

Covid-19 and Telework: Reminder of the obligations imposed on businesses

Given the unprecedented health crisis that we are currently experiencing, one of the key measures imposed by the Government to contain the Covid-19 epidemic is the massive and imperative use of telework for all types of employment positions that allow it.

The legal framework for telework has become considerably more flexible in recent years to support the development of this work arrangement in France.

As such, telework, whether on a regular or occasional basis, can be set up either by a collective agreement, or in the absence of such an agreement, by a charter drawn up unilaterally by the employer, after consultation with the Social and Economic Committee, if there is one; or finally - in the absence of such an agreement or charter - by common agreement between the employer and the employee.

The Macron Ordinance adopted on September 22, 2017 provides for an exception to the principle of prior agreement of the employee since *“in exceptional circumstances, notably the threat of an epidemic, or in case of force majeure, the implementation of telework can be considered as an adjustment of the employment position made necessary to allow the continued operations of the company and guarantee the protection of employees.”*

In its “Q&A” on the Covid-19 epidemic, the French Ministry of Labor confirmed that the use of telework, wherever there is an epidemic risk, does not require the agreement of the employee and does not require any particular formalities.

Although the use of telework has been significantly streamlined, the employer remains subject to specific obligations that must be complied with.

1. The employer must bear the costs of telework if such costs are considered as professional expenses.

This compensation can take several forms:

- direct payment of the costs related to telework;
- reimbursement upon production of the supporting documents such as phone bill, Internet bill, etc.;
- reimbursement through the payment of a flat-rate allowance covering all the expenses incurred by telework (heating, electricity, Internet, phone, etc.).

In the latter case, URSSAF^[1] specified that the lump-sum allowance is deemed to be used in accordance with its purpose and is exempt from social security contributions up to an overall limit of:

- 10 euros per month for an employee who teleworks one day per week;
- 20 euros per month for an employee who teleworks two days a week;
- 30 euros per month for an employee who teleworks three days a week.

When the employee teleworks 5 days a week, the flat-rate allowance could thus be increased up to 50 euros per month.

Whenever the amount paid by the employer exceeds these limits, exemption from social security contributions may be allowed provided that the employee can prove that the professional expenses have been actually incurred.

2. Telework cannot be combined with the short-time work scheme

It is not possible to ask an employee to telework if he/she has been put on short time work. Such a combination is fraudulent and considered as concealed employment.

In addition to the criminal sanctions incurred by companies, the use of telework in this context could give rise to a dispute before the labor court in which employees who are on short-time work and teleworking would ask for backpays or even damages for concealed work or unfair performance of their employment contract.

3. The employer has the obligation to ensure the safety of its employees who telework

In respect of health and safety at work, companies have under French law a so-called *obligation de résultat* and not only an obligation de moyens^[2]. As such, a particular attention should be paid in this respect.

It should first be recalled that the occupational risk assessment sheet (*document unique d'évaluation des*

risques professionnels, i.e. a document that must record the risks related to the activities of the company) provided for in Article R. 4121-2 of the French Labor Code must be updated due to the Covid-19 pandemic in order to take into account the new risks generated by the changes brought to the company's work organization, including those related to the widespread implementation of telework.

Companies must therefore be particularly vigilant with regard to the risks that telework can generate on the health and safety of employees during the lockdown.

In this respect, the French National Research and Safety Institute for the Prevention of Occupational Accidents and Diseases (*Institut national de recherche et de sécurité pour la prévention des accidents du travail et des maladies professionnelles* or "INRS") recommends that companies be more vigilant on the following points:

- the risk of isolation ;
- the risk of hyper-connection;
- the management of autonomy;
- the balance between professional and personal life;
- the monitoring of employee's activities;
- the role of middle managers;
- maintaining team spirit.

The INRS has listed actions to be implemented to mitigate the increased risks associated with the current lockdown, in particular for managers/supervisors and companies.

For the managers/supervisors, it is advisable to:

- ensure regular contact with each teleworker;
- increasingly respect the right to disconnection, even if the terms to enforce such right have not yet been discussed within the company. It is, in particular, about respecting decent working hours, especially concerning telephone communications;
- adapt the objectives and monitoring of teleworkers' activity to their particular working conditions;
- define the means of virtual meetings of the site and establish "rituals";
- pay special attention to the situation of non-teleworkers and find ways to maintain the link.

At company level, it is also necessary to:

- assist the managers/supervisors and help them carry out their assignment of supporting and coordinating the teams in this particular situation during which they are asked to be more vigilant and available in supporting and assisting employees;
- organize a remote assistance for the use of the computer and communication tools used for telework, as well as mobilize the company's IT maintenance teams.

[1] URSSAF (Unions de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales) is the body responsible for collecting social related contributions

[2] With an *obligation de résultat*, a party must fulfill a specific obligation or arrive at a specific result. With an *obligation de moyens*, the party must simply implement or use, to his/her best efforts, all necessary means in order to fulfill a specific obligation or achieve a specific result. In other words, concerning safety at work, the employer will be presumed liable from the sole fact that a professional risk occurred and caused harm to its employees

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