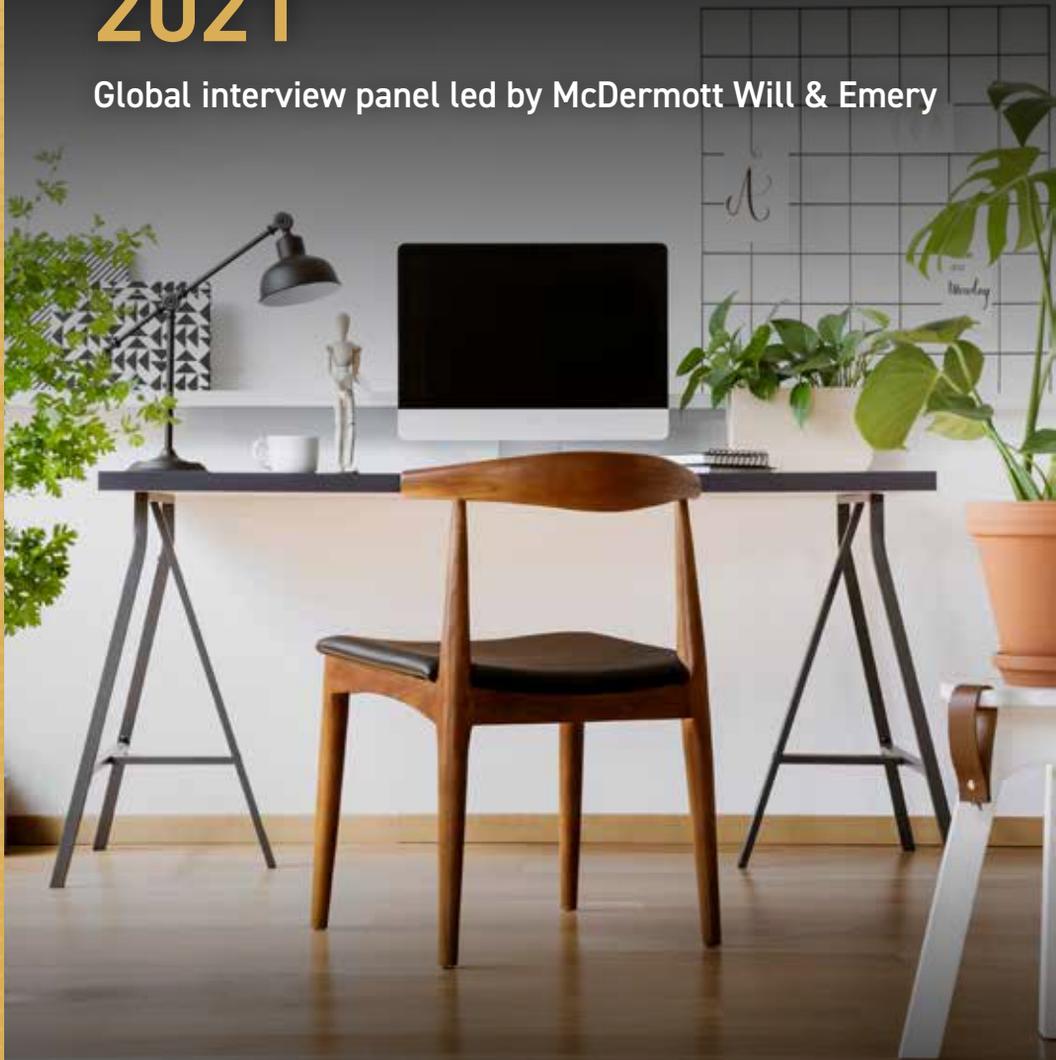


Market  
Intelligence

# REMOTE WORKING 2021

Global interview panel led by McDermott Will & Emery



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Getting the Deal Through

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# Austria

Roland Gerlach is the founding partner of Gerlach | Littler and a former senior partner of Griesser-Gerlach-Gahleitner, which was for a very long time a distinguished boutique law firm practising exclusively labour and employment law. After founding the law firm Gerlach Rechtsanwälte in 2011, the firm became part of the Littler Global network as Gerlach | Littler. Excelling in this practice area, Roland is regularly listed in the top tier of Austria's employment lawyers by major international ranking publications such as *Chambers and Partners* and *The Legal 500*.

He advises national and multinational corporations as well as individuals on all aspects of individual or collective labour law and social security law. His main areas of practice include employment law aspects of corporate restructuring, the HR aspects of M&A transactions, (management) employment contracts and management contracts and occupational pension schemes.

Markus Löscher became partner in January 2020, when the firm was joining Littler, and shareholder in January 2021. He is reputed for his work on high-profile, complex cases. He advises international and domestic companies on all aspects of employment law, with a focus on representing employers in and out of court. His clients include, among others, companies from pharma and retail industries, engineering industries and the IT industry.

Markus is particularly renowned for advising on international employer mandates and, in this context, he represents the firm externally as managing partner. He was also listed in the 2020 ranking of the German publishing house JUVE as 'up-and-coming' with 'excellent know-how' and inspired by the 'chance to step out of the big shadow of the founding partner'.

## 1 | What are the most consequential issues that an employer should consider when determining its post-covid-19 remote work policies?

First of all, in Austria, remote work cannot be applied unilaterally by the employer. Therefore, an agreement (if possible in writing) between employer and employee is required. Even if a works council is installed in the company, it can regulate the basic principles or conditions of remote work within the framework of a company agreement. Nevertheless, the consent of the individual employee is still required. It is easier in the case of new employees, where it can be stipulated in the employment contract that the remote working policy is part of the employment contract. A written agreement, on the other hand, provides a certain degree of legal certainty for the employer, because the policy or the individual agreement with the employee can regulate important points such as the reimbursement of costs and the recording of working hours. In contrast, it is more difficult to implement a remote working policy among regular staff. Since the employee's consent is required, the only remaining option in the event of rejection of the new working conditions is termination.

## 2 | Pragmatically speaking, is there a threshold to determine when working remotely (from home or otherwise) requires local rules to apply?

There are two limits in this respect:

- If the remote work activity lasts longer than six months, the national, local regulations must be applied in any case; and.
- if the working hours per week exceed 50 per cent, the local labour law provisions must also be applied.

Regarding the obligation to pay local social insurance, exceeding 25 per cent of the total activity in Austria is sufficient to fall within the scope of Austrian social insurance.

## 3 | If employees voluntarily move away from their main work location, can employers unilaterally impose locally appropriate compensation packages?

This is indeed an interesting consideration, but not possible in Austria – probably due to the relatively small size of the country. The unilateral intervention of the employer in the working conditions to the detriment of the employee and in particular in the salary is not possible. Moreover, if a works council exists in the company, such a plan would trigger its participation and approval rights. Finally, the employee cannot be restricted in his or her choice of place of residence. During the employment

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Roland Gerlach



Markus Löscher

relationship, it is only important that the employee offers his or her work in good time (regarding a possible longer journey) and in an orderly manner. Finally, working conditions in Austria are determined and influenced to a large extent by collective agreements. Many collective agreements apply nationwide, which is why individual local differences in living wages or local pay levels are compensated for by nationwide collective agreements.

**4 | Do you anticipate a rising trend of employers hiring remote workers as opposed to managing office-based employees who subsequently go remote? What practical issues should employers bear in mind when considering remote hiring?**

Definitely. Especially in industries where it is possible to work from anywhere, regardless of the workplace, there is a trend for employers to hire remote workers. The obvious advantage is that office space is becoming more and more expensive, especially in big cities, which is why it may be economically necessary to make corresponding savings.

A distinction will therefore have to be made between companies that require on-site work (eg, in production or in the service sector) and white-collar workers or companies in sectors without direct customer contact (eg, IT) that will tend to employ fewer on-site employees and more remote employees in the coming years.

An important and challenging aspect of employing remote workers is probably the control of working hours. Regardless of whether on-site or remote work is performed, employers are required to record the employee's working hours. Although the employee may be instructed to keep time records themselves, the employer is still responsible for monitoring and, in particular, verifying compliance with the maximum working hours. Of course, it is easier to check this if the employee is employed on-site at the company than if the employee works remotely – possibly hundreds of kilometres away – from his or her chosen place of work.

**5 | Do local laws provide remote employees with more generous leave entitlements, such as sick leave? Can employees avail themselves of leave entitlements in both the primary work location and the remote work location?**

No. The Vacation Act and the provisions on continued payment of wages in the event of accident or sick leave treat on-site workers and remote workers equally. The statutory vacation entitlement of five weeks per year is also identical.



All these entitlements are derived from the employment relationship itself and are due regardless of whether the worker works on-site, in remote or at several locations.

## 6 | What are some best practices for protecting confidential and proprietary information in a remote work environment?

Ultimately, it will depend on the contractual agreement between the employee and the employer. The permissibility of remote work can be restricted to certain locations, such as the employee's primary or secondary residence or that of a close relative or partner. Working in public shared spaces, in restaurants or public places, like parks or other facilities where a large number of other people could potentially have access to the equipment, should be contractually prohibited. The storage media (hard drives, laptops or any USB device) should be separately secured by software. The employee should be responsible for ensuring that other persons in the same household or other third parties do not have access to any company data. The downloading and installation of third-party software that has not been approved by the company's own IT department should be discouraged.

“The most controversial question is the existence of the employer’s ‘power of disposal’. Permanent power of disposal exists if the employer has a legal position that cannot be easily withdrawn. In the case of the employee’s activity in his or her private home a power of disposal can probably not yet be assumed.”

7 | How does a remote employee affect the employer's tax obligations? Do the employee's activities render the employer to be 'doing business' in the remote location? Will these activities create a taxable presence for the foreign employer in the local jurisdiction?

This question is currently the subject of lively discussion among labour law and tax law experts, not only because of the coronavirus pandemic and the associated far-reaching impact on remote work, but also because of the question of whether home offices or other remote workplaces establish a permanent establishment for the employer.

In principle, if a home office is established for a long period of time, a permanent establishment can exist both under domestic law and under treaty law.

The following criteria for the existence of a permanent establishment must be met cumulatively:

- permanent local plant or facility;
- power of disposal by the employer;
- not only temporarily; and
- directly used for the operation of the business.

The most controversial question is the existence of the employer's 'power of disposal'. Permanent power of disposal exists if the employer has a legal position that cannot be easily withdrawn. In the case of the employee's activity in his or her private home a power of disposal can probably not yet be assumed. The employer would have to be granted the legal position that allows it to enter the premises at any time, to use them or to make them accessible to other employees.

Unfortunately, however, the Austrian tax authorities have a much stricter opinion on this matter: according to the Austrian tax authorities, when work is performed in a home office, there is a 'de facto' power of disposal as soon as the employee performs significant work from home agreed with his or her employer. According to this view, the power of disposal is achieved solely by the fact that the employee uses the home office for business purposes.

The question of whether a 'de facto power' of disposal can be sufficient has not yet been clarified by the highest courts and is also criticised by Austrian practitioners. In Germany, the Supreme Court recognised that the mere shared use of rooms and facilities does not yet constitute a permanent establishment, especially since the employee's private residence is always not accessible to other employees of the company.

As long as there is no case law from the highest courts, the question of a permanent establishment remains unanswered to a not inconsiderable extent.

## 8 | What are some best practices for tracking remote work arrangements?

It is important that uniform regulations exist throughout the company so that there is no uncontrolled growth in individual departments. The respective agreements on remote work should be collected in the HR department and assigned to the respective personnel files. This is the only way to prevent the development of individual unwelcome practices that, on the one hand, put the employer in the position of not being able to deviate from them unilaterally and, on the other hand, result in possible administrative penalties.

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# The Inside Track

**What do you think are the most exciting and promising opportunities of remote working? How do you think it will affect the future of work?**

The flexible choice of work location and the more individualised design of the workday boost productivity and job satisfaction. Likewise, studies on concentration in the workplace show that when employees have the opportunity to plan their tasks according to their own biorhythms, higher results are achieved. With the increasing popularity of flexible working, a company's branding also benefits from such offerings. However, remote work not only reflects the possibility of a good work-life balance, but also contributes to a company's environmental management.

**In your view, what are the most difficult challenges raised by the rise of remote working? How do you think employers should tackle these challenges and adapt accordingly?**

In the longer term, the biggest challenge is probably maintaining direct communication and regular interaction between the employees. The first year of the covid-19 pandemic has shown that it is not uncommon for employees to struggle with feelings of isolation.

Therefore, employers should pay much more attention to mental health than they have in the past. The introduction of a company-wide workplace illness programme seems to make an important contribution here. These programmes can identify these risks and connect them to treatment and put in place supports to help people reduce and manage stress.

**What do you enjoy most about practising and advising in this area?**

The most interesting thing is probably the dynamic change in this area, which often happens even from one week to another. Not only new technological developments, but also changes in the attitude of employees to work confront employers with new challenges, but also with new opportunities.

One thing is already clear: those employers that offer and sustain remote work will undoubtedly prevail on the labour market.

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

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