

Łukasz Pisarczyk

Poland in the Search for an Appropriate Legal Framework of Distant Work

Summary: 1. Opening Remarks. 2. Legal Forms of Distant Work. 3. Sources of Regulation of Distant Work. 4. Implementing Distant Work. 5. Work Equipment and Costs of Distant Work. 6. The Organization and Performance of Distant Work. 7. Conclusions.

1. Opening Remark

Working outside employer's premises in its various forms enters, especially after the pandemic experience, a new era. The role which is played by the distant work in the contemporary world of work requires the adoption of an adequate legal framework that enables effective organization of work but also safeguards the employee's well-being¹. The law should search for an equilibrium between the organizational needs of employers and appropriate protection of workers who perform work in special circumstances – outside employer's premises.

The core of the existing legal framework of distant work in Poland is the Labour Code (LC)² providing for “telework”, which is a form of work outside employer's premises performed with the use of information technology only.

¹ For more see e.g., *Teleworking during the COVID-19 pandemic and beyond. A practical guide*, Geneva: International Labour Office, July 2020, p. 2 ff., https://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—travail/documents/instructionalmaterial/wcms_751232.pdf.

² The Law of 26 June 1974 – Labour Code, *Journal of Laws*, 2020, item 1320, as amended. Translations of the Labour Code used in the text: LEX (<https://sip.lex.pl/#/act-translation/1459619806>).

The anti-Covid legislation adopted in 2020³ introduced a special form of distant work – “pandemic remote work” which is based on special rules aimed at counteracting the consequences of the pandemic. The existing law is considered insufficient especially after a pandemic “explosion” in remote working. The need to create a new, comprehensive and adequate legal framework is obvious. Politicians, social partners and labour law scholars are considering how to reorganize the law on distant work to make it adequate to the changing reality⁴. In spring 2022, the government submitted a bill amending the Labour Code⁵ (“Bill”) and initiated consultation with social partners (trade unions and employers’ organizations representative at the national level). Currently the Bill is proceeded by the Parliament⁶. However the government has proposed some amendments recently (the beginning of October). Additionally, there are still some disputes between trade unions and employers’ organizations about the final form of the future regulation⁷.

The Polish case may be interesting when identifying obstacles in developing distant work and searching for solutions which may contribute to the improvement of the situation. To achieve this goal the author confronts the existing and future regulations and evaluates them from the perspective of standards essential for the sustainable development of distant work. At the same time, several features characterizing the Polish economy and the labour market, which affect the legal framework of distant work, should be remembered. New forms of work appeared in Poland later and are not as common as in some Western countries⁸. Still the sector of new technologies

³ The Law of 2 March 2020 on Special Measures to Counteract COVID-19, *Journal of Laws*, 2021, item 2095, as amended.

⁴ See e.g., MITRUS, *Praca zdalna de lege lata i de lege ferenda – zmiana miejsca wykonywania pracy czy nowa koncepcja stosunku pracy?* (Remote work de lege lata and de lege ferenda – a change of the place of work or a new concept of the employment relationship), in *Praca i Zabezpieczenie Społeczne*, 2020, Nos. 10 and 11; FLOREK, *Prawne ramy pracy zdalnej* (Legal Framework of Remote Work), in *Z Problematyki Prawa Pracy i Polityki Socjalnej*, 2021, Vol. 19, No. 2; TER HAAR, *Badanie aspektów pracy zdalnej w dobie pandemii COVID-19 i w perspektywie przyszłości* (Studies on the Aspects of Remote Work during the COVID-19 Pandemic and for the Future), <https://calg.pl/?s=Badanie+aspekt%C3%B3w+pracy+zdalnej+w+dobie+pandemii+COVID-19+i+w+perspektywie+przysz%C5%82o%C5%9Bci>.

⁵ <https://legislacja.rcl.gov.pl/projekt/12354104>.

⁶ <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2335>.

⁷ <https://www.rp.pl/prawo-pracy/art37181491-rzad-chce-rozszerzyc-prace-zdalna-bdzie-nie-tylko-na-umowie-o-prace>.

⁸ EUROFOUND, *New Forms of Employment: 2020 Update*, Publications Office of the European Union, 2020, pp. 8–9.

develops fast. At the same time, Poland has achieved steady economic growth⁹. The legal system is characterized by the weakness of collective bargaining and (which can be considered a consequence) by extensive legislation. The Polish labour market is one of the largest in Europe. However, a large part of working people are non-employees (working under civil law contracts or self-employed with the status of entrepreneurs)¹⁰. All these phenomena make the Polish case unique and affect the legal framework of distant work.

There is no ideal and universal model of distant work applicable in each legal system. However, taking into account international standards, including the ILO's Convention No. 177 concerning Home Work ("Convention") – Poland has not ratified the Convention – and Recommendation No. 184 concerning Home Work ("Recommendation"), the Framework agreement of the European social partners on telework, (FA) – implemented to the Polish law, the Framework agreement of the European social partners on digitalisation as well as other principles and standards that should affect the legal status of remote workers it is possible to set up a number of conditions that should be met by the legislation to contribute to the harmonious development of distant work "ensuring the well-being of workers and continued productivity while teleworking"¹¹: 1) voluntary character of distant work; 2) the maintenance of the legal status of distant workers, in particular as employees; 3) the promotion of employee' representatives, involvement in implementing distant work and shaping its conditions; 4) the right of employees to be informed in writing about specific conditions of employment; 5) the protection of workers against additional cost of work; 6) appropriate working conditions, including OHS, working time, and the right to be disconnected (including appropriate working conditions for workers in a special situation, e.g. work-life balance); 7) equal treatment of distant workers; 8) the protection of employees privacy, which must be confronted with the employer's managerial prerogatives; 9) the protection of data, including personal data;

⁹ <https://stat.gov.pl/obszary-tematyczne/rachunki-narodowe/roczne-rachunki-narodowe/produkt-krajowy-brutto-w-2021-roku-szacunek-wstepny,2,11.html>.

¹⁰ See the data published by the Central Statistical Office, <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/pracujacy-bezrobotni-bierni-zawodowo-wg-bael/aktywnosc-ekonomiczna-ludnosci-polski-3-kwartal-2021-roku,4,43.html>.

¹¹ *Teleworking during the COVID-19 pandemic and beyond. A practical guide*, Geneva: International Labour Office, July 2020, p. 5 ff. From the Polish perspective see e.g., TER HAAR, *id.*

10) the protection of employees against isolation; 11) support for the development of employees' skills to perform distant work; 12) the safeguarding of collective rights of distant workers.

The article begins with an analysis of the legal forms of distant work possible under Polish law (Section 2). Section 3 depicts an interplay between legislation, autonomous sources of labour law, and individual acts in implementing and shaping various forms of distant work. Next, the analysis concerns the most important components of distant work to answer the question whether Polish law, existing and future, enables harmonious development of distant work. The subjects of the analysis are: 1) the way of implementing distant work, including freedom of implementing distant work and the legal status of distant workers (Section 4); 2) work equipment and costs of performing distant work (Section 5); and 3) rights and duties connected with performing distant work, including working time, OHS, managerial competences of employers and employee's privacy (Section 6). There are also some intersectional questions, including the protection of some groups of workers (e.g., work-life balance) and the role of employee representatives in the development of distant work.

The analysis focuses on those legal forms that have been tailored to performing work outside employer's premises. However, one should not overlook the fact that in many cases distant work is performed outside this framework. Distant work is provided by the parties to employment as well as civil law contracts with reference neither to telework nor to pandemic remote work (informal remote work). Due to the variety of the existing and future forms of distant work there are terminological problems with describing and classifying various phenomena. The most general concept used in the article is distant work, describing all forms of work performed outside employer's premises, irrespective of their nature and legal classification.

2. *Legal Forms of Distant Work*

The existing Polish law provides for two main forms of work outside employer's premises: telework and pandemic remote work.

The legal framework for telework is set up by the Labour Code (LC). The regulation dates back to 2007, when Poland implemented the Frame-

work Agreement¹². Telework is defined as a form of organizing and performing work: 1) away from employer's premises 2) involving the use of information technology 3) on a regular basis (Art. 67^s § 1 LC). The definition has two significant implications. First, only work involving the use of information technology can be treated as telework. Those who perform work outside employer's premises but without using this type of technologies fall outside the scope of regulation. Second, telework must be regular. Even if this condition is interpreted quite flexibly, (telework performed, e.g., one day per week), occasional activities are excluded. Due to both limitations, the practical importance of telework remains significantly restricted. It is one of the reasons for a growing popularity of informal distant work. Moreover, it may be applied in employment contracts only while the Polish law provides also for other bases of the employment relationship, like nomination (teachers, civil servants), appointment and election.

The special anti-Covid legislation, aiming at counteracting negative consequences of the pandemic, established an extraordinary form of distant work: pandemic remote work. This form of distant work can be applied during the state of epidemic or epidemic emergency as well as three months after the state of epidemic (epidemic emergency) is cancelled¹³. Pandemic remote work is performed away from employer's premises. However, there are no requirements concerning the use of information technology and the regularity of performance. The legislature intended to enable performing work remotely in any situation when it was needed due to the state of pandemic and possible due to the nature of work. As a result, the spectrum of activities covered by pandemic remote work is much wider than in the case of telework.

If parties to the employment relationship decide to use either the telework or the pandemic remote work model, they fall under a legal regime adapted to the nature of work outside employer's premises. However, it is also possible to agree that the place of work will be situated outside the establishment organized by the employer and apply neither telework nor pandemic remote work ("informal distant work"). It can be, however, detrimental to employees (who have no right to the reimbursement of cost incurred in connection with performing work) as well as risky for employers

¹² The Law of 24/08/2007 amending the Labour Code and some other laws (*Journal of Laws* 181, item 1288).

¹³ The state of epidemic emergency has not been cancelled yet (9 October 2022) so employers are still entitled to impose pandemic remote work.

(who bears full responsibility in the area of OHS). Without a doubt, such a form of distant work was not intended and promoted by the legislature. However, informal distant work is not prohibited and, consequently, it is considered legal and possible. Moreover, informal distant work has gained great popularity in practice. First, it can be applied to each case of performing work outside employer's premises (while the scope of application telework is limited – see below). Second, it is very flexible since its application depends on the will of the parties only.

Finally, discussing the existing legal framework of distant work would not be complete without reference to the phenomenon of working outside the employment relationship – on the basis of civil law contracts without entrepreneurs status (workers) or of the basis of civil law contracts as entrepreneurs (self-employed). The Polish labour market is characterized by a relatively high (higher than in other countries) percentage of people employed under civil law contracts including those who enjoy the status of entrepreneurs (self-employed *sensu stricto*). Undoubtedly, some of them perform distant work. Even if they work in conditions similar to employees, they are not covered by labour law standards concerning telework and pandemic remote work. Their terms of work are shaped freely by the parties (freedom of contracts) with limited statutory intervention.

The Bill, which can be treated as a response to the current unsatisfactory situation, aims at creating a comprehensive model of performing distant work in various circumstances. It is intended to reconcile the needs of both: the employers and the employees¹⁴. The “remote work” provided for by the Bill may be perceived as a synthesis of the current concepts of telework and pandemic remote work. The main feature of the remote work will be work outside employer's premises. There are no requirements concerning the use of information technologies (they can be, of course, used) and regularity. The new law will bring a significant change in approach to remote work – a shift from telework in a strict sense (performed only via electronic technologies) to a broader concept of work performed outside employer's premises (closer to the ILO's perspective). The new remote work will cover teleworking in the strict sense as well as jobs involving modern technologies. Work may be performed remotely, either entirely (only outside employer's premises) or partially (e.g., on certain days of the week).

¹⁴ See the explanatory statement to the Bill, <https://www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2335>.

Although the Bill provides for one concept of remote work it will be internally diversified. The future law distinguishes three situations when remote work may be applied. The basic variant is “typical remote work” which may constitute a permanent element of the employment relationship. It replaces, in fact, the current concept of telework as a basic legal form of performing work outside employer’s premises. It will have, however, much broader scope of application (rather home work instead of telework *sensu stricto*). The parties to the employment relationship will be able to apply typical remote work in almost each case when work is performed outside employer’s premises. The place of work will be agreed by the parties (employee’s proposal and the employer’s approval). The employee is free when proposing a future workplace. The organization of telework (requirements concerning OHS standards, controls performed by the employer) suggests, however, that the place should be rather stable and somehow controllable by the employee (e.g., the employee’s home or a telecentre, but rather not cafes). Moreover, in exceptional situations, when the performance of work is impossible or considerably difficult the employer will be entitled to impose “extraordinary remote work”. A new construction is “occasional remote work” – a form of distant work applied on the employee’s request up to 24 days in a calendar year¹⁵. The main goal of the new institution is to create a flexible possibility of using distant work when it is convenient for employees, e.g., due to their personal or family situation and acceptable for the employer. The legal regime of each form of remote work will be slightly different.

The Bill does not concern in any way remote work performed on the basis of civil law contracts. The new model of remote work will not be applied within the legal relationships regulated by the civil law¹⁶. It will be possible to perform remote work on the basis on civil law contracts but without amenities arising from the new law.

¹⁵ The number in the initial draft was twelve days. The social partners still argue about the number of days of occasional remote work. Employers propose to increase while trade unions to reduce it.

¹⁶ <https://www.rp.pl/prawo-pracy/art37181491-rzad-chce-rozszerzyc-prace-zdalna-bedzie-tylko-na-umowie-o-prace>.

Table 1: *Legal forms of distant work in Poland*

Existing legal framework	Telework (Labour Code)	Pandemic remote work (anti-Covid law)	Informal remote work within employment relationship	Remote work based on civil law contracts
The legal framework provided for by the Bill	Remote work		Informal remote work within employment relationship (on the current terms)	Remote work based on civil law contracts (on the current terms)
	a synthesis of current telework and pandemic remote work			
	a) typical remote work			
	b) extraordinary remote work			
	c) occasional remote work			

The existing system of distant work in Poland is complex and complicated. In many cases, distant work is performed beyond the legal framework tailored to work performed outside employer’s premises (informal distant work in employment relationships, distant work in civil law contracts). Due to the factual position of the parties, it may lead to a situation when a proper balance is not achieved. The Bill gives an opportunity to create a comprehensive and more flexible legal framework for distant work. It gives hope that employers and employees will choose the new (hopefully efficient legal framework) and abandon the practice of informal distant work. However, the informal remote (in both: employment as well as civil law relationships) will be still possible. The result will depend on how the new rules prove

themselves in practice. Finally, the problem of evading labour law standards by using civil law contracts remains unsolved.

3. *Sources of Regulation of Distant Work*

The conditions of performing telework may be set forth at various levels. The basic standards are determined by the law. Some statutory rules are mandatory while others may be modified or supplemented by the social partners and parties to the employment relationship (see more in section 4 *and further*). Autonomous collective sources of distant work regulations are: 1) typical collective agreements concluded according to the rules set forth by the LC (Chapter eleven), 2) agreements on telework concluded with a company trade union organization (their content is limited to distant work matters only), and 3) regulations issued by employers for the whole company or its part.

Important for an appropriate development of distant work is the involvement of employee representatives whose negotiating position enables them to reach a real compromise. In theory, the principles of implementing and applying telework may be determined by typical collective agreements negotiated at the company or supra-company (e.g., branch or sectoral) level. Typical collective agreements may regulate the content of the employment relationships in their entirety, provided that they are not less favourable for employees and do not infringe the rights of third parties (Art. 240 §§ 1 and 2 LC). However, research carried out in years 2019–2022 has revealed that the issue of distant work (including telework) is generally absent from typical collective bargaining. Multi-company collective agreements are almost non-existent. Surprisingly, provisions concerning distant work are also very rare in company-level collective agreements which are more popular. None of the examined collective agreements regulated remote work to a greater extent¹⁷. One of the latest company-level collective agreements registered in Warsaw (a large enterprise, manufacturing) provides for a possibility of remote work without references to electronic means of communication. The

¹⁷ PISARCZYK, RUMIAN, WIECZOREK, *Zakładowe układy zbiorowe – nadzieja na dialog społeczny?* (*Company-level collective agreements – a glimmer of hope for social dialogue*), in *Praca i Zabezpieczenie Społeczne*, 2021/6, <https://www.pwe.com.pl/czasopisma/praca-i-zabezpieczenie-spoleczne/zakladowe-uklady-zbiorowe-nadzieja-na-dialog-spoleczny,a1992889691>.

employer is obliged to inform employees about the occupational risk and safety measures.

In order to avoid a regulatory vacuum and to involve somehow employees' representatives the law provides for an alternative mechanism of setting forth "principles of performing telework". The principles are adopted at the company level (Art. 67⁶ LC). Their content, contrary e.g., to typical collective agreements, is limited to telework matters only (collective agreements on telework). The agreement is negotiated with a company trade union organization (organizations). If no agreement is reached, the employer may issue unilaterally regulations on telework (the employer may take into account the opinion submitted by trade unions). If there are no company trade union organizations, the employer issues regulations on telework after consulting employee representatives elected according to the rules adopted in the company (the law does not lay down any principles of the election). The agreements on telework and employer's regulations apply to a group of employees who perform (are going to perform) telework. In practice agreements with trade unions are very rare (if only because company trade union organizations exist in a few enterprises). Usually, employers set up principles of telework unilaterally after consulting employees' representatives. If there are no collective standards, the rules of performing telework can be determined by the employer and employee in an individual agreement.

The Bill does not provide for any incentives to conclude typical collective agreements regulating remote work, in particular for larger groups of employers. The government did not use the popularity and importance of remote work to promote collective bargaining.

"The principles of performing remote work" (replacing current principles of performing telework) will possibly remain the main regulatory instrument. The procedure for adopting the principles remains unchanged: an agreement with company trade union organizations, regulations issued by the employer (if the agreement is not reached or there are no trade unions in the company), individual agreement between the employer and the employee. The Bill specifies, however, the content of the principles. They should lay down in particular: 1) the group or groups of employees who may perform remote work; 2) the reimbursement of the cost incurred by the employee; 3) the rules for calculating the cash equivalent for the employee (e.g. for the use of their own equipment); 4) rules of communication between

the parties, including the method of confirming the employee's presence at the workplace; 5) rules for monitoring the performance of work; 6) rules for monitoring OHS standards; 7) rules for monitoring compliance with the requirements in the field of information security and protection, including procedures for the protection of personal data; 8) principles of installation, inventory, maintenance, software update and service of the work tools entrusted to the employee, including technical devices.

The conditions of extraordinary and occasional remote work will be laid down in a special way – appropriate to their character. Principles of performing extraordinary remote work will be determined unilaterally by the employer – in its decision imposing remote work. Such a solution may be justified by the circumstances in which the remote work is imposed (*force majeure*) and the lack of time to follow the procedure. In the case of occasional remote work (up to 24 days per year), there is no obligation to lay down the principles. The employer and the employee should, however, agree upon selected issues connected with the organization of work (in particular the monitoring and communication).

One of the most important features of the Polish law, also in the field of remote work, is the deficit of collective (democratic) procedures. Typical collective bargaining is undergoing (in general) a very deep crisis. It is not used to create the legal framework for distant work. Collective agreements on telework are concluded rarely. The main regulatory sources are, therefore, regulations issued by employers and individual agreements with employees. The Bill will not change this situation. There are no incentives to engage in collective bargaining. Regulations issued by employers and individual agreements between the parties to the employment relationship will remain the chief regulatory instrument. It leads to the deficit of democracy and weakening of employees protection. One of the most important conditions for a proper development of distant work has not been met.

4. *Implementing Distant Work*

Telework must be provided for as an element of the employment contract. The employer cannot impose telework by means of unilateral decision (Art. 67⁷ § 4 LC). The telework may be adopted: 1) as a part of a worker's initial job description (the parties from the very beginning intended for the

work to be performed remotely), or 2) as a subsequent voluntary arrangement. The law provides for a detailed framework for implementing telework during the employment relationship. The main goal is to protect the voluntary character of distant work threatened by the factual position of the parties to the employment relationship. The implementation of telework may be initiated by both: the employer and the employee. As a rule, the employee's application to implement the telework is not binding on the employer. However, in some cases refusal is possible only in justified cases (privileged employees¹⁸). If the employer cannot (objectively) accept the application of privileged employees, it is obliged to justify the decision. The employee may appeal to the labour court. Moreover, if telework has been agreed when concluding the employment contract, each party, within three months of the date of the commencement of work in the form of telework, may submit a binding request to opt out of telework. Outside this time frame, the employer should accept the employee's request as far as possible (this condition is not very clear and precise). The employer itself may restore previous conditions (no telework) by means of unilateral declaration of will with period of notice while the employee's refusal leads to the termination of the employment contract (Art. 42 § 1-3 LC). This mechanism, in the particular in case of distant work, violates somehow the freedom to work (not to work) remotely.

The employee's proposal to implement telework, the refusal to accept telework proposed by the employer, as well as the decision to opt out of telework cannot entail any negative consequences for the employee, e.g., dismissal (Art. 67⁷ LC).

Pandemic remote work is imposed unilaterally by the employer. The law sets up the conditions that have to be met. Remote work may be imposed: 1) to counteract the effects of the pandemic; 2) if the type of work allows for

¹⁸ The following are in privileged position: 1) an employee-spouse or an employee-parent of a child in the prenatal stage of development, in the case of a pregnancy with complications; an employee-parent of a child holding a certificate provided for by the Law on Support for Pregnant Women and Families "For Life"; an employee-parent: a) of a child holding a disability certificate or a certificate of a moderate or severe degree of disability, provided for in regulations on occupational and social rehabilitation and on employing disabled persons, and b) of a child holding an expert opinion on the need for the early support of the child's development, a certificate of the need for special education, or a certificate of the need for revalidation and education activities (Art. 142¹ LC).

it, and 3) if the employee has the technical and organizational conditions to perform such work (e.g., necessary equipment). If these conditions are met, the decision of the employer is binding on the employee¹⁹. Pandemic remote work may not be treated as voluntary in a strict sense (the employee follows the decision of the employer). In this case, however, other values, in particular the protection of human life and health prevail. The same or similar solutions (distant work on employer's demand or even by virtue of law) have been adopted since the outbreak of the pandemic also in other legal systems²⁰. The employer's right to impose pandemic remote work exists only as long as the state of pandemic threat exists. When imposing remote work, the employer must specify how long it is going to be performed (e.g., one month). Moreover, the employer's power does not go beyond the type of work agreed by the parties: the employer's decision may concern only the work that has been agreed upon in the employment contract.

Implementing both: telework as well as pandemic remote work does not change the legal status of the employee. Despite the change of the place of work the employment relationship is maintained. Another problem (discussed in Section 2) is the phenomenon of evading labour law by concluding civil law contracts. This is, however, a consequence of the parties' decision and the lack of efficient mechanisms to qualify civil law contracts as employment contracts.

The method of implementing the new model of remote work provided for by the Bill will depend on the circumstances.

Typical remote work will be implemented similarly to telework – as an element of the employment relationship – agreed on at the beginning or during the employment relationship. The Bill protects the voluntary nature of remote work in the same way as in case of telework. An important difference is the extension of the group of privileged employees whose application should be accepted, unless it is not possible due to the type or organization of work (as now the employer will have to explain the reasons for the refusal). Compared to the current provisions, the privileged status will be granted, *inter alia*, to pregnant women, employees taking care of children under the age of four and employees taking care of other family

¹⁹ The employer's order may be issued in any form. The employer is also entitled to cancel remote work at any time.

²⁰ See more national reports in *ILLEJ*, 2020, Vol. 13, No. 1S.

members with a diagnosed disability. In parallel, the draft implementing Directive 2019/1158 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU provides that employees taking care of children up to eight years will be entitled to apply for flexible working arrangements, including telework (which probably will be converted into remote work).

An additional guarantee for the voluntary nature of remote work remains the possibility to resign from remote work introduced during the employment relationship (within three months of the moment when remote work was adopted). In such a situation, each party to the employment contract²¹ may submit a binding application to restore previous (non-remote) conditions of work. An important amendment is the lack of explicit employer's right to restore previous working conditions beyond this period via a unilateral legal act (nowadays, the employee's refusal leads to the termination of the employment contract). Moreover, the Bill provides explicitly that the employer cannot opt out of remote work in relation to privileged employees who applied for this work organization (unless it is objectively justified). An application for the introduction of remote work, refusal to work remotely, and resignation from it may not be the cause of reprisals against the employee, including dismissal from work.

In extraordinary circumstances, the employer will be entitled to oblige the employee (by issuing an order) to perform telework: during the period of a state of emergency, epidemic threat, or a state of epidemic²² as well as during the period in which the employer, they are not able to ensure health and safety at its premises. The employee will have to submit a declaration that they have the accommodation and technical conditions to perform remote work. The employer will be: entitled to cancel the decision at any time (with at least one day's notice), and obliged to resign from remote work, if the employee notifies it that due to a change in technical and accommodation conditions is not able to perform remote work any longer. The special, unilateral way of imposing remote work is justified, just as with the existing concept pandemic remote work, by extraordinary circumstances in which it is applied. As a result, it should be treated as an exception, but not violation

²¹ In the case of privileged employees, who applied for remote work, the employer may restore previous working conditions only in justified cases.

²² And within three months after their cancellation.

of the voluntary nature of distant work. Moreover, the performance of remote work will depend on employee's a factual situation (technical and accommodation conditions necessary to perform work).

Occasional telework will be based on an *ad hoc* agreement of the parties without changing the content of the employment relationship. The employee will be entitled to apply for the implementation of occasional telework. The employee will specify the number of days and the dates of remote work (within the annual limit of 24 days). The employee does not have to substantiate the request. However, the employer will not be bound by the request. Moreover, no justification of the refusal is required. In the event of occasional remote work, the parties do not agree on the place of work. Its choice is up to the employee. As a rule, the employer's approval is not needed. This allows the employee to work from various locations, even from abroad.

The Bill, similarly to the existing law, does not provide for a change of the worker's legal status.

Both the current and the draft Polish law, protect the voluntary nature of distant work. The rules for implementing telework are consistent with the standards arising from the Framework Agreement (telework provided for by the agreement, requests to implement telework, the right to opt out of telework). The same will apply to remote work provided by in the Bill. The new concept of occasional remote work will be applied on employee's request. The employer is entitled to impose distant work unilaterally only under special circumstances when it is justified by the need to protect human life and health. In theory, Polish law guarantees the maintenance of the employee's status at implementing distant work. In practice, it is quite common to conclude civil law contracts in conditions typical for the employment relationship. Solving this problem, however, goes beyond the legal framework of remote work. It constitutes a part of a broader social and legal phenomenon.

5. *Work Equipment and Costs of Distant Work*

The LC sets forth the rules for providing teleworkers with equipment and tools (based on the Framework Agreement). The employer is obliged: 1) to provide the teleworker with the equipment necessary to perform tele-

work; 2) to provide insurance for that equipment; 3) to cover the expenses related to the installation, servicing, operation and maintenance of the equipment; and 4) to provide the teleworker with the technical support and the necessary training in operating the equipment. The parties may decide otherwise in an agreement concluded besides the employment contract. In such a case the teleworker is entitled to a cash equivalent for the use of its private equipment (Art. 67¹¹ LC) – according to statutory standards and the principles of performing telework (Section 3).

As far as pandemic remote work is concerned, the employee should be provided with tools and materials needed to perform remote work, as well as logistic support for working outside employer's premises. However, the law does not specify the content of this obligation. At the same time, the employee is not prohibited from using tools or materials that have not been provided by the employer (as long as they meet the safety conditions). In practice, due to the general nature of the regulations there are disputes as to whether and what tools and equipment should be provided by the employer (e.g., who is responsible for the organization of the workplace at the employee's home). The general character of the provisions can be only explained by the extraordinary nature of pandemic remote work.

The Bill clarifies and extends the employer's obligations in the field of work equipment and cost. The new law differs in some important aspects from the LC's standards concerning telework (as presented above). The employer will be obliged to: 1) provide the employee with materials and work tools, including technical devices, necessary to perform remote work; 2) provide installation, service, and maintenance of work tools, including technical devices necessary to perform remote work, or cover the necessary costs related to the installation, service, operation and maintenance of work tools, including technical devices, necessary to perform remote work, as well as cover the costs of electricity and telecommunications services necessary to perform remote work; and 3) cover other costs directly related to the performance of remote work, if the reimbursement of such costs has been specified in the principles of performing remote work. First, the Bill clearly resolves it is the employer who is responsible for the costs of electricity and Internet used by the employee. Second, the employer may cover also other cost (e.g., specific for this type of remote work) related to remote work.

The parties may stipulate that the employee performing remote work will use materials and work tools, including technical devices necessary to perform remote work, not provided by the employer, as far as they meet the requirements set out by the Labour Code. In such a case the employee is entitled to a cash equivalent in the amount agreed with the employer. The obligation to cover the costs related to the performance of remote work and to pay the equivalent for the use of employee's equipment may be replaced by the obligation to pay a lump sum. The amount of the lump sum should correspond to the expected costs incurred by the employee²³.

The current regulations give rise to some interpretation doubts. In some cases, this may cause that the employee incurs excessive costs of distant work (contrary to the standards arising from the Framework Agreement). During the pandemic, due to the mass nature of remote work, there was a large-scale problem of energy and internet costs, which many employees incurred themselves. The Bill intends to create more transparent rules in terms of equipment and costs in order to make the protection of distant workers more efficient. In particular, the new law is expected to resolve the most common problems, like electricity and Internet costs.

6. *The Organization and Performance of Distant Work*

The Labour Code provides for a comprehensive legal framework for performing telework, in particular to find a balance between the managerial competences of the employer, on the one hand and the employees, HS and privacy on the other (according to the rules stipulated by the Framework Agreement). The practice of the application has revealed, however, that some mechanisms need to be clarified or modified.

First of all, the law requires the clarification of the position of teleworkers in the company's structure. The employer should inform the employee about the organizational unit to which the teleworker's workplace is assigned

²³ When determining the amount of the equivalent or lump sum, account should be taken, in particular, of the consumption standards of materials and tools, including technical devices, their documented market prices and the amount of material used for the employer's needs, and the market prices of this material, as well as electricity consumption standards and costs of telecommunications services.

and about the person representing the employer responsible for cooperation with the employee (Art. 67¹⁰ § 1 LC). The employer and the teleworker may conclude an agreement (apart from the employment contract) setting out the rules of communication between them, including the methods of confirming the teleworker's presence at the workplace as well as the method and form of the monitoring of work performed by the teleworker.

The employer remains responsible for the occupational health and safety of teleworkers (Art. 67¹⁷ LC). However, some of the employer's obligations, due to the circumstances of performing telework, are excluded: the responsibility for the state of buildings and their parts (e.g., rooms) in which work is performed and the obligation to provide the appropriate hygiene and sanitation facilities (e.g., toilets). In practice, employers believe that the scope of the exemptions is insufficient (an example being the need to assess occupational risk for each separate workplace).

As regards working time, general provisions of the Labour Code apply, including the length of the working day, rest periods, and overtime work. There are no special rules about time management by the employee (sec. 9 FA). It means that working time is organized by the employer (schedules of working time). The employer acting unilaterally or both parties acting together may resign from setting up the schedules (Art. 140 LC). It is not, however, obligatory. Work may be performed in its entirety outside employer's premises – no requirement that a part of working hours should be performed at the workplace. The law does not provide for the employee's right to disconnect (to be offline). However, the employees are protected by general working time standards (mentioned above). Work exceeding regular working hours is treated as overtime, which is permissible only in the case of a special need on the part of the employer²⁴. The question arises, however, whether such guarantees are sufficient in view of the specificity of distant work.

The employer has the right to monitor: 1) performance of the telework by the employee; 2) compliance with OHS regulations (Art. 67¹⁶ LC); 3) compliance with regulations concerning security and information protection. The monitoring is carried out in consultation with the employee at the place where telework is performed, during the employee's working hours. The employer has to adapt the way of monitoring to the place of work (e.g., employee's home) and its type. If telework is performed at home,

²⁴ <https://www.sejm.gov.pl/sejm9.nsf/InterpelacjaTresc.xsp?key=CCSJJEY>.

the teleworker's prior consent is necessary (without employee's consent the inspection cannot be carried out). Inspections must neither affect the privacy of the teleworker and their family nor interfere with the use of the private premises (Art. 67¹⁴ LC). Moreover, the employer has the right to access the place of work in order to verify, whether the applicable health and safety provisions are correctly in place.

The Labour Code provides that the employee doing telework may not be treated less favourably in terms of: entering into and terminating the employment relationship, terms of employment (including remuneration), and promotion and access to professional training, compared to other employees doing the same or similar work; albeit, taking into account the special nature of telework (which may lead to some modifications). As regards the isolation risk, the employer has to allow teleworkers to enter the workplace premises, to contact other employees, as well as to use the employer's premises and equipment, company social facilities and social activities under the same conditions that apply to all (other) employees.

Teleworkers enjoy the same collective rights as comparable workers at employer's premises. As employees they can establish and join trade unions. They are represented by trade unions in individual (e.g., the employer's intention to terminate the employment contract must be consulted with a trade union organization which represents the employee) as well as collective matters (negotiating collective agreements). The law provides for the same conditions for participating in and standing for elections to bodies representing workers. Teleworkers are included in calculations for determining thresholds for bodies with worker representation. Teleworkers may freely communicate with their representatives (compare sec. 11 FA).

The conditions of performing remote work in the future will be based on rules similar to the existing ones. The government plans, however, some amendments intended to improve protective standards for workers as well as to make distant work better adjusted to the organization of work outside employer's premises.

The employer will still be obliged to inform the employee about their organizational unit and the person from the employer's part responsible for cooperation with the employee. The employer will be obliged to provide the employee performing remote work with training and technical assistance necessary to perform this work. The Bill modifies slightly the data protection principles. The employee and the employer provide information

necessary for mutual communication. The employer defines the procedures for the protection of personal data and organizes, if necessary, training in this regard. To make communication more efficient and flexible, the parties will be able to submit all declarations not only in paper, but also in electronic form.

There are significant changes in the field of OHS. To increase the level of safety, the Bill prohibits distant work in dangerous or hazardous conditions. The drafters assume that in such circumstances, an employee working outside the establishment cannot be provided with appropriate protective measures. However, the main idea of amendments in the field of OHS is to better align the employer's obligations with off-site work – mainly to cancel, mitigate or modify those duties whose performance outside the plant is impossible or difficult. First, the Bill modifies the rules of preparing the occupational risk assessment by the employer. The employer will be entitled to submit such an assessment for groups of employees performing the same work (nowadays the assessment must be prepared separately for each workplace). Second, the draft contains provision stipulating explicitly that the employee should organize the workplace taking into account the requirements of ergonomics in the case of computer workstations. The employee will be required to submit a declaration that the place of work meets the requirements of occupational health and safety. The intention of the legislator is to exclude the employer's liability in areas beyond its control. At the same time, however, it may lead to the worsening of employee's position and limiting their rights. Third, some modifications concerning work accident procedure are planned. The inspection of the accident scene should be agreed with the employee or another household member (if the accident happens in the employee's home). Moreover, the team that examines the causes of the accident may refrain from inspecting the workplace (e.g., employee's premises), if the circumstances of the accident are clear. Fourth, the OHS training organized for employees may be conducted entirely with the use of electronic communication means.

The government does not see a need to adopt any changes in the field of working time. The parties will be free (as they are now) to resign from applying working time schedules. Otherwise, work will be performed according to the schedule. There will be no guarantee that a specific part of work will be performed in the establishment. Finally, the government has dismissed the suggestions to implement an explicit em-

ployee's right to be disconnected. According to the Minister of Family and Social Policy, employees are protected sufficiently by regulations on working time – they can be disconnected after their working hours, while overtime work is limited to extraordinary circumstances and compensated in a more favourable manner²⁵. However, due to the nature of remote work and the risks associated with it (interfering with the employee's private sphere by sending e-mails or other forms of remote contact), the general regulations on working time are not always fully adequate and effective.

The new law recognizes *expressis verbis* unequal treatment based on telework as a discrimination. This resolves doubts as to whether the teleworker may use the privileged path of pursuing claims (with the burden of proof being shifted to the employer). The Bill maintains the legal mechanisms of protection against isolation. The government intends to clarify the rules of protection against unequal treatment. The Bill prohibits unequal treatment of distant workers unless it is objectively justified (by the nature of their work).

Since occasional remote work is an exception employers and employees will not need to apply most of the rules for the organization of remote work. The Bill only expects the parties to agree on the principles of monitoring compliance with occupational health and safety and data protection, including personal data protection.

7. Conclusions

The existing Polish law provides for two legal forms of distant work: telework and pandemic remote work. The legal framework of telework reflects, in the main, the Framework Agreement. It concerns the definition of telework, its voluntary character for both sides and its reversibility, equal employment conditions, rules on equipment (provision, maintenance, costs and technical assistance), right to privacy, data protection, health and safety, training, and collective rights, in particular as regards the requirement to discuss the introduction and practical details of telework with employee representatives. In some areas, Polish law is considered to go even beyond the Agree-

²⁵ <https://www.sejm.gov.pl/sejm9.nsf/InterpelacjaTresc.xsp?key=CCSJJEY>.

ment's standards²⁶. The anti-Covid law created an extraordinary legal mechanism to counteract the consequences of the pandemic. However, the current model of telework and pandemic remote work are insufficient. Telework is an exclusive employment form – limited to working with the use of information technologies only. As a result, the existing legal framework is not adapted to the growing demand for work outside employer's premises. In practice, employers and employees create their autonomous framework of distant work – parallel to the law.

The Bill submitted in Spring 2022 by the government intends to establish a new comprehensive legal framework for distant work. First, the Bill extends the scope of application of distant work. The new law will apply to all the employees performing work outside employer's premises as far as the remote work is properly implemented. The new law should limit the phenomenon of autonomous (informal) distant work shaped by employers and employees. In the future, it will be more advantageous for them to use the provisions adapted to the characteristics of concept of remote work. However, the draft does not resolve the problem of circumventing the employment relationship by concluding civil law contracts. A comprehensive (system) solution is needed in this regard. At the same time, the Bill does not promote civil law contracts since they are not covered by special rules adapted to remote work. An interesting novelty is the concept of occasional remote work (up to 24 days a year), which is characterized by a high degree of informality. This will allow for short periods of work, e.g., from the employee's home, even if the employer has no a formal framework for teleworking. This change has long been expected by both employers and employees.

The Bill has adapted to remote work those legal mechanisms of telework which did not raise any doubts and ensured compliance with the Framework Agreement. The authors of the draft law intend to improve the legal framework in some areas. The Bill clarifies the situation of the parties as regards and costs. The employee should not incur costs related to the performance of work, including electricity and the Internet. At the same time, the law offers a mechanism simplifying the reimbursement of the costs by the employer. The new legislation develops special standards (adapted to dis-

²⁶ *Commission staff working paper - Report on the implementation of the European social partners' - Framework Agreement on Telework* {COM(2008) 412 final}.

tant work) as regards the organization of work, OHS and employee privacy. There is some concern that the employee is required to confirm that the workplace is organized in a way that ensures safe performance of work. A great deal depends on the practical application of the new law.

There are some areas where further improvements are still expected and recommended. Although Polish law provides for the participation of employee representatives in introducing remote work, the involvement is quite limited. In most cases, the conditions of teleworking will be determined by unilateral acts of the employer (issued after consultations with elected representatives) and individual agreements with employees. The state does not use the development of remote work to promote collective bargaining. The new law does not resolve the problem of working time in distant work and the employee's right to be offline.

Despite raised doubts and concern the Polish legislature is going to make a step towards a better legal framework for distant work. Taking into account ongoing changes, the future law creates a broader and more flexible formula of work outside employer's premises instead of teleworking in a strict sense. The changes provided by the new law aim at eliminating problems and restoring an appropriate balance between parties. There are still some solutions that raise doubts and should be monitored in practice (the organization of a workplace, working time and the right to be offline). Some other problems cannot be eliminated without system changes (the deficit of democracy, abuse of civil law contracts).

Abstract

The existing Polish law provides for two legal forms of distant work: telework and pandemic remote work. The telework is, however, limited to work with the use of information technologies only while the anti-Covid law, which allows remote work irrespective of the use of information technology, is of extraordinary and temporary character. As a result, the legal framework is not adapted to the growing demand for work outside employer's premises. To resolve this problem the government has recently submitted the bill aimed at creating a new comprehensive legal framework for the distant work. The Polish case may be helpful in identifying legal solutions which constitute an obstacle in the development of the distant work. It also provides examples of how to improve the situation. The article confronts the existing and future regulations and evaluates them from the perspective of international and European standards.

Keywords

Distant work, remote work, telework, employer and employee, collective bargaining.