



IT Law Newsletter Switzerland

Home Office or Tele Work – The need for Regulation

Home office or tele work is widely spread. Following a recently published study a significant percentage of 28% of employees works at least half a day per week from home. As employment legislation is older than the rise of home office, it does not necessarily provide answer to all issues. The employee and employer are well advised to agree upon the modalities of home office in the employment agreement or in a directive. This reduces the risk of misunderstanding and wrong expectations. Key points are the working time and infrastructure that should be regulated.

1 Agreement on Home Office

The employer and employee need to agree upon the place of work, if the place of work is (partly) located at the employee's home. Depending on the modalities of home office, the employer and employee can agree upon that home office is compulsory or not (no possibility to work from the office during home office days), it can be regular or occasional, full time or part time. The employer and employee can also agree on home office days on a case by case basis.

2 Working Time and Free Time to Be Separated

Working time is defined as the time during which the employee is available to the employer. It does not mean that the employee must work during this time; the availability is the decisive criteria. The proper reporting of working time is mandatory.

When working at home, working and free time tend to flow into each other. In order to avoid that the employee is considered working during free time, free and professional time need to be clearly separated. This may be implemented by fixed working hours, at which the employee is reachable and has to work, or by an electronic log in system. The employer should refrain from contacting the employee outside of the

fixed working hours or when the employee is not logged in.

3 Travel to Work Is Considered Working Time

When the employee needs to go to the employer's premises on an agreed home office working day, for example to attend a meeting, it is unclear whether the time to travel to the office will be considered as working time or not.

A solution could be to distinguish whether home office is compulsory or optional. If the employee has no working space assigned at the office premises during the home office days, travel time should (at least partly) be considered as working time. If the employee has the option to work from home or at the office, the employer can expect that the employee works at the office when attending meetings. If it is the employee's choice to nevertheless work from home, the time to travel to the office can be considered as free time.

4 Monitoring

Monitoring an employee's work is only possible within tight limits; in particular neither the behaviour of an employee nor private communication may be monitored. Monitoring the employee's work is however possible for security, quality and productivity reasons. If the employer wishes to monitor the employee's work while the employee is working from home, private and professional communication need to be segregated (physically or logically). This can be done by using different devices like e-mail accounts and storage platforms, depending on how the monitoring is foreseen. The employee needs to be informed in advance.



Segregating private and professional data will also allow securing professional data according to the company's standards.

5 Costs of Home Infrastructure

As a general rule, costs of infrastructure and devices are borne by the employer, unless the employee and the employer agree otherwise to the extent permitted. According to mandatory law, the employer must replace the necessary expenses incurred by the employee. The differentiation is rather difficult as there is no clear leading court case in this connection.

When the employee works from home, he/she generates only very little extra costs, in particular because of the use of the private flat rate internet connection, own devices (or the employer's mobile devices) and no increase of the employee's private rent. Nevertheless, employer and employee should agree on cost allocation. If home office allows the employer to reduce its costs for example because the employees work space in the office is used by another employee during home office days, it seems fair that the employer participates to the employee's costs. If home office is merely to accommodate the employee, it is fair that the employee bears (most of) the costs of home office, in particular because the employer still pays the costs for the infrastructure at the office.

6 Cross Border Home Office

National employment law contains mandatory provisions and the choice of jurisdiction and applicable law

is limited. When it comes to national public law governing the employee's protection, such as working time, the principles of territoriality linked to the place of work will apply. Thus, whenever the employer's offices are located in another country than the place of home office, different national legislation will apply.

Also, tax and social security issues could arise in case of cross border home office. Considering this greater complexity, cross border home office has to be carefully assessed by considering the applicable legislation beforehand.

7 Conclusion

Home office is wildly spread and will increase in the near future. Because legislation on employment relationship is older than the rise of home office, it does not necessarily provide for a (satisfactory) answer to all issues. The employee and employer are, therefore, well advised to agree upon the modalities of home office, avoiding misunderstandings and wrong expectations.

21 March 2017

Dr. Katia Favre

This newsletter is available on our website
www.thouvenin.com.

For further information, please contact Katia Favre



Dr. Katia Favre, Inf. ND
Attorney at law
k.favre@thouvenin.com

THOUVENIN rechtsanwälte compact

THOUVENIN rechtsanwälte is an innovative and partner-centered law firm with more than three decades of experience in business law.