

Telework in France: before and after the Covid-19 pandemic

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Telework first appeared in the 1990s with the development and then the generalization of information and communication technologies. In France, however, telework has had limited success for reasons essentially linked to the legal concept of “subordination” which characterizes the employment relationship. This concept did not fit well with the physical distance involved in teleworking and the inherent fear of a loss of control over the employee. According to a 2017 study by the Ministry of Labor, only 3% of employees, mostly executives, then teleworked one day a week, the most affected sectors being, not surprisingly, those of IT and telecommunications. But the health crisis experienced over the past year has considerably changed the situation by allowing telework to experience a new boom, in a context which is admittedly constrained, but which encourages an in-depth rethinking of the working relationship.

What is telework?

Long before the health crisis linked to Covid-19, a National Interprofessional Agreement (ANI) signed between the national representatives of employers and employees on July 19, 2005, defined the term “telework” as “a form of organization and / or performance of the work, using information technologies within the framework of an employment contract and in which work, which could also have been carried out on the employer's premises, is carried out outside these premises on a regular basis”. Telework therefore covers any form of regular remote work, carried out through an internet connection.

The French labor code adopted this definition in 2012 but added a condition: telework must be voluntary. In other words, the employer cannot force the employee to switch to telework.

The reform of the labor code launched under the presidency of Emmanuel Macron gave rise to an ordinance n° 2017-1387 of September 22, 2017 on teleworking, which relaxed the legal framework in order to encourage telework, including on an occasional basis. Branch or company agreements can be used to complete the legal frame when appropriate.

How to set up telework?

In normal circumstances, companies can use telework in application of a collective agreement signed with union representatives or, failing that, on the basis of a specific company or group policy established unilaterally by the employer after consultation with the staff representatives

(Social and Economic Committee). The purpose of such an agreement or policy is to set the rules for the controlled implementation of telework.

Both the agreement or policy must include compulsory information relating to the conditions in which employees may switch to teleworking and the conditions in which they may return to their non-telework position, the conditions in which employees must accept terms and conditions of the telework arrangement, the methods for monitoring working time and regulating workloads and the determination of the time slots during which the employer may usually contact teleworking employees.

It is also strongly recommended that the agreement or policy also defines the categories of positions eligible for teleworking, the amount of teleworking required over a given period (which can be customized for different categories of employees) and the conditions for switching to telework in exceptional circumstances (e.g., a pandemic). A period for reflection or withdrawal can also be provided as well as deadlines for requests to switch to telework and for their acceptance by the employer.

The 2017 ordinance provides that in the absence of a collective agreement or a policy, recourse to occasional teleworking is possible on the basis of an agreement between the employer and the employee. This agreement can be formalized by any means, for example via a simple email.

What has been the impact of the pandemic context on telework?

In many companies, the first confinement imposed in response to the pandemic in March 2020 led to the implementation of emergency telework, without either formality or any particular questioning. Without being mandatory, (there are no laws that have this effect) telework must, in the current circumstances, apply "wherever possible" according to the formula used by President Emmanuel Macron.

In fact, three situations now coexist. Employees whose tasks can be performed entirely by teleworking must telework five days out of five with the possibility of returning to the company's premises for one day if they so request and with the employer's agreement. Employees, some of whose tasks require a presence in the company's premises, will be able to go there part of the week to meet together in what they have to do.

Employees whose functions are incompatible with telework can go to the company's premises, it being incumbent on the employer to ensure that working conditions at the premises comply with the health instructions released nationally in spring 2020. On this particular point, the French labor code imposes an obligation on the employer to preserve the health and safety of employees and to take the necessary preventive measures to achieve this. If the employee contracts the coronavirus in the workplace, the causal link between the infection occurring and the workplace, will have to be established by the employee. Accordingly, the employer takes great risks in allowing employees to remain at the workplace since civil liability, but also criminal liability may be incurred for breach of the health and safety obligation.

More broadly, from a legal standpoint, the current practice of telework has given rise to particular questions, some of which have not yet been truly addressed, in particular in small and medium-sized companies.

Can the employee refuse teleworking?

No, not during an epidemic and no amendment to the employment agreement is necessary. Consequently, as long as the current health crisis lasts, the employer can unilaterally set up telework without consulting the employee. And if the latter nevertheless decides to go to the workplace, disciplinary action including dismissal may be taken.

Can the employer refuse an employee's telework request?

Yes, from a legal point of view, but reasons for the refusal must be provided, which establish that the functions cannot be accomplished by telework and that the presence on site of the employee is essential to the functioning of the company. This obligation on the part of the employer is particularly necessary in the context of the pandemic as the government has asked the labor inspectorates to increase their checks to ensure that the employees present in the workplace cannot really telework.

Does an accident occurring while teleworking qualify as an accident at work?

Yes, an accident occurring at the teleworking place during the performance of a working activity is presumed to be an accident at work. The difficulty for the employer is to know whether the employee was really working at the time of the accident. The employer can always dispute the causal link of working to this accident, if he can prove that it is unrelated to work.

Should the employer cover the expenses incurred by the employee in teleworking imposed by the health crisis?

No, since the law no longer expressly requires it, unless the company has provided for it in a collective agreement or a policy. It may be difficult, however, not to provide anything in this regard, given the principle of reimbursement of expenses incurred in the performance of a working activity. In practice, this will either involve reimbursement of actual costs with supporting documentation, or the granting of a lump sum allowance. In this regard, the French social security body (URSSAF) will exempt from social charges a fixed allowance of up to 10 euros per teleworking day per month.

Can the employer monitor the activity of teleworking employees?

Yes, but not without limits. In France, the employer has the right to monitor the activity of the employees, including when the work is carried out remotely, in compliance with the legal rules requiring prior consultation of the Social and Economic Committee and the provision of the required information to the employee. Monitoring activity must be carried out with full transparency and respect for private life. Permanent surveillance by means of video devices is definitely not allowed. Likewise, unless there is specific justification, the employer cannot require teleworkers participating in videoconferences to show themselves on camera, their participation via microphone being sufficient. The use of keyloggers is strongly discouraged, as the French data protection authority (CNIL) considers their use "cannot be justified in the absence of a strong security requirement (fight against trade secrets disclosure, for example,) accompanied by specific information for the persons concerned".

But, just as it would for a job done on its premises, the employer can monitor internet connections and limit their use (e.g., through site filtering devices). The employer can freely access electronic mailboxes as the emails are presumed to be work-related if they are not identified as "personal" by the employee. The employer can freely access all of the employee's working documents except those marked "personal".

Can monitoring occur of a teleworker's personal equipment?

The French Supreme Court (cour de cassation) is not opposed to a possible monitoring of the activity of teleworkers using their own equipment and the CNIL specified, for its part, that the employer must be able to access work-related content stored on personal equipment. Employees have to ensure that they identify the "personal" files stored on their personal computers or phones.

Finally, as soon as the monitoring system allows employees to be identified, it constitutes processing of personal data and must comply with the requirements of the general data protection regulation (GDPR).

What are the working time rules for teleworkers?

Unless there is a special arrangement with the employer, the teleworking employee is subject to the same working hours as if he or she was working at the employer's premises. Teleworking therefore does not offer any particular flexibility in terms of working time management. In other words, the working time regime specific to each employee (in hours, days, collective or individualized schedules) continues to apply.

For its part, the employer is required to monitor working time and in particular to ensure compliance with maximum working times and break times. The limits imposed by the French labor code are 10 hours per day and 48 hours per week or an average of 44 hours per week over a quarter.

For employees, whose working times are based on a certain number of days per year (making it possible to thus avoid the need to calculate the hours of working time), the employer must ensure that the rest periods (daily and weekly) are respected. The limits imposed by the French labor code regarding the minimum duration of rest are 11 consecutive hours for daily rest and 35 consecutive hours for weekly rest.

In practice, there are several ways of monitoring. The monitoring may be carried out, for example, via an automatic system for opening and closing computer access, or according to a system in which the employee declares his working hours or working days. In addition, the establishment of an alert procedure will allow the company to identify and deal with work overload situations. The challenge for the company is to ensure that employees actually log-off or otherwise stop work, especially since several studies have shown that teleworkers tend to work longer hours. However, the employer must ensure that there are mechanisms in place to enable the employees to disconnect, such as blocking access to servers outside working hours, instructing employees not to respond to emails or on the phone before or after certain times, deactivating audible alerts signaling the arrival of emails or text messages, etc.

What changes have been experienced in teleworking after the pandemic?

A survey carried out for the Ministry of Labor shows that in April 2021, 37% of working people in France were teleworking on average 3.6 days a week. 11% of French companies were not in favour of this work arrangement, exposing a real divide between large companies ready to perpetuate telework as opposed to small and medium-sized companies.

It is difficult to predict the future, but it nevertheless seems unlikely that in France telework will become the norm. In any case, if it is to be established, at least in part, permanently after the pandemic, telework will require a certain number of consequential issues to be addressed, such as how to manage teams remotely, the types of the positions eligible for teleworking and the personal characteristics of teleworkers. In this regard, it is essential to establish objective criteria to determine eligibility for teleworking in order to avoid disputes with rejected applicants.

It is also imperative to identify the means to prevent the occurrence of occupational risks associated with teleworking and to incorporate them into the occupational risk assessment document (DUERP). Teleworking involves the risk of increased social isolation of employees with a loss of the feeling of belonging to the working community and a loss of spontaneity in social exchanges and communication. It can also make it more difficult to monitor working conditions. In this regard, telework should undoubtedly only be offered to employees with a minimum level of seniority and whose experience in working autonomously in the company makes it possible to assess their ability to work alone.

It is also necessary to assure teleworkers that they will have access to the same collective rights as other employees, and benefit from the same career opportunities and the same evaluation policies. The company must also ensure perfect transparency on all the monitoring systems put in place, which must not result into excessive control.

As a conclusion, all these questions will have to be the subject of a precise and complete legal framework, in a collective agreement or a policy precisely defining the rights and duties of the parties concerned. It may be useful to first go through a survey or a questionnaire to understand the expectations and fears of potential teleworkers and adapt the project accordingly. From this point of view, teleworking should be fully integrated into the company's human resources policy, as being one of the advantages of attracting and retaining employees.

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