended Reality.

5 References made to Labour Code mean the Portuguese Labour Code, approved by Law 7/2009, February 12, in its current version.

However, when Avatars are used, employees behind said use are responsible for the use they make of them. Hence, be it in simple meetings where Metaverse just replaced videoconference or in a context of several virtual work environments with no physical presence needed, duties that are foreseen in the Labour Code as falling over employees apply.

As duties that fall over employers also do.

This is then relevant to be able to answer to and to deal with queries/issues/situations that arise in connection therewith in particular involving misbehaviors, infractions and disciplinary action, as we will see ahead.

The concept of Working Time.

The work from home/telework further to the Covid 19 push already put significant pressure in the traditional work models. Claims for larger flexibility in the management of the working times have been since then on the daily agenda, but we know where the somehow current rigidity came from – in a time where people could be called to work 24 over 24 hours, the whole set of rules regulating the number of working hours and work schedules was a claim for protection of employees health and safety, as well as result of the importance given to the work/life balance.

But the same way as work from home reality imposed on everybody, inclusive becoming often one of the main requisites for job applicants to apply to/accept a job offer (6), we may indeed be facing the need to accept this wave as the Home Office 2.0 movement, where, in the interest of everyone, employers and employees, laws and regulations will be forced to be creative and conceive or at least allow the birth of new work models, where there may be adaptation to each employee needs and conveniences and flexibility does not mean lack of protection or a new form of slavery.

2) Ciber/online/virtual/digital bullying/mobbing/harassment & discrimination. | Disciplinary action.

Can we speak about harassment - between Avatars or from Avatars against physical persons - @Metaverse? Can the resort to an Avatar to facilitate or inclusive stimulate situations of harassment in the work place, at the same time making it more difficult to attribute liability and protect the harassed? Who is the harasser? And who is the assaulted entitled to protection?

As you may already know, these are not hypothetical questions, there have already been sexual harassment cases reported. As discrimination cases of all kinds also have. And inclusive such cases led to the creation by Meta (Facebook) of the so called safety bubble which an Avatar can maintain on or turn off when entering the Metaverse and which was created precisely to prevent Avatars to be exposed to unwanted physical approaches from other Avatars.

6 At the same time that we saw recent changes to the Labour Code introducing an express reference to the duty of the employer not to contact the employee during respective rest time, except force majeure cases (article 199-A, Duty to Refrain from Contacting).

Indeed, do not think of this possible aggressions as something that could or not take place “solely” at the mental/psychological fields; the cases reported were referred to as sexual harassment as, besides the said mental/ psychological side, they took place when interaction @Metaverse included wearable capable of (re)creating physical feelings and reactions (such as the increasingly developed haptic devices that simulate tactical reactions in the skin).

The Metaverse characterizes by allowing an immersive experience of physical persons in the virtual world.

On its end, according to the Law it is considered harassment “(...) an undesired behavior, notably based on a discrimination factor, carried out at recruitment or at work or during professional training, with the aim or effect of affecting or embarrass the person, impact respective dignity, or create in the person an intimidating, hostile, degrading, humiliating or destabilizing atmosphere” (Labour Code, article 29).

Any of these can be carried out both by Avatars against Avatars, as well as directly against physical employees. Speak badly about an Avatar or an Avatar work may easily be seen or perceived against the employee behind it.

So, then the question really is if an employee can be subject to disciplinary action on the basis of the behavior that the respective Avatar adopted in the Metaverse, behavior that may directly or indirectly have damaged the rights of another employee.

Despite in the situation of digital twins for instance it is evident that an employee’s Avatar is an extension and represents him/her in the work place (and actually elsewhere @Metaverse), to each extent is it possible to conclude that the employee has indeed damaged another employee rights through behaviors @Metaverse and/or interactions between respective Avatars?

Well, according to the Labour Code, the Employee is subject to the general duty to “respect and treat with urbanity and righteously the superiors, work colleagues and people that interact with the company [employer]” (Duty of Respect) (article 127). This principle is fully applicable in this context. In such sense, it is my view that, for instance when an Avatar insults another Avatar it may possibly be considered that it is a case of insults between work colleagues hence should not by the mere fact that it is between Avatars be excluded of the legal framework of the violation of the duty of respect an respective treatment and consequences; indeed, behind each Avatar there is a work colleague, and also there is the whole exposure before other work colleagues that the situation may carry.

Also, the Labour Code expressly foresees not just that harassment is forbidden, but inclusive that the employer is obliged to carry out disciplinary action whenever there is a complain of harassment (article 127, nr 1, paragraph l)).

Also the employer is bound to the duty to guaranty and safeguard health and safety of the employees at the work place (Labour Code, article 127, nr 1, paragraphs c) and g)). This naturally includes health at all levels.

In the same context, another interesting question would be to determine if employees can be liable for behaviors adopted by their Avatars against NPCs.

An NPC - Non Player Character - is a character (at electronic games, usually) that cannot be controlled by the gamer. It is to expect that besides Avatars, the Metaverse also has a significant number of such inhabitants, which brings us to the question: is it possible to carry out a disciplinary action against an employee on the basis of, for instance, an offense conducted against an NPC, ie, a merely digital character, so not just without legal personality, but also to which no physical person is associated?

Although it is a fact that the Labour Law does not expressly foresee the liability for insulting "softwares", if NPCs share the digital work place, are at the work place, should "they" not be protected? Is it foreseeable for a near future a whole new movement pro NPCs rights? In my view also this situation should be put in the context of the already existing set of rights and duties over employee and employer.

The employer should have the right (and actually the duty) to act disciplinarily against an employee who insults an NPC due to the fact that such Employee adopted an improper behavior at the work place, having in mind the general duty of urbanity and probity, inclusively and especially when such type of behaviors may have a negative impact in the employer's image.

Separate attention should deserve the situations where the behaviors in question are not carried out at the work place - here the reasoning to apply should be the same already massively developed in the studies, opinions and Court decisions about the relevance or irrelevance of employees behaviors in the course of their personal lives and or outside the work place and work time. Nevertheless, an NPC is still a software, so it is of course arguable the resort to this framework.

It is worth also pointing out that Avatars behaviors are potentially able to damage the employers image, before respective clients, peers, etc.. So, also at this level, the possibility of disciplinary action should be on the table. Especially taking into account that a lot of what takes place @Metaverse is real time happening - which means strong spread around immediate impact -, so there is high potential for causing damages quickly.

This is a factor to have in mind notably in the evaluation of the seriousness of the misbehaviors and infractions in the context of the formal disciplinary actions and on the decision making regarding the applicable disciplinary sanctions.

On the other hand, not to forget the importance of being careful with deepfakes and fraud, manipulated contents with few or zero connection with reality have exploded to a point where it may be impossible to spot if what we are seeing/hearing was manipulated or not. This brings light to the concern about a stronger difficulty in terms of attributing responsibilities and liability.

Add to this the possibility of accused employees to defend themselves by resorting to arguments such as bugs, technical errors, wrong clicks, lack of technical control of the tools, unintentional behaviors, lack of impact in the physical (non-virtual) world, etc, arguments that would not have room in a case of face to face insults, and there we have a new recipe for impunity.

3) Physical and mental health

Still in what health is concerned, especially the increased efforts to which eyes and hears are subject by VR, AR, 3D and the like tools brings on board and increased responsibility over employers to prevent both immediate damages, as well as new formats of occupational diseases.

Moreover, being a more immersive experience (as called by immersive multisensorial virtual spaces), there is also an increased risk of generating addictive behaviors, along with dark patterns - behavior induction - at the turn of each corner, to which employers and employees should be especially attentive.

4) Privacy / data protection

Another point with relevance from a Labour Law perspective, and that you may have already analyzed earlier in the course, is the scenario of massive data collection, plus the increased and more invasive remote control of the activity.

Not to extend too much on this topic, but please do take into account that the Labour Code has an extensive and very relevant set of provisions regarding employees rights to privacy, with prohibition of the employer to violate the same.

Now, some OTHER employment and labour related INTERESTING TOPICS that come to mind.

New payment methods

The same way we have watched as MBWay payments are becoming more the norm, not carrying physical money and digital wallets are incrusted in the daily lives of an increasing number of people, digital coins are paving its way, especially @Metaverse - will we thus be seeing payment of salary in digital coins?

According to the Labour Code (article 259), remuneration should be paid in money (or partially in kind upon the parties agreement), where this means by bank check, postal ticket or bank deposit on behalf of the employee, hence for payment of salary in digital coins to see the light of day legislative changes seem to have to take place.

Competent Court and applicable law

If the Metaverse is a virtual world and employees can be everywhere, how to define the geographical frame of the activity carried out therein? Who is competent to resolve the emerging conflicts? When the employee develops the activity exclusively in the Metaverse the competent Court is the Court of the location of the physical place where the Employee uses the IT tools that allow him to operate in the Metaverse or the Court of the location where the employer registered office is located?

Also these are questions yet unanswered but from what was said previously you may already anticipate that I would tend to apply the rules already in force - here it means to opt between home address or place of work where the employee is physically based the majority of his time or employer registered office.

Virtual industrial action

Finally an also brief reference to the virtual industrial action. Indeed, as you may also have noted this is no longer a virtual reality.

The shift from the relevance of the production physical space to the communication / broadcasting of the conflicts is more and more real, especially with the advent of social networks.

And this includes virtual strikes and other formats of protests.

But, by way of curiosity, remember that it was already back in 2007 that IBM Avatars entered on strike @Second Life (a free tridimensional virtual world which simulates real life). Here are to images of that event:



And they managed to provoke the resignation of the manager and the management to renegotiate a Collective Bargaining Agreement, which was their main claim.

Of course that also had to do with the fact that the media was all over the event, and that contributed to a quick and stronger spread and impact, but still.

Also, as a curiosity, I brought you a Second Life image as is now in 2023:

