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THE FUTURE OF REMOTE WORK – LEGAL DILEMMAS¹

PRZYSZŁOŚĆ PRACY ZDALNEJ – DYLEMATY PRAWNE

Summary: The COVID-19 pandemic has changed many areas of life, and has also directly affected ways of performing work. The biggest change has been the expansion of remote working on an unprecedented huge scale. This form of work has allowed many workers to move their work activities online, thus reducing the pandemic threat. Remote working has many benefits for employees, saving the time needed to commute, as well as for employers, who can save the funds needed to maintain offices. Aside from its many advantages, remote working raises numerous legal dilemmas that relate to range of important issues, starting with the right to establish such work. Other problems include the provision of work tools, covering the costs of performing work at the employee's home, appropriate organisation of working time, together with respect for the principle of work-life balance. Other dilemmas concern the protection of privacy of the employee and his/her family. It is also connected with providing the employer with the possibility to control the performance of work by employees, as well as ensuring an appropriate level of occupational health and safety. This paper indicates such dilemmas, and discusses the key issues related to them. These issues need to be taken into account when developing regulations on remote working, both at international and national levels.

Keywords: remote working, employment law, work life balance, health and safety, right to privacy, teleworking

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Streszczenie: Pandemia COVID-19 wpłynęła na niemal wszystkie obszary życia. Spowodowała spustoszenie gospodarki, pokazała, jak nieprzygotowany jest system opieki zdrowotnej, a także jak trudno nam wszystkim zaakceptować ograniczenia i przyzwyczaić się do nowej sytuacji. Ale wskazała też jak nowe technologie mogą pomóc w pracy i codziennym życiu milionom obywateli. Największą zmianą była ekspansja pracy zdalnej na niespotykaną dotąd skalę. Ta forma pracy pozwoliła wielu pracownikom przenieść swoje czynności zawodowe do sieci, zmniejszając tym samym zagrożenie pandemią. Praca zdalna ma wiele korzyści zarówno dla pracowników, którzy oszczędzają czas potrzebny na dojazdy, jak i dla pracodawców, którzy mogą zaoszczędzić fundusze potrzebne na utrzymanie biur. Praca zdalna, mimo że posiada liczne zalety, rodzi jednak liczne dylematy prawne, które dotyczą szeregu istotnych kwestii, począwszy od prawa do decydowania o jej wprowadzeniu. Inne problemy to zapewnienie narzędzi pracy, pokrycie kosztów wykonywania pracy w domu pracownika, odpowiednia organizacja czasu pracy wraz z poszanowaniem zasady work-life balance. Kolejne dylematy dotyczą ochrony prywatności pracownika i jego rodziny. Wiąże się to również z zapewnieniem pracodawcy możliwości kontroli wykonywania pracy przez pracowników, a także zapewnieniem odpowiedniego poziomu bezpieczeństwa i higieny pracy. W niniejszym opracowaniu wskazano takie dylematy, a także omówiono kluczowe kwestie z nimi związane. Kwestie te powinny być brane pod uwagę przy tworzeniu regulacji dotyczących pracy zdalnej, zarówno na poziomie międzynarodowym, jak i krajowym.

Słowa kluczowe: praca zdalna, prawo pracy, bhp, telepraca, prawo do prywatności

INTRODUCTION

The COVID-19 pandemic has affected almost all areas of life: wreaked havoc on the economy, exposed the weaknesses of the healthcare system, and our struggles to accept the restrictions and adapt to reality. But it has also demonstrated how new technologies can help with work and everyday life of millions. Some of the solutions employed during the lockdown will stay with us for longer and are likely to significantly changing the ways of working.

THE EXPANSION OF REMOTE WORK

One crucial change caused by the pandemic is the expansion of remote work. The vast majority of office workers are now working remotely. Research firm Global Workplace Analytics estimated in a 2018 report that 4.3 million people in the US worked remotely, representing just 3.2% of the country's workforce. In a March 2020 poll of 375 executives by MIT Technology Review Insights, over two-thirds reported that over 80% of their workforce is now working remotely². In Poland, this

² MIT Technology Review Insights, Covid-19 and the workforce, 2020. <https://mittrinsights.s3.amazonaws.com/Alagenda2020/Covid19workforce.pdf>.

number has increased from a few percent to 50-75% (in some periods and sectors). More than 10% of employees in Poland used to work in this form on a permanent basis, and in some industries the percentage reached as much as 60%³. Significant differences in the use of remote working can be seen by region. The greatest demand was in regions that are business and service centres (above all in the largest cities). As expected, considerably lower intensity of remote work was observed in industrialised regions, e.g. in the mining industry, and the lowest in agricultural regions. Remote working has been extended not only to professions that used it before (such as analysts or programmers) but also to those that used it occasionally or not at all. Examples include doctors, teachers, academics, civil servants and journalists. For many employees, remote working during the pandemic was their first experience with this form of work. The same was true for many employers. Most employees appreciate the possibility to avoid morning traffic jams, crowded public transport, and eventually, save time. The benefits for employers are tangible. The average cost of maintaining one office position in a large company is of the order of \$ 5,000 a year. Sending a hundred employees home is a saving of \$0.5 million⁴. According to initial studies, productivity with this way of working increased by several (13.5) per cent. Although it does not seem high, it translates to a situation in which every eight-strong team suddenly had a new employee⁵. This suggests that remote work will not go away with the pandemic, on the contrary, it will find wider applications.

However, this raises a number of legal dilemmas. Some of them are of a key nature, which determines the possibility of providing work in this form. Others affect the quality of the work, as well as the employee's work-related rights and right to privacy.

INTRODUCTION OF REMOTE WORKING

A first, and critical issue is the power to introduce remote working: should the employer should have the right to introduce such work unilaterally? It seems that such a power goes too far. The decision to introduce remote working should be preceded by consideration of several issues. First of all, it should be considered whether the employee's competences allow him/her to work remotely. This applies especially to digital competences as the percentage of digitally excluded people is large, even though it varies from country to country. However, even people who are

³ Wpływ epidemii COVID-19 na wybrane elementy rynku pracy w Polsce w II kwartale 2020 r., Statistics Poland Report, 2020. Impact of the COVID-19 epidemic on selected elements of the labour market in Poland in Q2 2020.

⁴ B. Ryder, *Covid-19 is foisting changes on business that could be beneficial*, "The Economist", Mar 5th 2020 ed, <https://www.economist.com/business/2020/03/05/covid-19-is-foisting-changes-on-business-that-could-be-beneficial>.

⁵ A. Surdoval (2017, September 20). [Web log post]. Retrieved October 04, 2020, from <https://ideas.ted.com/why-working-from-home-should-be-standard-practice/>.

not digitally excluded may not have sufficient competences to work remotely. Next, technical possibilities of providing such work need to be considered. This concerns both hardware, software and a secure Internet connection. Another important issue that needs to be taken into account before deciding to introduce remote working concerns the employee's housing conditions. The accommodation of the employee should ensure the possibility of performing such work while guaranteeing the basic principles of health and safety at work. At the same time, such work should not adversely affect the normal life of the employee and their family. The employers should therefore be informed about these issues so that their decision to introduce remote working is well-considered and objective.

It is worth postulating that the unilateral introduction of remote working by an employer should only be possible for a limited period of time (e.g. a maximum of three or six months). Permanent introduction of this form of work should be allowed only with the consent of the employee⁶. It is also worth considering the options of using different forms of remote work, depending on the location where it is carried out, similarly as in the case of teleworking. We can refer here to the division of teleworking formulated in the German⁷ and Polish⁸ doctrines into: home teleworking, alternating teleworking (provided partly at home, partly in the company), mobile teleworking, in neighbourhood offices, telecentres and on-site teleworking and in virtual enterprises. In the case of remote working, two forms seem to be the most prevalent: remote working provided from home and partial working from home and at the company's premises.

PROVISION OF WORKING TOOLS OR COVERING ITS COSTS

This dilemma concerns the provision of appropriate work tools to the employee. Certainly, this obligation falls on the employer. The first key issue is the computer necessary for remote working. While the purchase of a computer for remote work should not pose a problem for the employer, it is worth remembering that an important tool here will be software enabling work and transferring its results to the employer. These tools should ensure adequate productivity and comfort of work. At the same time, the software should guarantee a level of security adequate for the work performed, especially with regard to digital security. This issue becomes extremely important in relation to companies that have put in place very strict digital security policies. Some of them require logging in only through secure networks, which is extremely difficult, if not impossible, when working remotely, especially from an

⁶ L. Mitrus, *Praca zdalna de lege lata i de lege ferenda – zmiana miejsca wykonywania pracy czy nowa koncepcja stosunku pracy? Część 2*, „Praca i Zabezpieczenie Społeczne” 11/2020, p. 4.

⁷ T. Lammeyer, *Telearbeit*, Saarbrücken 2007.

⁸ A. Piszczek, *Podróż służbowa telepracownika*, „Monitor Prawa Pracy” 7/2011.

employee's home. In this case, it is up to the employer to secure the network that the employee uses for work. In addition, it is worth considering the need to equip the employee with an Internet connection (which may be essential especially in areas with limited Internet access).

Where employees use their own hardware or software for work, the employer should cover the costs to a certain extent. It seems that the distribution of the costs for the use of the equipment should correspond to the actual use of the equipment. This means that if an employee's computer is used 60% for work and 40% for private purposes, this should be the sharing of costs. Difficulties arise when the employee uses old equipment, the cost of which is difficult to estimate, or when the equipment is owned by another person. Other costs that are often passed on to the employee in remote working are related to the need to cover Internet connection fees and electricity costs. The issue of possible compensation for the increased costs of heating or air conditioning the employee's home needs to be considered. Of course, there may be opinions according to which the employee bears these costs regardless of whether he/she performs remote work or not. However, the principle in the labour law is that the employer bears the costs of providing work. It should also be borne in mind that the employer gains savings when transferring the work in the office to remote working - for example, resulting from the reduced need for electricity, office maintenance and operation services.

The right way to regulate the issue of participation of the employer in the these costs would be the conclusion of an agreement between the employer and the employee. However, it is worth proposing that provisions of the labour law encourage the conclusion of such agreements, and perhaps even require their conclusion.

WORKING TIME AND WORK-LIFE BALANCE

Another issue is related to the working time of remote workers. On one hand, employees are not always able to organise themselves well - according to research 46% of the respondents admit to engaging in activities other than work, and 31% find it difficult to focus on their duties at home. On the other hand, employers often treat remote work as a flexible form of employment and tend to contact employees at any time of the day. Research by Eurofound shows that people who work regularly from home are more than twice as likely to surpass the maximum of 48 working hours per week, compared to those working on their employer's premises. Almost 30% of those working from home report working in their free time every day or several times a week, compared to less than 5% of office workers⁹. As many as 70% of remote wor-

⁹ Eurofound, 2020, *Telework and ICT-based mobile work: Flexible working in the digital age*, New forms of employment series, Publications Office of the European Union, Luxembourg.

kers declare that their supervisors contact them after working hours. This extends the time during which the employee remains available to the employer. At the same time, employers are not keen to compensate employees for the extended time spent on their duties. It seems important in this context to introduce provisions regulating the right to be offline. The importance of the right to disconnect was pointed out even before the COVID-19 pandemic by the European Union and the ILO¹⁰. In some countries, regulations were introduced at the statutory level. Examples include France, Italy and Slovakia. In other countries (such as Germany), this right has been introduced in some sectors through collective agreements. In January 2021 the European Parliament called on the Commission to propose a law allowing employees to disconnect from work during non-work hours without consequences and setting minimum standards for remote work. Parliament considered that the right to be offline is a fundamental right inextricably linked to new working patterns in the modern digital age, and that this right should be seen as an important social policy instrument at EU level to ensure that the rights of all workers are protected¹¹.

This includes the need to maintain the work-life balance principle, which can be disturbed in the case of remote working. In the case of traditional work, there is a natural separation between work, which is performed in the company, and family duties, which are most often concentrated at home. Employees have time to mentally switch between work and home activities, most often while travelling to work or returning home. Remote working disrupts this natural division. Employees sometimes have to change their mental attitude in the few minutes it takes to launch a computer and software. For many, this time is insufficient. This can cause frustration for workers who are forced to divide their attention between work and home activities.

When comparing well-being on days when employees worked remotely with those when they were at the workplace, it was found that more positive outcomes were reported on the days when they worked remotely¹². These well-being outcomes have been attributed to better work-life balance and greater autonomy. It is important, however, to note that much of this research has been carried out where employees have had a choice over where to work and that the perception of autonomy has been found to be an important factor in explaining the positive outcomes from remote working¹³. Working from home during the lockdown offered no such choice

¹⁰ Eurofound and the International Labour Office, 2017, Working anytime, anywhere: The effects on the world of work, Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva.

¹¹ European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect [2019/2181(INL)].

¹² A.J. Anderson, S.A. Kaplan, R.P. Vega, *The impact of telework on emotional experience: when, and for whom, does telework improve daily affective well-being?*, "European Journal of Work and Organizational Psychology" 2015, Vol. 24, No. 6, pp. 882-897, <https://doi.org/10.1080/1359432X.2014.966086>.

¹³ D. Anderson, C. Kelliher, *Enforced remote working and the work-life interface during lockdown*, "Gender in Management" 2020, Vol. 35, No. 7/8, pp. 677-683, <https://doi.org/10.1108/GM-07-2020-0224>.

and as a result employees are less likely to perceive greater autonomy and felt greater satisfaction with remote working.

Many parents had to juggle work commitments with the increased demands on their time, including the practical aspects of supervising children's learning, exercise and play. Domestic work covering housework and childcare expanded to include home-schooling and increased emphasis on health and well-being, including the responsibility for the emotional welfare of children at a time when they may also have been anxious and confused. Perhaps not surprisingly, given that the domestic work has tended to fall more heavily on women, this emphasis seems to have been maintained, with concerns expressed that the lockdown may serve to reinforce traditional gender roles. So much like the 1950s housewife, women will not only be expected to make exciting meals, keep the house clean and tidy and the children entertained – but she will also have to do all this while working from home¹⁴.

RIGHT TO PRIVACY

Respect for the worker's right to privacy is also an issue. When connecting from home, workers often provide images of their own home, sometimes including images of family members. This can lead to undue interference with the employee's protected rights. The employer may in this way find out both the housing conditions of the employee and with whom the employee lives. The use of webcams and microphones may impede the normal functioning of the employee's family members in the residence. While in the case of large houses or flats it is usually possible to set aside a room for work, the matter becomes difficult when the employee lives in a small flat, e.g. a one-room flat.

These concerns are not unfounded. During the pandemic, the demand for spyware has increased, which may indicate a desire by employers to illegally control employees. In addition, some of these programmes monitor a computer user's online activities, while others allow a camera or microphone to be switched on without the user's consent.

THE SAFETY OF WORKERS

Another issue is ensuring the safety of workers. This is the duty of the employer, according to many international and European acts (e.g. International Labour Organization Convention No. 155: Occupational Safety and Health, 1981, Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to enco-

¹⁴ H. Chung, *Return of the 1950s housewife? How to stop coronavirus lockdown reinforcing sexist gender roles*, 2020, <https://theconversation.com/return-of-the-1950s-housewife-how-to-stop-coronavirus-lockdown-reinforcing-sexist-gender-roles-134851>.

urage improvements in the safety and health of workers at work). It is important to emphasise that the employer's health and safety obligations in the case of remote working are not reduced. However, in the case of work at home, the employer's options are very limited. The employer has no influence on the employee's living conditions, and cannot ensure that the furniture, lighting, etc. are appropriate for the work performed. Hence, the employer's obligation is devoid of practical sense. This is also related to the possible limitation of the employer's liability for accidents at work performed in the employee's home. However, responsibilities such as risk assessments, informing employees of potential risks when working remotely, and health and safety training must be remembered. Remote working also brings new risks, particularly psychological risks. There is currently increased reporting from remote workers who are suffering from stress, anxiety and depression and emotions such as loneliness, irritation and worry.

OTHER DILEMMAS

Obviously, these issues are not the only dilemmas associated with remote working. This analysis should thus be regarded as an indication of some relevant issues. Other important aspects include ensuring equal treatment of remote workers and those working in the company, guaranteeing collective labour rights to remote workers, access to training (especially related to remote working tools – specialized software, etc.). In addition, some studies recognise potential outcomes from remote working, such as curtailing employee interactions, knowledge sharing, team collaboration and creativity¹⁵. Another interesting issue is the possibility to provide remote work from any place in the world, thus allowing employees to move around while not being obliged to appear at the company when called upon by the employer. The latter issue does not only concern the appropriate definition of the place of work in the employment contract, or the adjustment of working hours to the relevant time zones. It also involves the application of the law (labour law, tax law, etc.) of the relevant country, ensuring an adequate level of remuneration, or issues related to social security, etc.

When considering remote working, it is also worth noting other aspects of staying at home during a pandemic. In recent months, we have often heard the slogan "stay at home". However, this does not always mean "stay safe". Not being able to leave the house (in order to go to work, for example) has been the cause of many

¹⁵ T.D. Allen, T.D. Golden, K.M. Shockley, *How effective is telecommuting? assessing the status of our scientific findings*, "Psychological Science in the Public Interest" 2015, Vol. 16, No. 2, pp. 40-68, <https://doi.org/10.1177%2F1529100615593273>; T. Thorgeirsdottir, C. Kelliher, *Changing Interfaces: The Implications of Flexible Work Arrangement Use on Team Collaboration*, "Academy of Management Proceedings" 2017 (1) 11496, <https://journals.aom.org/doi/10.5465/AMBPP.2017.11496abstract>.

incidents. There is a noticeable increase in domestic violence, estimated differently in different countries (from 10 to 30% in the USA, about 25% in the UK, 20-30% in Spain, up to 50% in Brazil). The number of murders and suicides has also increased. While the COVID-19 pandemic situation is precedent-setting, the literature recognises an increase in such behaviour in cases of emergency, such as those caused by natural disasters. Improving collaboration between human welfare and animal welfare agencies, expanding community partnerships, and informing the public of the great importance of reporting any concerns of abuse are all critical at this time¹⁶.

CONCLUSION

In conclusion, legislators and the social partners in most countries face an important challenge to standardise remote working in such a way as to make use of its advantages and at the same time limit the identified problems. Such standardisation is all the more important as pandemic threats may become a normal situation in the 21st century, so labour law must be ready to face such challenges. While some individual issues have already been regulated in some countries or are in the process of being legislated (such as the right to be off-line), there is still no clear pattern for the full regulation of remote working. In some countries, some steps have already been taken towards the adoption of such legislation¹⁷, but it does not seem to be sufficient. It is worth postulating urgent legislative work within the European Union, as well as the development of global standards of such work by the International Labour Organization.

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¹⁶ A.M. Campbell, *An increasing risk of family violence during the Covid-19 pandemic: Strengthening community collaborations to save lives*, "Forensic Science International: Reports" 2020, Vol. 2, <https://dx.doi.org/10.1016%2Fj.fsir.2020.100089>.

¹⁷ Examples include: Spain, Turkey, Russia, Ukraine, Ireland, and outside Europe: Argentina, Mexico, Chile and Colombia.

Campbell A.M., *An increasing risk of family violence during the Covid-19 pandemic: Strengthening community collaborations to save lives*, Forensic Science International: Reports, Volume 2, 2020. <https://dx.doi.org/10.1016%2Fj.fsir.2020.100089>.

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