



Workplace 4.0

Everywhere & always? How companies master mobile work's employment law challenges

Whether at home or on the road: new forms of work have emerged through the mobile technology of smartphones, tablets etc. More flexibility can help to reconcile family and work life, save a long journey to work and promote self-determination. This complies especially with the life planning of young high performers.

July 2017, Dr. Jan Tibor Lelley

But by far not all companies allow their employees to work from the home office. And not everyone who has the opportunity uses it. According to a study by the Federal Ministry of Labor (as of November 2015), just under a third of the surveyed companies offer employees the opportunity to work from home. On the other hand, about half of the large companies surveyed (more than 500 employees) allow their employees to use a home office. Nearly 40 percent of the employees who currently do not have the opportunity to work at home would like to do so regularly or occasionally.

Apples vs. pears: Home Office & Mobile Work

Usually home office and telework are considered to be the same thing. Telework is an activity, which is carried out on a regular basis outside the company and by means of information and / or communication techniques.

The new Workplace Regulation (ArbStättV), which came into effect on December 3, 2016, stipulates strict conditions for teleworking jobs in § 2 para. 7: these are screen workstations in the employees' private place for which the employer has defined a weekly working time in the contract or within the framework of an agreement. These rigid guidelines let telework become a model of the past, this is also reflected in the Federal Ministry of Labor's study: while the number of employees working in the home office is constant since 2013, the employees' availability outside the working hours has increased steadily.

The intended flexibility can only be achieved in a workplace that is not restricted to employees' home. And that is why mobile work or the mobile office, which is not covered by the ArbStättV, is on the rise: a fixed allocated workplace in the domestic area does not exist. One can rather work with the laptop, tablet and smartphone from

anywhere – on the road, on the way to the workplace or at home.

Mobile work has time limits – the ArbZG

The Working Hours Act (ArbZG) also applies to mobile work. In § 3 it stipulates a maximum working time of eight hours. It may be extended up to 10 hours if an average working time of eight hours is not exceeded within six calendar months or 24 weeks. Furthermore, § 5 ArbZG regulates an uninterrupted rest period of at least eleven hours after the end of the daily working hours. So even if the employee wanted: to work around the clock is not allowed. Only executives are exempted according to § 18 para. 1 no. 1 ArbZG.

And this is precisely where the problems begin in the 21st century: the ArbZG is based on the outdated idea that working time is a rigid, measurable unit. However, now the boundaries between work and leisure are fluent, especially in case of mobile work. If an employee meets family obligations while working in the home office, this is not considered working time. This constant change of work and leisure, which is intended to be as flexible as possible, cannot be directly influenced by the employer. And precisely that is the goal.

Nevertheless the employer must ensure that the regulations of the ArbZG are fulfilled. Moreover, § 16 para. 2 of the ArbZG requires the employer to record working hours that extend the maximum daily working hours and to keep these documents for at least two years.

That the existing legal regulations cannot be reconciled with the increasing digitalization and flexibilization of the working world 4.0, is obvious. This is also addressed in the White Paper on the Working World 4.0, recently published by the Federal Ministry of Labor. More flexible working time models and a relaxation of the rest periods are discussed.

But until further notice, everything remains as it is: meaning in the working world 4.0, the eight-hour day applies – exceptionally with a maximum of ten working hours. And then the eleven-hour rest period follows, in which work is strictly not allowed – neither mobile nor flexible.

Dangerous? Assessment of working conditions

The mere fact that employees are not working in the company nor at a fixed teleworking station in their private place does not make them defenseless. The employer is also responsible for protecting the health of mobile workers.

In addition to the Working Hours Act, the Act on the Implementation of Measures of Occupational Safety and Health (ArbSchG) and the Regulation on Industrial Safety and Health (BetrSichV), contain protective mechanisms for employees. In contrast to the Workplace Ordinance (ArbStättV), they apply without restrictions to mobile work.

In particular, the risk assessment plays an important role: while § 5 of the ArbSchG establishes general regulations applicable to each activity on behalf of the employer, § 3 BetrSichV specifies the risk assessment to the use of work equipment. Once the dangers have been identified, they must be reduced or eliminated by measures of occupational health and safety.

Mobile work and co-determination of the works council

In case of mobile work in the Working World 4.0, the works council has multiple information and co-determination rights. If the works council would like to know how

many employees work from home and with which technical resources they are equipped, they can obtain this by means of § 80 para. 2 sentence 2 BetrVG. In particular, the enforceable co-determination rights for social matters from § 87 of the BetrVG create extensive powers which can be enforced through the conciliation committee:

- § 87 No. 2 BetrVG: commencement and termination of the daily working hours including breaks and the distribution of working hours among the days of the week.
- § 87 No. 3 BetrVG: temporary reduction or extension of the hours normally worked in the establishment.
- § 87 No. 6 BetrVG: introduction and use of technical devices; in particular the introduction of mobile devices to enable mobile work.
- § 87 No. 7 BetrVG: arrangements on occupational health and safety on the basis of legislation or safety regulations.

Master the challenge: What can companies do?

The trend towards mobile work continues through digitalization. Modern communication facilities offer the possibility to work flexibly –both in time and space. What matters are the framework conditions: they determine whether this flexibility has a positive effect on the health and work satisfaction of the employees. That's why well-advised companies will ensure transparent and clear rules on mobile work.

The applicable law, in particular the ArbZG, is the obvious legal basis here. If an employer acts intentionally or negligently contrary to the regulations, a fine of up to € 15,000.00 may be imposed pursuant to § 22 para. 2 ArbZG. If the employer deliberately endangers the health of the employee or repeats his work-time violations persistently, he may face imprisonment up to one year or a fine pursuant to § 23 para. 1 ArbZG. Whether and how the regulations of the ArbZG will be designed more flexible in the future is completely open.

Well-advised employers will meet the challenges of the working world 4.0 and take advantage of the opportunities of digitalization and new telecommunication technologies – also by using labor & employment law. This is primarily possible through the drafting of works agreements, for example with the regulation objects

- workplace and working time flexibility,
- use of laptops, tablets, smartphones in the workplace (at work or at home and on the road),
- home office & mobile work.

In a technology-friendly and thus future-oriented corporate culture, flexible working conditions are created that promote satisfaction and the employees' willingness to perform. This is how companies master the challenges of mobile work.

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