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Legal Challenges of Teleworking in Latvia¹

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Abstract

Due to technological developments and entry of new generations into the labor market, teleworking is rapidly becoming more widely used as a form of employment. The Covid-19 crisis has increased its relevance over the past year. In the Latvian regulatory framework, this has been defined recently, including the definition of telework in the Labour Protection Law. Given that companies have had to adapt to the organisation of telework relatively quickly, in practice there are legal obstacles to effective implementation of sustainable telework.

The aim of the article is to reveal the most significant legal obstacles to implementation of efficient and sustainable telework in Latvia, considering experience of other countries. Both national and international legislation have been used in the study to achieve the set goal. Descriptive, analysis, induction and deduction methods have been used in the development of the article.

The results showed that there are uncertainties about application of the law in Latvia in the context of telework to the employee's right to disconnect from digital

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devices. The authors also found that planned changes to the Labour Law regarding telework do not create legal certainty in employment relations in emergency situations, such as the Covid-19 crisis. The authors also suggest including the right to disconnect in the Latvian regulation, to secure employees' rights to privacy and secure and healthy work environment.

Keywords: Labour Law, teleworking, the right to disconnect.

Introduction

Technological developments and the Covid-19 crisis have highlighted teleworking as a form of employment. In addition, it is the wider use of technology that suggests that teleworking, as a form of employment, is not temporary in nature, but is expected to continue to be used more widely (Belzuneugui-Eraso & Erro-Garcés, 2020). The research problem is justified by the topicality of the research. As telework is used more and more widely, in practice only new cases arise in which it is necessary to clarify and apply legal norms in cases that have not been experienced before and which are not directly regulated.

Topicality of telework is confirmed not only by international studies (for example, Eurofond, OECD) and data from the Central Statistical Bureau in Latvia, but also by the project "Life with COVID-19: Assessment of Corona virus Crisis Management in Latvia and Proposals for Future Public Sustainability". The primary data set of the study consisted of three surveys conducted in the second half of 2020 – the Latvian Business Survey, the Population Survey and the Employee Survey. The results of the surveys showed that in practice during the crisis caused by Covid-19 there are violations of Labour Law, which are largely related to organisation of telework and lack of common understanding of application of regulations in various telework cases.

The aim of the article is to reveal the most significant legal obstacles to implementation of efficient and sustainable telework in Latvia, considering the experience of other countries. Both national and international legislation have been used in the study to achieve the set goal. Descriptive, analysis, induction and deduction methods have been used in the development of the article.

In the following chapters, attention is paid to the problem of remote work regulation in Latvia, especially analysing the right to disconnect from digital devices.

Regulation of Telework in Latvia

Topicality of telework now and in the near future is evidenced by the results of the research carried out within the project "Life with COVID-19: Assessment of the Corona virus Crisis in Latvia and Proposals for the Future of Society". Within the framework of the study, companies, employees and the general population were surveyed. The results of the population survey showed that 22 % of the respondents worked remotely during

the Covid-19 emergency. Of the respondents who worked remotely, 45.3 % represented the public sector and 26.8 % the private sector. The results of the survey also showed that a large proportion of respondents would like to continue to work remotely entirely or a couple of days a week. Not only did the crisis caused by Covid-19 determine improvement of the regulatory framework in the context of telework, but it is also provided for Improvement Action Plan for 2019–2022 in the Business Environment (Cabinet of Ministers, 2019). This means that as teleworking becomes more widely used, it is important to have a common understanding of application and interpretation of the regulatory framework, which would create legal certainty and security even in exceptional circumstances.

Amendments to the Labour Protection Law of 1 July, 2020 define telework, stipulating that it is a form of work performance where the work that the employee could perform within the employer's company is performed permanently or regularly outside the company, including work performed using information and communication technologies. For the purposes of this law, telework is not considered to be work which, due to its nature, is associated with regular movement. In addition, Article 8 of the Labor Protection Law was supplemented with a clause providing for co-operation between the employer and the employee in assessment of work environment risk (Labour Protection Law, 2001).

Currently in Latvia, the first part of Article 53 of the Labour Law enables the employer and the employee to agree on the place of work. This means that teleworking is possible by agreement between both parties. The employer may enter into such an agreement with employees with whom an employment contract has already been concluded by proposing amendments to the employment contract in accordance with the procedures specified in Article 97 and 98 of the Labour Law. The results of the employee survey show that 76 % of employees who worked remotely did not have such a written agreement.

The legal framework for telework agreements and the right to unilateral action varies from country to country. For example, German and Swiss legislation stipulate that an agreement on telework must be provided for in either employment contract or collective agreement. However, in exceptional cases, such as the Covid-19 pandemic, the employer has the right to unilaterally require the employee to work remotely (Andersen, 2020).

In addition, it should be noted that the general inclusion of the employee's right to work remotely in the Labour Law is currently being discussed in Germany. Perhaps this would be important for people who are unable to work for the company due to a medical condition, such as people with disabilities or pregnant women. Italian legislation on employment law provides for the right of employees to work remotely in the event of an emergency if the employee has a child under the age of 14 who is studying remotely or has another person who is unable to take care of themselves or has a disability. In Portugal, the employee's right to work remotely for a specific group of people was included because of the Covid-19 pandemic. The circle of persons included those with disabilities

or illnesses that may endanger other persons. Inclusion of such a reservation in the regulatory framework contributes to protection of the most vulnerable groups in the field of labor law, while ensuring the continuation of employment.

In Latvia the Labour Law does not regulate telework separately, but amendments to the Labour Law have been proposed, which would supplement Article 76 of the Labour Law with the fourth part in the following wording: "For purposes of this Law, telework is a form of work in which the work which the employee could perform within the enterprise is performed permanently or regularly outside the employer's enterprise, including work performed by the employer. For the purposes of this Law, work which, due to the nature of the work, is connected with the regular movement of an employee shall not be considered telework" (Labour Law, 2021). Thus, both definition of telework and obligation of the employer to cover expenses incurred by the employee in connection with the performance of telework would be provided. Such a definition of telework is also in line with international practice. However, it would also be important to provide for exceptional cases in which it would be possible for the parties to decide on telework alone, in order to ensure equal and fair application of the law.

The results of the study showed that in practice there is uncertainty regarding employers' compensation to employees for expenses that have occurred due to teleworking. Considering the economic benefits of telework, it is necessary to create preconditions for the wider use of telework. It also includes clear and fair distribution of costs of teleworking between the employer and the employee, in order to avoid situations where teleworking is delayed because the employer and the employee cannot rely on clear tax regulation. The results of the Employee Survey show that 42.8 % of the respondents who are employed and worked remotely were not reimbursed for costs (for the Internet, electricity) although they were necessary. This leads to the conclusion that there is a risk of a breach of employment law with regard to fair compensation for the employee's expenses required to perform telework.

On January 1, 2021, amendments to the Personal Income Tax law came into force, which aims to supplement the transitional provisions with items 159, 160, 161, which states the type of expenses related to telework being exempt from taxation. However, the temporary nature of such regulation is not understood, as the amendments apply only to the rear 2021. Telework, as a form of work organisation even after the end of the Covid-19 emergency, is expected to continue to develop and be used more widely, so appropriate changes in the regulatory framework should be sustainable, thus ensuring legal certainty and predictability. Otherwise, a situation arises in which the Labour Law will provide for a general obligation of the employer to cover the employee's costs related to telework, but the application of taxes in this case is only temporary. In order to ensure legal certainty and predictability, changes are required in Article 9 of the Personal Income Tax Law, which provides for the types of non-taxable income.

To promote legal certainty, it is necessary both to amend the regulatory enactments that regulate the employer's compensation for employee expenses related to telework,

and to create common understanding between entrepreneurs and state institutions on interpretation and application of legal norms.

There is also legal uncertainty regarding the right to privacy in the context of teleworking. Entrepreneurship survey data show that 61 % of the companies that have introduced teleworking have increased digitalisation and use of information technology in business. This shows that as the form of teleworking becomes more widely used, so does the use of information technology, which in turn poses risks in a way that is compatible with an employee's right to privacy or rest.

Given that the right to privacy is a fundamental human right, restrictions on employees' rights to privacy must be lawful and proportionate. Protection of personal data in the Member States of the European Union is determined by the General Data Protection Regulation (2016) and in Latvia also by the Law on the Processing of Personal Data (2018). In the field of labour law, there is no separate regulation in Latvia that, for example, prohibits an employer from controlling an employee's behavior on digital devices.

Although preconditions for lawful data processing follow from the General Data Protection Regulation, individual assessment of individual cases may lead to different subjective interpretations, which creates a legal risk for protection of employees' right to privacy in Latvia.

For example, in Germany, the legislation specifically requires the consent of employee representatives for use of software (for example, employee screen control, computer mouse and keyboard management, control of websites visited) that controls teleworkers. On the other hand, Italian and Portuguese legislation prohibits use of such software which controls employees work-related behavior on digital devices, as it disproportionately violates employees' right to privacy. This shows that there are also different interpretations of the right to privacy between the Member States of the European Union in the context of teleworking.

Right to Disconnect from Digital Devices

It is considerably more difficult to establish balance between work and personal life in digital economy. Because the employee is always in contact with not only the employer, but the entire outside world, achievements of international labor regulations to limit working hours are lost (Chudnovskikh, 2019). Technological developments have created a risk for fair use of breaks and rest periods at work, especially in the context of teleworking. In response to the concerns arising from the "always-on" work culture, the concept of the "right to disconnect" has developed, which provides employees with the ability to disconnect from work, and generally from related communication technologies, outside defined working hours. It is in context of telework that employees are most likely to work "hidden" overtime that is not paid for by their employer. The authors note that the results of the survey of employees showed that 69.3 % of the respondents who worked remotely have an important opportunity to disconnect from digital devices

outside working hours (when the assigned tasks have been completed). The need to introduce the “right to disconnect from digital devices” in order to prevent burnout is also highlighted by a study carried out by Eurofond (Eurofond, 2020).

The right to disconnect from digital devices is considered for some as a new aspect of the right to rest periods and limitation of work hours. The Latvian Labour Law does not directly define the right to disconnect from digital devices; however, such rights arise from certain legal norms, for example, provisions of the Labour Law relating to the general rules on rest periods and breaks in work. This right also follows from Article 27 of the Labour Protection Law, which stipulates that the employer is responsible for safety and health of employees. In general, the right to disconnect from digital devices evolves from the right to privacy and autonomy, employees right to safe and healthy work environment and from employees right to leisure and rest period (Secunda, 2019).

Separate legislation on the right to disconnect from digital devices exists in France, Italy and from 2019 also in Spain. The French legislation provides that employers are required to include in the employment contract a reservation concerning use of telecommunications equipment between the employee and the employer (Orstein & Glassberg, 2019). The right to disconnect from digital devices is provided in different ways by companies in France. Some organisations use preventative measures and provide training for employees on working hours, as well as include a reservation in internal regulations that e-mails cannot be sent outside working hours. Some companies have introduced technological solutions that store e-mail sent by an employee in the system and deliver it only on the morning of the working day. Some companies include a ban on sending e-mails at night in collective agreements or employment contracts (Orstein & Glassberg, 2019). On the other hand, the Italian legislation of 2017, which provides for flexible working hours, stipulates that the employer and the employee must provide technological and organisational means that ensure a minimum rest period, including the right to disconnect from digital devices (ITUC, 2021). Spain is currently the most recent country in establishing the employee's right to disconnect to their regulation along with other digital rights. It is interesting to note that in French and Italian regulation there is no direct recognition of employee's right to disconnect as such while Spanish legislation clearly prescribes the existence of the right to digital disconnection of employees.

In 2019, the Luxembourg Supreme Court also recognised the employee's right to disconnect from digital devices; however, certain rights to disconnect from digital devices are not included in the Luxembourg legislation (Castegnaro, 2019). In Spain, the right to disconnect from digital devices outside normal business hours is set out in the Data Security and Digital Act (2018).

Although more and more countries are introducing the right of employees to disconnect from digital devices in their regulatory framework, either by taking legislative approach (France, Italy) or corporate self-regulatory approach (Germany), there is no uniform regulation at the level of the European Union. The right of employees to disconnect from digital devices is implicit in the Working Time Directive 2003/88/EC.

For example, the directive sets minimum daily and weekly rest periods to protect safety and health of workers. Similarly, the right to disconnect from digital devices derives from the 20 principles of the European Pillar of Social Rights, which include the principle of work-life balance (Principle 9) and the principles of a healthy, safe and well-adapted work environment and data protection (European Commission, 2021). This legislation is more of a recommendatory nature, but compliance with it is essential for harmonisation of social rights in the European Union.

It can be concluded that experience of the EU Member States differs regarding the right of employees to disconnect from digital devices. Although such rights also derive from the Latvian regulatory framework, clear regulation would create legal certainty. Considering the topicality of telework, Latvia also needs a regulatory framework that would include the right of employees to disconnect from digital devices, thus promoting sustainability of telework and compliance with international principles. That would also help to protect employee privacy, productivity and compensation, and their rest and leisure time. Notwithstanding, it is worth noting that the right to disconnect can also be secured in a variety of ways, not just through legal means. Modern technology has enabled modern businesses to exercise their right to disconnect through technical means. This suggests that there is a need for social dialogue in Latvia between institutions and businesses to implement the right to disconnect in practice along with changes in regulation.

Conclusions

1. With the development of technology, relevance of telework is expected to increase; therefore, a clear regulatory framework is needed that would create legal certainty on organisation of telework, the right of employees to disconnect from digital devices, and employers' compensation for expenses incurred by employees work.
2. The planned changes to the Labour Law in Latvia regarding telework do not create legal certainty in employment relations in emergency situations, such as the Covid-19 crisis, as they do not provide for a unilateral right to telework in exceptional cases. Such rights would ensure their fair application in exceptional cases.
3. Although the planned amendments to the Labour Law provide for the employer's obligation to reimburse employee expenses incurred in connection with telework, the application of personal income tax in this case is only temporary with a time limit that creates legal uncertainty, as telework is an expected form of employment and will be used more widely in the future.
4. Although preconditions for lawful data processing follow from the General Data Protection Regulation, individual assessment of individual cases may lead to different subjective interpretations, which creates a legal risk for protection of employees' right to privacy in Latvia in the context of telework.

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5. The right to disconnect from digital devices is not directly defined in the Latvian Labour Law; however, such rights arise from separate legal norms in both the Labour Law and the Labour Protection Law. However, it would be necessary to improve the understanding of the right of employees to disconnect from digital devices, and considering the ever-increasing use of technology, provide for a separate right to disconnect from digital devices in the regulatory framework.

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