

WorkLife 2.0

# **The hybrid workplace** – how home working is becoming the new normal and what does it mean to employers

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When a number of tech giants announced earlier in the year that home working would be the norm until 2021, many were surprised. Now that most of us are still in some sort of lockdown, it seems that these employers were right. One thing we do know is that instability adds to the stress that many are already experiencing during this period. As a result, we know that increased stability helps both businesses and people's financial and mental health. In light of this, the question on employers' agendas across the globe is increasingly likely to be what to do with home working in the long term, beyond any pandemic-related measures.

Views are still rather positive on home working. As a recent [Eurofound survey](#) reveals, most employees in the EU reported a positive experience of teleworking during the first phase of the pandemic but very few of them wish to work in this way all the time, with the preferred option being a mix of teleworking and presence at the workplace. Over three-quarters of the surveyed EU employees wanted to continue working from home at least occasionally, beyond COVID-19 restrictions.

Long-term/permanent home working will generally be permissible beyond the period covered by COVID-19 measures, upon certain conditions being satisfied, as a number of countries had a pre-crisis home working regime (which some will be tempted to flex post-crisis, as explained below). The most important and common condition, certainly in Europe, is the need for consent (either at the individual level through an appendix to the employment contract, or at collective level through a works council agreement or a Collective Bargaining Agreement, depending on the jurisdiction). In other words, in most jurisdictions, there is not a general statutory right to work from home (beyond the COVID-19 related measures).

Building on the year so far, Freshfields has prepared the below Q&A to help employers in assessing their options and deciding what to do in the long-term with what some are now calling the 'hybrid workplace'. Finding the right balance between home working and use of the company premises will be challenging. The sooner you start planning, the better!

This Q&A is part of our [WorkLife 2.0 initiative](#), which considers the lessons learnt during the COVID-19 pandemic that may transform the future of work, reflecting on what the new working environment will look like.

This Q&A is by no means a comprehensive study of the legal challenges arising from permanent homeworking and the hybrid workplace, but more a selection of what we believe to be topical based on our experience so far. Other issues, such as [oversight and management](#), [corporate culture](#), [remote employee investigation](#) or [monitoring and privacy](#) are addressed separately under the above-mentioned WorkLife 2.0 initiative.

Issues of a collective nature and relating to virtual labour relations (remote works council meetings, online collective bargaining) will be addressed separately as this Q&A focuses on topics relating to the individual employment relationship.

## 1. Is there a difference between teleworking and homeworking?

Most people use the terms home/tele/remote working interchangeably where there might be differences. Teleworking is a very broad concept that allows employees to work from any place outside of the traditional workplace, using information technology. During the first part of the pandemic, because of lockdown measures, employees were generally stranded at home, meaning that teleworking was effectively the same as home working. However, as we will emerge from lockdown, we expect the differences to become more important, as we see employees working from other locations (such as their holiday rental or shared working spaces). Hotels are selling the concept of teleworking in a quiet room, far away from the busy family house or the shared flat. Places such as Barbados or Mauritius are even inviting people to telework from the beach, offering long term working visa to them and their families. In this Q&A we will refer to tele - and home working indistinctively.

Please note that in France, homeworking is a distinct concept of employment that follows a specific set of rules and applies only to employees who work full time from home, generally autonomously and without the help of other employees (they can however be assisted by their spouse or partner). A similar distinct concept of employment also exists in Belgium. The term teleworking should therefore be used when speaking to French or Belgian employees about COVID-19 related homeworking, in order to avoid any misunderstanding.

## 2. How to best manage Health and Safety and protect your workforce's mental health?

### **Work life balance, the social link and the right to disconnect**

The [Eurofound survey](#) confirms that the rise in teleworking during the pandemic has highlighted the blurring of lines between work and private life. Interestingly, we spent many years in protecting the workplace against the intrusion of private life (remember the discussions on allowing employees to access their Facebook account from their workplace's desktop). The focus is now on how to protect private life and space from the intrusion of the work life. More than ever, it will be a difficult balancing act. Recommendation for governments and social partners to introduce 'right to disconnect' initiatives in order to prevent large segments of employees becoming at risk of physical and emotional exhaustion pre-date the pandemic, but they are even more acute now.

A right to disconnect already exists in a number of jurisdictions, including France where it was introduced in the 2017 revision of its Labour Code. In Germany, one of the submitted proposals for a legal framework for teleworking includes such right to disconnect and calls for technical solutions to be developed, in order to allow for effective disconnection, especially when working time has been made more flexible (although there is strong political opposition to this proposal, making it unlikely to succeed). In Russia, a draft bill on teleworking suggests, in particular, granting the remote employees the 'right to be offline', which is currently not guaranteed to them. Even in countries without an explicit right to disconnect, like Belgium, it could be argued that such right could fall under the scope of the general obligation of employers to safeguard the well-being at work of their employees.

Solutions that were developed by some employers a few years ago (such as shutting down the company servers at night, effectively protecting employees against incoming mail during their rest period) may not be work well in a remote working context, with employees favouring flexible working time.

In France, appropriate measures have to be discussed with the employee representatives and put in place to prevent (or at least limit) the impact of the temporary measures to deal with the COVID-19 situation on the employee's health and safety. This relates to employees forced to continue working from their usual workplace but also employees having to work remotely. The guidelines put in place by the French government further indicate that employers must set measures applicable to teleworking with their employee representatives, taking particular care of ensuring the maintenance of the social link and the prevention of risks associated with the isolation of teleworking employees.

In Germany, the term teleworking is used to describe the broader concept but there are very strict occupational health and safety regulations which apply for so called 'tele workstations', eg fixed monitor-based workstations in the employee's private space, for which stipulated weekly working hours and the conditions for teleworking have been agreed in a contract of employment or in the framework of an agreement. In this case, the employer is obliged to provide and install furniture and work tools including communications equipment. However, this does not apply in case of mobile work, meaning occasional work from home or during business trips. The health and safety standards published by the German Federal Employment Ministry clarified that the strict regulations do not apply to home working during the pandemic.

## International instruments

It is crucial that the employer has clear guidelines on working time arrangements and work/life balance that are in line with national legislation. In Europe, employers will also need to keep the work/life balance Directive in mind which grants flexible working time arrangements to parents and carers, by allowing them to adjust their working patterns, including through the use of remote working arrangements, flexible working schedules, or reduced working hours. Where the directive pre-date the COVID-19 pandemic and is still in the implementation phase (deadline is 2022), employers may want to consider its impact on existing guidelines and arrangements.

It is equally important (especially when national legislation is missing) that employers comply with international instruments which have been ratified in the country(ies) where they operate. For instance, the ILO passed in 1996 the Home Work Convention, no. 177, 'C117' calling for equality of treatment between homeworkers and other wage earners, taking into account the special characteristics of home working. Specifically, the Convention and its accompanying Home Work Recommendation, 1996 (No. 184), called for the promotion of equality of treatment in relation to several aspects, including protection in the field of occupational safety and health. The Convention does not apply to employees who occasionally perform their work at home, rather than at their usual workplaces, but it does include employees who perform their work at home on a regular basis.

Therefore, [a recent ILO policy brief](#) suggests that since many employees, in the context of COVID-19, are working from home on a regular and extended basis, telework as a response to the COVID-19 pandemic would likely be recognized as falling within the scope of C177.

## Site visit and privacy requirements

One of the main questions related to this topic is how the employer can ensure the health and safety of an employee working from home, without breaching the employee's privacy.

A [European Framework Agreement on Telework](#), which was concluded between the social partners in July 2002 and that has been implemented by most of the EU Member States by way of national social partnership agreements, covers, among other aspects, health and safety. According to this agreement, the employer is responsible for the protection of the occupational health and safety of the teleworker in accordance with a 1989 EU Directive on the introduction of measures to

encourage improvements in the safety and health of workers at work and relevant daughter directives, national legislation and collective agreements. In order to verify that the applicable health and safety provisions are correctly employed, the employer, employees' representatives and/or relevant authorities have access to the telework place, within the limits of national legislation and collective agreements. If the employee is teleworking from home, such access is subject to prior notification and their agreement for obvious privacy reasons. But the teleworker is entitled to request inspection visits. Apps are being developed for virtual site visits, but the privacy issue remains. As an alternative to site visits, some organisations are using self-assessment forms (for example in France).

## Workplace vs home injuries and liability issues

As the European Agency for Health and Safety at work provides, working remotely (presumably from home) reduces the risks of road accidents, because of the reduced travel to work. On the other hand, it increases the occupational safety and health risks if proper risk assessments are not carried out. The issue is still controversial when it comes to what extent the employer should check for compliance with the health and safety measures when the employee is working remotely (see above); and for which categories injuries (caused while working remotely) should the employer be held liable.

Due to the COVID-19 crisis, the Austrian government has introduced a regulation which provides that accidents in timely and causal relation to the insured professional activity in the home office are covered by the general accident insurance. Thus, accidents in the context of the professional work are covered, as opposed to private activities such as sleeping, showering, shaving, beauty care, getting dressed, child care at home, private telephone calls etc. Until now, this regulation is only effective for a limited period of time until 31 December 2020.

In Belgium, the legislation already provided that a teleworker is covered by the occupational accidents' insurance in case the occupational accident occurs at home during and by the fact of the execution of the employment agreement, provided that such accident occurred during the teleworker's working hours and in a place listed as the workplace. However, it is expected (and has also been informally announced) that the government will enact more detailed legislation relating to home offices in general in Spring 2021. The focus of such new legislation will be on how employment law can be modernized and become more flexible in order to meet the requirements of digitalization.

In Germany, a draft legislation aimed to establish a legal basis for teleworking took up the issue of accident insurance when working from home which is currently poorly regulated. However, it is unlikely that the draft law will pass legislative proceeding as noted elsewhere in this document.

### **3. How to ensure compliance with working time regulation?**

Working time was already an issue before the pandemic, with digitalisation leading to increased fragmentation of work, both in time and location. In a changing world of work, where flexible arrangements are no longer the exception, it was – and it still is, even more essential to reconcile the aspiration for more flexibility with the protection of employees from health and safety risks (see question 2 above).

The big question is how to reconcile often rigid working time regulation (and rigid case law, cfr the European Court of Justice on working time recording from May 2019) with the hybrid workplace?

One of the key issues is compliance with the legal requirements about the mandatory rest period and maximum working time at times when the working day/week is no longer the classic 9 to 5 but rather ‘a la carte’.

Internationally, the ILO has adopted 3 conventions and one recommendation about the maximum working hours and the mandatory rest period, which have been adopted across a large number of jurisdictions.

These provisions are compulsory, and the employer must comply with them in any case. However, when allowing employees to work remotely, monitoring and complying with the compulsory rest time becomes difficult. How does the employer do so? One way is by providing clear guidance to the employees on how long they are expected to work and between which time-frame. Another way would be to ask employees to record their working time.

In Europe, the EU Working Time Directive stipulates that in every 24 hours employees are entitled to a minimum of 11 consecutive hours of rest and for each 7-day period employees are entitled to a minimum of 24 uninterrupted hours in addition to the 11 hours’ daily rest.

The Directive contains a limit to weekly working hours, according to which the average working time for each seven-day period must not exceed 48 hours, including overtime. Depending on national legislation and/or collective agreements, the 48 hours average is calculated over a reference period of up to 4, 6 or 12 months.

Compliance with the EU directive and the implementation legislation is made even more complex since the May 2019 European Court of Justice decision on working time recording. Member States ‘*must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured.*’ This is to ensure employees are not working in excess of 48 hours per week and taking adequate rest breaks, as provided for by the Directive. However, the ruling allows for some flexibility by stating that it is up to the Member States to determine the ‘*specific arrangements for implementing such a system, in particular the form that it must take, having regard, as necessary, to the particular characteristics of each sector of activity concerned, or the specific characteristics of certain undertakings concerning, inter alia, their size.*’

As the decision itself does not give precise examples of time recording tools, some of them can be found in the opinion of the AG and encompass: a wide range of systems for recording working time is available (paper records, computer systems, electronic access cards and so on).

Following this decision, in countries such as Spain, a new legislation (Royal Decree-Law 8/2019) came into force, making time recording mandatory on a daily basis so as to increase legal certainty and facilitate supervision by employees’ representatives and the labour inspection. Other countries have so far kept a more flexible regulatory framework, and some haven’t even decided yet about the consequences of the decision for national legislation.

None of the above (maximum working time, minimum rest periods, working time recording) work well in the context of the hybrid workplace and permanent home working. Employees will want the flexibility attached to the new model and the ability to organise their working day/week as they see fit. Employers may prefer general guidance on work/life balance, the importance of times of effective disconnection. This is open for discussion and no doubt will take some time to be fixed. Working time, and the broader mental health issue, are one of the biggest challenges of the new hybrid workplace.

Another issue that arises when recording time is related to employees’ privacy, as records of working time may constitute personal data. Hence, the employers must only use the data available in the record in a lawful manner and must grant access only to persons who have a legitimate interest.

#### **4. Who pays for the cost of homeworking?**

Employers generally have an obligation to provide their employees with the tools they need to perform their work. Employees in positions that lend themselves to teleworking will generally already have the minimum equipment they need, eg laptop and smart phone. But what about additional hardware, such as a large screen(s), mouse, keyboard and printer for the home office? And furniture (chair, desk, lighting)? Or connectivity costs (WiFi)?

In many jurisdictions there is no clarity on this, and questions such as whether a printer is required as standard home working equipment have not yet been solved. When it comes to furniture, since the occupational health and safety rules apply also when working from home, it is likely that the employer must provide a suitable chair and light, if the employee does not have this equipment. In Germany, we rarely ever see employers offering furniture or providing a budget for the employee to make such a purchase.

Employees' perception of home working was rather positive over spring and summer 2020, with many employees enjoying working from home, given the weather we experienced in Europe. But with home working being extended and winter coming in the northern hemisphere, one can expect more questions from employees on the related costs, especially increased energy costs (heating, electricity). This is new territory for most employers and employees and will no doubt lead to intense discussions.

The ILO guidance suggests that when home working is considered necessary, certain costs (eg mobile phone, landline costs, internet costs, personal computer or tablet, teleconferencing software, hardware) should be provided and/or reimbursed by the employer. However, employers may exclude home office expenses which are mainly for the convenience of the employee, which may include a faster internet connection, additional computer monitors, ergonomic chairs, or printers.

In the long term, employers will want to ensure that the company policy specifies which expenses it will cover for working from home situations (and may need to consult – or co-decide in the case of Germany – with works councils). For instance, the policy could specify that employees must seek the company's prior approval for the reimbursement of expenses incurred in remote working situations.

Countries where there is an existing legal framework for teleworking may already have rules for this kind of cost reimbursement. For instance, in Belgium and in France, when an employee's home working becomes structural

(eg two days a week every week for the long term), the employer has to reimburse internet and office costs. It can do so through a monthly fixed sum, which, if certain conditions are met, will be tax free (or as in the case of France, taxed at a reduced rate). A key question will therefore be to assess whether we have moved from a 'crisis' home working situation to what can be treated as structural home working. In both Belgium and France, the position adopted by most employers has been to consider that since teleworking is currently imposed by the government due to the COVID-19 situation, an occupation indemnity is not due. The Belgian National Social Security Office currently accepts that such fixed sum cost allowance is exempt from social security contributions for all employees working from home due to COVID-19, even if no written agreement on teleworking has been entered into.

In many countries where there is no legal framework for teleworking. This will be a matter of individual or collective bargaining. Indeed, even some jurisdictions that have adopted a new legal framework (such as Spain) left this issue to collective bargaining. A similar solution is in place in Russia: where the law says that employers must provide employees with the means to perform their duties, in case of remote working, the matter of reimbursement of their costs related to the performance of their job duties is left at the parties' discretion.

The German Federal Employment Ministry recently published a draft legislation including the employee's right to work from home for at least 24 days per year, if the type of work is suitable for such arrangement and there are no conflicting operational reasons. An adverse decision needs to be explained by the employer otherwise it is deemed to be approved for up to six months. It is unlikely that this draft will come into force since the coalition partner already refused consent.

Employers may want to review their entire benefits policy in the context of permanent home working and where such situation may lead to extra costs it may also lead to savings with benefits linked to the presence in the office being (partially) suspended (eg commute costs, company cars, catering and more).

#### **5. Can I let employees work from home where home is in a different jurisdiction?**

If the country in which the employer is based doesn't have a legal framework for teleworking beyond the home working organised by the authorities and/or the employer during the pandemic, then the employee will not have an unfettered right to work remotely (for instance, from a holiday location) unless there is an agreement in place.

If there is a legal landscape for teleworking, such as in Belgium or France, the situation will be different, and employers will not necessarily be able to restrict the places from which their employees can work. In Russia, which does not differentiate between home/tele/remote working, employment authorities consider that remote working arrangements cannot be used for employees located in other jurisdictions. The proposed amendments to Russian employment legislation on further development of remote work also do not provide for such an option.

Employers should beware of the tax and regulatory issues which may arise if an employee chooses to work in a different jurisdiction. If the employer doesn't have regular business in that jurisdiction, the presence of employees performing work there may create a permanent establishment and lead to the payment of local taxes. Similarly, some regulated positions (eg in the financial industry) may only be carried out in a particular territory. Traders may not be able to sell financial products outside of the market in which you have regulatory clearance either for your business or its individual employees.

Additionally, working remotely from another jurisdiction may trigger prospectus and/or other filing requirements according to local legislations on securities, employment, etc. for employees with equity-based awards that have been granted by the employer. Cross-border remittance of funds to settle the awards may also not be as easy as expected if the enhanced regulations on foreign exchange apply to the place where the employees are located (such as in China). Moreover, employers in a jurisdiction which imposes strict data privacy laws (in particular on data export) must be very cautious with the data accessible by an employee who will be or has been teleworking outside of this territory, as such remote access to data may be viewed as data export and subject to restrictions or prior approvals.

Where the employer must ensure that the employee's remote workplace complies with health and safety requirements, working from elsewhere than home (eg a holiday place) may give rise to additional difficulties. In France for example, employees generally self-declare that their house is compliant, in particular regarding the electrical installation. In case of work from a remote location that is not the employee's usual home, the employer should make sure that a new declaration is issued in order to avoid any occupational hazard that may implicate their responsibility in case of accident or disease.

Finally, if the employee provides his services from another jurisdiction on a permanent basis it may also be necessary to think about which laws apply to the employment

contract (eg the Rome I regulation in Europe) and which court will have jurisdiction over any dispute.

## **6. Can I adjust salaries for employees working from places with a lower cost of living?**

A number of tech employers in the US have announced adjustments to salaries for those choosing to go back to their home state and work from there long term, the rationale being that almost any place across the US is cheaper than the Silicon Valley. While such adjustments are easy to implement in the US (as are most changes to terms and conditions), it will not be the case in other parts of the world.

In civil law jurisdictions, the place of work and the salary are generally deemed to be essential terms and conditions which cannot be changed unilaterally. It will be a matter of individual bargaining with, in some jurisdictions, the added challenge of employee representatives and information and consultation requirements. The idea also gives rise to potential discrimination/equal treatment issues which would make it impossible to pay different salaries/reimburse cost to the employees depending on where the employee is (home) working from (see question 5 above).

## **7. Can I rethink the office space, changing the set up and/or reducing my total square meters?**

Another driver for businesses to encourage permanent home working is the prospect of reducing the size of their overall office space, especially in expensive cities such as London or Paris. This is tempting but potentially challenging. As explained above, in most civil law jurisdictions the place of work is an essential term of the agreement, so whilst it might have been easy to get people to work from home during the pandemic, barring them from returning to the usual place of work is a different story. Employers may need to keep a seat for them.

Even changing the office set up (eg moving from private rooms to open plan) may trigger information and consultation rights (eg Germany or France). Also, employers need to pay attention to the so called 'reversibility right' for employees. The reversibility right, as expressed in ILO publications, means that employees can request to go back to the employer's premises. This has been an issue for employers in Colombia for example, considering the investments that have had to be made to implement teleworking.

Not all countries give the same importance to ILO guidance of course, but it is definitely something to keep in mind in a situation where remote working is not mandated by the authorities but is of a voluntary or contractual nature. Any agreement on prolonged home working, whether individual or collective, should set out what is intended in relation to this reversal right, just to be on the safe side.

Finally, real estate cost savings isn't really an incentive in places such as Dubai, as employers need to have a minimum number of square meters for each expatriate as part of their visa requirements.

## **8. Can employees working from home still access the usual workplace? If so under what conditions? Can employers discipline non-compliant employees?**

As home working gets extended, where it is not compulsory, employees may want to go back to the office, at least partially. Reversibility of home working is something to keep in mind (see above question 7). In any case, these returning employees will need to comply with health and safety regulations and company policies.

When assessing whether to take disciplinary action against employees who fail to comply with the law or with reasonable COVID-19 instructions, eg going to the workplace while displaying symptoms and/or awaiting a test result, the answer will vary across jurisdictions. Generally speaking, failing to comply with the reasonable directions of the employer could be grounds for disciplinary action.

In Hong Kong and the UK, one would have to check what is set out in the underlying employment contracts and policies.

In Germany, such action is possible the concrete sanction depending on the kind of misbehaviour and a weighting of interests, including, inter alia, whether the violation was intentional or not, expected future behaviour etc.

In China, an employer can take disciplinary action if the situation is expressly addressed in its internal policies that have been duly consulted. If no such specific provisions are in place, the employer may turn to other broader provisions to justify disciplinary action (eg employers may state in the policies that disobedience with reasonable workplace sanitary instructions and arrangements of the company is a disciplinary ground), but it may be subject to the review of the labour

arbitration tribunal or court if in dispute. The position would be similar in France, where the internal rules would have to be checked to determine which sanction are possible but since the sanitary measures are dictated by the Government and must be communicated within the companies, in case of persistent refusal to apply the rules, the employer should be able to sanction the employee.

As part of employer's additional measures, can the employer offer employees the choice between getting tested and going to the office versus working from home? Again, the answer will vary. This may be particularly difficult in jurisdictions where tests are only available for free to those with symptoms or who meet other criteria, which may make it less reasonable for employers to require testing, unless they are willing to pay for private tests, if available. But even if the employer is paying for the test, the point is likely to remain controversial. There might be cases where there is a predominant interest on the employer's side (eg risk of many employees being infected). Also, if the employer decides to send an employee into quarantine where there is no such order from the health authorities and the employee cannot work from home, it is very likely that the employee is entitled to salary even if he refuses testing.

What about employees who call on medical reasons not to comply with (all or some of) the measures eg refusing to wear a mask for medical reason? Is the employer bound by the third-party medical certificate? Generally, the employer would be bound, unless there are indications that the certificate is fraudulent.

Also, please be aware that according to health and safety rules in places like Germany, where an employee cannot wear a mask and he is working together with other employees where the minimum distance cannot be guaranteed, the employer must provide FFP2 masks to the other employees.

In doubt over the status of a particular employee, can you force him/her to see a doctor or put him/her on leave/working from home regime? It would generally be possible to send an employee home for the reason of a suspected infection, but it will not be possible to force the employee to take a test and the employer might need to have to pay for the salary.

Whatever you do, it is recommended to have clear policies and guidance in place and to record and document any decision, even if individual.

## 9. What options are available to employers who want their employees to return to the office?

Permanent home working may not be suitable in the long-term for every employer and employee. There are many good reasons – managerial, regulatory and more – for employers to want their staff to return to the office, COVID-19 measures permitting.

How can employers incentivise people to come back? In the first place, employers should look at the terms of the employee's contract (if there is one) and if it defines the place of work, simply request the employee to comply with that clause. Beyond any COVID-19 measures and save for individual and/or collective agreements, there is no statutory right to work remotely in most jurisdictions. This may change with new laws, but the situation is already clear in most places. Therefore, employees may invoke health and safety concerns in order to resist returning to the office, and in some countries such as France have a 'right to withdraw' ('droit de retrait').

Can employers – as an additional sanitary measure - offer free testing to encourage employees to go back to the office? Only on a voluntary basis as indicated above (see question 8). Imposing medical testing - and even screening - for employees before they return to work is indeed difficult in many jurisdictions, including across the APAC region. For example, in Japan an employer generally cannot require an employee to attend medical examinations: employee consent will be required.

Next to legally 'pushing' employees to come to the office, employers might want to make the workplace more attractive in order to make it easier to 'bring the employees back' to the workplace, eg by launching new initiatives (new rest spaces, having more meeting rooms and common spaces for socialisation while keeping distances). ILO suggests that employers should aim for 'a collaborative workspace', given that socialising with colleagues and meetings are key reasons why employees go to the office. Some employers have already embraced this, whilst also giving their employees more time to work from home instead of coming to the office.

As ever, it is recommended to have clear policies and guidance in place and to record and document any decision, even if it only applies to a single individual.

## 10. Do employers need new HR policies?

Many employers around the world have already adjusted existing policies and drafted new ones so as to address COVID-19 related issues, eg home working, return to work or disciplinary proceedings.

You may also want to look at other policies, such as those relates to whistleblowing, as the pandemic is certainly having an impact on both: employees' attitude towards speaking up and how to best investigate complaints in a hybrid workplace. [Our whistleblowing 2020 survey report](#) sheds some light on these issues and includes recommendations.

Do employers need a company policy for video calls? The 'Zoom etiquette' is something that is currently debated in HR circles. Issuing basic guidance on how to prepare for and behave on video calls is certainly a good thing to do as many of us spend a considerable part of our working time on Zoom, Teams and other platforms. Guidance may cover technical issues, the use of the camera or establish a dress code.

Working time policies may also need to be reviewed, as stated above in question 3.

Employers may also want to review their business travel policies, transforming short term adjustments to long term ones.

## 11. What will be the future role of governments and local authorities?

Most governments have been – and still are – publishing precise guidance as part of the lockdown home working measures, including: who has to work remotely, who can go to the workplace, etc. But what is the future role of governments beyond the crisis?

Germany, Italy and the Netherlands are amongst the European countries that are currently looking at regulating home/teleworking beyond the pandemic. Belgium and France already have rules in place, but these might need to be adjusted. Singapore and Sweden also regulate telework, including work hours and rest provisions, through collective bargaining or guidance issued by public authorities.

Spain just adopted a new law, which is based on the EU 2002 'European Framework Agreement on telework'. The new law does not apply to COVID-19 related teleworking but looks beyond the pandemic. It states that remote working is voluntary for both parties and will be done by mutual agreement. This new law requires the agreement to be set out in a written

document, and a copy of it must be provided to the employees' legal representatives. The agreement must include a list of tools or equipment needed for the remote working, costs (and how they will be compensated), working time and availability rules, percentage of distribution between remote working and office-working, workplace for time spent office-working, location for remote working, notice period to exercise changes, means for the employer to monitor the performance, instructions on data protection and security of information for the remote working, and term of the agreement. Employees who work remotely have the same rights that they would have if they were working in the office.

Various proposals have been published in Germany, however, they are unlikely to be adopted for political reasons.

Russia is considering a draft bill on development of remote work. It is proposed to permit temporary remote working (this option currently exists de-facto, but it is not regulated) and combined work – eg to permit the parties to agree that an employee works partially at the workplace and partially remotely. Currently, an agreement on remote work must contain some specific provisions, such as: the reimbursement of the employee's costs incurred due to remote working and the employee's obligation to use the employer's equipment and software (if applicable).

Where local authorities take a passive approach in adopting teleworking legislation, the applicability of international conventions which might have previously ratified should be considered.

## **12. What will be the role of employers and employee representatives/trade unions?**

Increasingly, businesses are not waiting for governments to act. We have seen a lot of unilateral statements by employers.

Collective bargaining is another way to address the issues of remote working. A major European bank very recently co-signed a declaration on teleworking with its European works council. The declaration confirms the voluntary nature of teleworking and the minimum standards to be complied with. It looks at offering the possibility to all in the bank's HQ and central offices to work remotely up to 40% of the time.

Another example which brings into focus the role of trade unions is that of Spain, which recently adopted new legislation that leaves several issues to collective bargaining, such as: compensation for costs, how to

register working time, and how to exercise collective rights, etc.

In France, national-level employers' trade unions agreed with employees' trade unions to open negotiations on a global reform of rules governing teleworking. The discussions started strong in September 2020 but quickly reached a deadlock, as the trade unions struggle to find a common ground.

Beyond the collective bargaining point, in a number of countries, any teleworking arrangement will have to be discussed at works council level, as it has to be treated as part of the general information and consultation requirements of the employee representatives, which cover the way work is being organised.

In jurisdictions where trade unions/employee representatives do not have any specific role in governing remote work, such as in Russia, things may change in the future. Indeed, should the Russian draft bill on remote work be adopted, trade unions will be involved in certain processes related to remote work. Such processes can be related to the adoption of an internal policy on the means of interaction with remote employees and introduction of remote work without entering into additional agreements with employees in extraordinary cases (such as the recent pandemic). In France, in exceptional circumstances, such as that of the ongoing pandemic, teleworking can be set up as a conservative measure before launching the consultation process with the works council. However, such consultation must follow immediately, in order to make sure that the employee representatives are heard on the matter.

# Contacts

For further advice on any of the issues raised in this briefing,  
please contact one of the lawyers below.



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