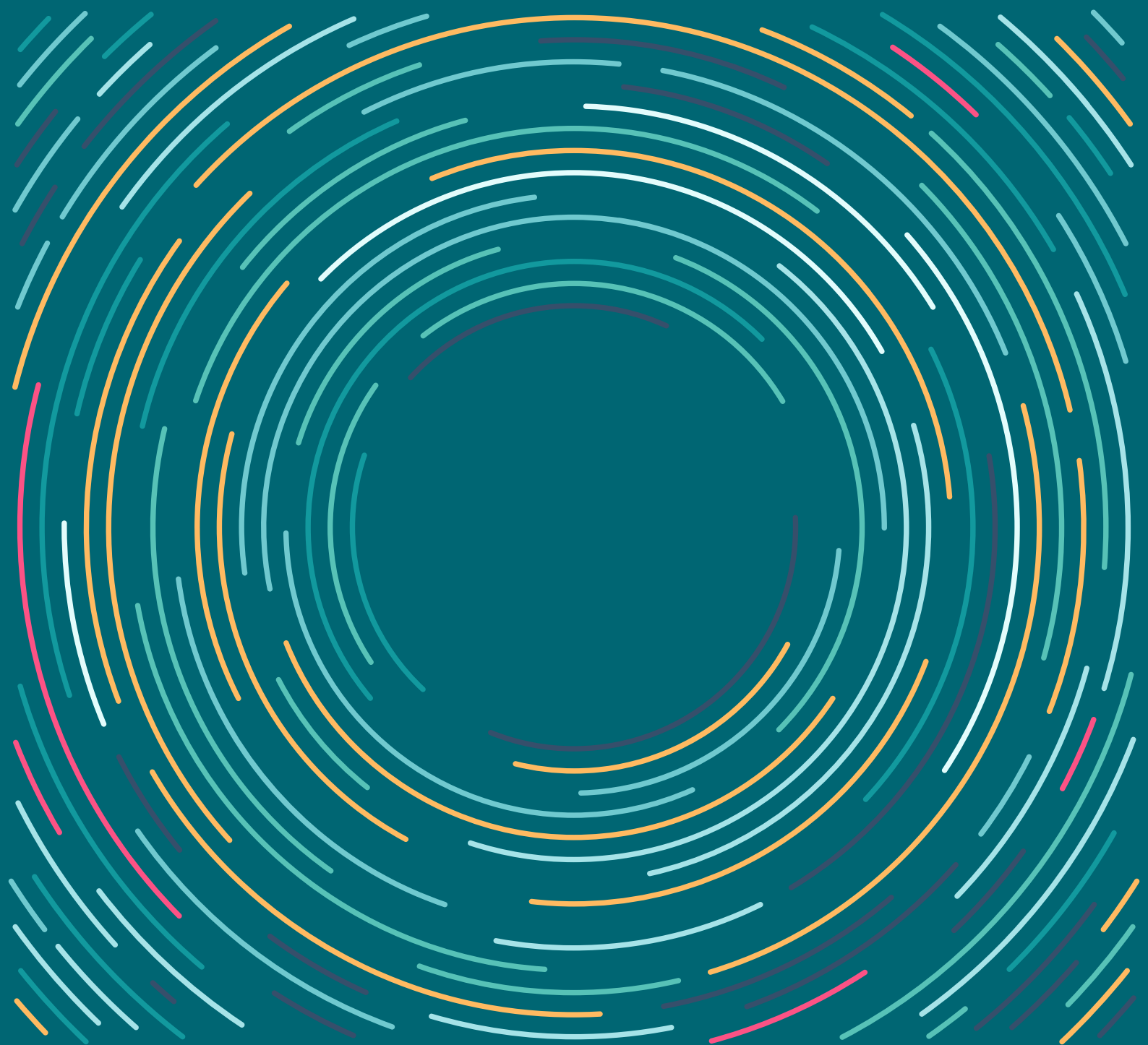


# EUROPEAN EMPLOYMENT LAW UPDATE

FLEXIBILITY AND TELEWORKING



2021 EDITION

GARRIGUES



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# INTRODUCTION

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**T**his edition of the European Employment Law Update is perhaps one of the most innovative editions that have been published in recent years. In fact, some of the regulations analyzed in this guide seemed impossible to apply just a few years ago.

The adoption of measures to curb COVID-19 in the vast majority of countries in the world has completely changed the lifestyle to which we were accustomed. The labor and employment sector has been, together with the healthcare sector, the one that has had to adapt itself more quickly to the new circumstances. In particular, the pandemic has forced to accelerate the process of teleworking that had begun in European countries.

Teleworking was intended by Governments to respond to the needs of family conciliation, which is so necessary in an aging Europe with serious demographic problems. Today, however, it has become a basic health recommendation. It has been shown that greater adaptation of national legislations to teleworking translates into better protection against the pandemic. This need has led certain European countries to pass laws regulating teleworking in the shortest possible time and also an EU Directive is in the process of being drafted.

It is clear that teleworking is here to stay and that, after the COVID-19 pandemic, it will be an everyday reality that will be present in many companies both in the public and private sector.

Although each country has regulated teleworking according to its economic capacity and industrial network, there are important similarities and common points throughout all European legislations. We will address such points in this guide trying to highlight the relevant regulations and rights linked to remote work and flexibility schemes, which seemed unfeasible only a few months before the outbreak of the pandemic.

This guide has been elaborated by all the law firms included on the European Employment Group of the World Services Group. We hope it will be useful and, as always, the contacts of the different firms are included so that you can contact the authors for further information.

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In line with the European trend, teleworking has recently been on the rise in Austria. While *homeworking* was often considered the exception before the COVID-19-crisis, it is now clear that many companies will continue to rely on this additional option and that employees will increasingly work from home in the future. By using mobile information and communication technologies, it is frequently possible to perform work not only from home (or at the employer's premises), but anywhere in the world, be it at home, on the road in a train, or a foreign country. All these forms of mobile working, including *homeworking*, fall under the umbrella term "teleworking".

Until now, there was no separate legal regulation for teleworking in Austria. On the occasion of the Covid-19 pandemic, new statutory provisions were introduced

in spring 2021, which regulate basic requirements and framework conditions for working from home (but not teleworking in general).

#### ***Homeworking is and remains a matter of agreement***

Legally, working from home cannot be implemented unilaterally but requires consent of the individual employee as well as the employer (unless the existing contract already provides for such arrangement). Under the new law, such agreement must be concluded in writing for purposes of proof and can be terminated by both the employee and the employer for good cause with a notice period of one month to the end of each calendar month. Such "good cause" includes, for example, a significant change in operational requirements or significant changes in the employee's domestic situation, which no longer enable the



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**D O R D A**





employee to work from home in the future. In addition, it is also possible to agree on a fixed term or further options of giving notice.

*Framework conditions* for working from home (e.g. general provisions on work equipment, reimbursement of costs) can also be agreed with the works council, if any, by way of a shop agreement.

### **Work equipment, costs and tax advantages**

As a general principle, the employer must provide employees with all relevant work equipment and bears the costs for such equipment. When the employee provides own equipment, employees generally can claim for expenses. Under the new law, employers are specifically required to provide digital work equipment for employees who regularly work from home. This may be deviated from by agreement if the employer bears the reasonable and necessary costs for the digital work equipment provided by the employee. Such costs may also be compensated as a lump sum.

Payments made by employers to compensate their employees for additional homeworking costs enjoy a tax relief (e.g. costs for business calls or the extra cost of gas and electricity). In this context, payments by the employer up to a maximum of EUR 300 per year (i.e. EUR 3 per day for a maximum of 100 days – “homeworking allowance”) are tax-free. Should the employer not exhaust this tax relief, the employee himself will be able to claim the difference (up to the maximum of EUR 300) as income-related expenses in the context of their employee tax return.

In addition, employees may claim a further tax relief for the purchase of ergonomically suitable furniture (e.g. their own office chair) in the context of their employee tax return. Employees can deduct up to EUR 300 per year as income-related expense (and even another EUR 300 if the employer does not use the above-mentioned EUR 300). The precondition for this is that at least 26

days per calendar year are worked exclusively from home.

### **Health and safety rules**

There are no specific health & safety rules for teleworking. Rather, workplace-related employee protection regulations do not apply to work in employees’ private homes or any other places where work can be carried out (e.g. in public transport, parks and accommodation establishments).

However, other employee protection regulations not related to the workplace do apply, such as rules on workplace evaluation, information and instruction, or protection of use. More specifically, employers are obliged to design monitor workplaces ergonomically, including the provision of appropriate display screen equipment, monitors, keyboards and other necessary additional equipment, but there is no obligation to provide suitable worktables, work surfaces and seating.

Neither the employer nor the labour inspectorate have a right to inspect the employee’s workplace at home.

According to the new law, accidents that occur at home are also considered occupational accidents, if there is a temporal and causal connection with the insured activity. This means that trips to prepare a meal or to the garden during a break are also covered by accident insurance.

### **Other instruments for more flexibility**

In addition to teleworking, Austrian labor law also offers a wide range of instruments to meet the desire of many employees for more flexibility. In this context, there is e.g. the possibility to agree on a flexible working time model; under certain circumstances, employees can also make use of parental part-time work, a special caregiver leave, partial retirement and educational leave.



### Different regimes

**T**raditionally, Belgian labour law distinguishes between two forms of telework, namely:

- **structural telework** where the employee works at a chosen location outside the company premises on a regular basis and with the use of information technology; and
- **occasional telework** where employees are offered the possibility to occasionally perform telework in the case of 'force majeure' (e.g. an unplanned train strike or serious traffic disruption) or for personal reasons (e.g. a doctor's or a garage appointment).

Both systems are characterised by their voluntary nature - an employee cannot be obliged to telework - as well as by the fact that the employee can carry out this work in his/her home, but also in any other place of his/her choice (e.g. an Internet café).

Since the start of the Covid-19 pandemic, a third category has been added, namely '**Covid telework**'. As in most European countries, 'Covid-telework' is compulsory in Belgium for all functions for which telework is possible (unless the continuity of the

business operations would require the employee(s) at the workplace). In January 2021, a national Collective Bargaining Agreement was entered into, creating a legal framework for this Covid telework for companies that did not yet have a structural or occasional telework regime in place.

In addition to the above 'telework' regimes, there is also the system of '**home working**' where the employee works from his/her home or other location of his/her choice, but without the use of information technology. However, being more the exception than the rule, this system will not be discussed in this contribution.

### Formalities

Structural telework must be formalised in a written agreement between the employer and employee and concluded, at the latest, when the telework starts. This agreement must contain a number of mandatory provisions, such as the number of teleworking days, periods during which the employee must be reachable and by what means (e-mail, telephone, Teams, Skype, etc.), an agreement on the costs associated with the telework, etc.

For Covid telework, the arrangements made relating to the teleworkers' working conditions must be



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formalised (i) by a company collective bargaining agreement (CBA), (ii) by amending the work rules, (iii) by entering into an individual agreement or (iv) by drafting a telework policy.

Occasional telework is the least formalised. The employee must make a request for occasional telework, but the employer may refuse. The employer can lay down a framework for this type of telework in a CBA or the work rules, but doing so is not an obligation.

### **Flexible working hours**

In principle (i.e. if they are not under the direct control of the employer), teleworkers are excluded from the stringent rules regarding working time.

This means that teleworkers are free to organise their own work within the framework of the working time applying in the company. In other words, they will have to work the same number of hours as apply in the company, but without having to strictly observe a work schedule. Therefore, employers who want their employees to work during specific hours are advised to make specific arrangements about this point with its teleworkers.

Moreover, being excluded from working time regulations implies that any 'overtime work' performed by a teleworker during his/her homeworking days will not give rise to compensatory rest or overtime pay. Yet, this does not mean that the employer can overload the teleworker with work as the teleworker must be subject to the same workload and performance standards as apply in the workplace.

However, if the teleworker only works partly from home and partly at the office, then the hours worked at the office will be subject to working time legislation and any overtime performed at the office will have to be compensated with compensatory rest and overtime pay.

### **Right to disconnect?**

A typical problem with teleworking is the blurring of the boundaries between work and private life and the need for employees to be able to de-connect.

In Belgium, there is no right to de-connect, but there is a right to discuss it. Indeed, at regular intervals and whenever requested by the workers' representatives, this issue must be discussed in the Health & Safety Committee (or, in its absence, with the trade union delegation, or, in the latter's absence, with the workers themselves), which may formulate proposals (e.g. no obligation to answer e-mails after working hours or during the weekend) but the employer has no obligation to put such proposals into practice.

### **Equipment and expenses**

For structural telework, the employer must provide the equipment necessary to perform the telework and must pay any internet and communication costs linked to the telework. If the employee has to use his/her own equipment, then he/she is entitled to a reimbursement of the costs regarding the installation and the use of this equipment.

The employer is not obliged to refund any other costs such as heating, electricity, small office equipment, etc., but employers who wish to do so can grant their employees a lump-sum compensation of EUR 129.48 per month (for the second quarter of 2021 increased to EUR 144.31 per month), which is accepted by the tax authorities and the NSSO, free from social security contributions and taxes.

In the case of occasional telework, there is no obligation on the employer to cover costs or provide equipment, only to make arrangements for this with the employees. Also, for Covid telework it seems that only 'arrangements' must be made concerning the communication costs. In theory, it thus seems that the parties could agree that no such reimbursement is to be paid.



**A**s of November 2020, within the context of measures taken in Cyprus in order to restrict the proliferation of the Covid-19 pandemic, only a fraction of the employees of a business in the professional service sector are allowed to be on-site at any given time, currently at 30% of the total workforce. Equally, similar measures have been adopted for the public sector. In light of this, a big part of both the private and the public sector have been driven mandatorily to teleworking.

Existing case law and practice do recognise the ability for an employer to change the place of provision of work, as well as certain other terms of employment, where this will not result in unilateral changes detrimental to the employee, that could constitute cause for constructive dismissal.

Nevertheless, there is still no comprehensive regulatory framework covering teleworking in Cyprus. However, due to its current widespread use, teleworking has now entered into the realm of preliminary public discussion between employee and employer organisations, as well as the government, in particular to protect employees from a culture of “around-the-clock” availability and preserve work-life balance. At the same time, discussions have already begun on a cross-EU level, in order to produce a harmonised framework;

indicatively, the European Economic and Social Committee conducted a public hearing on 7 January 2021 to discuss the challenges of teleworking upon request of the Portuguese EU Presidency, with a view to producing a pertinent expert opinion for a future framework.

Finally, any future framework should ideally be based on the basic principles that arise from the Framework Agreement on Telework of 16 July 2002 between ETUC, UNICE/UEAPME and ECPE, specifically the voluntary nature of teleworking, equivalent rights with on-site employees, data protection, right to privacy, equipment and technical support, protection of health and occupational safety, flexibility of working time, equivalent workload and targets with on-site employees, access to training and professional development, and collective rights. Equally, the European Social Partners Framework Agreement on Digitalisation of 22 June 2020, between BusinessEurope, ETUC, CEEP and SMEunited, should be taken into account when devising employer policy concerning the use of new technologies, particularly the four basic principles of the Agreement, i.e. (1) digital skills and securing employment, (2) modalities of connecting and disconnecting, (3) artificial intelligence and guaranteeing the human in control, and (4) respect of human dignity and surveillance.



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## **T**eleworking in the Czech Republic before and during the Covid-19 pandemic.

The increase in work from home ("teleworking") in the Czech Republic has been linked with measures adopted by employers in connection with the Covid-19 pandemic. Until the outbreak of the pandemic, teleworking was not significantly widespread in the Czech Republic and was primarily viewed as an occasional benefit for managerial employees. According to the statistics, before the pandemic, in 2019 less than 5 % of Czech employees worked from home. The number has increased to 18 % in the autumn 2020. At the beginning of 2021, the pandemic situation in the Czech Republic deteriorated again and anti-covid governmental measures were tightened and the government of the Czech Republic has repeatedly recommended to employers to use teleworking where it is possible.

### **Legal Basis**

Teleworking is briefly regulated by the Labour Code. Nevertheless, the regulation does not correspond to the reality of a social and technological development and thus is rather insufficient. The employer cannot unilaterally order the employees to work from home or other places than agreed. Content of the agreement between the employer and the employee is crucial.

Telework cannot be ordered unilaterally, it must always be agreed upon with the employee. The Labour Code refers to telework in Section 317 which applies to the cases where (i) an employee does not work at the employer's workplace and (ii) performs agreed type of work under the laid down conditions within working hours which the employee himself/herself organizes. The arrangement would be often used for work from home, but can be used also for work from other places. The employees are subject to the same regulation as the employees who perform their work at the employer's workplace with certain exemptions, such as to working hours distributions, non-entitlement to

compensation, including compensatory time off, for overtime work.

However, not every teleworking falls under the legal regulation stipulated in Section 317 of the Labour Code. The employers sometimes prefer that the employees work from home in the same way, as if they worked from the employer's workplace, i.e. the employers wish to decide on the employee's working hours. Such arrangement is possible under Czech law, but the Labour Code does not contain a special regulation for such teleworking. The latter presents the vast majority of currently used form of teleworking.

### **Main issues arising out of teleworking in the Czech Republic**

The increase of Teleworking has given rise to the following interpretation problems:

#### **· Compensation of costs related to teleworking**

The Labour Code does not contain any specific guidance as to the telework costs compensation. However, since the employer needs to bear the costs of work, employers shall provide the employees (i) with the necessary equipment and/or (ii) provide compensation of the costs of the employees' using their own equipment or other costs arising in connection with teleworking (internet, electricity, printer, etc.).

#### **· Tax aspects of teleworking**

As mentioned above, in case the employee uses his/her own equipment while teleworking, the employee is entitled to receive compensation which may be provided in real costs (based on the submitted documents or bills) or in a lump sum amount. Whereas, the employer must be able to prove the calculation used for the lump sum amount, provide evidence of the conditions for determining the amount. The employer must



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review the calculation of the lump sum amount once a year at least.

It is more complicated with respect to other types of costs, such as electricity, heating etc. According to Coordination Committee of the Chamber of Tax Advisors it is not possible to use a lump sum compensation in respect of these utilities. Real costs need to be documented by respective evidence.

An employee has to prove the costs incurred in connection with work to be able to receive the compensation. Therefore, employees' cooperation is highly required but might be complicated in practice. The compensations that comply with all the criteria are considered a tax deductible expense on the employer's side and are not subject to income tax (nor to the social security and health insurance contributions) on the employee's side.

#### • Meal vouchers

Another interpretation questions that have arisen in connection with teleworking are whether employees are entitled to receive meal vouchers during teleworking and whether costs for such vouchers can be tax deductible. Depending on the arrangement used and provided several conditions agreed between the employer and the employee for teleworking are all fulfilled, the employees would be entitled to receive the meal vouchers even if they work from home and the costs incurred by the employer would be tax deductible. However, terms and conditions of the arrangements in place are always to be taken into consideration and assessed from tax laws perspective on case-by-case basis.

#### • Occupational safety and health

The employee working from home should follow the rules for occupational safety and health protections. The agreement on teleworking should

cover the issue of the employer's access to the employee's workplace (i.e., home) to (i) inspect working conditions with respect to occupational safety and health or (ii) investigate work accidents. Occupational safety and health procedures should also be regulated by the employer in a specific internal regulation.

### ***Flexibility in the Czech Labour law***

The Czech Labour law allows for a part-time work or shared work (shared employment) as flexible work arrangements.

The part-time work is an arrangement based on an agreement between an employer and an employee, for the employee to work less than standard weekly working hours (i.e., below 40 working hours per week in one-shift work regime). The employee is entitled to salary according to the scope of the part-time work.

Shared employment is brand new institute of Czech Labour law introduced as of 1 January 2021, which in fact aims to enable two or more employee to share the work (and workplace). The employees "switch" in doing the work according to their mutual agreement and by such joint effort they substitute for one full time employee. The employees at a shared workplace should not work more than standard weekly hours, i.e. no more than 40 hours a week. At the same time, they need to fulfil the average weekly working hours in no longer than 4 week time-period, i.e. they may work different number of hours in a week, but over no more than 4 weeks' time period they must achieve their weekly hours in average. This arrangement can be used only for part-time working employees doing the same type of work and the agreement concluded must contain details as to working hours distributions.

Both mentioned types of flexible work arrangements are less widespread in the Czech Republic than in other countries.



Generally, the technological changes and opportunities have resulted in more flexibility and teleworking, even prior to the COVID-19 pandemic. The pandemic has naturally entailed a broader range of teleworking in Denmark, since all public employees with office-based work and all other employees who are able to work from home are required to do so. Also, private employers are encouraged to have all their employees who can work from home to do so. The Danish government has imposed several restrictions that affect Danish employers differently as office workers are able to do remote work, while e.g. restaurants are forcibly closed for an unknown period of time with no opportunity to keep their employees occupied.

As a result, the Danish government has adopted a bill on a temporary work-sharing scheme in May 2020, which is prolonged to include all of 2021. The bill means that employers can divide the available work among the employees instead of terminating them.

In addition to the above-mentioned changes in flexibility and teleworking caused by the pandemic, the current rules on flexibility and teleworking in Denmark will be outlined below. Finally, we will provide a brief outline on the expectations for teleworking post the pandemic.

### ***Rules on Flexible Working***

To ensure the rights of part-time workers, the Danish Part-Time Employment Act protects against unauthorized discrimination of part-time workers in relation to full-time employees. Furthermore, the objective of the Act is to make it easier for the parties to agree on part-time work.

Apart from the bill on a temporary work-sharing scheme caused by the COVID-19 pandemic and the Part-Time Employment Act, no general rules are applicable to flexible working, but some collective agreements are governing the rules on work sharing and flexible hours. However, flexible hours are common in both the private and the public sector.

### ***Rules on Teleworking***

Whether an employee has the right to do remote work depends on the specific employment agreement. When employees are working from home, the provisions of the Danish Working Environment Act must be taken into consideration. All Danish employers are subject to this Act, the objective of which is to ensure a safe and healthy working environment in accordance with the technical and social development of society. The Act also applies to teleworking from home, where the ordinary obligations of the employer and the employee apply as well. This means that the employer must ensure - and the employee must contribute thereto - that the conditions for the work at home are reasonable with respect to safety and health. More specifically, the Act contains rules on e.g. the physical arrangement of the workstation and screen work. The rules on periods of rest and rest days also apply on remote work. However, it is possible to derogate from these rules under certain conditions if the employee works part-time from home. This ensures some flexibility in the organization of work for the employee.

### ***Expectations for Teleworking Post the Pandemic***

While the possibility of teleworking prior to the pandemic was considered as a sort of employee benefit, the pandemic has caused that many employers have experienced several benefits from providing employees with the possibility of teleworking from home. When providing the employees with this opportunity, the employees will have a larger amount of flexibility and a healthier work-life balance, which may result in a healthier work environment and more job satisfaction.

New studies even show that teleworking may increase the mobility on the labour market, as almost every second employee is willing to increase the distance between the home address and the place of work if granted one extra day of teleworking from home per week.

It is therefore our expectation that, post the pandemic, teleworking will be offered more commonly by the employers.



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**L**ike in many countries across the world, also most employers in Finland were required to adapt to new, unforeseen circumstances and to adopt to teleworking in a larger extent than before. The amount of teleworking increased by 541 percent during the week after the Finnish Government declared a recommendation to perform telework in March 2020. According to an e-survey conducted by the European Foundation for Improvement of Living and Working Conditions (Eurofound), teleworking was utilised in Finland in spring 2020, at the beginning of the pandemic, more than in any other countries in Europe. However, the survey shows that for the most part teleworking has been positively experienced in Finland. A flexible shift to telework has been promoted inter alia by the digitalisation of Finnish society, effective ICT, flexible working hours and working habits and previous experiences of teleworking.

There is no specific legislation concerning teleworking in Finland. The employer and the employee can agree on teleworking, but, as a general rule, the employer is not entitled to unilaterally order employees to teleworking and the employee is not entitled to telework without the employer's consent. There is no statutory requirement for the employer to pay additional compensation to employees who perform telework. Such compensation could be payable, if specific agreements on remote working have been entered into with employees including provisions on additional compensation, or if such can be considered common practice at the workplace. However, employees are generally entitled to make certain workspace deductions in their income taxation, even if the employer also provides a workspace or room for the employee. The deduction is determined by the number of days the employee works remotely.

### **Occupational health and safety**

Under Finnish law, the employer is responsible for the employees' health and safety at the workplace. However, in teleworking the employer's ability to

influence the employee's working conditions is restricted. The Occupational Safety and Health Act contains provisions on the employer's obligations to improve the working environment and working conditions to ensure and maintain the working capacity of its employees as well as to prevent occupational accidents and diseases. This includes making sure that the workplace, work equipment and the indoor environment do not cause adverse physical strain to the employee.

There is no obligation for the employer to conduct a separate risk assessment with regard to occupational health and safety for employees who work from home. The responsibility is to a certain extent divided between the employer and the employee, as the employee shall without delay inform the employer of any faults and defects they have discovered in the working conditions or working methods. Employees shall follow the orders and instructions the employer has given under its competence in relation to health and safety at work. Employees shall also otherwise observe the order and cleanliness, as well as care and caution that is necessary for maintaining health and safety regarding the work performed and the working conditions. However, it is also important that the employer carefully fulfils its own obligations.

Further, the limited coverage of the statutory accident insurance with regard to teleworking shall also be taken into consideration, as the insurance does not cover occupational injuries taking place at remote work as comprehensively as injuries taking place at the workplace. The statutory insurance only covers damage directly related to the work, e.g. if an employee is considered to have been on a break and injures themselves at home, the insurance may not cover the injury.

### **Finnish Working Hours Act and flexible working hours**

The new Working Hours Act entered into force on 1 January 2020. Unlike the former Working Hours Act,



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remote work is not, as such, excluded from the scope of application. However, employees working remotely may fall outside the scope of application of the Act if the employee is considered to perform work in conditions where it cannot be considered a duty of the employer to monitor the arrangements of the time spent on said work and the working time is neither predetermined nor monitored. Therefore, employees performing telework can fall outside the scope of the Working Hours Act.

The most significant change in the new Working Hours Act was the introduction of the possibility to agree on a flexible working hours arrangement. The act introduced a new concept of flexible working hours, an arrangement where employees have the right to decide the timing and the place of work, whereas the employer will define the work duties and the

targets thereof as well as the schedule for the work. The flexible working hours arrangement can be used for work where at least half of the working time is not tied to a specific time or place. The employees can, within the agreed limits, decide their working time. The regular working time must balance out to 40 hours per week on average over a period of four months. Overtime work requires an express agreement between the employer and the employee. Monitoring of working time in this arrangement is primarily on the employee's responsibility.

This new flexible working hours arrangement has not yet been widely implemented, but may serve as a useful arrangement with the increased demand for flexibility and teleworking which is expected to continue in a larger scale than before also after the pandemic.





**D**uring the period of the first lockdown, from March 17 to May 11, 2020, around 47.2% of French employees teleworked, including 80.7% of executive employees.

Telework was not properly/necessarily implemented within all the French companies so that, they had to adapt quickly to the situation notably through Article L1222-11 of the French Labor Code provides that *"In the case of exceptional circumstances, including the threat of an epidemic, implementation of telework may be considered as an adjustment of the workstation made necessary to allow the continuity of the company's activity and ensure the protection of employees"*.

On the basis of this provision, the Ministry of Labor has been able to specify that the employee's agreement is not necessary to use the telework organization in the context of the COVID-19 epidemic, and that no formalism had to be observed (Q&A of the Ministry of Labor, updated on March 5th, 2021).

As of today, in view of the health situation, French Government considers telework as a way limiting social interactions between people in the workplace and preventing the risk of transmission of Covid19 and still recommends favoring telework for employees whose tasks can be carried out remotely (Q&A of the Ministry of Labor, updated on March 5th, 2021).

In this respect, the National Protocol provides that telework must be the rule for any and all job position that allow it. In such a case, the telework should be implemented 100% of the working time for all employees able to do their work from home.

As regards employees who cannot do all their work from home, the company's organization must make it possible to reduce the number of commuting hours and arrange the time of presence within the company premises for the duties that cannot be performed from home.

Also, the employer must arrange the employees working hours in order to smooth the employees' arrival and departure times and limit the rush hour traffic.

For employees who are 100% teleworking, a presence of one day per week within the company premises is possible (to avoid any risk of isolation), if such employees express the need to do so and with the employer's agreement.

The health crisis has been the occasion for French employers to make great progress on this issue and we have noticed a strong dynamic in the implementation of company agreements relating to telework, which reflects a high degree of organizational flexibility.

For some companies, the traditional on-site organization is still preferred but they are keen to offer more flexibility to their employees 1 or 2 days per week.

For other companies, telework is preferred since it facilitates the adoption of the flex office and allows to reduce the number of physical workstations in the company.

Also, by generalizing this type of work organization, companies are able to reduce their office space and at the same time reduce their operating costs, without reducing their profits.

Moreover, since workers are at home and travel time is neutralized, schedules can be adapted to the needs of each individual which simplifies the work/life balance and even increases employee productivity.

Telework, which has been accelerated due to the health crisis thus becomes a global flexibility tool for many companies.



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### Introduction and current situation

**D**ue to the pandemic, many employees are working from home. The acceptance and popularity of off-site working has increased significantly.

In Germany, there is still **no general legal entitlement to teleworking**. Due to a resolution in January 2021, employers are now temporarily required to offer the possibility of working from home in order to help contain the pandemic and to ensure the safety of their employees. Exceptions are only allowed if on-site working is required for compelling operational reasons. The obligation is initially limited until April 30, 2021.

Normally, if an employee wants to work off-site, the employee must seek to get an individual permission from the employer. Usually the parties set out the rules in the individual employment contract. A unilateral assignment by the employer or order to work from home is not covered by the employer's general right of direction (Sec. 106 Trade Ordinance - *Gewerbeordnung*).

The teleworking regulations in Germany are not codified in one statute or ordinance but rather in a multitude of laws. The German government is currently finalizing the draft of a **Mobile Working Act** (*Mobile Arbeit Gesetz*). The goal is to establish the framework conditions for mobile working and to provide legal clarity. A legal entitlement to work from home (in German "home office" or *Heimarbeit*) has been discussed but is not envisaged at the moment, due to a disagreement between the political parties.

### Statutory Provisions and the Duties of the Employer

Teleworking in principle means that the employee has a permanently installed workstation in his/her private sphere. Often the employee has no office space on-site, unless he or she does alternating telework. **The employer is responsible for ensuring that regulations**

**on occupational health and safety, data protection and working time regulations are complied with.** Otherwise, the employer could face administrative fines.

The Workplace Ordinance (*Arbeitsstättenverordnung*) regulates the minimum requirements for the safety and health protection of employees when **setting up and operating work-places**. It determines in detail the requirements for setting up a workplace, for example, the lighting and temperature, but also requirements for computer monitors and laptops. It is important to note that in principle the employer is obliged to provide the work equipment, including all materials.

The Working Hours Act (*Arbeitszeitgesetz*) also applies to teleworking. Employees must therefore adhere to the regulations on maximum working hours, rest periods as well as the prohibition of work on Sundays and public holidays. After six straight hours of work, a rest period of 30 minutes is mandatory. When working for more than nine hours, a rest period of 45 minutes is mandatory.

The protection of the **mandatory occupational accident insurance** also applies when employees work from home. The conditions for the insurance coverage are that the accident has occurred in the dedicated office space and that the employee was actually working for the employer at the time the accident occurred. The insurance does not cover accidents that occur e.g. on the way from the desk to the kitchen.

Due to the often spontaneous or short-term set-up of workplaces at home caused by the pandemic, often not all regulations are complied with. In this case, the employer's duty is limited to a **general risk assessment**.

### Employment Contract

Whenever fixed days of working from home are agreed, a corresponding **contractual arrangement**



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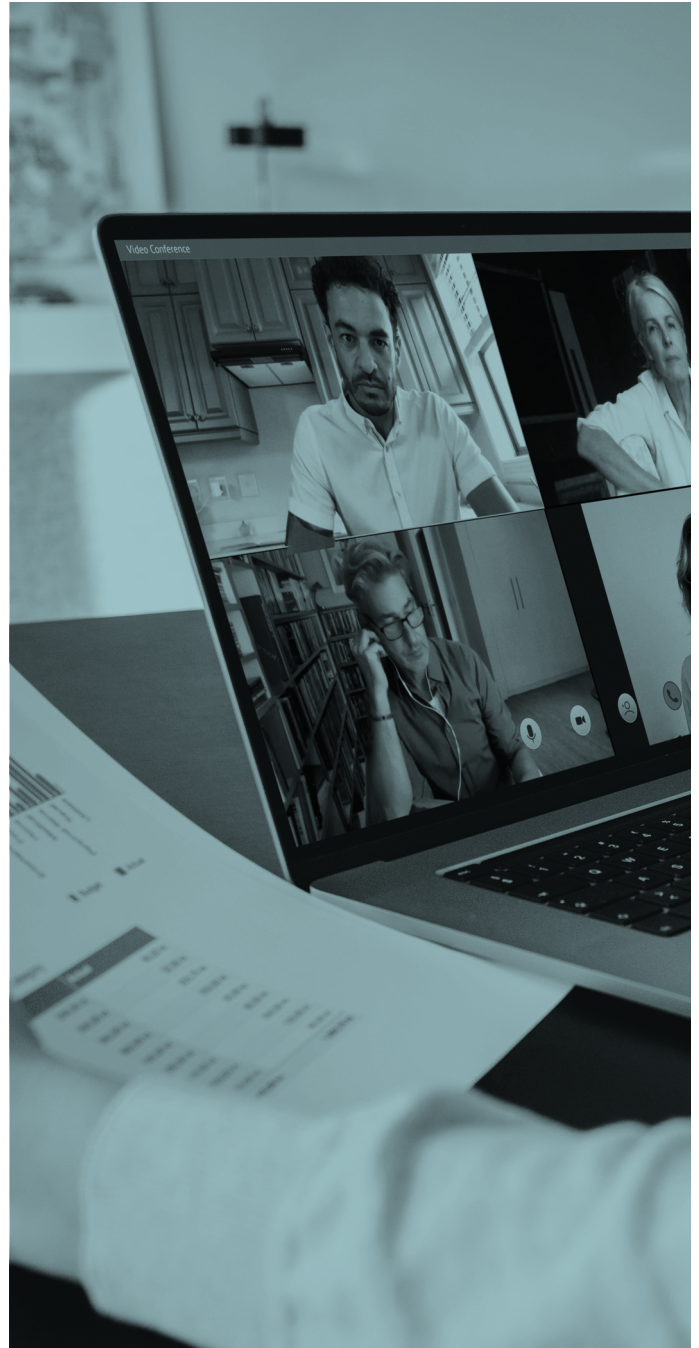
**in writing** is recommended. In the employment contract, the rules for working from home should be defined as precisely as possible. The parties may for example agree on certain working hours and on the technical realization of all work duties.

**Data protection** agreements and employee privacy statements are essential. If there is a works council, the regulations on working from home can be set up in a shop agreement. In order to ensure the compliance with the Workplace Ordinance, the employer should obtain a **right of access** to the employee's private premises. This way, the employer can for example once a year check if all requirements for the setup of the working space are met. If the employee only occasion-ally works from home or does not want the employer to access his or her premises, it is rec-ommended to at least **hand out information on requirements for safety and health protection**. Because of the lack of the employer's influence on the private sphere of the employee, it is advised to agree in writing on the **duty of the employee to cooperate**.

Since the employer is normally obliged to provide all work equipment, it is very important to have a detailed agreement on this matter. If the parties agree that the employer provides e.g. a computer or a laptop, **the employer is responsible for all costs**, including maintenance and set-up. The parties may also agree on the **employee using his or her own equipment** (BYOD). However, imposing the costs on the employee is not always permitted. If the work is performed mainly or exclusively from home, it is a good option to pay a "**home office flat rate**". This way the employee is reimbursed for all expenses regarding the working place such as rent or electricity.

### Taxes

**Employees may deduct their expenses from their tax.** A flat rate of five euros per calen-dar day the employee has worked from home can be entered in the tax return of 2020 and 2021, up to a maximum of 600 euros.





**T**he Hungarian Labor Code promotes the various forms of flexible working practices and atypical forms of employment including flexible work time and teleworking. Teleworking and flexible work arrangements were, however, still far less widely spread in Hungary than in other European countries, mainly due to the administrative burdens and the risks that employers take on when employing teleworkers. That was the case, at least, until everyone suddenly became a remote worker due to the COVID-19 pandemic.

Employees in Hungary are not entitled to request remote working or flexible hours. Teleworking and flexible working arrangements require an agreement and are thus based on the decision of the employer, even during the COVID-19 pandemic.

Under the applicable labor safety rules, accidents that happen during teleworking may qualify as work accidents. Employers therefore take on a significant risk when employing teleworkers. In 2019 the labor safety rules pertaining to teleworking were to a certain extent amended. Under the amended rules, work equipment for teleworking may be provided by the employee as well, subject to an agreement with the employer. Regarding such work equipment, the employer shall conduct a risk assessment in order to ascertain that the work equipment is in a safe state. In that case the responsibility to ensure that the work equipment is in a safe state at all times lies with the employee.

There is a favorable taxation regime available for cost reimbursement of equipment provided for the purpose of remote working, but it does impose significant administrative burden on employers.

The Covid legislation enacted during the national state of emergency relaxed these otherwise strict and rigid rules pertaining to teleworking. Under the transitional home-office regime, employees and employers may agree to deviate from practically all the rules of teleworking defined by the Labor Code.

The labor safety rules concerning teleworking do not have to be applied during the state of emergency. The employers' only remaining obligation is to inform the employees about the rules of non-hazardous and safe working conditions necessary for working and the employees must take these into consideration when choosing a place to work.

Employers, at their own discretion, may also choose to reimburse employees' costs incurred in connection with the telework and pay a lump sum stipend that is tax free, up to an amount equalling 10% of the monthly minimum wage until the end of the state of emergency.

The possibility to pay a lump sum cost reimbursement and to clarify the rules for teleworking had been on the agenda of policy makers for a while and the regime was ripe for a change.

Permanent teleworking and flexible workweeks have broad support and it may become the "New normal" in Hungary too. Therefore, many employers plan to continue having their employees work from home at least partially and plan on using a hybrid model. We expect that at least some of the long-awaited developments that were fuelled and accelerated as a result of the pandemic will remain in force and will continue to also be applicable once the state of emergency and the restrictions are lifted.

If you have any questions about the above, please contact Hédi Bozsonyik at [info@szecskay.com](mailto:info@szecskay.com), who is happy to assist in these kinds of matters.



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In March 2020, employees were launched into a large scale, remote working experiment. A year on, most employees continue to work from home, adapting to wide ranging and significant changes to their working environment. These changes were created by the emergency response to Covid 19 but it is clear that a new way of working has been firmly established.

### **Remote Working - what new law is in the pipeline?**

**Making Remote Work** - Ireland is yet to enact specific legislation on remote working. This will change, as the legislature catches up with the significant developments in thousands of workplaces over the last year<sup>1</sup>. The Government's 2021 strategy "*Making Remote Work*"<sup>2</sup> (the **Strategy**) anticipates remote working<sup>3</sup> as a permanent feature of the Irish workforce. In doing so, the Strategy recognises some of the benefits of remote working, such as reduced commuting and impact on the environment, more family time for workers, and a better population spread across rural areas.

As part of the Strategy, it is expected that legislation will be enacted to grant employees certain statutory rights to request remote working arrangements and employers will be obliged to demonstrate genuine and adequate consideration of such requests. Employers will not be required to accede to all such requests but will have to provide objective business reasons in refusing a request. Similar legislation has, of course, been in place in other jurisdictions for some time and this new law is not expected to create radical

change on its own. However, in tandem with the other measures set out in the Strategy<sup>4</sup>, it is likely to assist in a more permanent move to remote working.

The attitude of the judiciary and employment law adjudicators will clearly be important and this was highlighted in a recent case where an employee succeeded in an unfair dismissal claim after her request to work remotely, due to COVID-19, was denied<sup>5</sup>. It was held that her employer's instruction for her to attend the workplace permanently, was unreasonable, and the employee had therefore been constructively dismissed. A key feature of this decision was that some of the employee's duties could have been carried out from home and her employer did not give adequate consideration to her request.

**Right to Disconnect** - The disadvantages of remote working were also explored in the Strategy, leading to a Code of Practice on the "*Right to Disconnect*", published in March 2021 (the **Code of Practice**)<sup>6</sup>. As numerous surveys depict a remote workforce working longer hours, with many employees finding it difficult to disengage from work, the Code of Practice seeks to minimize the blurring of the lines between employees' work and personal lives. The Code of Practice (while recognizing that there may be occasional, legitimate situations where it is necessary for an employer to contact employees outside of normal working hours) defines the right to disconnect as the right to disengage from work, and refrain from engaging in work-related electronic communications outside of "normal" working hours.

<sup>1</sup> Ireland has yet to implement the Work Life Balance Directive 2019/1158.

<sup>2</sup> Department of Trade, Enterprise and Employment "Making Remote Work - National Remote Work Strategy" January 2021.

<sup>3</sup> Remote working is referred to as the broad concept of an arrangement where work is fully or partly carried out at an alternative worksite other than the default place of work and the Strategy adopted the definition of telework described in the 2020 European Framework Agreement.

<sup>4</sup> E.g. mandating that remote work should be the norm for 20% of public sector employment, investing in a network of remote hubs across Ireland, accelerating the provision of high speed broadband.

<sup>5</sup> An Operations Co-ordinator v A Facilities Management Service Provider [2020] ADJ - 00028293.

<sup>6</sup> Failure to follow the Code of Practice is not an offence in itself, but it will be considered in the adjudication of relevant workplace disputes and employment claims.



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A right to disconnect was already enshrined in Irish legislation which provides employees with specific statutory protections in relation to working time, including a maximum working week of 48 hours and specific rest breaks and holidays which apply regardless of where employees work<sup>7</sup>. This legislation is, however, over 20 years old and has long been considered as outdated, drafted with a traditional “9-5 type worker” in mind who clocked in to a physical location from Monday to Friday. In many modern workplaces, such workers no longer exist and the Code of Practice seeks to reflect that.

### **Issues with Remote Working**

Remote working has greatly impacted routine HR processes and matters (e.g. performance appraisals, disciplinary proceedings, bullying complaints) and has also thrown up new issues such as the creation of corporate tax liabilities arising out of a more nomadic and global workforce. Some of the issues employers are grappling with include:

- **Health & Safety:** While it is undoubtedly more difficult to monitor and assess the suitability of remote working environments, an employer’s responsibility and duty of care for the health and safety of employees is unaffected by an employee’s place of work. Guidance has been published, directing employers to conduct risk assessments to ascertain if employees’ working environments (including their homes) comply with health and safety legislation<sup>8</sup>. However, it is likely that most employers have not yet done so and it is not clear what lengths employers will be expected to go to in this regard.
- **Data Security & Confidentiality:** Employers must

reassess and reboot their protection measures to take account of how data is being processed in domestic and mobile locations. It is likely that many employers are still coming to terms with the practicalities of this and it will be interesting to see how the Data Protection Commissioner will deal with complaints and data breaches arising out of remote working.

#### • **Monitoring and recording working hours:**

Employers have traditionally been obliged, but in many cases have failed, to keep adequate records of employee working time<sup>9</sup>. The move to remote working has made this more difficult and it remains to be seen how this obligation will survive or adapt as some form of remote working becomes embedded as the norm.

### **Looking to the Future**

The Government (and indeed the Irish workforce<sup>10</sup>) has made it clear that remote working is here to stay. Tensions between employers and employees are likely to arise however over the various interpretations of “remote working” as some employees will be hoping to avoid any permanent return to the office, others are hoping for the opposite and most will seek to design their own bespoke hybrid. Employers will have different needs, influenced by productivity, rental costs and perhaps the ability to reduce payroll costs for those who opt to move out of cities and work in locations with a lower cost of living. We can be certain that employers and employees will find themselves innovating and adapting for some time, as the disruption to traditional ways of working looks set to continue.

<sup>7</sup> Organisation of Working Time Act 1997.

<sup>8</sup> Health and Safety Authority “Guidance on Working from Home for Employers and Employees” October 2020.

<sup>9</sup> Section 25, Organisation of Working Time Act 1997.

<sup>10</sup> NUI Galway Whitaker Institute & Western Development Commission (2020) - Remote Working during COVID-19: Ireland’s National Survey.





In the context of Covid-19 pandemic, since March 2020, employers have massively and globally adopted smart working or, as referred to in Italy, "Agile Working", which was originally introduced in Italy by Law no. 81/2017 (the "**Law**").

This was mainly due to the fact that remote working is able to grant the protection of the employees' health and safety while limiting the business disruption. The truth is that this practice, which was initially considered as an emergency tool, has definitively changed the way of working and we are all convinced that this will not change in the "new normal".

Let's see how the emergency legislation has temporarily (?) amended the ordinary regime of Agile Working, which differs from teleworking that, under Italian laws, refers to work from home (teleworking=homeworking; Agile Working=remote working).

#### **"Agile" working - ordinary regime**

The Law defines Agile Working as a way to perform the working activities partially outside the office, without a predetermined working time and place and organized by phases, cycles and objectives. Agile Working is based on a written individual agreement between the employee and the employer, thus the consent of the employee is always needed.

In other words, flexibility in organizing the activities to timely achieve the set objectives is the main feature of Agile Work, it being aimed to support employees in balancing work-and-life while increasing their motivation and productivity.

In summary, the main features of Agile Working based on the Law and/or applicable National Collective Agreements, are the following:

- (i) **flexibility**, allowing the employee to work wherever and whenever he/she wants according to the objectives and terms set by the parties (and on the terms of the individual contract);
- (ii) **will of the parties**, who have to sign the individual agreement on a fixed or open term basis, with possibility of withdrawal by prior notice; the agreement usually specifies:
  - (a) where the work is/can be carried out (e.g., in a place at the employee's disposal);
  - (b) maximum daily and weekly working time as well as rest periods;
  - (c) forms of exercise of employer's managerial power, in compliance with the rules governing remote controls;
  - (d) technological tools used by the employee that are usually provided by the employer;
  - (e) technical/organizational measures adopted to ensure the employee's **right to disconnect**.

"Agile" employees are granted with the same economic and legal treatment recognized to those employees who perform the working activities in the office (principle of equality). In particular, they have the right to benefit from protection against accidents at work and professional diseases deriving from risks connected to work performance executed outside the company's premises, and they are also required to cooperate to the implementation of the preventive H&S measures provided by the employer.

#### **Agile working - the COVID-19 regime**

As anticipated, since the beginning of the Covid-19 pandemic, the Italian Government has strongly



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recommended and encouraged the performance of the **working activities from home**, in order to prevent, reduce and avoid the spread of the Covid-19.

To this purpose, the first Covid-19-related emergency decree (i.e., Prime Ministerial Decree dated March 1, 2020) introduced significant derogations from the ordinary regime of Agile Working. In particular, such Decree, as subsequently extended to date (March 2021) and in force until (at present) the end of April 2021:

- (i) allows the employer to force remote working, without the need of the employee's consent nor of the written agreement (a unilateral policy/verbal communication is enough);
- (ii) states that for certain categories of fragile employees as well as for employees with young children in certain conditions (e.g. when the school are closed or when affected by the Covid-19 or quarantined), Agile Working is a right that cannot be refused by the employer;
- (iii) introduces a simplified mandatory communication procedure to labour authorities as to the commencement date of the Agile Working regime;
- (iv) provides that the working activities can also be performed with technological tools that belong to the employee;
- (v) predetermines and simplifies the applicable H&S regime (i.e., making it easier for the employer to comply with health and safety regulations related to Agile Working).

It should be considered that the forthcoming Law Decree to be signed by the end of April 2021 may extend the emergency status until July 31, 2021, thus also extending the derogations from the ordinary regime of Agile Working.

The report from the Italian National Institute of Statistics (ISTAT) dated December 14, 2020 showed that (i) 90% of the big companies (with over 250 employees), (ii) 73.1% of the medium-sized companies (50-249 employees), (iii) 37.2% of the small companies (10-49 employees) and (iv) 18.3% of the micro companies (3-9 employees) introduced or implemented Agile Working during the Covid-19 emergency.

Smart working has even played a significant role in the Italian H&S emergency legislation. The "Shared Protocol for Regulating Measures to Contain the Spread of the Covid-19 in the Workplace" - executed by the Government and the Social Parties on March 14, 2020 and subsequently updated on April 24, 2020 - has expressly recommended to employers (and self-employed) to maximize the use of smart working for all the compatible activities.

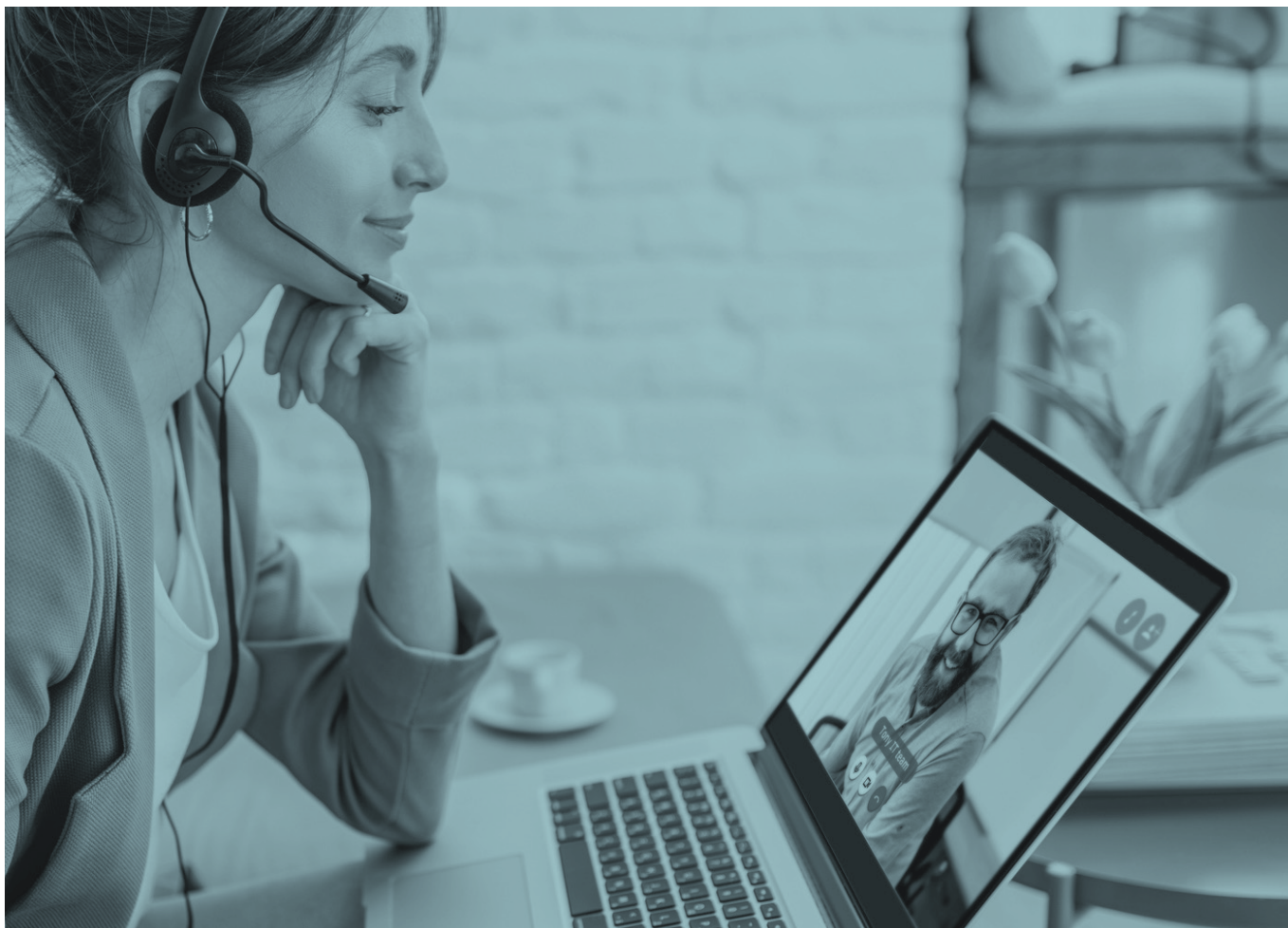
### Conclusions

Based on the recent massive and global increase of the remote working due to the Covid-19 pandemia, one can conclude that this modality of performance of the working activity is here to stay.

However, the increasing rate of stress and pressure affecting the employees during this pandemic, mainly due to the incapacity to disconnect and/or to their getting out of the comfort zone, demonstrate that there is still a lot to do in order to properly implement and regulate this innovative instrument.

Indeed, in its structural and ideal feature, in the "new normal" Agile Working should become one of the main expression of sustainability and diversity at the workplace.

How far we are from this goal?



**T**eleworking as an autonomous concept is not discerned in the legal system of Latvia; usually the term “remote work” is used instead, which includes the concept of teleworking. Remote work is not a novelty in the legal system of Latvia and has been applied for a long time - both in the private and public sectors. However, the concept of remote work has only recently been concretely defined in the law through 1 July 2020 amendments to the Labour Protection Act (the “LPA”). Remote work is defined as *type of work performance where the work that*

*might be performed at the employer’s undertaking, is performed, permanently or regularly, outside the undertaking, including the work performed using information and communication technologies.* The meaning of remote work excludes business trips and official travel.

Currently, neither the LA nor any other legislative act contains legal framework governing remote work. On the one hand, the remote work is flexible and at the discretion of an agreement between employer



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and employee. At the same time the general legal framework and principles for work contained in the LA apply to remote work without any limitations.

### **Agreement on Remote Work**

Employer and employee must agree on remote work in writing and absent written agreement neither can unilaterally decide that the employee will work remotely. Particular remote work arrangements can be agreed in the employment contract in different ways: (a) the employee may perform the work both at the employer's office and remotely, for example, from his or her own home; (b) the work is performed only remotely; (c) the work is performed mainly remotely while, if necessary, it can also be performed at the office. Types of possible arrangements are at the discretion of the employer and employee. To give more flexibility for employers, usually a clause providing that the employer can unilaterally require employee to work remotely is included in employment contract. If such provision is included in the employment contract, the employer can ask employee to work remotely by employer's order.

Generally, the employer is responsible for covering all expenses incurred by employee in relation to work, e.g. electricity, utility, phone, internet bills and any other expenses which are associated with the work performed.

### **Location for Performance of Work**

In case of remote work arrangements, it is possible to agree that the employee works: (a) from one specific place, such as home, or (b) that the employee can work remotely from any place, such as café or park. If place of work is not included in either employment contract or agreement on remote work, the employee can choose where to work remotely.

During remote work employers are responsible to provide a safe and hazard-free work environment

(to the extent it is possible). The LPA provides that the employee must collaborate with employer in work environment risk assessment and to inform the employer about working conditions during remote work.

### **Notion of Working Time**

Even though remote work and flexible working time are different notions they are often applied together. Flexible working time is not defined in the LA, but also is not prohibited. Where remote work is coupled with flexible working hours it can be established that: (a) employee works specific hours e.g. between 09.00 – 13.00 and 14.00-18.00, (b) employee works within a specific time period, e.g. any 8 hours between 07.00 – 22.00 (c) employee selects the time for work (if possible due to the nature of work). Working time arrangements must be agreed in the employment contract or provided in internal regulations.

In any case it is the employer's obligation to record the working hours. Where employees work remotely based on flexible working hours, the employer must pay special attention to ensure proper recording of working hours and that no arbitrary overtime, night work or work on public holidays occur.

### **Compliance with the Code of Conduct**

During remote work employees must comply with internal regulations and the employer's orders. Since employees who work remotely are out of direct employer's supervision, the employers must pay special attention to develop a procedure for monitoring work and to ensure secure circulation of documents and other information. It is also important to establish procedures for processing confidential information, for maintaining information security (access, passwords, codes) and for data processing. The LA does not govern these matters and such procedures can be established by internal regulations or by agreement between the employer and employee.



Inspired Technological breakthroughs force organisations to quickly adapt the work place. Employees have to constantly learn new skills and improve their capabilities and competencies. Therefore, an even greater flexibility in work arrangements is needed, including flexible working hours and working from home. In the below, we will explain what legal framework exists in the Netherlands. We will highlight health and safety and taxation rules.

## Working hours

The Dutch Flexible Working Act (*Wet flexibel werken*) enables employees to adjust their working hours. The Act applies to companies employing at least 10 employees. Under the Act, an employee having been employed for at least six months can request the employer in writing to adjust the employee's working hours (both the number of hours worked as how the hours are spread over the week). The employee's request must be submitted at least two months before the proposed start date and must include the proposed start date and the suggested new arrangements. The employer has an obligation to consult with the employee on the request to adjust working hours. The employer must then inform the employee of its decision and the reasons for a rejection (if rejected), in writing. If the employer does not respond at least one month before the proposed date, the requested change is considered to be accepted. In principle, the employer must grant the employee's request, unless there are major business reasons for the employer not to do so. A major business reason may for instance exist if with granting a request for reduction of working hours, serious operational problems will arise with re-allocating the hours (nobody can be found to work these hours), with time tables or in the area of health and safety. The employer may refuse a request to increase the number of working hours if this increase would lead to serious financial or organizational problems, the lack of available work or in case of insufficient staffing budget. It should be noted that the employer cannot

terminate the employment contract because the employee filed a request under the Flexible Working Act. If the employer grants or rejects the request, the employee can in principle submit a new request after one year.

## Working from home

Under the Flexible Working Act, the employer furthermore has a duty to consider an employee's request for adjusting the place of work. Other than is the case with the adjustment of working hours, the employer does not have to prove (a) major business reason(s) to justify a rejection of the application.

As a result of the COVID-19 crisis and the increase in employees (partially) working from home, a legislative proposal from an individual Member of Parliament was submitted to Dutch Parliament for the Working Where You Want Act (*Wet werken waar je wilt*), which would amend the Flexible Working Act. With this proposed Act, a request to amend the workplace (which includes a request to work from home) submitted by the employee can only be rejected by the employer when the employer can prove it has major business reasons. The employer does not have to grant the request if the employee wishes to work at location outside the territory of the European Union or does not concern the employee's home address or the employer's work location. Because it is an individual Member of Parliament who submitted the bill and not the Government, it remains to be seen whether Dutch Parliament and, subsequently, the Senate will adopt this proposal. Several large employers in The Netherlands have indicated that they want to offer their employees the opportunity to work partly from home and partly from the office, even after the COVID-19 crisis.

## Workplace conditions when working from home

In the Netherlands, health and safety issues are governed by the Working Conditions Act



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(*Arbeidsomstandighedenwet* or *Arbowet*). The *Arbowet* requires the employer to observe certain health and safety standards for the workplace. The employer is obligated to ensure the employee's health and safety in the workplace, even if the employee works from home. Therefore, the employer has to apply effective and preventive measures to ensure a safe and healthy environment. The workplace itself and the equipment must be adapted to the individual needs and characteristics of the individual employee. This means that the employer should in any case provide the employee with a suitable chair, table and proper lighting in order to perform the work, should the employee not possess such items.

#### ***Taxation when working from home***

The employer may at its own discretion reimburse certain costs to the employee free of tax up to a

certain percentage of the (taxable) payroll according to the so-called expense allowance scheme (*werkkostenregeling*). For instance, the employer may choose to reimburse the costs of electricity and/or coffee at home. However, an employer is not allowed to simply allocate any allowances and / or benefits: an allowance or a benefit in kind with a maximum of EUR 2,400 per employee per annum is acceptable. Certain specifically identified allowances can be reimbursed tax-free and can therefore be provided without any impact on the discretionary margin. For instance, the employer may provide a mobile phone and laptop to the employee. These provisions are tax-free, provided they are considered necessary for the proper performance of the duties by the employee. In addition, the employer may reimburse costs for internet (at home) free of tax and/or provide a printer to the employee.



### **Legal starting point**

**L**In Norway, as in most countries, basis for the normal employment contract is the employee performing her/his duties on the employer's premises within the working hours specified in an employment contract or in a collective bargaining agreement. The pandemic has introduced a new normal: office workers are (mainly) working from home, using their own infrastructure, furniture, housing, and very often deciding at their own convenience when and where they want to work.

This new normal introduces a variety of new legal challenges and possibilities. Unless otherwise agreed in the Labour Contract Employer can within certain limits, decide where Employee shall perform work. Introducing Teleworking as a new "normal" will require new regulations regarding who is responsible for the working environment, limiting work to allowed working hours and use of automatic performance measuring systems which modern technology facilitate to an extent far beyond today's regulations.

### **Place of work**

Unless otherwise agreed, the employer decides where the employee shall perform his/her services, within reasonable limits. Many professions have been used to working from home, visiting customers or clients or performing services without any defined place of work. During the pandemic, it has been widely accepted that an employer may request the employee to perform work from home without any additional compensation other than providing the necessary equipment to do so. This is mainly due to the extraordinary pandemic situation and a result of the authorities ordering employers and employees to work from home. Infection prevention and control regulations simply state that employers must document that all employees are ordered to work from home if possible, which presumes that the employee has an obligation to provide free office

space, communication infrastructure, furniture etc.

Normally an employee may object to working from home. Pre-pandemic regulations limit work from home to those situations where there is a written agreement satisfying a minimum content as specified in regulations from 2002. Government have drafted new regulations more in line with today's new normal. We expect Government to send a draft for a public hearing very soon.

Employees may prefer working from home as this saves commuting time. Unless otherwise agreed in the employment contract, the employer still has the final word and may decide the place of work. However, as a consequence of savings with regard to office space, reduced commuting time and being able to use an otherwise geographically inaccessible expertise, we expect employers will increasingly accept employee preferences to work from home which will require a whole new set of employment contracts and tariff agreements. Our firm have started developing schedules for highly versatile flexible work arrangements facilitating possibilities in current legislation and Agreements.

Today's regulations do only allow for limited tax deduction when employees are using their own facilities. Usually only separate office rooms are deductible. This is expected to be change making Teleworking more economically viable.

### **Working hours and performance measuring**

Today, working hours are limited both daily, weekly and monthly and Employers are responsible for keeping records documenting compliance with legislation and ensuring that working hours are within responsible limits. Introducing work from home makes this obligation difficult or impossible to comply with without extensive electronic monitoring. In Norway, the use of monitoring like Mobile Device Management etc. is limited to safety measures and not for monitoring



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performance. Introducing performance-measuring techniques requires transparency and all initiatives will require to discussions with employee representatives and will need to be GDPR compliant.

### **Work environment**

The employer is responsible for providing a safe working environment wherever employees perform work. This is achievable when the employee is working at the office, factory etc. which are controlled by Employer. If the employee decides unilaterally where and when he is working, the employer is no longer able to control the work environment. Current regulations limit an employer's responsibility to what is "practically possible", but the employer has to document that the work environment is covered by employer's internal control standards. However, the Employer and elected safety

delegates do not have access to an employee's home, holiday-home or other places from where the employee will perform work.

### **How to facilitate flexibility**

Given the opportunities that a more efficient and flexible working environment has revealed during last twelve months both labour organisations and Government have started work to amend old laws and agreements to the requirements of a future labour market very different from what we had in 2019. Before new regulations are developed, flexibility and adaption of new technology is facilitated by developing new contract strategies based on a need to comply with employees and employers' needs to take advantage of new technology and new insight enforced by adapting to the pandemic.



**2** 020 saw no significant changes to Polish labour and employment law. However, many COVID-19 related measures were adopted, temporarily modifying certain general employment law provisions. The temporary measures generally apply during a state of epidemic or epidemiological threat and for a certain period after its end. However, one may also expect some modifications to employment law regulations in 2021.

### ***Increase in the minimum wage***

In 2021, the national minimum wage is PLN 2,800 gross per month (approx. EUR 600) for individuals working under employment contracts, and PLN 18.30 gross per hour (approx. EUR 4) for individuals engaged under civil law contracts.

### ***Obligation to report specific-task contracts***

A new obligation comes into force on 1 January 2021 involving the requirement to inform the Social Insurance Authority (ZUS) of any concluded specific-task contracts (umowy o dzieło). This obligation applies to payers of social insurance contributions (therefore particularly employers), as well as to individuals. These entities are required to inform ZUS of the conclusion of each specific-task contract, if:

- that contract has been concluded with a person with whom there is no relationship of employment, or
- the person with whom that contract has been concluded does not provide work under it to the employer with whom it has a relationship of employment.

Information on concluded specific-task contracts should be provided using the specific ZUS RUD form.

### ***Employee Capital Plans (PPK)***

This is a regulated general savings programme that encourages individuals to save in order to have

financial security once they reach 60 years of age. It is mandatory for employers to establish PPK. Employees are enrolled automatically, but they may opt out at any time. PPK was introduced in stages, starting from the largest employees. The last stage of implementation commenced on 1 January 2021 i.e. from this day the Act on PPK applies to the smallest employers (employing between one and 19 persons), who are obliged to conclude PPK management agreements by 23 April 2021 and PPK operation agreements (on behalf of particular employees) by 10 May 2021.

### ***New misdemeanours to the Labour Code***

As of 1 December 2020 two new misdemeanours came into force specifically penalising the unlawful; employment of maintenance debtors, i.e.:

- If an employer does not confirm a concluded employment contract in writing before allowing an employee to work (which in itself constitutes a misdemeanour) and such employee is a person against whom enforcement of maintenance payments is pending (under specific statutory conditions), the employer or person acting on his behalf may be subject to a fine from PLN 1,500 to PLN 45,000 (approx. EUR 325 to EUR 9,780);
- Whoever, contrary to the obligation, pays remuneration exceeding the amount specified in the concluded employment contract without making deductions to satisfy maintenance payments, to an employee against whom enforcement of maintenance payments is pending (under specific statutory conditions) may be subject to a fine from PLN 1,500 to PLN 45,000 (approx. EUR 325 to EUR 9,780).

### ***Temporary COVID-19 related measures***

Due to COVID-19 a few specific temporary employment regulations have been introduced which will be in



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force by the end of pandemic. Under certain statutory conditions employers may, in particular:

- order employees to perform work remotely (i.e., in a place other than specified in their employment contract);
- agree with employees on reduced work time or economic standstill (and potentially apply for subsidies in such situations);
- reduce statutory length of uninterrupted daily and weekly rests; conclude with employees specific agreements on introduction of balanced-time work time system or agreement on application of less favourable conditions than that stemming from employment contracts;
- suspend certain obligations related to the Social Benefits Fund;
- terminate a post-employment non-competition agreement with seven days' notice (even if such possibility was not prescribed in the contract itself);
- pay severance pay, compensation or other pecuniary benefit paid to the employee in connection with employment termination, in an amount not exceeding ten times the national minimum wage, i.e. in total PLN 28,000.00 (approx. EUR 6,080.00) in 2021.

#### ***Anticipated changes in 2021***

Legislative procedures are in progress concerning the introduction of remote working regulation into the Labour Code (currently, there is only a separate COVID-19 related temporary regulation). This will replace provisions on telework. Additionally, as an EU Member State, Poland will be obliged to implement the EU Directive on the Protection of Persons Reporting on Breaches of Union Law by 19 December 2021.







## **T**eleworking was an exception

Teleworking is governed by the Portuguese Employment Code. It is considered a special type of employment contract and must be agreed in writing. The parties may agree to change a standard employment contract into teleworking regime or the reverse. The agreement to change temporarily the standard employment to teleworking has a time limit of three years.

In line with most European countries, teleworking in this country was an exception until the Covid-19 pandemic. Teleworking is governed by the Portuguese Employment Code. It is considered a special type of employment contract and must be agreed in writing. The parties may agree to change a standard employment contract into a teleworking contract or vice versa. The agreement to change temporarily the standard employment to teleworking has a time limit of three years. In general terms, any employee subject to teleworking has the same rights and duties as any other employee with a standard employment contract.

Since March 2020, teleworking has been mandatory for most of the period for employees (i) whose personal situation allows them to do so and (ii) whose roles are compatible with remote working. In those cases, teleworking applies with no need for a written agreement. A new governmental law was recently published which states that teleworking will be mandatory until the end of 2021.

### **Mandatory teleworking**

There are two situations in which an employee can ask to be subject to teleworking and the employer must accept this unless the roles are incompatible with remote working: (i) an employee who is a victim of domestic violence, has filed criminal complaint has left their previous home and (ii) an employee with a child below the age of three years and employer has the adequate means to implement teleworking.



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In those cases, the employer is not allowed to oppose to the request for remote working.

### **Flexible teleworking**

As teleworking is considered to be a special type of contract, the Portuguese Employment Code does not contain any provision regarding partial or flexible teleworking. However, during the Covid-19 pandemic, many employees have adopted a flexible teleworking practice. Many companies are adopting policies according to which the employee is entitled to work some days remotely. In some cases, the employer's premises do not have workstations for all employees, assuming that part of the workforce will be working remotely. The Government has started the social dialogue in order to change the law regarding some matters including the possibility to provide for partial remote working.

### **Equipment, Internet connections and other costs**

Under the Portuguese Employment Code, the parties must agree on the terms of ownership of equipment and its use and costs. Unless otherwise agreed by the parties, it is assumed that the employer owns the information technology and communication equipment and must pay for its installation, maintenance and costs.

However, there is some discussion about the extent of this rule in the context of the pandemic. The employer must make work and communication equipment available to the employee. However, there is no clear obligation to pay other costs. A Government notice stated that telephone and Internet costs must be included, but this interpretation is not consensual.

The parliament is discussing bills to change the law mainly regarding the payment of the costs and the maximum duration of the teleworking.

### **Privacy, working hours and the right to disconnect**

The employer must respect the employee's privacy and

rest periods. In addition, the general provisions of the Portuguese Employment Code apply to teleworking. If the employer needs to visit the remote workstation to check on the employee's work or to provide maintenance for the work equipment, this must be done between 9 am and 7 pm.

There are no special provisions regarding working hours in the context of remote working. In general terms, the employee is only required to comply with their working hours. Therefore, the employee could disconnect after the end of the working day. However, there is no special rule regarding the right to disconnect.

### **Health and safety rules**

There are no specific health and safety rules for teleworking. In general terms, the employer should confirm whether the employee has adequate health and safety conditions to do their job remotely. This check can be made by a questionnaire filled in by the employee.

Complex questions may arise in the event of occupational accidents with a temporal and causal connection to the work, because the law has not considered cases of accidents occurring in the employee's private home or in other places chosen by the employee.

### **Other instruments for flexibility**

An employee with children under the age of 12 years may ask for a flexible schedule. The employer can only refuse the request based on imperative requirements of the functioning of the company, or the impossibility of replacing the worker if he or she is indispensable.

In that case, the employer must request an opinion from the Authority for the Equal Opportunities between Men and Women. If the Authority issues an opinion that does not support the employers' intention, the employer must bring a legal action against the employee in the Employment Court to confirm the legal grounds to reject the flexible schedule.



Even from the pre-pandemic period, in terms of remote work, the Romanian legislation provides two main manners of organizing work, namely **teleworking** (having a special legal framework developed based on the European directions in this field) and **work from home**.

By definition, teleworking represents the work performed on a regular and voluntary basis by the employee, at least one day per month, from a different location than the workplace organized by the employer, using the information and communication technology (mainly PC/laptop, telephone/smartphone, tablets and other such devices which may also be connected to the internet, etc.). In contrast, the “*work from home*” regime, regulated only in a general manner by the Labor Code, remains to apply for those activities that do not involve usage of the technologies mentioned, by interpretation, to a limited range of jobs involving handwork, crafts, manual activity, etc.

Teleworking has been largely implemented by employers during the current pandemic and state of alert instated on Romanian territory, generating at the same time a series of challenges in interpretation and application. Compliance with the minimum content to be included in the act establishing the teleworking regime and certain obligations to be borne by the employers became the main points of discussion in practice, as the legal provisions did not prove at all times clear enough or as adapted as necessary for the current unstable context.

Particularly, the main legal text requires as an express mention within the act implementing teleworking regime, *the conditions under which the employer bears certain expenses related to teleworking activity*. This represents a rather vague wording, while for other similar obligations of the employer (e.g. to ensure the necessary equipment and technological means, with the possibility to derogate, or transport of the materials used from the headquarters to the place where

telework is performed), the law appears to clarify the extent of employer's obligations.

The recent legal amendments to the Fiscal Code seem to shed more light on this issue, as they instate a *special fiscal regime for the certain amounts granted by employers to employees who work under teleworking regime*, in order to support the expenses with utilities (such as electricity, heating, water and data subscription, and the purchase of office furniture and equipment). These provisions do not expressly refer to an obligation of employers to grant such sums, but seem to emphasize a possible approach of the authorities in interpreting teleworking law, namely that employees shall receive at least some financial support for said expenses from the employers. The compulsory nature of such an approach is still to be confirmed in practice.

On the other hand, what is certain at this point in relation to teleworking and implementation of flexibility is the obligation to implement such regimes as **mandatory measures for the currently applicable state of alert**, imposed by authorities last year and prolonged several times. More exactly:

- (i) the employers are obliged to implement/continue the application of homeworking/teleworking, where the nature of activity allows for such a measure;
- (ii) for activities that cannot be performed remotely, employers with more than 50 employees, have the obligation to organize the work schedule so that the employees are divided into groups to start, respectively to finish the activity at a difference of at least one hour.

Apart from the measures imposed during the state of alert, the law recognizes the general possibility of employers to organize the work schedule in a flexible manner by implementing an **individualized work schedule**, following an agreement with the employee.



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An individualized work schedule applies so that the daily duration of working time is divided into two periods: a fixed period in which the employees are simultaneously at work and a *variable, "mobile" period*, in which the employees choose the arrival and departure times, in compliance with the daily schedule. For example, employees are allowed to arrive at work anytime between 07:00 and 10:00 and to leave at any time between 16:00 and 19:00, as long as they complete the 8 hours of daily work (plus lunch break). The legal provisions regarding duration of working time, exceptions thereof, overtime and other essential aspects remain applicable accordingly.

As another form of work flexibility, the **unequal work schedule** abandons the classical distribution of 8 hours a day and 5 days a week and proposes, just as its name indicates, an uneven number of working hours/day during the week, even leading in some cases to additional weekly days off. For example, an employee would work 11 hours on Monday and Tuesday and 9 hours on Wednesday and Thursday and would have Friday as a day off.

Unlike the individualized work schedule, in the case of the unequal work schedule, the law provides that it can only work if it is expressly specified in the individual employment agreement. However, the law does not clarify whether "*expressly specified*" involves detailing the program by days and hours, or whether simply mentioning that the program is unequal (with a possible reference to internal rules/regulation) is sufficient. A unitary interpretation on this subject does not exist at this moment.

As a side note, so as to allow employees to "extend" their weekends, employers also started implementing another form of flexibility, by applying a **shorter work schedule on Friday and / or Monday** - for example, employees have the right to leave work from 14:00 on Friday and / or return to the office on Monday from 12:00. The employees are free to use this benefit or not, depending on the specific activity and deadlines they have to finish, but in case they make use of this benefit, it does not have consequences, for example, on their statute as full-time worker and the related benefits. Some employers implement this artifice by also providing the recovery on other days of the respective hours "used" by employees.

In any case, implementing this approach must be doubled by proper registration of this benefit, so as to avoid potential risks. In this sense, taking into account the requirements of the Labor Code, which impose the obligation to have a record of working time, including the start and end hours of the work schedule, it is important to highlight exactly the hours shortened by the employer.

Everything considered, the general tendency towards flexibility and remote work organization results with a certain degree of clarity from the latest practical approach and at most, from a necessity to ensure the safety and, at the same time, productivity of employees, as adapted as possible to current challenges. Out of the flexibility options available at this point and those to be developed for the future, only time can tell whether these solutions are feasible in the long term.





Inspired by the speedy changing employment environment due to COVID-19 the initiative to introduce changes in the regulation of teleworking came into force as of January 1, 2021. This change became one of the fastest new laws passed in the history of the Russian Labour Code. Teleworking, by itself, accentuates the importance of effective HR policies, confidentiality, cybersecurity, compliance at workplaces, as well as switching to the digital world.

The new rules define various categories of remote work and establish a number of new rights and responsibilities for both employers and employees regarding teleworking. Novel legislation brings to a new level the necessity of electronic document management in the sphere of labour relations in Russia, which so far is subject to not the most flexible legal regulation. But the positivity of further development can be seen in the recent court practice.

The new types of remote and combined work, allowing far more flexibility to employers than in the past, are the following:

1. permanent remote work;
2. continuous temporary remote work (no more than six months);
3. periodic temporary remote work (alternation of remote work with office work);
4. emergency temporary remote work.

Each type of remote work has its own particularities. For example, the transfer of employees to emergency temporary teleworking is possible without the consent of employees. In any other cases, this would be illegal, since, in fact, such a transfer changes the essential conditions of the employment contract.

Regarding permanent teleworking and temporary teleworking up to 6 months, the regulation is intuitive. The ultimately new concept for Russian labour law – the periodic temporary remote work, implies that the employees may combine teleworking and work in the

office. Although this convenient approach has been quite widely spread in practice during the last 5-6 years in large companies, its legality was approved only in January this year. In order to introduce this regime of work, the parties should agree on a particular schedule of work reflecting remote and office work periods.

Alongside the abovementioned regulations, new additional termination grounds for teleworkers were introduced. Those grounds are:

- a teleworker does not get in touch with the employer for more than two working days in a row without a valid reason (the employer may set a longer period);
- a permanent teleworker has moved to another area and therefore cannot work under the same conditions.

Apart from the above described legal regulation, there are also practical challenges that employers have to face. For instance, there is no direct prohibition under Russian law from teleworking from abroad. In practice, such an option is possible. However, it is important to keep in mind the ambiguous positions of the state authorities and consider all the possible risks that arise. Some of those risks are quite basic like time difference and tax residency issues, others are more complex like maintaining social security, health and safety, personal data privacy, its transfer and storage, etc. As we see it in Russia, the leitmotif of transferring to remote work flexibility is the gradual rejection of the classical understanding of the workplace, the “withering away” of the usual models of labour discipline management and subordination.

To benefit from the changes and keep themselves on the safe side, employers need to re-address the existing forms of employment in Russia, introduce or amend the existing local policies on new types of work, as well as regulations on electronic documents workflow with employees, amend the existing employment agreements and work out new templates for new hires.



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**A**s in almost all other countries, working from home (where the type of work permits that) became a standard way of working during the pandemic. Many HR professionals and business consultants expect that after “a return to the office” in the post-pandemic era requirements for flexibility at work will be yet more important than ever.

Which flexible working models are available in Slovakia? Probably the most flexible working regime is home work or telework:

### HOME WORK AND TELEWORK

Telework and home work is nothing new in Slovakia. These special work regimes – within which employees work from home rather than at the employer’s workplace – have been available to employers and employees already for quite some time. However, pursuant to the past legal regulations, several restrictions applied to these regimes, e.g., employers could not, in general, schedule working time of these employees at all – thus, they could not enforce any start or end of working shift (working hours) and could not define working and non-working days for these employees. Naturally, these restrictions constituted practical difficulties for employers. The Slovak Labour Code<sup>1</sup> was, however, amended recently, and since 1 March 2021 telework and home work regimes are much more flexible.

### Definition of Home Work and Telework

If work – that could otherwise be performed at an employer’s workplace – is performed regularly from an employee’s home, such work is regarded as “home work”. It can be performed either the full agreed weekly working time from home, or work can be performed in this regime only in respect of a certain part of the agreed working weekly time. The relevant decisive criterion is that this set-up is regular. The difference

between “home work” and “telework” is, that in case of telework, information technology is used at work and there is a regular remote electronic data transmission at such work. Home work or telework must be agreed in an employment contract, an employer cannot impose this set-up unilaterally.

These are the main attributes and rules that apply to home work or telework:

- a) **Regularity.** As said, the work set-up must be regular. An occasional work from home (e.g., provided by the employer as a benefit) or work from home in exceptional cases (as is also mandatory or recommended work from home during the pandemic) is not telework or home work. During the pandemic, special regulations apply (temporarily) in respect of work from home, but such work from home should not be confused with home work or telework.
- b) **Work could be (otherwise) performed at the employer’s workplace,** i.e., the type and nature of work enables performance of such work at the employer’s workplace (and despite that the employer and employee agreed on a home work or telework).
- c) Work is performed from **home** of the employee, or from another agreed place. The employer and employee can also agree in the employment contract (if the nature of work allows that) that work shall not be performed at a specific place (the employee’s home or another specific place) but that the employee shall be free to determine the place himself/herself. In practice, this may not be an ideal solution for all employers, but this would be the ideal set-up for so called digital nomads.
- d) **Extent and combination of work regimes.** In the employment contract the parties can agree that the

<sup>1</sup> Act No. 311/2001 Coll. the Labour Code, as amended.



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home work or telework regime applies in full extent or only to a particular extent – for example, that three days a week the employee shall work in a home work/telework regime and two days a week in a “normal” work regime at the employer’s workplace.

e) **Scheduling of working time.** The parties can agree in the employment contract that:

- either the employee shall schedule his/her working time himself/herself, i.e., the employer is not allowed to determine a start and end of work shifts and working days at all; or
- the employer shall determine the working time schedule as usually (as is the case at “normal” work). The parties can of course agree also on flexible working time.

#### **Employee Scheduling Working Time Himself/Herself – Restrictions**

If the parties agree that the employee shall schedule working time himself/herself, the employee loses certain benefits that otherwise apply to “normal work”: the employee shall not be entitled to salary for overtime, salary surcharges for work at night, on holidays, or on Saturday or Sunday, or for work in difficult conditions (unless the employer and employee agree otherwise). Also, save for a certain exception, the employee shall not be entitled to salary compensation (to which “normal” employees are usually entitled to) for time when the employee cannot work due to important personal obstacles preventing him/her to work, such as when he/she goes to a medical check, or accompanies a child to a doctor, etc.

Although the employer is not entitled to schedule working time to such employee, the employee is still entitled to his/her uninterrupted weekly rest or daily rest and he/she does not have to work during such time slots (determined by the employee) – the employee has a **“right to disconnect”**.

#### **Cost and Working Tools**

The employer can agree with the employee that the employee shall use his/her technical and software equipment for telework. Otherwise, the employer must install and maintain such equipment required for telework. Also, if the employee uses his/her own working tools or items for work with the employer’s consent, the employer shall compensate the employee for provably increased expenses connected therewith.

#### **Prohibition of Discrimination**

Home workers or teleworkers cannot be restricted or cannot have preferential treatment compared to comparable employees working at the employer’s workplace. The employer must prevent isolation of such employee and must enable the employee’s access the employer’s workplace in order to meet other employees.

#### **OTHER FLEXIBLE WORKING MODES**

In addition to home work or telework, the following work modes provide also some extent of flexibility to employees:

- a) flexible working time; in this regime, the employer defines basic (core) working time, a time slot when the employee must be at work, and flexible working time, a time slot when the employee can or should be at work so that the employee works the required agreed time.
- b) so called “home office benefit” – occasional work from home provided to the employee as a benefit from time to time.



**O**n September 23, 2020, Royal Decree-Law 28/2020, on remote working schemes, was published in the Official State Gazette. This law came after a major social debate during the coronavirus pandemic, which forced a large number of workers to work from home. More specifically, Article 5 of Royal Decree-Law 8/2020, on urgent measures in response to the Covid-19 pandemic, established the preference for companies to ensure teleworking schemes to their workers.

However, in Spain there was already a regulation on teleworking in different legislative texts, such as Article 13 of the Workers' Statute or the various regulations on flexibility due to family conciliation. This legislation was insufficient to the extent that it did not cover some important legal issues linked to teleworking schemes (e.g. coverage of expenses, minimum content of a teleworking agreement, among others). As previously mentioned, this situation, and the need of granting more flexibility to workers, ignited the debate within the pandemic period and ended up in the publication of Royal Decree-Law 28/2020.

The new legislation on teleworking is based on the following main principles:

- There must be an agreement between the employer and the worker in order to implement a teleworking scheme. That is to say, teleworking could never be imposed.
- Equality of treatment and opportunities and non-discrimination must be ensured, between the teleworkers and those who carry out their activity at the work center. Teleworking cannot involve a loss of labor, economic or union rights.
- Teleworking schemes would be "reversible", meaning that either party could decide to return to work on-site at any time (giving the agreed prior notice).

Based on the new regulation, both parties (employer and worker) assume a series of reciprocal rights and obligations that must be foreseen in a teleworking agreement, in which the parties would lay the basic principles of the

new modality of work performance. It must be noted that this new regulation left certain aspects to the collective bargaining negotiation. Agreements between company and unions become essential in relation to e.g. quantification of expenses to be covered or means to be offered for the provision of services.

Royal Decree-Law on teleworking establishes a minimum content, which both parties must comply with in the teleworking agreement. Among such obligations, we may highlight the following ones:

1. Obligations imposed on teleworking workers:

- a. Obligations related to data protection and cybersecurity.
- b. Employee's control. The company may adopt the control and surveillance measures it deems necessary to ensure compliance with his/her duties, always taking into account the dignity and privacy of the worker.

2. Obligations imposed on employers:

- a. To provide the worker with the necessary means to carry out the work correctly (e.g. table, chair, computer and keyboard).
- b. To compensate the worker for the expenses that the worker may incur for doing the work at home (e.g. additional costs of electricity and internet connection).
- c. To maintain the same rights that the worker had prior to performing the work remotely. Recently, the Labor Authority announced on December 22, 2020 (through a public consultation) that companies could not suppress the meal tickets due to teleworking schemes, since this would mean an economic disadvantage compared to workers working in person.

In summary, this new regulation implies a significant step forward in the flexibilization and conciliation of work, although materially it still leaves some very important points unresolved, which will have to be dealt with in collective bargaining and set forth in the individual teleworking agreements.



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**D**ue to the emergence of technical solutions enabling work to be conducted from other places than the traditional office, flexibility and teleworking have in recent times been discussed frequently among employees and employers. As the outburst of the Coronavirus last year resulted in an extensive close down of offices worldwide; the issue of teleworking and its consequences has now become more relevant than ever for employers to consider. The impact of the Coronavirus will most likely continue affecting our working situation also going forward and the question of flexibility and teleworking will therefore continue being an important matter for employers to consider.

### Work environment

Under Swedish law and regulations, an employer has a far-reaching responsibility for the work environment; implying an obligation to prevent employees from being exposed to any health threats. The responsibility includes an obligation to continuously investigate, carry out and follow up activities in such a way that ill-health and accidents at work are prevented and a satisfactory work environment is achieved.

This is however not a sole responsibility for the employer and the employees also have a responsibility to contribute to a healthy work environment and to comply with the instructions given by the employer. In order to achieve a healthy work environment (at the workplace as well as during teleworking) a collaboration and regular dialogue between the employer and the employees is required.

The employer's responsibility for the work environment applies also when the work is conducted from other places than the regular office, i.e. during teleworking. The specific meaning of the employer's responsibility for the work environment during teleworking is however not clearly defined by law. The fact that applicable rules and regulations

are written based on fact that the work is conducted from a certain work place controlled by the employer further complicates the predictability of the employer's responsibility.

In order to satisfy a healthy work environment when employees are teleworking and conducting work from different places, the Swedish Work Environment Authority has in February 2021 published guidelines for employers to consider. These guidelines stipulate for example that it is important that the employer is well informed of the work environmental policies at the company as well as applicable rules and regulations governing the work environment. It is also important that the employee and the employer collaborate closely in order for the employer to notify any risks or other shortages in the work environment and in the employees' wellbeing. A need to amend and adjust the work in order for it to be conducted in a satisfying way from a work environment-perspective may be needed. How this shall be done in practice shall be clarified between the employer and the employees based on the specific situation. In order to achieve a healthy work environment during teleworking, the employer could for example consider which forms of meetings that are suitable, ensure that feedback between manager and employee is provided on a regular basis and safeguard that the employees are working under their regular working hours and that regular pauses etc are taken.

It should also be noted that the organisational and social work environment (i.e. the non-physical work environment) is a part of the employer's work environmental responsibility, implying that the employer should consider also that factors such as limited social contacts between employees could affect the employees' wellbeing.

Lastly, it should be noted that occupational injury insurances normally provide a more limited insurance coverage for employees during



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teleworking, requiring that injuries that occur outside of the employer's premises must be directly related to the work tasks in order to be covered. Such limited coverage could result in demarcation issues and the employer should therefore consider which insurance coverage the employees are entitled to during teleworking and if any additional coverage is necessary.

### ***Right to teleworking***

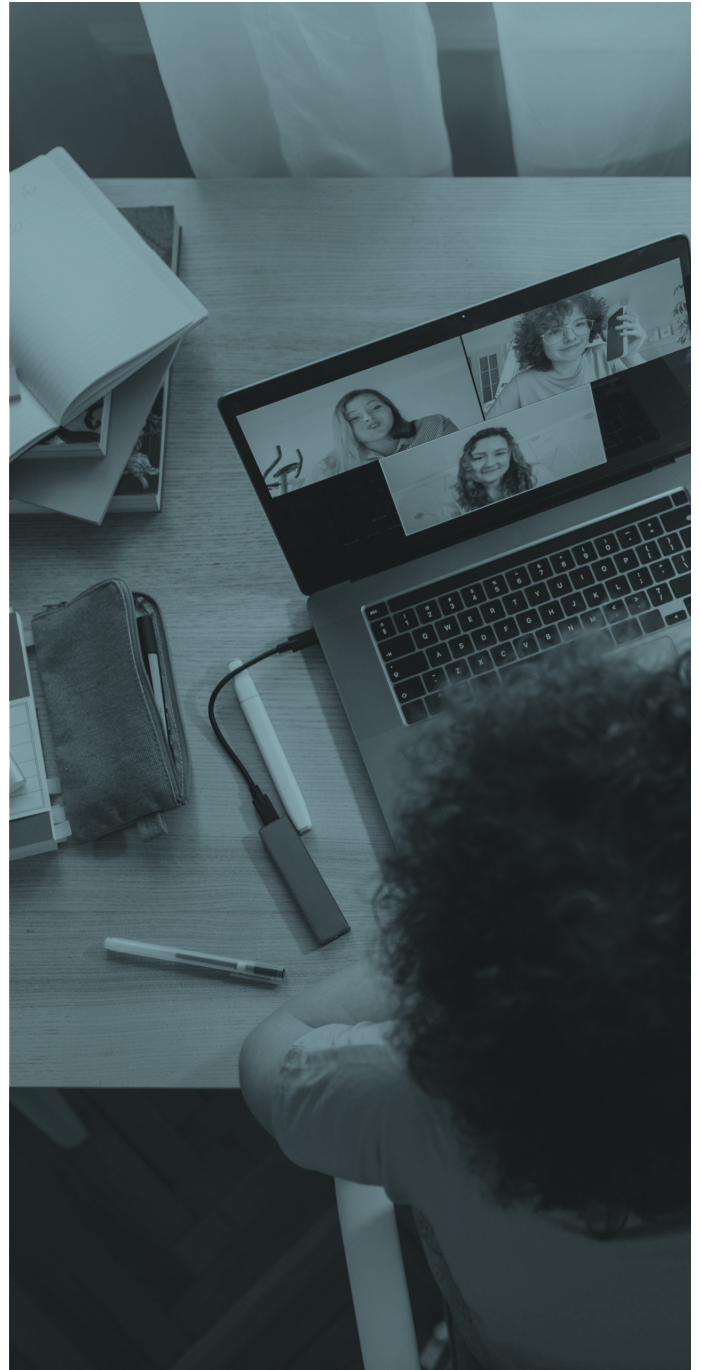
The employer has a right to lead and organize the work at the work place, including a right to decide where the work should be conducted. The employer also decides whether the employee should go on a business trip; if traveling normally is a part of the work obligation.

This implies that an employee unilaterally cannot decide to work from home (or any other place).

However, the employer is not allowed to put employees at risk. Therefore, should an employee refuse to work from the company office or refuse to go on a business trip due to e.g. fear of being infected by the Coronavirus, an overall assessment of the specific situation must be made.

### ***Other aspects to consider***

Besides questions regarding work environment and the right for employees to work from other places than the office, also other questions may arise due to teleworking. One question that needs to be taken into consideration is how confidential information is handled. This as teleworking could imply that documents and information are brought from the company's office and that information may be shared by external conference programs. Therefore, how to ensure confidentiality and the matter of cyber security should also be considered.







**H**ome office and teleworking arrangements become increasingly popular. However, there are many legal issues which need to be considered. In particular, the Swiss Federal Court ruled (decision 4A\_533/2018 of 23 April

2019) that an employee has a claim the reimbursement of the costs for a room in his private apartment which he used as office and archive. The Federal Court concluded that such a claim for reimbursement of rental costs is valid and that the reimbursement of such costs is mandatory under Swiss law if the employee is not provided with a workplace. Hence, in case the employee is not provided with an office, then the employer has to bear the costs of such home office, even if there are no actual expenses (e.g. deemed rent for owned real estate). In the particular case the Swiss Federal Court awarded the employee an amount of CHF 150 per month.

Further, the law provides that any equipment necessary to perform the work is to be provided by

the employer, unless otherwise agreed between the parties in writing. An elementary question is whether the necessary furniture for a home office is necessary equipment or not. Hence, it is important to agree with the employees what will be provided and what not.

The situation is different in case remote work or home office is just granted as a possibility to employees, but if they still have the possibility to come to the office. In such a case the employer has not to cover the expenses for the home or remote office, but needs to be careful that employees do not accrue a right to work from outside of the office. This can be done by implementing a clear policy.

Finally, health and safety in the workplace is a concern to employers who remain responsible for compliance. Consequently, it is important that employees inform employees of the applicable minimum health and safety requirements in a office space and get a confirmation from the employee that the personal workspace complies with such requirements.



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**F**lexible working is not a new concept in the UK, and it exists in a number of forms, both formal and informal. However, in the UK as with the rest of Europe, the sudden emergence of the coronavirus pandemic flipped the way many people worked across the EU as governments put in place social distancing and isolation measures.

The UK's homeworking statistics over the past year have fluctuated slightly with changes to government policy, peaking at 38% in June 2020 according to the Office for National Statistics. This is notably higher than the average prior to the pandemic. The situation going forward is as yet unclear, but most commentators expect a higher proportion of homeworking (whether part-time or full-time) to be an enduring effect of the pandemic on the British workforce.

Many of these home-working arrangements are likely to be agreed informally with individuals' line managers or permitted by a company's discretionary policy on flexible working. Where that does not happen, or where an employee wants the security of a formal home working pattern, they may make a statutory flexible working request.

### **Flexible working requests**

In the UK, all employees with 26 weeks' continuous employment have the legal right under the Employment Rights Act 1996 ('ERA 1996') to request flexible working from their employer once in each 12-month period. Given that the ERA 1996 includes several formalities which must be met in order for the request to fall within this regime, most employers have a standard format for employees to use.

An employer in receipt of a statutory flexible working request is obliged to deal with that request in a reasonable manner and notify the employee of their decision within three months. In rejecting a request, the employer must rely on one or more of the eight grounds prescribed by the ERA 1996: the burden

of additional costs; detrimental effect on ability to meet customer demand; inability to reorganise work among existing staff; inability to recruit additional staff; detrimental impact on quality; detrimental impact on performance; insufficiency of work during the periods the employee proposes to work; and planned structural changes. Whilst the legislation does not require employers to offer the right of appeal against the refusal of their request, Acas (a public body which conciliates employment disputes and sets best industrial relations practice in the UK) suggests an appeal is offered. Acas also recommends offering a trial period rather than rejecting a request where possible, which many employers do.

An employee unhappy with the handling of their flexible working request may bring a claim in an Employment Tribunal on a number of bases, including that the employer failed to deal with it in a reasonable manner or rejected it for a reason other than the statutory grounds. Such a claim must be brought within three months of the employer's failure, subject to extension by mandatory early conciliation through Acas.

The Employment Tribunal's power to overturn an employer's decision to refuse a flexible working request is narrow, but if it does, it must make a declaration that the claim is well-founded and may also make an order to the employer to reconsider the request and/or an award of compensation from the employer to the employee of up to eight weeks' pay.

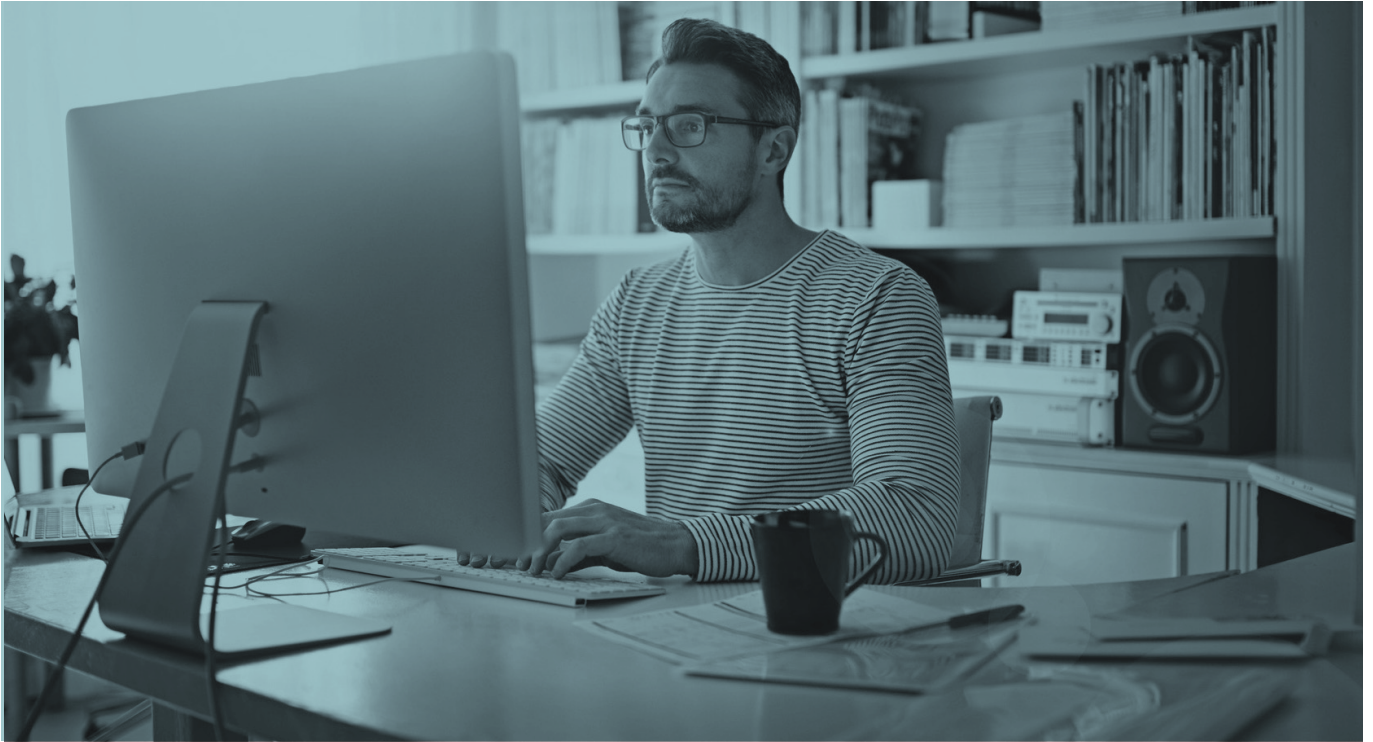
### **Discrimination**

The anti-discrimination regime in the Equality Act 2010 ('EqA 2010') also bears relevance to flexible working or teleworking. A common application is where an employee meets the EqA 2010 definition of disability. Where that disabled employee is put at a substantial disadvantage because of an employer's provision, criterion or practice ('PCP') applied generally, a physical feature of the workplace or the need for an auxiliary



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aid, the onus is on the employer to make reasonable adjustments to alleviate that disadvantage.

An employee with mobility or pain issues connected with a disability may find it difficult or uncomfortable to travel into the workplace five days a week. Assuming the employer is aware of the disability, it is very likely an Employment Tribunal would expect the employer to allow the employee to work from home for some or all of the working week if it is possible. If it is not possible, the employer is still entitled to refuse – a refusal of a disabled employee's flexible working request was held by the Employment Appeal Tribunal not to be a failure to make reasonable adjustments given the employee's job necessarily involved having face-to-face interviews with the public and had to be done at the office.

The other discrimination issue which can arise with flexible working is indirect sex discrimination.

Courts and tribunals in England and Wales generally accept that women are more likely than men to have primary care responsibilities for children or others. Therefore, a blanket policy against allowing flexible and teleworking is a PCP which would put female employees at a substantial disadvantage. In order to avoid liability for indirect discrimination, an employer would either have to permit flexible or teleworking to a suitable degree or have an objective justification for the refusal – i.e. that the nature of the job does not allow it.

Aside from the legalities of flexible and teleworking, it is clear that in the UK – at least in some sectors, such as professional services – it is an unavoidable part of people management. Especially after the pandemic, flexibility around work is expected by many staff and an accommodating employer will see the benefits to staff retention and talent attraction.



**W**ith both the Covid-19 pandemic and technological change more broadly, there has been a significant shift to flexible and remote working in Scotland over the past few years. Although employment law legislation is decided on for the whole of the UK by the UK Parliament, the Scottish Government has sought to promote and improve access to flexible working, and is encouraging an ongoing and continued shift in employer policies towards incorporating higher levels of teleworking. Throughout the Covid-19 pandemic, there has been a particularly strong emphasis in Scotland on the importance of office-workers and anyone else who can work from home to do so wherever possible. Based on the Covid-19 Tier System published by the Scottish Government, this is likely to remain the default position for a number of months. The statutory regime does not yet reflect the changes in practice in relation to teleworking, and it may be that further employment law changes will come in this regard.

### ***Right to request flexible working***

Since June 2014, all UK employees with 26 weeks' service have had the right to request to work flexibly. This flexibility can take a number of forms, for example:

- Teleworking
- Compressed hours (working longer hours over a shorter number of days)
- Varying start or finish time
- Reducing hours/days of work to work part-time
- Job-sharing

The right is a right to request, rather than a right to obtain. The employer must consider the request reasonably, and make a decision within three months. If the request is accepted, it becomes a permanent change to the employee's contract, unless it is agreed to be only for a fixed period of time.

If the employer refuses a request, the refusal must be for one of the statutory reasons, namely:

- A detrimental effect on ability to meet customer demand
- Inability to reorganise work among existing staff
- Extra costs that will damage the business
- Inability to recruit more staff
- A negative impact on quality or performance
- A lack of work for the employee to do when they have requested to work
- Planned changes to the business (i.e. a reorganisation that means the request will not work)

Employees can make up to one flexible working request every 12 months. Employees are protected from unfair treatment ('detriment') as a result of making or intending to make a flexible working request.

### ***Changes in practice***

An increase in flexible working is felt to have a positive impact on increasing loyalty, motivation, and business productivity, as well as helping to reduce the gender pay gap. Although the statutory regime is relatively limited, especially with the need for employees to have been working for 26 weeks before they can make a request, in practice many larger employers may consider requests at an earlier stage in an employee's work. In some sectors, jobs are often advertised on a specifically flexible basis, to allow prospective employees the opportunity to request flexible hours or teleworking from the start of their employment.

Based on surveys undertaken in the past year, it is clear that there is a desire for a mix of office-based and teleworking going forward as pandemic restrictions start to ease. It has also been reported that the government may consider introducing a right to work from home – albeit this would not be possible for all types of jobs, so there will still need to be some flexibility built in for employers to decide whether or not this was appropriate in the circumstances.



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**S**ince early 2020, Ukrainian parliament adopted several laws aiming at regulation of flexible working and teleworking. The most recent of them is Law of 4 February 2021 No. 4051 (the “**Law**”), which entered into force on 27 February 2021 and replaced previous regulation on flexible worktime arrangements. The Law regulates remote and home-based work, as well as flexible working hours.

### **Remote work**

Under the Law, it is possible for employees to work remotely, meaning from any place at the employee’s

discretion, and with the use of communication technologies. When working remotely:

- it is mandatory to enter into an employment agreement in writing; though exceptions apply for epidemics and other emergencies, in which case it is allowed for the employer to issue an order instead of signing a reciprocal employment agreement in writing;
- employees are independently responsible for the safety of working conditions at their workplace (home or other), but the employer must hold relevant occupational safety trainings;



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- employees work according to their own work schedule, established at their discretion (but the employment agreement may provide for exceptions);
- the employer must provide employees with the equipment and other necessities to perform their work, and reimburse employees for relevant expenses incurred in their functions, unless the employment agreement provides otherwise;
- employees may request to temporarily work remotely in case of alleged discrimination or sexual harassment against them in the workplace; remote work is also available for employees with children;
- remote employees are fully responsible for the safe upkeep of the employer's equipment.

The Law allows for a combination of remote work with work at the employer's premises.

### **Home-based work**

The Law separately regulates home-based work, which is work performed by an employee outside of the employer's premises but from a designated workplace (place of residence or other pre-selected premises). As compared to "remote work" as described above, home-work differs in that:

- the employee's workplace is fixed and normally can change only upon the employer's approval;
- the employer must inspect the employee's living conditions prior to allowing home-based work;
- the employee works according to the employer's regular working hours (but the employment agreement may provide for exceptions);

- home-based work is not available as a temporary measure in case of alleged discrimination or sexual harassment against employees in the workplace.

### **Flexible working hours**

The Law also envisages a specific regulation for flexible working hours. Under a flexible schedule, the working day consists of a combination of both:

- fixed hours during which employees are under an obligation to be working; and
- variable time (usually at the start and/or the end of working day), during which employees determine their working time at their own discretion.

In any event, employees must complete the total amount of work hours agreed in the employment agreement within the established accounting period (week, month, etc.).

Flexible working hours may be available:

- at the request of the employee;
- at the initiative of the employer as a substantial change of working conditions with two months' notice;
- at the initiative of the employer, if during a threat of epidemic or other emergency, without prior notice.

The Law also allows for the employer to force employees to temporarily revert to a regular work schedule without the employees' consent if business needs so require, or as a disciplinary measure.

# EUROPEAN EMPLOYMENT LAW UPDATE

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