

## NEW RULES OF REMOTE WORK – AMENDMENT TO THE LABOUR CODE

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**Purpose:** The impulse to write the article was the coming into force on 7 April 2023 of the amendment to the Labour Code, which introduced regulations regarding remote work. The possibility of an employee working remotely was provided for in Art. 3 of the Act of 2 March 2020, the act on special solutions related to the prevention, counteracting and combating of COVID-19, other infectious diseases, and crisis situations caused by them (The Act, 2020, Item 1842). Due to the temporary nature of the above-mentioned regulation, it became necessary to statutorily regulate the principles of remote work. The new regulations undoubtedly constitute a challenge for employers and make the issue of remote work in labour law important and topical. Author presents the definition and types of remote work, as well critically evaluates new regulations.

**Design/methodology/approach:** The deliberations are based on the related literature on the subject and an analysis of the legal provisions applicable in the area under discussion.

**Findings:** The current structure of remote working is less restrictive. The amendment does not specify any conditions enabling the introduction of remote work. The current regulation allows for more flexibility than with teleworking, because remote work does not always have to be only work the effects of which can be sent via electronic communication. There are also some criticisms of the above, though. The new regulation is extensive, and numerous references to other articles make the provisions relatively illegible. The procedure for agreeing on remote work has been significantly formalised, and part of the risk associated with its performance has been transferred to the employee.

**Practical implications:** Adjusting their business to the new legal requirements, entrepreneurs will need to implement far-reaching organisational changes. For this reason, knowledge about the remote work regulations has become increasingly important.

**Originality/value:** The article raises the issue of remote work, which is important not only from the point of view of the employee but also from the entrepreneur's perspective. The issues arising from this are the subject of only a few publications.

**Keywords:** labour law, remote work, entrepreneurs' obligations, employee.

**Category of the paper:** viewpoint, literature review.

## 1. Introduction

For the first time, regulations regarding remote work were introduced into the Polish legal system by way of the Anti-Crisis Shield (The Act, 2020, Item 1842). It had already been possible for an employee to work remotely. Since 2007, it had been possible to employ employees via teleworking (i.e., performing work regularly in a place other than the workplace using electronic means of communication (The Act, 2007, No. 181, Item 1288), or a home office). The adoption of these solutions required the unanimous intention of the employee and the employer. In the case of remote work, the greatest concerns arise regarding the possibility of the employer unilaterally imposing it on the employee. Pursuant to Art. 3 of the Anti-Crisis Shield, in order to counteract COVID-19, the employer could instruct the employee to perform work specified in the employment contract, for a fixed period of time, outside their place of permanent performance (The Act, 2020, Item 1842). The above regulation is detailed in the provisions of the Act of 19 June 2020 (The Act, 2020, Item 1082). At that time, a requirement was introduced for the employee to have the skills, the technical capabilities, and a location to perform remote work, and the possibility of performing remote work was limited to the type of work that allows for its remote organisation. Remote work could be recommended to the employee in order to counteract COVID-19, which in particular should be understood as limiting the direct threat resulting from COVID-19 (protection of employees' health and life) (Baran, Książek, 2020, p. 44).

Due to the temporary nature of the above-mentioned regulation, it became necessary to statutorily regulate the principles of remote work (Baumann, Marcum, 2023). The introduction of appropriate changes to the provisions of the Act of 26 June 1974 – Labour Code was argued in terms of the necessity to meet the justified needs of employees and employers in two important areas: enabling employers (in justified cases) to introduce preventive control of employees regarding the presence of alcohol or substances acting similarly to alcohol in their organism, and introducing regulations regarding remote work as a permanent solution (Justification..., 2022).

The Act of 1 December 2022 amending the Labour Code and certain acts, which introduced remote work to the Code, at the same time repealed the existing provisions regulating teleworking.

It could be said that the new institution of remote working is a combination of the three forms of remote working that have existed so far (as such a combination was envisaged in all projects published to date):

- Telework regulated for in the Labour Code (Art. 67(5)-67(17) of the Labour Code).
- Home office work, unregulated, but widely used in corporations.
- Remote work in force during the pandemic pursuant to Art. 3 of the Anti-Crisis Shield (Mędrala, 2023).

The new solution is based on the existing idea: the permissibility of working outside the place of permanent work. It is worth emphasising that the current structure of remote work is less restrictive than the regulation of the Anti-Crisis Shield, which granted the employer the right to issue an order to perform remote work (as performing work in this form was not based on the mutual intent of the parties to the employment relationship), and more flexible than telework (because remote work does not have to be restricted to work the effects of which can be sent via electronic communication) (Kryczka, 2023).

The amendment to the Code, which introduced the statutory regulation of remote working, made it a point of interest not only to representatives of legal doctrine, but also to entrepreneurs. The aim of the article is to present this new legal solution and the challenges faced by employers as a consequence of this modification.

## 2. Definition of remote work

The new regulation introduced a definition of remote work. Pursuant to Art. 67(18) of the Labour Code, “Work may be performed entirely or partially at a place indicated by the employee, including at the employee’s home address, and each time agreed with the employer, in particular with the use of means of direct remote communication (remote work)” (The Act, 2023, Item 1465).

The newly introduced definition of remote work is a combination of the existing, although significantly expanded, definition of telework, and remote work modelled on COVID regulations and *ad hoc* work from home (home office). This definition includes the following elements: complete or partial performance of work remotely (with the possibility of working in a hybrid model, part-time); performance of work at a place indicated by the employee, but each time agreed with the employer; and performance of work in particular (but not solely) using means of direct remote communication.

Importantly, the first two elements are obligatory, while the third is optional (Mędrala, 2023b).

Since remote work is allowed to be performed entirely or partially at a place indicated by the employee, a remote employee will be either an employee who exclusively performs their duties outside the workplace or one who alternately performs work outside the workplace only on certain days. Therefore, the exclusive performance of work outside the premises of the workplace cannot be accepted as a necessary condition for recognising a given job as remote work (Kryczka, 2023). Remote work may be permanent (where the only way of performing work by a given employee is remote work) or hybrid (where in parallel with remote work, the employee performs on-premises work when it is performed for a period not exceeding 24 days in a calendar year (Łuczak-Tarka, 2023)).

According to Art. 67(18) of the Labour Code, remote work may be performed “at a place indicated by the employee and each time agreed with the employer” (The Act, 2023, Item 1465). The Act excludes the possibility of imposing on an employee the place of remote work. The justification for the draft act reads as follows:

This part of the definition is crucial for distinguishing remote work from work performed in a traditional way. This means that an employee who performs all or part of their professional duties outside the workplace will not be an employee performing remote work if their place of work has been indicated by the employer and agreed with the employee (in the employment contract) or has been indicated *ad hoc* pursuant to employer’s instructions (e.g., instructing an employee to travel on a business trip) (Justification, 2022).

Pursuant to Art. 67(31) §7 of the Labour Code, allowing an employee to work remotely is contingent on the employee submitting a declaration, in paper or electronically, confirming that safe and hygienic working conditions are ensured at the remote workstation in the place indicated by the employee and agreed with the employer (The Act, 2023, Item 1456). It can be concluded that the burden and risk resulting from the obligation to ensure safety at work has been partially transferred to the employee. This is a beneficial situation for the employer, but for it to arise, it is necessary for the employer to know where the remote work will be performed, provide employees with the information required in this regard, and agree to allow the performance of remote work there (Prusik, 2023). It follows from this that mobile work or work performed as part of a business trip cannot be considered remote work, due to the fact that in such cases the employee does not make an independent decision as to where to perform their duties (Sobczyk, 2023). Making the recognition of a given job as remote dependent on the employee’s designation of the workplace has perhaps rightly been criticised. If the employer indicates the place of work to the employee (e.g., their place of residence), the employee will not then be performing remote work but rather “home working” (Walczak, 2023).

The new regulations introduced a new concept of “address of residence”, previously unknown to the law, without introducing its legal definition. Art. 25 of the Act of 23 April 1964 – Civil Code defines the place of residence as the place where a person resides with the intention of permanent residence, and Art. 28 of the Civil Code states that one can only have one place of residence (The Act, 2023, Item 1610). In turn, the provisions of administrative law include the term “address of registration”, referred to in Art. 89 of the Act of 6 August 2010 on identity cards (The Act, 2022, Item 671). The basis for the introduction of this new legal concept may be the fact that most often the address of registration is not also the place of permanent residence (Tomaszewska, 2023). “The intention to reside permanently occurs when there are circumstances that allow an average observer to conclude that a specific locality is the main centre of activity of an adult natural person” (Resolution, 2022). This address may, but does not have to, coincide with the employee’s place of residence or registered office. There are no obstacles to it being any other place where the employee lives at the time; e.g., a hotel or their

parents' house. Labour law provisions also do not prohibit remote work from being designated in a publicly accessible place.

According to Art. 67(18) of the Labour Code, the provision of remote work means performing work "in particular" using means of direct remote communication. The Act does not constitute a catalogue of technical means through which remote work can be performed, and "thus, the subject of remote work may be various activities and different scope of duties – as long as they do not fall into the catalogue of exclusions resulting from the provisions on remote work" (Kryczka, 2023). The use of the phrase "in particular" by the legislator allows one to assume that these may be "not only means of electronic communication, but also, for example, telephone, fax, instant messengers, and even no use of such means (e.g., document analysis)" (Justification, 2022). It is obvious that remote work can be provided via various means of direct remote communication, but can also involve the provision of manufacturing parts or material services (working on documents, preparing documents and analyses, verifying information, contact with clients and colleagues, etc.) (Marciniak, 2023).

The Act did not introduce subjective or objective prerequisites for the possibility of introducing remote work, which results in the highly flexible nature of its application (Matyjas-Łysakowska, Maroń, 2022). However, certain exceptions have been introduced to this rule: Remote work cannot apply to the work specified in Art. 67(31) §4 of the Labour Code (including particularly hazardous work involving the use of harmful substances). It is worth emphasising that the type of work or its organisation may also constitute an obstacle to the introduction of remote work at the employee's request (The Act, 2023, Item 1465, Article 67(19) §5).

With regard to the employer's obligation to create and provide a job, the amendment introduced a solution similar to the general principles of labour law. Pursuant to Art. 104(1) §1 of the Labour Code, the tools and materials necessary to perform the work are provided by the employer (The Act, 2023, Item 1465). The newly added article 67(24) §1 Point 1 of the Labour Code stipulates that the employer is obligated to provide an employee performing remote work with the work materials and tools, including technical devices, necessary for them to perform remote work (The Act, 2023, Item 1465). The concept of work tools should be understood in particular as "devices enabling the performance of activities constituting the work process, which the employer considers necessary to perform duties at a given job in the remote work formula" (Kuczkowski, 2022). These include a computer, software, access to workplace resources, and other things necessary to remotely perform employee duties, and may be specific to the nature of such duties (e.g., a mobile phone or a printer). Materials should be understood as the consumables most often necessary when using the tools; e.g., printer paper.

Since the employee declares that they have the premises and technical conditions to perform such work, it seems that the employer is not obligated to provide permanent office equipment, such as file cabinets, a desk, or a chair. The justification for the draft act states that "preparing the employee's place of remote work to perform work in the form of remote work may require

various adaptations, e.g. the need to rearrange the room in order to obtain better access to natural lighting. The employer's obligation in this case will be to prepare the employee for what an optimal (healthy and safe) workplace should look like" (Justification, 2022). It should be emphasised that the purchase of office furniture at the employer's expense is permissible under internal company regulations or individual agreement with the employee (Mędrala, 2023).

### 3. Types of remote work

Remote work may therefore be recommended to any person who meets the conditions specified in Art. 2 of the Labour Code: i.e., is employed on the basis of an employment contract (regardless of its type), appointment, election, nomination, or cooperative employment contract. Statutory regulations regarding remote work do not apply to persons employed under civil law contracts. However, it should be emphasised that nothing prevents the parties from contractually determining the place of work outside the workplace and the method of performing it based on the principle of freedom to conclude contracts (Jaśkowski, 2023). Remote work, like telework before it, is not a separate type of contract or basis for employment, but only a different way of performing work.

The Act provides for four remote work modes:

- Basic mode – as part of the arrangements between the employer and the employee (Art. 67(19) §1-2 of the Labour Code).
- Extraordinary mode – by order of the employer (Art. 67(19) §3-5 of the Labour Code).
- Privileged mode – at the request of certain specific groups of employees (Art. 67(19) §6-7 of the Labour Code).
- Occasional home office work up to 24 days a year – applied at the employee's request (Art. 67(33) of the Labour Code).

This division results from the very definition of remote work in Art. 67(18) of the Labour Code, according to which work may be performed entirely or partially in a place other than that specified in the employment contract (The Act, 2023, Item 1465). In addition, remote work, pursuant to Art. 67(33) § 1 of the Labour Code, may be occasional. Another division is related to the mode of remote work (voluntary, forced, or on request). It is worth emphasising that agreeing to remote work based on the employee's request is voluntary and requires mutual agreement between the parties to the employment relationship (Głądoch, 2023).

Importantly, the basis for introducing remote work does not affect how it is performed, which is always the same. However, this may affect the very arising or termination of the obligation to perform work in this way (Jaśkowiak, Maniewska, 2023).

The basic mode of remote work regulated for in Art. 67(18) of the Labour Code, as emphasised earlier, is based on the principle of voluntariness. However, a number of exceptions have been introduced to the above rule. The employer cannot refuse the possibility of providing remote work to, among others, parents who are raising a child under the age of 4, parents and guardians taking care of a person with a disability in the family, and pregnant women, as well as employees listed in Art. 142 §1 Points 2 and 3 of the Labour Code, as follows:

- Employees who are parents of a child who has the certificate referred to in Art. 4 Section 3 of the Act on supporting pregnant women and families “For life”: i.e., a certificate of severe and irreversible disability or incurable life-threatening disease that occurred in the prenatal period of the child’s development or during childbirth.
- Employees who are parents of a child with a certificate of moderate or severe disability specified in the provisions on vocational and social rehabilitation and employment of disabled persons.
- Employees who are parents of a child about whom an opinion has been expressed on the need for early support for the child’s development, a decision on the need for special education, or a decision on the need for revalidation and educational classes, as referred to in the provisions of education law (The Act, 2020, Item 1329).
- Remote work can be provided entirely or partially (hybrid model).

Choosing to work in the hybrid model requires specifying the amount of work performed remotely (i.e., the number of days a week on which work will be performed remotely) and indicating on which days the work will be performed remotely (e.g., on Mondays and Tuesdays). The possibility of changing the above arrangements becomes problematic due to the needs of the employer. Pursuant to Art. 22 §1 of the Labour Code, by establishing an employment relationship, the employee undertakes to perform work of a specific type for the employer and under their direction and at the place and time designated by the employer, and the employer undertakes to employ the employee in exchange for remuneration (The Act, 2023, Item 1465). Therefore, from the very definition of the employment relationship, it should be concluded that the employer is entitled to unilaterally determine the method of performing remote work provided partially. It should be emphasised, however, that there are no solutions in the statutory provisions regulating remote work that would directly indicate such a possibility, and the introduction of hybrid work itself requires a mutual agreement of the parties, which precludes imposing remote work on the employee, and thus, it seems, a change in the number of days of on-site work (Tomaszewska, 2023).

Remote work may be recommended to an employee only in the situations specified in Art. 67(19) §3 of the Labour Code, provided that the employee submits a declaration that they have appropriate working conditions in terms of health and safety at the remote workplace. “In practice, this means that the employer is obligated to obtain – before issuing an order to work remotely – information whether the employee has the above-mentioned skills and

capabilities” (Justification, 2022). The employee has the right to refuse to work remotely if there are no appropriate conditions to do so.

In the light of Art. 67(19) §3 of the Labour Code, remote work may be performed at the employer’s request during a state of emergency, a state of epidemic threat, or a state of epidemic, and within 3 months after their cancellation or during the period in which ensuring safe and hygienic working conditions at the current workplace by the employer for the employee is temporarily not possible due to *force majeure* (The Act, 2023, Item 1465). The decision to introduce and cancel remote work can be considered a managerial competence of the employer, but it should still be remembered that the employee’s declaration of having appropriate premises and technical conditions is necessary, and the provision of work in this mode is time-limited and depends on the existence of the conditions listed in Art. 67(19) §3 of the Labour Code (Mitrus, 2023).

Pursuant to Art. 67(33) §1 of the Labour Code, remote work may also be performed occasionally at the employee’s request submitted on paper or electronically, for a period not exceeding 24 days in a calendar year, and may be established only at the employee’s request (although the employer is, of course, not bound by this request). In relation to occasional remote work, the application of Art. 67(19)-67(24) of the Labour Code (including initiating and resigning from remote work, providing tools and covering costs by the employer) and Art. 67(31) §3, it was mandated to regulate, in consultation with the employee, the control principles regarding remote work, occupational health and safety, or compliance with information security and protection requirements, including personal data protection procedures (The Act, 2023, Item 1465). The Act does not specify whether the limit of 24 days in a calendar year applies to every employee regardless of whether they are employed full-time or part-time, which will undoubtedly result in practical problems (Moras-Olaś, 2022). It seems reasonable to adopt the position that, similarly to the calculation of leave, the number of days of occasional remote work should depend on the time worked (Kosut, 2020).

#### **4. Conclusion**

Regulation of remote work in the Labour Code and its permanent introduction into the Polish legal system was positively received by both employees and employers. An undoubted advantage is the possibility of initiating this type of work not only by the employer but also by the employee. Providing remote work means performing work “in particular” using means of direct remote communication, but the Act does not exhaustively list the technical means by which remote work can be performed, which may be beneficial for the employee.



Art. 67(29) of the Labour Code should be considered equally beneficial; according to it, an employee performing remote work in terms of establishing and terminating an employment relationship, terms of employment, promotion, and access to training in order to improve professional qualifications cannot be treated less favourably than other employees employed in the same or similar work, taking into account differences related to the conditions for remote work (The Act, 2023, Item 1465). Importantly, the employee will not be able to be discriminated against in any way due to remote working or their refusal to do so. This amounts to a prohibition of discrimination against an employee performing remote work as well as against an employee who refuses to perform remote work. This will constitute an additional protective regulation for employees working remotely.

There are also some criticisms of the above, though. The new regulation is extensive, and numerous references to other articles make the provisions relatively illegible. The procedure for agreeing on remote work has been significantly formalised, and part of the risk associated with its performance has been transferred to the employee. This is in particular the result of burdening the employee with the majority of organisational responsibilities regarding the introduction of remote work, with the simultaneous lack of systematisation of some issues; e.g., incurring costs for the means used to perform remote work. The issue of protecting personal data when working remotely, including that of the employee's closest relatives, also seems problematic.

All of this means that the application of the provisions on remote work may pose considerable difficulties in practice. Only time will tell whether and to what extent they require further amendments and improvement.

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