iel International Employment Lawyer

New Ways of Working

Austria

Contributor:

Littler

Austria

Christopher Badalec, Jakob Zöchling and Paul Moosmann
Littler

Remote working

1. Has the government introduced any laws and/or issued guidelines around remote-working arrangements? If so, what categories of worker do the laws and/or guidelines apply to – do they extend to "gig" workers and other independent contractors?

First, it should be noted that in the Austrian legal system a distinction must be made between remote working and working in a home office. While remote working regularly includes any work without a fixed workplace (eg, also in cafés and public premises) the work in a home office is limited to an employee's place of residence or at least that of one's partner. Only working in a home office is substantially regulated by law, while remote working can still be agreed largely without formalities and is "only" subject to general labour law norms.

The most important government measure in this sector is the Home Office Act, which came into force on 1 April 2021 in response to the covid-19 crisis and the corresponding working conditions. The Home Office Act adapts various existing laws and tightens the legal framework for home office employment. The relevant provisions include a legal definition of a home office, its direct tax implications, and fundamental legal requirements for working in a home office, such as the requirement of a written agreement between employer and employee. Therefore, a home office can neither be imposed unilaterally nor is there a legal entitlement at a statutory level for any worker to work from home.

The relevant legal provisions on home offices cover all genuine employment relationships that are based on a private law contract. Those are essentially characterised by the personal and economic dependence of the worker. It can be deduced from this definition that independent contractors are not covered by those provisions. They are essentially free to determine working hours and places and only owe their contractual partner the production of a result. Therefore, they can regularly decide independently where they choose to work.

From an Austrian point of view, "gig workers" are also ordinary employment relationships under social security law, which is why the above also applies to them.

2. Outline the key data protection risks associated with remote working in your jurisdiction.

The potential data protection risks associated with remote working are largely equivalent to those associated with working in a regular workplace, but are arguably even more prevalent.

A significant potential risk factor is the transfer of personal data if it is no longer securely stored on a company's servers. In addition, employers thereby transfer responsibility for the safekeeping and use of sensitive data to the worker. In doing so, employers have a significantly reduced ability to exert any influence. Nevertheless, companies are still generally regarded as being responsible for data protection within the meaning of the General Data Protection Regulation (GDPR), which creates a certain amount of friction.

It is also questionable whether a so-called privacy impact assessment must be carried out when working in a home office.

In principle, such an assessment must be conducted if data processing – especially when using new technologies – is likely to result in a high risk to the rights and freedoms of natural persons due to the nature, scope, circumstances, and purposes of the processing.

At present, it cannot be assumed that the threshold for the use of new technologies has already been exceeded in the context of remote working. In individual cases, however, it could amount to an "organisational solution" within the meaning of the GDPR, which also triggers the obligation of a privacy impact assessment by the data controller.

Insecure data connections that might not be constantly checked and maintained should also be considered. Another potential risk arises from it being easier for third parties to obtain access to sensitive data, whether it be persons in the same household or others at public places of work.

From a legal perspective, compliance with data security can also be adequately ensured for remote work, considering the GDPR and the corresponding national legal basis (Austrian Data Protection Act).

In home-office agreements, however, it is advisable to make further reference to data protection aspects. Here, companies should refer to the secure and data protection-compliant transport of sensitive hardware. Additionally, companies should take technical and organisational measures to ensure data security (eg, use of VPN, two-factor authentication with mobile phones, encryption of USB sticks, provision of a LAN network, requirements for secure storage of access data).

3. What are the limits on employer monitoring of worker activity in the context of a remote-working arrangement and what other factors should employers bear in mind when monitoring worker activity remotely?

Relevant here are first the restrictions on the employer's control of working time. Both the Working Time Act and the Rest Periods Act also apply to remote work and to work in a home office. However, section 26 paragraph 3 of the Working Time Act provides that in the case of work that is predominantly carried out in the home, only records of the duration (not the specific beginning and end) of the working time are to be kept. If the working hours are fixed, only deviations must be recorded.

The practical possibilities of monitoring work performance are manifold due to the IT tools that are now available (eg, log files, webcam). In contrast, in Austrian labour law, the employer's ability to control is subject to important restrictions. Control measures that affect human dignity require either the consent of the works council or – if such a council does not exist – the consent of the respective worker. Both attendance and performance or productivity controls can be relevant here. According to case law, the question of whether human dignity is affected must be assessed on a case-by-case basis. In

addition to the employer's interest in monitoring, the way the monitoring is carried out is also decisive, so that the possibility of constant electronic monitoring (for example, by controlling keystrokes or screen duplication) certainly affects human dignity[1].

However, it is of course lawful to check the availability of employees during working hours.

---

[1] Huger in Huger (Hrsg), Home Office und mobiles Arbeiten [2021] Rechtliche Rahmenbedingungen.

4. Are employers required to provide work equipment (for example, computers and other digital devices) or to pay for or reimburse employees for costs associated with remote working (for example, internet and electricity costs)?

The basic obligation of employers to reimburse employees for expenses incurred on behalf of employers already results from general private law for all forms of remote working (more precisely: section 1014 of the General Civil Code).

However, the reimbursement of costs is more precisely defined for work in a home office. Employers are, in principle, obliged by law to provide home workers with the necessary digital work equipment. If an arrangement has been made by works agreement or individual agreement whereby the employee provides digital work equipment, which includes the necessary data connection, the employer shall pay the reasonable and necessary reimbursement of costs. To this extent, the employer is obliged by law to pay compensation.

This expense is to be borne by the employer, who may, however, pay a so-called home office allowance tax-free to the employee up to a limit of €300 and thereby, or by paying an appropriate lower amount, compensate the employee for expenses, including those resulting from increased internet or electricity consumption.

5. What potential issues and risks arise for employers in the context of cross-border remote-working arrangements?

Labour Law:

The essential issue regarding labour law is the question of which labour law should apply. Often, employers will want to apply a uniform labour law to all employees. However, this becomes impossible if in cross-border remote-working arrangements the labour law of the state of residence provides certain overriding mandatory rules and minimum standards (eg, in wage dumping and working time). Additionally, it may prove difficult for employers to keep track of the ever-changing legal landscape in various jurisdictions. Allowing for cross-border remote-working arrangements will oftentimes lead either to higher staffing requirements in the in-house legal department or increased recourse to local external partners. Both are associated with costs. There is also the question of work permits, depending on the applicable local law.

Social Security Law:

While temporary covid-related home office work in other EU or EEA countries (and Switzerland) should not lead to any change in social security responsibilities, the corresponding provision is limited until 31 December 2021 and is restricted to pandemic-related work in a home office. Apart from an exceptional situation such as this, for workers who are working in more than one member state, working or earning more than 25% of the working time or remuneration in the country of residence leads to a change of the applicable social security regulations there. This is naturally associated with (sometimes) considerable administrative effort. The corresponding declarations must be made, and the payment of contributions must be ensured.

From the employer's point of view, especially regarding accident insurance protection, it is important to note that the exact location of the remote workplace must be specified individually.

While insurance coverage in the home office is expressly clarified, the details concerning remote work in general are still controversial. These uncertainties are exacerbated in cross-border situations.

Tax Law:

If remote work is carried out across borders, this can have (potentially negative) effects on taxation. First, it must be considered that a domestic employer may employ workers who carry out their work both domestically and, for example, in a home office abroad. This may result in the establishment of a foreign permanent establishment through that home office. This would lead to a limited tax liability for the domestic employer abroad. A limited tax liability may also be accompanied by the obligation to deduct income tax via PAYE (pay as you earn). Since national legislation must be considered, this can lead to a considerable administrative effort.

In general, employees should not stay abroad for more than 183 days per year as otherwise they will be taxed in the country in which they are active. Finally, it must be considered whether there are taxation agreements between the countries and how these are structured.

6. Do employers have any scope to reduce the salaries and/or benefits of employees who work remotely?

Employers cannot unilaterally reduce employees' salaries because of remote work. A salary reduction is only possible either by mutual agreement or through a dismissal, with the option of re-employment on altered conditions.

Regarding benefits, we believe that a distinction must be made according to whether they were granted with working on office premises in mind and whether the employer has reserved a right to revoke them. In the latter case, employers may reduce or revoke benefits unilaterally. In addition, it can also be argued that, for example, meal vouchers for the company canteen are no longer issued and are not reimbursed. Such and other "social benefits by the company" can be limited to use at the company's workplace.

The return to work and vaccinations

7. What are the key privacy considerations employers face in relation to ascertaining and processing employee medical and vaccination information?

Yes. The employer's duty of care implies that they are obliged to implement measures to protect their workforce. This duty of

care is a general duty to protect workers' interests. It covers not only the protection of the workers' lives but also their health.

Over the past year, the employer's obligation to fulfil this duty was regularly specified depending on the prevailing covid situation at that time. There were rules on the wearing of masks as well as on social distancing in the office.

Several prevention guides on covid-19-safe working environments have been published since then. Employers can easily take guidance from these prevention guides to comply with their duty of care. For example, a covid-19 checklist for SMEs was published to ensure a safe and healthy working environment. This checklist can be found here . For specific questions on worker protection, employers, as well as workers, may consult the Labour Inspectorate.

Furthermore, the implementation of a covid prevention plan has become mandatory for certain employers. Every facility with more than 51 employees now must implement a framework to prevent further infections. In many cases, a covid appointee must be selected as well. These measures serve to minimise the incidence of infection.

8. Can employers require or mandate that their workers receive a covid-19 vaccination? If so, what options does an employer have in the event an employee refuses to receive a Covid-19 vaccination?

Vaccination is not compulsory (but see question 10). Employers will not be able to force workers to have a covid-19 vaccination, as long as no corresponding legal basis has been established. However, the legal situation of workers who refuse vaccination has not yet been fully clarified.

Employers might struggle to comply with their duty of care if workers remain unvaccinated. Co-workers, but also customers, would be exposed to a greater risk of infection if workers are unwilling to get vaccinated. Moreover, the set-up of additional protective measures might lead to a considerable increase in costs the employer is unwilling to bear.

Therefore, the employer has two options:
A transfer of the worker to another workplace with a reduced risk of infection (no contact with customers or co-workers) should be considered first. If the employment contract does not provide for a transfer of workers and the worker refuses to change his or her workplace, the employer could give notice of dismissal with the option of reemployment on altered conditions. Here, for example, a change in working conditions or a change in the place of work would constitute an adequate rearrangement.

However, a dismissal or a dismissal with the option of reemployment on altered terms may not be conditional on vaccination. Yet, if there is no such opportunity for employment, the worker might be legally dismissed as he or she has nowhere to work. The question here too is if the worker can provide other evidence to meet the requirement of a reduced incidence of infection. Besides vaccination, a negative test result or a confirmation of a Covid-19 recovery will serve this purpose.

9. What are the risks to an employer making entry to the workplace conditional on an individual worker having received a Covid-19 vaccination?

Employers may ask about their employees' vaccination status. This is since the employer's interest in the employee's vaccination status is greater than the employee's personal rights. Workers are obliged to answer truthfully.

The employer may even make entry to the workplace conditional on employees' vaccination status and is entitled to link the return to the workplace to proof of a covid-19 vaccination. This action is objectively justified provided vaccination reduces the risk of infection with covid-19 for other workers.

However, a separate question to ask is whether an unvaccinated employee is entitled to remuneration during a lockout. This assessment is to be made on a case-by-case basis. Since there is no legal basis for compulsory vaccination, a balance of interests must be made here. Many aspects play a role when balancing the interests of the employer and individual workers. For example, if there is a home-office agreement with a white-collar worker, the employer may link the return to work to changed conditions and therefore to proof of a covid-19 vaccination. In the case of blue-collar workers (or white-collar workers without a home-office agreement), however, a lockout with retention of salary will not be justifiable. The legislature currently provides three options to prove that there is no infection. A negative test result, proof of vaccination and a confirmation of a covid-19 recovery (3-G proof) are suitable ways of providing evidence here. Employers are not entitled to unilaterally impose stricter conditions without objective justification and will need to accept all three options. Furthermore, one must also consider the individual situation of the worker. Some workers are simply unable to have vaccinations for health, religious or ethical reasons. Therefore, if employers opened their business only to vaccinated workers, they might also have to pay workers who have been locked out, without receiving any work performance.

10. Are there some workplaces or specific industries or sectors in which the government has required that employers make access to the workplace conditional on individuals having received a Covid-19 vaccination?

In principle, there is already the legal possibility to impose vaccinations for certain professions in the health sector. However, this option has not been exercised yet. There is no legal basis for compulsory vaccination in most sectors.

In certain sectors, customers must provide a negative test result, proof of vaccination or a confirmation of a covid-19 recovery (3-G proof) to enter a certain facility. This applies, for example, to restaurants, the accommodation industry, close-contact services, leisure facilities, residential facilities, nursing and care facilities and cultural institutions. In this regard, employers are well-advised to require the same standard of testing (3-G Proof) of their workers. In most of the aforementioned sectors, this is compulsory anyway.

To sum up, there is no explicit regulation stipulating that only vaccinated workers may enter the workplace. Vaccination is just one of three options you can choose from to enter certain facilities. The same applies to workers in most cases.

11. What are the key privacy considerations employers face in relation to ascertaining and processing employee medical and vaccination information?

Employers are entitled to ask workers about their vaccination status. Since this information contains sensitive data, employers may not store this information longer than is required. However, employers might be obliged to inform co-workers or third parties, due to an identified infection of a worker.

Furthermore, employers are required to take appropriate technical and organisational measures to protect this information.

Health & safety and wellbeing

12. What are the key health and safety considerations for employers in respect of remote workers?

Any regulations concerning the general protection of workers apply to teleworkers as well. Only workplace-related regulations do not apply here. Thus, an employer's duty of care does not end at the worker's front door when the worker performs their work from home. In Austria, several large companies produce videos for their workers showing the ideal design of a teleworking workplace. They use these videos to support their workers to set up their teleworking workplace properly. In some cases, workers are even offered the opportunity to film their workplace and send the video to the employer. Experts then assess whether the workplace meets occupational health and safety requirements.

13. How has the pandemic impacted employers' obligations vis-à-vis worker health and safety beyond the physical workplace?

Employers' duty of care requires supervision of employees in terms of occupational health and safety and work ergonomics, even during teleworking. This was hardly dealt with before covid.

14. Do employer health and safety obligations differ between mobile workers and workers based primarily at home?

No. Regarding employers' obligations on health and safety measures, the same rules apply to mobile workers and workers based primarily at home.

15. To what extent are employers responsible for the mental health and wellbeing of workers who are working remotely?

An employer's duty of care also includes looking after the mental health and well-being of employees who work from home. However, their duties are of course limited only to those aspects that arise from the work performance itself (hence no private factors). However, neither employers nor representatives of the labour inspectorate may enter a worker's home. Therefore, employers are unable to examine working conditions during teleworking. Nevertheless, employers are still expected to ask their workers about their state of health and offer support. As mentioned above, some employers offer their employees creative solutions. However, the prerequisite is always that employees voluntarily cooperate with the measures if his or her home is affected.

16. Do employees have a "right to disconnect" from work (and work-related devices) while working remotely?

There is a general "right to disconnect" beyond normal working hours, which can only be interrupted in exceptional cases, in jobs where overtime work is permissible.

While working remotely, the general regulations on working time still apply. Therefore, employees must be available during working hours, but have no obligation to be at the employer's disposal during their free time.

Furthermore, legal obligations regarding rest periods also apply for remote working. For this reason, regardless of where the employee performs their work, rest periods between two working days must last at least 11 hours. Working time during teleworking is to a great extent a matter of agreement, as the legal framework here is quite broad. Therefore, flexibility regarding working time strongly depends on the employment contract, any company agreements or common practice within the company.

Unions and/or work councils

17. To what extent have employers been able to make changes to their organisations during the pandemic, including by making redundancies and/or reducing wages and employee benefits?

Regarding changes in the organisational structure itself, large employers, in particular, are relying heavily on home offices and are already planning for a time after the pandemic. Desk-sharing models are increasingly being considered and actively implemented. This is accompanied by a (partial) return of leased property. In the internal organisation, there is a noticeable departure from rigid hierarchies and a shift towards increased network thinking, in which decision-making processes take place jointly using digital work equipment.

The government and legislature have been very careful to minimise layoffs as much as possible and at least to counteract pandemic-related redundancies. This was achieved, on the one hand, through direct support of the economy in the form of aid packages (compensation for loss of sales, subsidies for monthly fixed costs, etc) and, on the other hand, through the widespread use of short-time work, which was largely financed through state aid. The short-time work subsidy is accompanied by a retention obligation placed on employers, so that there have been relatively few redundancies during the pandemic so far, as the companies have accepted this aid well.

18. What actions, if any, have unions or other worker associations taken to protect the entitlements and rights of remote workers?

Austria benefits from its system of "social partnership", which is characterised by cooperation between employers' and employees' interest groups and with the government. Due to long negotiations between the social partners in the run-up to the Home Office Act, workers' rights were safeguarded before the amendment was implemented.

19. Are employers required to consult with, or otherwise involve, the relevant union when introducing a remote-working arrangement? If so, how much influence does the union and/or works council have to alter the working arrangement (for example, to ensure workers' health and safety is protected during any period of remote work)?

Especially regarding home office work, the Austrian legislature has clarified that such work requires an agreement between employer and employee. At the same time, however, the legal possibility was established to determine framework conditions under which home working can take place within a company through a works agreement. At this level, employee representatives (the works council) can therefore help to shape the implementation of remote working. However, the conclusion of such a works agreement is voluntary and cannot be enforced. Nevertheless, employers should inform the works council before introducing home working, as the works council has a general right to information, which in our opinion also includes the introduction of remote working.

In addition, various collective agreements for entire industries also lay down framework conditions for teleworking, although their implementation also requires an agreement between employer and employee.

Employee protection in the context of mobile working is already guaranteed by the fact that relevant worker protection laws also apply to remote work in their essential provisions. In practice, works agreements regularly provide for employers to undertake a workplace evaluation to ensure the health and safety of its employees.

Authors:

Christopher Badalec
Littler

Christopher Badalec has specialised in employment law for almost a decade. Due to his several years of prior experience in the Chamber of Labour, he already had a great sensitivity for advising clients when he joined the bar as a junior associate nearly six years ago. Over the years, Christopher has proven to be a reliable partner in our firm's litigation practice, and with his experience in court, he consistently represents a cornerstone of our litigation department. In addition, he is the firm's go-to expert when it comes to migration matters.

Learn more

Paul Moosmann
Littler

Paul Moosmann studied law at the University of Vienna. During his studies, he worked as a tutor for first-year students for three semesters. Having developed an initial interest in employment law during his first few semesters, he worked as a student assistant at a Viennese employment law firm. For Paul, it was already clear during his studies that he felt most at home in employment law. This led him to the Vienna Labour and Social Court for his court practice and in April 2021 he joined our firm.

Learn more

Jakob Zöchling
Littler

Jakob Zöchling studied Business Law and Business Administration at the University of Economics and Business in Vienna, which gave him a corporate perspective of law. Jakob's previous professional experience was in distinguished tax consulting and audits firms in Vienna. He joined our team in 2020 as an associate for Roland Gerlach, specialising his expertise in occupational pensions, labour law litigation, and strategic consultancy.

Learn more