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A specific indemnity is now mandatory for any type of work from home

With the development of information and communication technologies, a growing number of employees are telecommuting for all or part of their work. Additionally, companies have often been required to reduce the surface area of their premises and request their employee to work, in part, from their homes. As a result, working conditions have evolved. The National Multi-Sector Agreement (*Accord National Interprofessionnel* or ANI) of July 19, 2005 implementing the European Framework Agreement of July 16, 2002 set forth the general principles of telework. Following a decision of the Labor Chamber of the French Supreme Court dated April 7, 2010, we need to touch base on this type of work from home.

First, we need to distinguish between the notions of telework and working from home, both of which may be done simultaneously.

Pursuant to Article 1 of the ANI, telework is defined as follows: *"Telework is a type of organization and/or performance of work, using information technologies within the framework of an employment contract and for which the work that could have also been done on the employer's premises is instead carried out regularly away from these premises."*

Working from home, however, is subject to a few specific provisions of the French Labor Code (Articles L. 7411-1 *et seq*.), which are for the most part antiquated and unsuitable as working from home today has nothing to do with the work performed by laborers, the majority of the employees concerned in the past by these provisions. The last law enacted on this issue dates back to July 26, 1957.

Therefore, an employee can be teleworking without working from his home or he can be working from home without teleworking. The notion of regularity of the activity, not the quantity, is the determining factor to consider an employee a teleworker.

1. The decision of the French Supreme Court (no. 08-44.865)

In this case, itinerant employees requested the payment of a constraint indemnity because they performed a part of their administrative duties from their homes. The French Supreme Court noted that using one's domicile for professional reasons *"constitutes interference in the private life"* of the employee who has no obligation to accept such use. If the employee accepts, the employer *"must indemnify the employee for this particular constraint as well as for the expenses incurred by the professional use of the domicile."* If the employment contract only mentions this constraint without fixing a corresponding indemnity amount, there is

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no proof that a real counterpart is paid.

For the French Supreme Court, teleworkers and any employee required to perform a part of his duties at home are concerned. The indemnity for work from home is therefore not linked to the use of new technologies. Rather, the financial counterpart that is now required applies to the case where the employee must work from home, set up his files there and transform a part of this domicile into an office space.

This indemnity should therefore not be confused with the expenses incurred by the employee who happens to carry out his duties at home, for which the employer must pay.

Because the constraint indemnity is aimed at compensating the employee for a specific constraint, it is considered a part of the remuneration and therefore subject to social charges. Professional expenses, on the other hand, are exempt from social charges under certain terms and conditions.

2. The practical consequences for companies

To avoid any dispute tied to a possible work from home situation, even if very minor given the total working time of the concerned employee, it would be preferable to mention this particular issue in any employment contract of an employee who may be required, in practice, to perform certain duties at his domicile. This would probably be the case for most salespersons.

For these employees who work in part from their domicile, their employment contracts or amendments must address this constraint and the amount of its financial counterpart.

The amount of this indemnity for the professional use of the domicile will depend upon the extent of the constraint, which may be quantified by the time spent on the tasks carried out at home and the space necessary to perform such tasks. The company can put together a table distinguishing different levels of indemnification, for example, by professional category. However, to avoid any claims based on unequal treatment, objective and pertinent criteria should be defined and justified. For example, a regional director whose administrative tasks represent 40% of his time would be granted an indemnity higher than his salesmen whose time is devoted 90% to canvassing on the road.

Companies must now clearly distinguish between professional expenses that they are obligated to bear (such as communication costs, costs for the installation of a telephone line) and this constraint indemnity. This formal distinction is all the more justified as professional expenses and this indemnity are governed by different tax and social regimes.

With regard to professional expenses, please be reminded that a Circular DSS/SDFSS/5B/N°2005/376 dated August 4, 2005 details the expenses deemed inherent to work and therefore that may be exempt from social contributions. This Circular also describes how to evaluate the expenses tied to telework: rental value of the surface area reserved for work, furnishings, fitting out, equipment, expendable items, connection costs.

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Please note that the ANI of July 19, 2005 states that the employer *"shall provide, install and ensure maintenance of the equipment necessary for telework. If, exceptionally, the teleworker uses his own equipment, the employer shall ensure its adaptation and maintenance.* ***In any case, the employer shall bear the costs directly incurred by this work,*** *in particular those related to communications. He shall provide the teleworker with an appropriate technical support service."*

Communication costs are ordinarily borne by the company, but other incurred costs (electricity, heating, expendable items, etc.) are not always. There is no doubt that numerous employees could use the list of expenses in the aforementioned Circular, which are reimbursable to the teleworking employees, as a basis of their claims.

It is however important to note that the provisions of this Circular apply only in the case of telework as defined by the European Framework Agreement and the ANI of July 19, 2005 that requires that the telework be done on a regular basis.

Consequently, occasional work at one's domicile should not expose the company to the risk of paying for all the expenses mentioned above (rent, heat, etc.).

3. Other factors to take into consideration

Any work carried out at home at the request of the employer, or, if there is no request, with the employer's knowledge, may render the employer liable, specifically in terms of safety.

Within the very general framework of the employer's obligation to achieve a specific result in terms of employee safety (i.e. the employers must keep their employees safe), it is obvious that employees working under particular conditions, and notably teleworkers, must benefit from all necessary protections while carrying out their tasks, even if they are doing so from home. The employer's responsibility cannot end at the door of the employee's domicile.

Article 7 of the ANI recalls: *"When the teleworker is working from his domicile,* ***subject to the electrical installation and the work areas being compliant,*** *the employer shall furnish, install and ensure the maintenance of the necessary equipment."*

Article 8 of the ANI, dealing with the health and safety of teleworkers, recalls that the legal and collective bargaining agreement provisions relating to health and safety are applicable.

It specifies that the employer, the employee representatives competent on the issues of health and safety, and the competent administrations shall have access to the place where the telework is being carried out. However, with regard to work carried out from home, the access is dependent upon a notification sent to the concerned employee and his prior consent to such a visit.

Because in the case of an accident, for example, the employer will not be exempt from liability even if the

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employee refused this access, we strongly recommend authorizing telework only after the installations have been inspected and ensuring that the employee will be able to fulfill his duties in complete safety.

Finally, please be reminded that the ANI of July 19, 2005 expressly requires the information and consultation of the Works Council, or the Personnel Delegates in the absence of a Works Council, to introduce telework within the company. The teleworkers must also be identified as such on the employee register.

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