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TELEWORK IN UKRAINE

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ABOUT THE ILAW NETWORK

The International Lawyers Assisting Workers (ILAW) Network is a membership organization composed of trade union and workers' rights lawyers worldwide. The core mission of the ILAW Network is to unite legal practitioners and scholars in an exchange of information, ideas and strategies in order to best promote and defend the rights and interests of workers and their organizations wherever they may be.

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I. BASIS OF PREPARATION AND PURPOSE OF RESEARCH

This report assesses teleworking in Ukrainian labor law, with particular focus on new legislation adopted in February 2021, as well as practical implementation of the laws and their impact on worker rights in Ukraine. The report is part of a series supported by the International Lawyers Assisting Workers (ILAW) Network on the regulation and impact of telework in different national contexts. Telework refers to the organization or performance of work at home or another location other than an employer's premises through the use of information and communication technologies (ICT).

Well-regulated telework can benefit workers by creating greater autonomy, flexibility, and an improved balance between work and personal life. In Ukraine, telework has allowed many workers to maintain employment in the midst of an unprovoked invasion by the government of Russia. The fact that telework has been vital tool to maintaining livelihoods and income at such a challenging time makes its proper regulation all the more critical. Poorly-regulated telework risks pushing the costs associated with maintaining a worksite onto workers, increasing work hours, and blurring the boundaries between work and personal time. It can also leave isolated workers vulnerable to discrimination, harassment and abuse. As the world hopes for peace in Ukraine, telework must be a central component of rebuilding a sustainable, equitable economy where worker rights are protected.

This report consists of six parts. Part 1 discusses legislative changes introducing telework in Ukraine. Part 2 contains a comprehensive analysis of the law on telework. Part 3 reviews practical aspects of implementation of statutes and jurisprudence related to telework. Part 3-1 outlines peculiarities of remote work in the midst of war in Ukraine. Part 4 discusses labor inspection activities regarding telework. Part 5 compares the Ukrainian rules on telework for compliance with European Union principles of its regulation. Part 6 lists recommendations to a number of stakeholders on the basis of this research.

RESEARCH QUESTIONS

Legal context

1. Is telework regulated by a specific telework law, or is it regulated by general labor law?
2. How is telework defined, and do current legal frameworks/ judicial decisions make distinctions between telework, remote work, homework, and other work performed away from a primary place of work?
3. How are the following issues regulated (if at all):
 - a. voluntariness
 - b. hours of work and right to disconnect
 - c. costs of maintaining office, equipment, and connection
 - d. occupational safety and health
 - e. freedom of association and collective bargaining
 - f. non-discrimination, and equal access to training, opportunities, and promotion
 - g. GBVH
4. Which international or regional labor standards are generally applicable to telework, and which rights might have a specific application?
5. Have any aspects of telework been regulated through Framework Agreements, pronouncements of multilateral or supranational bodies?
6. What other (non-labor) laws or regulations may impact the performance of telework?
7. Has labor inspection laws, regulations, or practices been adapted or changed in order to properly protect the rights of workers under general labor laws or specific telework laws?
8. What other laws, regulations, and practices should be considered or amended to make telework more equitable?

Practical Context

9. For each issue listed in Question 3 (a-g), what are the specific practical obstacles that workers face in exercising these rights, and how are these obstacles overcome?
10. What are the additional burdens and impacts of telework on women, who often also bear the brunt of care work within the homes?
11. Have there been specific disparate impacts on certain groups of workers, which further entrench, e.g., racial or gendered hierarchies? How are these obstacles being overcome?
12. What are the specific obstacles to labor inspection, and how are these obstacles being overcome?

SOURCES OF LAW

In preparing this analysis, the following sources of law were used:

- The Law of Ukraine No.1213-IX “On Amending Certain Legislative Acts to Improve Legal Regulation of Remote Work” (entered into force on February 27, 2021)¹
- The Labor Code of Ukraine No.322-VIII (entered into force on December 10, 1971)²

PART 1. GENERAL OVERVIEW OF A TELEWORK CONTEXT IN UKRAINE

Telework was not regulated by Ukrainian national legislation before the COVID-19 pandemic. In pre-pandemic times, “work from home” was mentioned only once (Art. 179³) in the Code of Labor Laws of Ukraine (hereinafter Labor Code). Previously, home-based work was regulated by the Soviet Regulations of 1981⁴; however, as work using computers was not envisaged back in 1981, provisions of these Regulations apply mainly to vocational professions and manual work from home.⁵

1.1. COVID-19 PANDEMIC AS A CATALYST OF LEGISLATIVE CHANGES

According to a study by the sociological group “Rating”, as of March 2020, 29% of the adult population of Ukraine worked remotely.⁶ A study conducted by DigData found that, among Internet users, the share of those working at home was slightly higher: 31%.⁷ In April 2020, 40% of Ukrainian city dwellers with a population of more than 50,000 worked from home part-time or full-time, according to a Gradus survey.⁸

The first attempt to modernize national legislation through the introduction of clauses addressing telework was made on March 17, 2020: two of them (№ 3219⁹ and № 3275¹⁰) were adopted directly after the first lockdown was imposed in Ukraine. Their main provisions are as follows:

1 Про внесення змін до деяких законодавчих актів України щодо удосконалення правового регулювання дистанційної роботи [On Amending Certain Legislative Acts to Improve Legal Regulation of Remote Work], Feb. 4, 2021, Law No. 1213-IX, VVR, 2021, no. 20, art. 178, <https://zakon.rada.gov.ua/laws/show/1213-20#Text> (Ukr.) [hereinafter 2021 Remote Work Regulation Amendment].

2 Кодекс законів про працю України [Code of Labor Laws of Ukraine] art. 60-2, <https://zakon.rada.gov.ua/laws/show/322-08#Text> (Ukr.) [hereinafter Labor Code].

3 *Id.* at art. 379.

4 Положение об условиях труда домашних работников [Regulations of the USSR State Committee for Labour and Social Issues on Working Condition of Homeworkers] (dated on September 29, 1981). Available in Russian at: https://zakononline.com.ua/documents/show/159449__159449

5 Alesya Pavlynska. Norwegian-Ukrainian Chamber of Commerce, *Remote and Home-Based Work in Ukraine: status quo and planned legislative changes* (Feb. 11, 2021), <https://nucc.no/remote-and-home-based-work-in-ukraine-status-quo-and-planned-legislative-changes>.

6 Група «Рейтинг», *Україна на карантині: моніторинг суспільних настроїв* (Apr. 4, 2020), http://ratinggroup.ua/research/ukraine/ukraina_na_karantini_monitoring_obschestvennyh_nastroeniy.html?fbclid=IwAR3Ige1LaFAA7gtP5wMJ7_vvdtPNoEVWpHthPhg2pi9HX-pQ1DIZHjIA_Q.

7 Наталя Ломоносова & Ліліана Філіпчук, *Коронавірус і дистанційна робота: що зробила держава*, CEDOS (Sept. 24, 2020), <https://cedos.org.ua/researches/koronavirus-i-dystantsiina-robota-shcho-zrobyla-derzhava/>.

8 Тимофій Брік & Максим Обрізан, *Ковід, карантин та ринок праці в містах України*, Вокс Україна (Aug. 17, 2020), <https://voxukraine.org/uk/kovid-karantin-ta-rinok-pratsi-v-mistah-ukrayini/>.

9 Проект Закону про внесення змін до деяких законодавчих актів України, спрямованих на запобігання виникненню і поширенню коронавірусної хвороби (COVID-19) [On Amendments to Certain Legislative Acts of Ukraine intended to Prevent Covid-19 Outbreak and Spread] (voted on 17.03.2020) http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=3219&skl=10

10 Проект Закону про внесення змін до деяких законодавчих актів, спрямованих на забезпечення додаткових соціальних та економічних гарантій у зв'язку з поширенням коронавірусної хвороби (COVID-2019) [On Amendments to Certain Legislative Acts of Ukraine intended to Ensure Additional Social and Economic Guarantees due to Covid-19 Spread] (voted on 30.03.2020) http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68479

- A company can order employees to work remotely during a quarantine without their consent;
- In “normal times,” remote work is formalized in a written employment agreement reflecting the consent of both parties;
- Employees working remotely arrange their work themselves and are not subjected to the employer’s work schedule or regulations (unless otherwise provided by the employment agreement).¹¹

Although these laws were intended to amend the Labor Code to establish a statutory framework for telework, there were several gaps because they were adopted in a rush. For instance, the law made no distinction between remote work and home-based work. Following harsh critiques from scientists and labor law practitioners¹², there was an agreement to craft a solid draft law amending the Labor Code, with separate articles on telework and flexible working schedules. The result, draft law № 4051, entered into force on February 27, 2021.¹³

According to a survey by Factum Group during the first lockdown in March 2020, around 36%¹⁴ of employees were switched to remote work despite the fact that remote work was not properly regulated by the law. Another survey, conducted by the Razumkov Center in May 2021,¹⁵ found that only 14% of respondents in Ukraine wanted to work remotely, while 73% declared that they did not. Another 12% responded that it was “hard to answer.” Most often, those who switched to remote work during the pandemic with full pay, 29.5%, answered in the affirmative about remote work; however, the majority (56% of respondents) did not want to work remotely.

According to the Economic Strategy Center, in January 2021 number of vacancies with remote work regimes increased by 26%.¹⁶ As of August 2021, demand for telecommuting in Ukraine has decreased by half since the lifting of the coronavirus pandemic lockdown measures. As of this writing, according to various data, from 3% to 6% of Ukrainian employers offer the opportunity to work remotely.¹⁷

PART 2. THE LEGAL FRAMEWORK OF THE REMOTE/HOME-BASED WORK IN UKRAINE

According to Art.60-2 of the Labor Code, **remote work (or distant work)**¹⁸ is a form of work performed by an employee outside of the employer’s premises or away from the territory of the owner or his authorized agent¹⁹ at any place of the employee’s choice and using information and communication technologies.

Article 60-1 stipulates that **home-based work** is a form of work performed by an employee at the employee’s place of residence or in other premises pre-selected by the employee, and characterized by the presence of either a fixed area, some technical means (basic production and non-production assets, tools, devices, inventory), or both, that are necessary for the production of items, the provision of services, the performance of work or functions provided for by the constituent, but outside the production or work premises of the employer.

When performing home-based work, the workplace of the employee shall be fixed and cannot be changed at the initiative of the employee without the consent of the employer in accordance with the established employment contract for home-based work. The decision of the employer to refuse to grant consent to change the workplace at the initiative of the employee must be justified. If it is impossible to perform work at a fixed workplace for reasons beyond the employee’s control, an employee shall have the right to change the workplace, provided that the employer is notified at least three working days prior to such a change in the manner specified in the employment contract for home-based work.

11 *Ibid* note 6

12 See generally Кухня трудових прав: нариси про важливі інгредієнти: збірник тез (2021), <http://trudovi.org/textEditor/Kuhnia%20trudovykh%20prav.pdf>.

13 Проект Закону про внесення змін до деяких законодавчих актів України щодо удосконалення правового регулювання дистанційної роботи [On Amending Certain Legislative Acts to Improve Legal Regulation of Remote Work, (voted on April 2, 2021) http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69838

14 Панченко Олександра, *36% українців повністю перейшли на віддалену роботу (опитування)*, Хмарочос (Apr. 1, 2020), <https://hmarochos.kiev.ua/2020/04/01/36-ukrayintiv-povnistyu-pereishly-na-viddalenu-robotu-opytuvannya/>.

15 Разумков Центр, *Робота і зайнятість в умовах пандемії COVID-19 (травень 2021р.)* (June 2, 2021), <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/roboata-i-zainiatist-v-umovakh-pandemii-covid19-traven-2021r>.

16 В Україні зростає кількість вакансій з віддаленої роботи/ <https://www.business.ua/uk/node/11443>

17 Олександр Іванов, *Не лише айтивці. Яких спеціалістів в Україні найчастіше шукають на дистанційну роботу* (Aug. 18, 2021), <https://biz.nv.ua/ukr/markets/distanceyna-roboata-yaki-fahivci-mayut-naybilshiy-popit-u-robotodavciv-novini-ukrajini-50178202.html>.

18 These terms are interchangeable depending on the version used by translator.

19 “The owner or his authorized body” is wording for the employer in terms of the Labor Code of Ukraine. For better understanding, we will use the term “employer” further in the text.

The authors believe that prior notification could be complicated in circumstances of force majeure (including power outages or cut-offs of water or internet service). Therefore, it will be reasonable to specify the employer's and employee's required actions in such situations in a contract on home-based work (for instance, to specify that messaging or calling an employer or supervisor could be a sufficient notification in case of force majeure; the list of specific force majeure circumstances could be also set in the contract).

Overall, differences²⁰ between remote and home-based work could be presented in such table²¹:

Criteria	Remote work	Home-based work
Employment agreement	Both remote work and home work require a written agreement under the Labor Code. There are Exceptions for epidemics and other emergencies. In such cases, the employer may issue an order instead of signing an employment agreement in writing. The template of an agreement on remote and home-based work is established by the Ministry of Economy. Employees are to be acquainted in writing with an internal code of conduct, collective bargaining agreement, local regulations of an employer, notifications, and other documents using electronic means of communication.	
Workplace	An employee independently chooses his/her own workplace. It could be any place at the employee's discretion, and with the use of communication technologies.	Work is performed by an employee outside of the employer's premises at a designated workplace (place of residence or other pre-selected premises). The workplace is fixed and cannot be changed at the employee's initiative without the employer's consent in the manner specified in an employment contract for home-based work. The employer must justify a refusal to give consent for a workplace change at the employee's initiative.
Working time	Employees work according to their own work schedule, established at their discretion; however, the employment agreement may provide for exceptions. The overall working hours shall not exceed those established by the Labor Code.	The employee works according to the employer's regular working hours; however, the employment agreement may provide for exceptions.
Means of production	Internet, communication technologies.	Tools, devices, inventory, or their combination, mainly for manual work from home.
Costs of maintaining office, equipment, and connection	Equipment and other necessities to perform their work and reimbursement mechanism is stipulated by an employment agreement; otherwise, it will be an obligation of the employer .	The employer is obligated to cover costs.

20 Inesa Letych, *New Law on Remote Work Entered Into Force in Ukraine*, LEXOLGY (Marc. 2, 2021), <https://www.lexology.com/library/detail.aspx?g=64475ecb-5f72-4ef4-a519-a34315c37c82>.

21 European Business Association, *New Law on Remote Work Entered Into Force in Ukraine*, EBA: Kyiv (Apr. 3, 2021), <https://eba.com.ua/en/nabulo-chynnosti-nove-zakonodavstvo-pro-dystantsijnu-pratsyu/>

OSH issues	Remote employees are fully responsible for the safe upkeep of the employer's equipment. The employee shall be personally responsible for ensuring safe and harmless working conditions. Employers must provide safety training to remote workers.	During home-based working, employees are subject to an employer's general work regulation, unless otherwise provided in an employment contract.
Right to disconnect	Rest breaks are guaranteed for remote employees when they can interrupt any information and telecommunication with the employer and are not considered a violation of the terms of the employment contract or labor discipline. Rest break periods are established in the employment agreement on remote work.	Not envisaged
Discrimination issues	Employees may request to temporarily work remotely in case of alleged discrimination or sexual harassment against them in the workplace; remote work is also available for employees with children.	Home-based work is not available as a temporary measure in case of alleged discrimination or sexual harassment against employees in the workplace.
Reporting	The procedure and terms for submitting performance reports shall be determined by an employment contract for remote work.	The employer independently decides how to entrust the work to the employee, monitor its implementation, and ensure reliable accounting of the work performed.

Article 60 introduces one more mode of work - **flexible working hours**. Under a written mutual agreement between the employee and the employer, a work regime can be established for the employee incorporating self-regulation of the start, end, and duration of working hours during the working day for a specified period or indefinitely, both upon hiring and afterward. Flexible working hours is a form of work that allows the establishment of a work schedule that is different from the one determined by internal employment rules, subject to completion of the established total number of working hours within a specified accounting period (week, month, quarter, year, etc.).

Flexible working hours may include:

1. a fixed time during which the employee must be present at the workplace and perform their job duties; this may also provide for the division of the working day into parts;
2. variable times during which the employee, at his own discretion, determines the periods of work within the established standard duration of working hours;
3. break time for rest and meals.

Below we outline the key features of remote/home-based work as well as flexible working hours.

2.1. VOLUNTARINESS OF REMOTE/HOME-BASED WORK

Employers and employees should make a written agreement on remote or home-based work based on **model agreements elaborated by the Ministry of Economy**²² which came into force on July 16, 2021.

²² This model agreement is a template for parties and establishes mandatory provisions (for instance rights and obligations of the parties) along with recommendatory ones (confidentiality ones). Олександра Кознова, *Діють типові форми трудових договорів про надомну та дистанційну роботу*, LIGA ZAKON (July 20, 2021), https://biz.ligazakon.net/news/204976_dyut-tipov-formi-trudovikh-dogovorv-pro-nadomnu-ta-distantsynu-robotu.

However, in case of threat of the spread of an epidemic, pandemic, or the need for self-isolation of an employee under circumstances established by law and/or at the time of a military, man-made, natural, or other kind of threat or emergency, remote/home-based work may be established in an order (instruction) of the employer without the obligatory conclusion of a written employment contract for remote/home-based work. In this case, the norms of Article 32, part 3 of the Labor Code shall not apply for the duration of the stated emergency.²³

Article 60 (parts 8 and 9) provides the following rules for the fixed working hours:

“Flexible working hours can be provided:

- at the request of an employee with an acceptable work schedule without a preliminary, two-month notice about the new work schedule;
- by the employer - on the basis of production needs with a two-month notice of the new work schedule.”

Flexible working hours are an option for all categories of workers by mutual agreement, albeit some exceptions. For example, at the emergence of the types of threats or emergencies outlined above, flexible working hours may be established in the order (instruction) of the employer. The employee shall be familiarized with such an order (instruction) before introducing flexible working hours. In this case, the norms of Article 32, part 3 of the Labor Code shall not apply.²⁴

In cases involving production and technical necessity, the performance of urgent or unexpected tasks, or both, the employer may temporarily (for up to one month during a calendar year) apply the work schedule generally established by the enterprise, institution, or organization to the employees enjoying flexible working time. In this case, the norms of Article 32, part 3 of the Code are not applied.²⁵

2.2. HOURS OF WORK AND RIGHT TO DISCONNECT

When **working remotely**, employees organize their working time at their own discretion; they are not subject to the internal employment rules unless otherwise provided in the employment contract. At the same time, the total duration of working hours cannot exceed the norms provided for in Articles 50 and 51 of the Code, which sets a limit of 40 hours per week. By agreement between the employee and the employer, remote work can be simultaneously combined with the employee’s performance of work at workplaces on the premises or on the territory of the employer. The features of the combination of remote work with work on the premises or on the territory of the employer shall be determined in an employment agreement for remote work.²⁶

Many scientists and labor law practitioners criticized²⁷ the provision concerning the exemption of remote workers from internal employment rules, as this can lead to abuses and overwork. According to the Labor Initiatives legal clinic and various publications,²⁸ working time has become blurred for a lot of remote workers which led, in its turn, to overwork and “being online” practically 24 hours a day, seven days a week.

When **working at home**, employees shall be subject to the general working regime of an enterprise, institution, and organization, unless otherwise provided in the employment contract. At the same time, the duration of working time cannot exceed 40 hours per week (or, for certain categories of employees, a reduced duration of the working week). Working arrangements that combine work at home and in the office for home-based workers are not addressed by the Code (as for remote workers in part 6 of Art.60-2 of the Code), but this option could be necessary in case of, for example, work-related meetings that take place on site. Because of this, the authors believe that a combination of home-based work and work on the premises or the territory of the employer should be determined in a contract on home-based work.

²³ Labor Code art. 60-2, part 1 and art. 60-1 part 8. Art. 32 establishes employer’s obligation to notify employees about change of essential working conditions in two months prior to the changes. Transition to remote work is also considered as a change of essential working conditions.

²⁴ Labor Code art. 60, part 2.

²⁵ Labor Code art. 60, part 6. “Flexible working hours, as a rule, are not used in continuously operating enterprises, institutions, organizations, multi-shift work, as well as in other cases due to the specifics of the activity, when the employee requires his presence in hours strictly defined by the internal employment rules or when such a regime is incompatible with the requirements for safe working conditions”

²⁶ Labor Code art. 60-2, parts 4 and 6.

²⁷ See generally Кухня трудових прав: нариси про важливі інгредієнти: збірник тез (2021), <http://trudovi.org/textEditor/Kuhnia%20trudovykh%20prav.pdf>.

²⁸ Анастасія Зануда & Євгенія Ковалевська, *Дистанційка по-українськи: як вона змінила роботу і що буде далі*, BBC NEWS UKRAINIAN SERVICE (Apr. 28, 2021), <https://www.bbc.com/ukrainian/features-56849251>.

Although a regime of **flexible working hours** guarantees the employee right to determine the start, end, and duration of working hours during the working day for a specified period or indefinitely, the employer (in the case of a written agreement between an employee and the employer), based on the structure of the working day and the established accounting period of each individual employee, shall coordinate so-called “flexible employee” work time with the work of other employees, by regulating the fixed, variable time and the time of breaks for rest and food.

In case of violation of the accepted flexible working hours, in addition to the application of appropriate disciplinary sanctions, employees may be transferred to the generally established schedule without a preliminary two-month notification by the employer about the change of essential working conditions.

The **right to disconnect** is only guaranteed for the category of employees who work remotely. Article 60-2, part 9 of the Labor Code states that an employee who performs remote work must be provided with a guaranteed period of free time for rest (period of disconnection) when the employee can refuse to respond to any information and telecommunication with the employer, which is not considered a violation of the terms of the employment contract or labor discipline. A guaranteed period of free time for rest (period of disconnection) is established in the employment agreement on remote work.

Under the definition, the right to disconnect refers to a worker’s right to be able to disengage from work and refrain from participating in work-related communications, such as emails and WhatsApp messages, during non-working hours.²⁹ Interpreting the above provision in Ukrainian legislation, the authors deem that the period of disconnection by default is established during working hours as a rest period, also taking into account the fact that the working week cannot exceed 40 hours per week. Particular hours for disconnection, for instance, from 6 PM to 9 AM, are defined in the employment contract.

2.3. COSTS OF MAINTAINING OFFICE, EQUIPMENT, AND CONNECTION

An employment contract for remote work shall establish and define the following: the procedure and terms for providing employees who perform **work remotely** with equipment, software and hardware tools, information security tools, and other means necessary to fulfill their duties; the procedure and terms for submitting performance reports by such employees; the amount, procedure, and timing of payment of compensation for use of equipment, software and hardware, information security tools and other means owned or leased by employees; and the procedure for reimbursing other expenses related to remote work (Part 7 of Article 60-2).

Providing the means of production, materials, and tools necessary for the worker to perform **home-based work** shall be the responsibility of the employer unless otherwise provided by the employment contract. (Part 7 of Article 60-1). If an employee uses their own tools and instruments, the employee is entitled to compensation under the provisions of Article 125 of the Labor Code.³⁰ However, under this article, the employee only has a right to compensation, there is no corresponding obligation on the employer to ensure the worker has all needed equipment.

Thus, provisions on remote work set no obligation on employers to provide basic tools unless workers have the leverage to demand them in the contract. Whereas remote work provides no such assumption, home-based work operates on the assumption that the cost is on the employer.

In 2020, the largest private logistics company in Ukraine adopted a new version of a collective bargaining agreement (CBA) with provisions regarding remote work.³¹ Under it the employer shall be responsible for providing the employees working remotely, with the means of production related to information and communication technologies used by the employee.³² It shall also provide for appropriate equipment installation and maintenance, as well as pay the costs associated with it.³³ The employer shall provide for an equipped workplace (laptop/desktop tower, screen, mouse, keyboard, Internet access), and furniture, if necessary (desk, chair, shelves, etc.), and delivery of the relevant equipment to the location of remote work.³⁴ The property of the enterprise, transferred for use to the employee to perform work at home or remotely, shall be handed over according to the relevant documents and in the manner

29 Karl Briffa, Ann Bugeja, Jonathan De Maria & Cynthia Galea, *Malta: Will The Right To Disconnect Become The New Reality?*, MONDAQ (Feb. 26, 2021), <https://www.mondaq.com/employee-benefits-compensation/1040146/will-the-right-to-disconnect-become-the-new-reality>.

30 Labor Code art.125 states that employees who use their tools for the needs of the enterprise, institution, organization, have the right to receive compensation for their deterioration (depreciation).The amount and procedure for payment of this compensation, if they are not established in a centralized manner, shall be determined by the employer in agreement with the employee.

31 <https://profspilka.org/pro-nas>. <https://profspilka.org/en/pro-nas>

32 КОЛЕКТИВНИЙ ДОГОВІР: між Адміністрацією та Профспілковою стороною пара. 3.11 (Nov. 26, 2021), <https://profspilka.org/themes/psnp/assets/doc/koldogovor.pdf>. <https://profspilka.org/themes/psnp/assets/doc/koldogovor-eng.pdf>

33 *Id.*

34 *Id.*

prescribed by the enterprise.³⁵ If the employee fails to return the received property, or in case of destruction, damage, loss, or shortage of property, the employee shall bear pecuniary liability in the manner provided by the legislation.³⁶

Moreover, under par.7.1.26 of that CBA, to create healthy and safe working conditions in the company, the employer shall improve the sanitary and material conditions of labor, eliminate the risk of deteriorating health of workers due to consumption of poor-quality drinking water; and purchase packaged drinking water, tea, coffee, and sugar.³⁷ The employer agreed to ensure free access to drinking water, tea, coffee, and sugar for all employees of the Company, and in the case of employees working remotely or at home, ensure the delivery of drinking water, tea, coffee, and sugar.³⁸

2.4. OCCUPATIONAL SAFETY AND HEALTH FOR REMOTE/HOME-BASED WORKERS

When performing remote work, the employee independently chooses his own workplace and shall be personally responsible for ensuring safe and healthy working conditions.³⁹ Specific provisions regarding occupational safety and health (OSH) for home-based work are not enshrined by the Labor Code. There is only one clause interpreting which we conclude that general OSH rules cover home-based workers: “When **working at home**, employees shall be subject to the general working regime of an enterprise, institution, and organization unless otherwise provided in the employment contract.”⁴⁰

2.5. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

No express limitations on the freedom of association for remote workers/home-based or those working under flexible schedules is prescribed by law. Currently, unions do not change their practice of organizing in terms of remote workers and do not adjust their programs/activities to remote/home-based workers. The only changes refer to the method of holding meetings or periodic conferences. While certain modern unions have amended their charters in order to make it possible to conduct the meeting via Zoom or other digital service, others refrained from holding one-to-one meetings during lockdowns and waited to resume them until after the quarantine measures had been lifted.

2.6. NON-DISCRIMINATION, AND EQUAL ACCESS TO TRAINING, OPPORTUNITIES, AND PROMOTION FOR REMOTE/HOME-BASED WORKERS

Under Article 60-2, part 10, an employee may request that the employer transition them, for a temporary period of up to 2 months, **to remote work** in cases in which they claim to have faced discrimination in the workplace. However, the employer may refuse to grant this request if the employee did not provide factual data confirming that discrimination, sexual harassment, or other violence took place, or if the performance of remote work is incompatible with the activity and job functions of the employee.

On the one hand, this provision is positive and necessary as it provides additional forms of protection for employees who are victims of harassment or other forms of discrimination. On the other hand, this clause does not create an obligation for employers to transfer employees to remote work. Moreover, the burden of proof is on the employee. In cases where employer is alleged to have committed the discriminatory behavior, this provision will likely have little practical effect, as the employer probably will not willingly admit guilt.

Part 12 of the same Article stipulates that pregnant women, employees who have a child under the age of 3 or take care of a child who needs care in accordance with a medical diagnosis until the age of six, employees who have two or more children under the age of 15 or a child with disabilities, parents of a person with disabilities from childhood (subgroup A group 1), and caretakers of a child or a person with disabilities from childhood (subgroup A group 1) may perform their duties on the basis of remote work, if this is compatible with the business, and the employer of the enterprise, institution, the organization has resources and means for this. The same possibility of transition to **home-based work** for the same categories of employees.⁴¹

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at para. 7.1.26.

³⁸ *Id.*

³⁹ Labor Code art. 60-2, part 4.

⁴⁰ Labor Code art. 60-1, part 5.

⁴¹ Labor Code art. 60-1, part 11

General norms on anti-discrimination prescribed in Article 2-1 of the Labor Code refer also to remote and home-based work. In terms of the unique concerns of so-called “remote discrimination,” workers may not know that they are being treated unfavorably because it is difficult to know how other workers are being treated. Because employees are dispersed, they may have differing understandings about working processes. The isolation of remote work means that there are less likely to be witnesses to abusive behavior, and workers may not be able to confide in colleagues or identify patterns of inequitable treatment. Isolation can lead not only to discrimination but also to **bullying practices** such as unequal workloads, manipulation, and psychological pressure. Further, online spaces offer new and invasive forms of harassment, including inappropriate use of surveillance technology. Online communication could also lead to misunderstandings and communication gaps because it cannot transmit all facial expressions and body language. Remote working can present an opportunity for managers to exclude or marginalize people at a time when everyone is feeling insecure.⁴² Workers also may be less familiar with internal process, and not know where to report harassment.

As mental health professionals make clear,⁴³ the psychological effects of putting on a work uniform and going to a specific work location create clear markers that can help people maintain appropriate behavior in a work setting. With video conferencing, work colleagues remain in their homes, and enter their colleagues’ homes. Boundaries can be flimsier, and it may feel like work has become a more casual environment, leading employees to let their guard down about what they say and do in email, instant messaging, or video.

Employers are required under law to take measures to create safe working conditions and to avoid incidents of sexual harassment.⁴⁴ Many teleworkers may be unaware of existing internal procedures to address violence and harassment, and isolation from coworkers and trade union representatives may exacerbate this disconnection. Employers and trade unions can counter this by providing access to sufficient training to all workers, including teleworkers and managers of teleworkers, on internal procedures to address violence and harassment, as well as employees’ rights under the law. International Labour Organization Convention 190 on ending violence and harassment in the world of work offers critical guidance on how to enact proactive preventative measures to identify and prevent violence and harassment, including gender-based violence and harassment, including addressing these issues in OSH laws and programs.⁴⁵

Under current Ukrainian law, to bring a claim for discrimination, the worker must provide “actual data” confirming that discrimination took place.⁴⁶ This requirement can present a significant obstacle for all workers, including teleworkers, to achieving justice. The International Labour Organization and other experts have recognized that the information needed to prove or disprove discrimination is generally in the hands of the employer and it is therefore proper to assign the employer the burden of proof in discrimination cases once a worker alleges a violation.⁴⁷ ILO Convention 190 and Recommendation 206 on Ending Violence and Harassment in the World of Work explicitly recognize this, calling for “access to gender-responsive, safe and effective complaint and dispute resolution mechanisms,”⁴⁸ including “shifting the burden of proof” in civil proceedings.⁴⁹ The burden to provide “actual data” is particularly onerous, as discrimination can often take the form of inappropriate comments or actions that do not produce a physical record. In a telework situation, such actions may be less likely to be witnessed by other coworkers, making it even more difficult for workers to prevail.

One more challenge is to address harassment in the home office that takes place in digital communication media, including email and Zoom. It is vital to secure evidence related to harassment, especially when it occurs in instant

42 Amanda Woodard. *Distant Threat: How Bullying Persists in Remote Work*, INTHEBLACK (Dec. 9, 2020), <https://www.intheblack.com/articles/2020/12/09/how-bullying-persists-in-remote-work>.

43 *Id.*

44 Про забезпечення рівних прав та можливостей жінок і чоловіків [Law of Ukraine on Ensuring Equal Rights and Equal Opportunities of Women and Men] art. 17 https://laws4me.com/wp-content/uploads/Laws/Ukraine/Law_on_Equal_Rights_for_Men_and_Women.pdf

45 Int’l Lab. Org., Violence & Harassment Convention, 2019, at art. 12, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100_ILO_CODE:C190; see also INT’L LAB. ORG., SAFE AND HEALTHY WORKING ENVIRONMENTS FREE FROM VIOLENCE AND HARASSMENT (June 24, 2020), https://www.ilo.org/global/topics/safety-and-health-at-work/resources-library/publications/WCMS_751832/lang--en/index.htm.

46 Цивільний процесуальний кодекс України [Civil Procedural Code of Ukraine], Art.81, part 2, <https://zakon.rada.gov.ua/laws/show/1618-15#Text>

47 See, e.g., INT’L LAB. ORG., REPORT V(I): ENDING VIOLENCE AND HARASSMENT AGAINST WOMENT AND MEN IN THE WORLD OF WORK (2018) (presented at the 107th Session of the International Labour Conference), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_553577.pdf; INT’L LAB. OFFICE, REPORT III (PART 1B): GIVING GLOBALIZATION A HUMAN FACE, at para. 885 (2012) (presented at the 101st Session of the International Labour Conference), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf.

48 Int’l Lab. Org., Violence & Harassment Convention, 2019, at art. 10(e), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100_ILO_CODE:C190.

49 Int’l Lab. Org., Violence & Harassment Recommendation, 2019 (No. 206), at para. 16(e), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100_ILO_CODE:R206.

message applications such as Viber or Telegram. National court practice is still ambiguous regarding using screenshots and printouts of messages from phone/laptop as evidence.⁵⁰ Verification of digital evidence is probably the most difficult and problematic issue. Nevertheless, more courts tend to find screenshots of communication the relevant and admissible evidence.⁵¹

In terms of electronic evidence, there is a great risk of losing it. For example, chats in Telegram could always be deleted by both sides in any one-on-one conversation. Hence, the collection and recording of electronic evidence should be made as soon as possible after the fact of harassment or discrimination, not allowing the potential defendant to delete or change the content.

In the authors' opinion, a set of anti-discrimination rules or regulations aimed at promoting gender equality, including in particular the rights of women, in telework would be beneficial. For instance, Ukrainian activists on women's rights have been advocating for years for flexible working hours for women, who often face disproportionate burdens of care and other unpaid work. In its Concluding observations on the 8th periodic report of Ukraine⁵² the Committee on the Elimination of Discrimination against Women highlighted the importance of sustainable employment of opportunities for women. Telework and the option of flexible schedules broaden opportunities for women, making them more economically independent as well as increasing the participation of women in employment in the public and the private sectors.

In addition, legislative regulation of telework in Ukraine should also aim to open more vacancies to people with disabilities, who may require workplace accommodations that are easier to implement outside a traditional office. However, care should be taken to ensure that telework is not offered as a substitute to in-house work for workers with disabilities. In-person interaction with supervisors and coworkers can provide better opportunities for advancement, more integration into the business and other benefits, and the choice of whether to telework or work at a worksite should be based on the needs and preferences of the worker rather than what is most expedient for the employer.

Measures to improve participation by traditionally marginalized workers, including women and workers with disabilities, should be crafted with broad application and designed to address rather than perpetuate underlying societal dynamics of oppression. Measures such as those ensuring access to accommodations, or access to parental leave and other forms of family leave should be applied equally. One positive example is the recently adopted Law of Ukraine 1401-IX,⁵³ which equalizes the rights of women and men to parental leave. Previously the right of the father to take such leave is understood as "derivative" from the mother's right, reinforcing societal norms and stereotypes about women being exclusively responsible for caring for children. The Law defines parental leave up to the baby's age of three as an equal right of each of the baby's parents. It also supplements the Labor Code with the provision that both parents have the right to reduce working hours and to additional paid leave (for those who work and have two or more children under the age of 15, or a child with a disability, or an adopted child).⁵⁴ This is an important measure to promote gender equity and a more balanced distribution of care responsibilities within families and in society. The government and employers must also make sure that measures to reduce the burden of care work through better funding and access to childcare is available to both teleworkers and workers in traditional settings, including ensuring that telework is not used as a substitute for paid leave for care or equitable access to childcare.

PART 3. IMPLEMENTATION OF LEGISLATIVE NORMS AND COURT PRACTICE REGARDING REMOTE/HOME-BASED WORK IN UKRAINE

According to the data from the Labor Initiatives legal clinic,⁵⁵ Ukrainian workers reported the following violations of labor law: unilateral cutting of wages after transitioning to remote work during the lockdown, coercion to transfer to remote work, verbal instructions to work remotely, and mandatory work at the office even though it was possible to work remotely. Despite the fact that remuneration for remote work cannot be lower than work at the office, some

50 Центр демократії та верховенства права, Чи можна використовувати скріншоти як доказ у суді? (June 19, 2021), <https://cedem.org.ua/consultations/skrinshoty-yak-dokaz-u-sudi/>.

51 *Id.*

52 Comm. on the Elimination of Discrimination Against Women (CEDAW), Concluding observations on the Eighth Periodic Report of Ukraine, U.N. Doc. CEDAW/C/UKR/C/8 (Mar. 9, 2017), <https://digitallibrary.un.org/record/1286284?ln=en>.

53 Закон України «Про внесення змін до деяких законодавчих актів України щодо забезпечення рівних можливостей матері та батька у догляді за дитиною [Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine regarding Ensuring Equal Opportunities Mother and Father in Childcare"] <https://zakon.rada.gov.ua/laws/show/1401-IX#Text>

54 Comm. on Ukraine's Integration into the E.U., *Equal Childcare Opportunities for Both Parents* (July 6, 2020), <http://comeuroint.rada.gov.ua/en/news/73190.html>.

55 The NGO Labor Initiatives has been operating a free legal aid clinic on labor law in Kyiv since 2014. <https://www.trudovi.org.ua/about/>

workers in Ukraine⁵⁶ reported wage cuts of up to 50% or a loss of bonuses during remote work, a loss especially relevant for the public sector. Usually these were unilateral decisions of employers, and in most cases workers did not report such violations to appropriate bodies or commissions for fear of losing their jobs.

Judicial practice is not well-developed on the issue of telework, especially in terms of definitions. However, one case vividly demonstrates the importance of correct usage of definitions.

One of the enterprises of the gas sector in the Vinnytsia region introduced a “remote mode of work with being at the place of residence” from March 31 to April 10, 2020. The order to work remotely required employees to independently ensure compliance with the rules of the internal code of conduct, and to provide accounting of working hours and relevant information to their supervisor on a daily basis. This order established neither the procedure for monitoring employees’ observance of these requirements, nor specific persons who responsible for carrying out such control measures. On April 8, an engineering staff member was noticed driving into the city during working hours, at 3 PM. He explained he had to visit a pharmacy, and had given prior notice to a supervisor, but he was reprimanded on the basis of violation of the “remote mode of work with being at the place of residence.” The court of first instance, and subsequently an Appellate Court, ruled in favor of the employee who challenged the reprimand,⁵⁷ emphasizing that “remote mode of work with being at the place of residence” does not correspond with the term “remote work” and clauses of Art.60-2 of the Labor Code. Thus, according to the court’s interpretation, any attempts to reprimand employees for breach of this mode are illegal. Moreover, the plaintiff’s place of residence was not defined correctly, the procedure of monitoring also did not comply with the requirements of remote work.⁵⁸

One more court decision concerns the procedure of termination of an employment agreement at the initiative of an employee. The Supreme Court of Ukraine, in its decision of April 21, 2021, stated that failure to provide remote work can form the basis for termination of the employment contract by the employee within the period specified in the contract.⁵⁹ Under Article 38 of the Labor Code, an employee has the right to terminate a contract at his own initiative with two weeks’ prior notification about such a decision.⁶⁰ In case of valid reasons for terminating a contract (move to another city, care for the ailing relatives, illness, pregnancy, etc.), the employer must terminate a contract within the period specified by the employee.⁶¹ Thus, under this decision, failure to provide remote work (with the necessary equipment, tools, etc.) shall be considered as a valid reason for termination of an employment contract.⁶²

As a whole, during severe lockdown measures in March-April 2020, according to the data from Labor Initiatives legal clinic as well as numerous articles in media,⁶³ employers often coerced employees to take unpaid leave while continuing to perform their employment obligations at home without official orders on introducing remote work. In a case involving this issue, an employee who refused to take leave and work at home without any remuneration (as described in the court case No.639/7093/20 of the Zhovtnevyi District Court of Kharkiv City⁶⁴) was dismissed because of truancy under p.4 Art.40 of the Labor Code. The courts reinstated the employee on two grounds: first, unpaid leave could be taken solely at the initiative of an employee, and second, in case of a pandemic, remote work is allowed only on the basis of a written order, and any oral guidance to work remotely is not applicable.

A similar court case with dismissal due to truancy during the quarantine took place at the state enterprise in Odesa region.⁶⁵ In June 2020, an employee was officially transferred to remote work (based on the employer’s decision in accordance with p.1 Art.60-2 of the Labor Code). Then, in August 2020, he was reprimanded and dismissed because of absence at the office for two days (August 10 and 11). Following the breach of the “non bis in idem” principle as the employee sued and got a positive decision on his reinstatement at work.⁶⁶

56 Анастасія Зануда & Євгенія Ковалевська, *Дистанційка по-українськи: як вона змінила роботу і що буде далі*, BBC NEWS UKRAINIAN SERVICE (Apr. 28, 2021), <https://www.bbc.com/ukrainian/features-56849251>.

57 Вінницький апеляційний суд [Vinnytsia Court of Appeal], Feb. 3, 2021, Case No. 125/965/20, *Опендатобот*, <https://opendatobot.ua/court/94618384-ce8d22f97d2d69f6f4b5e9ce092265023> (Ukr.).

58 *Id.*

59 Верховний Суд [Ukraine Supreme Court], April 21, 2021, Case No.569/9738/20, <https://supreme.court.gov.ua/supreme/pres-centr/news/1117686/>

60 *Id.*

61 *Id.*

62 *Id.*

63 See Сергій Горбачов, Освітній Омбудсман, *Як захистити права учасників освітнього процесу під час карантину?*, OSVITA.UA (Mar. 16, 2020), <https://osvita.ua/school/71749/>; Кічич І. Шалені премії за чужий рахунок / shorturl.at/fsuz5; Олександра Устінова, *Вінницький медичний мор: лікарів відправляють «добровільно» додому за свій рахунок, щоб не тестувати*, Українська правда (Apr. 2, 2020), <https://life.pravda.com.ua/columns/2020/04/2/240437/>.

64 Жовтневий районний суд м.Харкова [Zhovtnevyi District Court of Kharkiv City] July 15, 2021, Case No. 639/7093/20, <https://reyestr.court.gov.ua/Review/97630323>

65 Роздільнянський районний суд Одеської області [Rozdilna City District Court of Odesa Region], April 14, 2021, Case No.511/1777/20 <https://opendatobot.ua/court/96562640-06a0e280fa91b9612f85fa553b0cc702>

66 *Id.*

Another set of decisions concerns remote work and payment of wages. In particular, this issue has been the most problematic for schoolteachers. For instance, during lockdown measures, all schools in one city of the Kyiv region were officially transferred to remote work with full remuneration. However, contrary to the legislative provisions, employers and the relevant city departments of education did not elaborate a clear procedure, form, and timelines for submission of reports by schoolteachers working remotely. In the absence of these reports, the school administrations refused to pay wages in full, suggesting instead only $\frac{2}{3}$ of the salary and citing the lack of confirmation of the teacher's work at home. The District Court of the Kyiv region⁶⁷ ruled that there are no grounds to accuse the employee of non-performance of working responsibilities remotely unless the employer did not provide accurate guidelines on the reporting process. The court ruled that the schoolteachers were entitled their wages in full.

One more case related to teacher's wages occurred in the Kherson region of Ukraine. A part-time teacher of Ukrainian language and literature was informed of the order on the transition to remote work and agreed to it. However, he was not included in a list of remote workers by the administration of the school because he was a part-time worker rather than a full-time worker. The director argued that wages should not be paid to part-time workers during the quarantine. The court of the first instance and further the Appellate Court⁶⁸ reaffirmed that every worker should get full remuneration during remote work irrespective of whether they are a full-time or part-time worker.

Amongst other aspects, Labor Initiatives labor lawyers encounter the following issues not being regulated by legislation or practice: OSH issues in remote work (such as insufficient electrical service in the home to maintain an office there), lack of communication among remote workers, compensation for utility bills during work at the home office (electricity, internet, water, etc.). In theory, the last point regarding compensation could be defined by the employment contract, but the authors have not seen such examples yet. Moreover, compensation of such costs for those employees who were transferred to remote work on the basis of the employer's decision (because of the COVID-19 pandemic) is also a lack of regulation.

PART 3-1. IMPLEMENTATION OF LEGISLATIVE NORMS ON REMOTE/HOME-BASED WORK DURING WARTIME IN UKRAINE

Russia's brutal and unprovoked invasion of Ukraine caused an immense shock and challenge for the entire Ukrainian labor market. However, the adoption of remote work regulations during the COVID-19 pandemic served as a lifeline for millions of Ukrainians who were forced to relocate to another region or flee the country entirely, and saved their jobs by enabling them to work remotely.

Laws regulating labor relations under martial law (in particular, Law of Ukraine No.2136⁶⁹) do not create separate provisions in respect of remote/home-based work; therefore, the legislative norms adopted in 2021 remain in effect.

Transferring to remote work does not require two months' advance notification. For the period of the existing threat of a military aggression or other kinds of emergencies, remote work may be introduced by an order (resolution) of the employer, without entering into an employment agreement about remote work in writing.⁷⁰

Legislation neither stipulates an employee's obligation to notify the employer about his/her location, nor prohibits performing remote work from abroad.⁷¹ Hence, remote work from abroad shall not require any additional paperwork.

However, remote work from abroad is not allowed for certain employment categories, in particular remote work of public servants and those who are employed at state-owned enterprises. On April 12, 2022, the government of Ukraine issued Resolution No. 440⁷², which introduces remote work from abroad only in case of a public servant's business trip. Staying abroad without a legally formalized business trip can result in disciplinary action for a public servant. Similar provisions are applied to workers of state-owned enterprises (Resolution of the government of

67 Білоцерківський міськрайонний суд Київської області [Bila Tserkva City District Court of Kyiv Region], May 5, 2021, Case No. 357/7412/2, <https://opendatabot.ua/court/99154585-a1b29cf779f7502b78e4db5a85aa7588>

68 Херсонський апеляційний суд [Kherson Court of Appeal] February 9, 2021, Case No.766/8422/20, <https://reyestr.court.gov.ua/Review/95193648>

69 Закон України «Про організацію трудових відносин в умовах воєнного стану» [Law of Ukraine "On Regulation of Labor Relations during Martial Law"] (March 15, 2022) <https://zakon.rada.gov.ua/laws/show/2136-20#Text>

70 Dmytro Pavlenko & Viktoriia Sydorenko, *Major Changes Introduced by the Law of Ukraine "On Organization of Labor Relations under Martial Law" No.2136-IX*, DELOITTE UKRAINE (Apr. 8, 2022), <https://www2.deloitte.com/ua/en/pages/press-room/tax-and-legal-alerts/2022/04-08.html>.

71 Головне управління Держпраці у Київській області [The Main Department of the State Labor Service of Kyiv Oblast], Чи може працівник, якій працює дистанційно, виконувати свої трудові обов'язки за кордоном? [If remote worker can perform his functions from abroad?] Mar. 23, 2022, <http://kiev.dsp.gov.ua/novyny/chy-mozhe-pratsivnyk-ia-kii-pratsiuie-dystantsiino-vykonuvaty-svoi-trudovi-obov-iazky-za-kordonom/>.

72 Кабінет Міністрів України [Cabinet of Ministers of Ukraine], Постанова [Resolution] no. 440 (Apr. 12, 2022), <https://www.kmu.gov.ua/npas/deyaki-pitannya-organizaciyi-roboti-derzhavnih-sluzhbovciv-ta-pracivnikiv-derzhavnih-organiv-u-period-voyennogo-stanu-440>.

Ukraine No.481⁷³).

According to the Labor Initiatives legal clinic, many workers of state-owned enterprises have been forced to return to Ukraine to work remotely despite the fact that technical and organizational conditions for remote work from abroad were sufficient.

PART 4. LABOR INSPECTION AND REMOTE/HOME-BASED WORK

There were no specific changes related to telework in terms of labor inspection regulations, nor are there reports or statistical data analyses from the state authority on how to inspect remote or home-based workers in practice.

Representatives of the labor inspectorate (the State Labor Service in Ukraine) do not state official positions on carrying out inspections in home offices. Current legislative provisions do not anticipate conducting labor inspections in the home, only at industrial, office, and administrative premises. The State Labor Service has merely published snapshots of general rules for remote or home-based work on their social media feeds.

The authors are not aware of any particular complaints filed by workers doing telework/remote work regarding excessive hours, overtime, or payment deductions.

Article 265, part 2 of the Labor Code stipulates in the event an employee is actually allowed to start work without entering into an employment agreement or contract, or is employed part-time and actually works full-time and is paid a wage (remuneration) without assessment and payment of the single contribution for mandatory state social insurance and respective taxes, the employer will be subject to a fine in the amount of ten times the official minimum wages (as of October 1, 2022 the minimum wage is 6700 UAH – around 183 USD), set by law as of the moment a violation is revealed, for each person with respect to whom a violation is committed. For the first violation, a warning is issued to legal entities and individuals (entrepreneurs who hire employees and are single taxpayers). Committing a violation repeatedly within two years from the date of detection of the violation will result in a fine in the amount of 30 times the minimum wages established by law at the time of detection of the violation, for each person with respect to whom a violation is committed.

As mentioned above, employers and employees should make a written agreement on remote or home-based work with flexible working hours based on a template developed and distributed by the Ministry of Economy. Failure to conclude an agreement on remote work should lead to imposing fines to the employer according to Article 265 of the Labor Code. However, currently, it is not clear whether it is necessary to sign a new agreement on remote work with an already-hired employee, or merely to execute an additional agreement on remote work as an addendum to the valid employment agreement.

PART 5. INTERNATIONAL STANDARDS ON TELEWORK

Under Annex XL to Chapter 21 of the Association Agreement between the European Union and Ukraine,⁷⁴ Ukraine undertakes to gradually approximate its legislation to the following EU legislation, amongst others: Directive 2003/88/EC on the organization of working time,⁷⁵ Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work,⁷⁶ and Directive 2019/1158 on work-life balance for parents and carers.⁷⁷ These legal instruments influence the shape of working conditions, including teleworking. Directive 2019/1152 on transparent and predictable working conditions in the European Union⁷⁸ could be also considered as a guide in the area of telework for Ukraine.

In January 2021, the EU Parliament issued recommendations on the right to disconnect that emphasize that all workers, in all sectors, should have this right, in order to ensure fair working conditions, including a balance between

73 Кабінет Міністрів України [Cabinet of Ministers of Ukraine], Постанова [Resolution] no. 481 (Apr. 26, 2022), <https://www.kmu.gov.ua/pras/deyaki-pitannya-organizaciyi-roboti-pracivnikiv-subyektiv-gospodaryuvannya-derzhavnogo-sektoru-ekonomiki-na-period-voyennogo-stanu-481>.

74 E.U.-Ukraine Association Agreement, 2014 O.J. (L 161) 3, https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf.

75 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time, 2003 O.J. (L 299) 9, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0088&from=FI>.

76 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, O.J. (L 183) 1, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31989L0391>.

77 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, O.J. (L 188) 79, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L1158>.

78 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, O.J. (L 186) 105, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L1152>.

work and home life, and to protect health and safety; additionally, this right should be effectively enforced.⁷⁹ Many laws and national-level collective agreements have been implemented in Europe to protect the right of workers to refrain from engaging directly or indirectly in work-related electronic communication during non-working hours and holidays, and to prevent retaliation against workers who exercise this right.⁸⁰ This also offers guidance for Ukraine lawmakers and social partners.

The main applicable international and EU instruments specifically focused on telework include ILO Convention 177 on Home Work,⁸¹ and ILO Recommendation 184 on Home Work,⁸² which have historically been applied to home-based workers and may offer some guidance on how to approach some of the telework challenges, as well as the Framework Agreement on Telework, concluded on 16 July 2002, by the European cross-industry social partners.⁸³

In addition, since telework is a specific type of employment relationship, ILO Recommendation No. 198 on the employment relationship⁸⁴ and other international and EU labor standards, applicable to different aspects of an employment relationship, such as working time, night work, part-time, employer's obligation to inform workers and to ensure transparent and predictable working conditions, labor inspection, OSH, freedom of association, right to organize, collective bargaining, tripartite consultation, workers' representatives, equality of opportunity and treatment, vocational guidance and training, employment security, wages, social security, and maternity protection, are also applicable to telework employment arrangements.⁸⁵

The Framework Agreement on Telework (Framework Agreement) is the first autonomous agreement negotiated by the European social partners and as such it represents a landmark in EU industrial relations.⁸⁶ The Framework Agreement establishes a general framework of rules on telework. It aims to promote the development of this new form of work while safeguarding the protection of workers and the interests of employers. The social partners wanted to ensure that no new employment status would result from an expansion of telework. While the Agreement stresses that teleworkers enjoy the same legal protections as employees working permanently at the employer's premises, it also identifies aspects that are specific to distance working and which call for adaptation or special attention, such as employment conditions, data protection, privacy, equipment, health and safety, organization of work, training, and collective rights.

Based on the main European principles of telework⁸⁷ and their comparison with Ukrainian legislation, the authors have developed the following conclusions:

1. The voluntary principle: telework should be voluntary for both employees and employers, except in those cases where it is required as part of the initial job description. There is no right as such to telework and there is no obligation to do telework. Telework can thus only be introduced by mutual agreement. Telework is always, no matter how it is introduced, voluntary for the worker.⁸⁸

Although the abovementioned principle is considered by the Ukrainian legislation, there are some exceptions in case of threat of spreading diseases, pandemic, or the need of self-isolation of the employees in the situation prescribed by the law and/or at the time of a threat of a military invasion, or other emergency situations such as a natural disaster.⁸⁹ In such situations, remote/home-based work may be established by order of the employer,

79 European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)), at Annex (9)-(10), O.J. (C 451) 161, 169, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021IP0021>.

80 EUROFOUND, TELEWORK IN THE EU: REGULATORY FRAMEWORKS AND RECENT UPDATES 29 (2022), https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef22032en.pdf.

81 Int'l Lab. Org., Home Work Convention, 1996, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312322

82 Int'l Lab. Org., Home Work Recommendation, 1996, https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312522

83 Framework Agreement on Telework (July 16, 2002) (signed by the European Trade Union Confederation, the Union of Industrial and Employers' Confederations of Europe, the European Association of Craft, Small and Medium-Sized Enterprises, and European Centre of Employers and Enterprises providing Public Services), <https://www.etuc.org/en/framework-agreement-telework>.

84 Int'l Lab. Org., Employment Relationship Recommendation, 2006, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535

85 EU-ILO PROJECT "TOWARDS SAFE, HEALTH, AND DECLARED WORK IN UKRAINE," TELEWORK: ONLINE TRAINING SERIES: INTERNATIONAL AND EU LABOUR STANDARDS BACKGROUND PAPER (July 2020), https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/genericdocument/wcms_753334.pdf.

86 *Id.*

87 PABLO SANZ DE MIGUEL, MARIA CAPRILE & JUAN ARASANZ, EUROPEAN AGENCY FOR SAFETY AND HEALTH AT WORK, REGULATING TELEWORK IN A POST-COVID-19 EUROPE (2021), <https://euagenda.eu/upload/publications/telework--20post-covid.pdf>.

88 EUROPEAN TRADE UNION CONFEDERATION, VOLUNTARY AGREEMENT ON TELEWORK (2003) (the ETUC's interpretation guide for the 2002 Framework Agreement), https://resourcecentre.etuc.org/sites/default/files/2019-09/Telework_ETUC%20interpretation%20guide%20-%20EN.pdf.

89 Labor Code article 60-2, part 1 and Article 60-1, part 8.

without the otherwise obligatory conclusion of a written employment contract for remote or home-based work. An employee must be notified of such an order within two days from the date of its approval, but before the start of remote/home-based work. In this case, the general requirement that a change to essential working conditions requires two months notice shall not apply.

2. Reversibility: when telework is not part of an initial job description, the decision to move to telework is reversible by individual and/or collective agreement. The modalities of this reversibility are established by individual and/or collective agreement.

If telework was established by an individual employment contract, its terms are defined there - whether for several months, permanently, or for a particular work performance. If telework was introduced by the employer's order, timelines are set there.

3. Employment conditions, training, and collective rights: teleworkers are entitled to the same rights and opportunities granted by legislation, collective bargaining, and company rules/policies as comparable workers at the employers' premises.

This principle is, in general, observed by legislation. However, in practice the realization of collective rights could differ for remote employees. As of the writing of this report, no such cases have been reported.

4. Data protection: the employer is responsible for ensuring the protection of data used and processed by the teleworker

Such a chapter is stipulated by the Model agreement on remote or home-based work. It is realized pursuant to other laws, for instance, the Law of Ukraine "On Protection of Personal Data."⁹⁰ Clauses on the protection of confidential data are included in the employment agreement under the parties' agreement.

5. Privacy: employers respect the privacy of employees and monitoring systems have to be proportionate to the objectives.

The massive uptake of remote work during the COVID-19 pandemic has often been coupled with an increase in the use of worker surveillance tools (including geo-localization) and extremely invasive software, such as taking a screenshot or a photo of each worker every few minutes through their webcam, tracking every keystroke, and analyzing every email and chat message sent.

According to the key trade union principles for remote workers⁹¹ published by UNI Global Union, the use of surveillance tools to monitor remote workers, store their data, and use the data in disciplinary proceedings, should be restricted unless firmly regulated through national or local law, or a trade union collective agreement. Workers and trade unions should be granted the right to transparency and to participate in the implementation and use of such tools.

Ukrainian legislative norms on remote and home-based work do not enshrine particular regulations and guidelines on these items. Clauses guaranteeing the right to privacy of employees and limiting the use of surveillance and requiring informed consent could be stipulated in the model agreement on remote or home based work.

6. Equipment: issues regarding equipment have to be agreed upon before starting the telework arrangement. As a general rule, the employer is responsible for providing, installing, and maintaining the equipment unless the teleworker uses their own equipment.

An employment contract for remote work shall determine: 1) the procedure and terms for providing employees who perform **work remotely** with the equipment, software, and hardware tools, 2) information security tools, and other means necessary to fulfill their duties, 3) the amount, procedure, and timing of payment of compensation for use of equipment, software and hardware, information security tools and other means owned or leased by employees, 4) the procedure for reimbursing other expenses related to remote work.

Thus, remote work under Ukrainian legislation does not apply the general concept that the employer is responsible, but that the responsibility is established by agreement. Thus, an employment agreement prevails.

In terms of **home-based workers**, it is an employer's obligation by default to provide the means of production,

90 Закон України «Про захист персональних даних» [Law of Ukraine On Protection of Personal Data], June 1, 2010, Law No, 2297-VI, VVR, 2010, no. 34, art. 481, <https://zakon.rada.gov.ua/laws/show/2297-17#Text>

91 UNI Global Union, Key principles for collectively bargaining to advance remote workers' rights (2021) https://uniglobalunion.org/wp-content/uploads/uni_remote_work_guidelines_report.pdf

materials, and tools necessary for the worker unless otherwise provided by the employment contract. In case of using his own tools and instruments, the employee is entitled to compensation under the provisions of Article 125 of the Labor Code. It is worth noting that under this article, the employee only has a right to compensation without the relevant obligation for the employer.

7. Safety and health: the employer is responsible for the OSH of the teleworker. Among other aspects, this requires that employers conduct a risk assessment and inform teleworkers of potential risks

Remote employees are personally responsible for ensuring safe and healthy working conditions. Employers must provide safety training to remote workers (as for other workers notwithstanding their mode of work) as well as recommendations on work with the equipment and means transferred to the remote worker. Clauses on remote work in the Labor Code do not specify these items in detail, just referring to Lex specialis - the Law of Ukraine "On Labor Protection."⁹²

Specific provisions regarding OSH for home-based work are not enshrined by the Labor Code. There is only one clause interpreting which we conclude that general OSH rules cover home-based workers: "When **working at home**, employees shall be subject to the general working regime of an enterprise, institution, and organization unless otherwise provided in the employment contract."⁹³

8. Organization of work: the teleworker manages the organization of their working time under the limits of national legislation and collective bargaining.

As it was mentioned above, home-based workers shall be subject to the general working regime of an enterprise, institution, and organization unless otherwise provided in the employment contract.

Whereas remote workers distribute working time at their own discretion, they are not subject to the internal code of conduct unless this is required under the employment contract. At the same time, the total duration of working hours cannot exceed the general rules, i.e. 40 hours per week. By agreement between the employee and the employer, remote work can be simultaneously combined with the employee's performance of work at workplaces on the premises or on the territory of the employer.

PART 6. CONCLUSIONS AND RECOMMENDATIONS

Based on this research and for better implementation of the law provisions, telework regulation in Ukraine could be improved. For this aim the following recommendations could be determined:

For policy and lawmakers:

1. Fully incorporate the principle of voluntariness in remote and home-based work, as it is now established for flexible working hours. Current legislation stipulates pregnant women and some other categories of employees, mainly those with family obligations, may perform their duties through remote work if this is compatible with the business needs of the employer. This should be available to all employees, whatever their identity or status, provided the employer has the necessary resources and means.
2. Enhance the definition of the right to disconnect and bring it into conformity with the best European and world legislative practices. There should be measures that guarantee all workers in all sectors and work arrangements the right to refrain from engaging directly or indirectly in work-related electronic communication, such as emails and other messages, during non-work hours and holidays. Employers should be mandated not to require workers to work outside working time and not promote an 'always on' work culture in which workers who waive their right to disconnect are clearly favoured over those who do not. Workers reporting situations of non-compliance with the right to disconnect in the workplace should not be penalized.
3. Measures to prevent anti-discrimination should be strengthened to ensure teleworkers are fully protected and can access appropriate remedies. National legislation should be amended to shift the burden of proof to the employer in anti-discrimination cases generally, which would benefit teleworkers and all workers in Ukraine. Teleworkers, and other workers, would also benefit from efforts from government ministries to raise awareness and educate about their rights under law and how to seek justice in cases of employment

⁹² Закон України «Про охорону праці» [Law of Ukraine "On Labor Protection"], October 14, 1992, Law No,2694-XII, VVR 1992, no.49, art.668, <https://zakon.rada.gov.ua/laws/show/2694-12#Text>

⁹³ Labor Code art. 60-1, part 5.

discrimination, including information on how to build a good case and obtain evidence to prevail in cases.

4. Employers that have teleworkers in their business should be required to adopt preventative measures that take into account the unique dynamics and risk factors inherent in telework, and to provide adequate training to teleworkers and their supervisors on how to identify and report discrimination, violence and harassment. Protections against occupational safety and health should incorporate discriminatory violence and harassment, including the obligation on employers to take preventative measures.
5. Introduce measures that protect a worker's right to privacy. These should include limiting when employers can utilize surveillance technology to when it is necessary to achieve a legitimate objective that cannot be achieved through other, less invasive means. Employers should be required to negotiate with unions prior to adopting such measures, and obtain informed consent from workers. Surveillance tools that enable the use of digital transmission and/or recording of audio or visual of workers without their informed consent should be prohibited. Employers should be required to protect workers' personal data.

For social dialogue partners:

1. Develop concrete rules of remote work in CBAs or other local documents, depending on the sector and the needs of workers and companies' capacities. These could include provisions that:
 - 1a. Provide employees with an automatic system that disables messaging services outside working hours to guarantee work-life balance;
 - 1b. Enshrine clear rules for reimbursement of the costs of remote work, including proportional reimbursement for electricity, water and other costs;
 - 1c. Specify a process for employees to indicate situations when it is impossible to perform work at a fixed workplace for reasons beyond the employee's control, such as power outages, or water or Internet cut-offs. For instance, a message or call to the employer or a supervisor could be a sufficient notification in case of force-majeure; the list of specific force-majeure circumstances could be also set in the contract on home-based work.
 - 1d. Include measures to ensure that the union has access to remote workers, and access to digital spaces to hold meetings and engage in trade union activities on an equivalent basis with workplace access. This could include measures like access to the company zoom or other digital platforms.
 - 1e. Strictly follow legislative regulations while switching on telework under the employer's unilateral decision. Telework or other modes of work at home shall be properly formalized. Minor violations of law provisions could be challenged in court.

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