



Work from Home

Antonia Herfurth, Rechtsanwältin in Munich and Hanover

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The classic work picture is changing due to digitalization - away from the fixed desk in the office and towards flexible use on the move or in the home office. The current Corona crisis is now acting as a catalyst: around ten million people in Germany are currently working in their home offices, often on short notice and not planned. This raises many questions: Is the employee entitled to work from home? Does the employer or the employee bear the costs for an adequate equipment of the home office, or also costs for paper, toner, electricity or water? Can the employer ensure that the employee takes rest periods required by law? To what extent is the insurance cover provided for work from home?

Obligation to work from home and right to work from home

The employer cannot unilaterally impose an obligation to work from home.

Whether and when employees work from home should therefore be regulated in the employment contract. If this is not done, a supplementary agreement to the employment contract can be concluded subsequently. The work in the home office can also be agreed upon orally, or the employee shows by his behaviour that he agrees with working from home, e.g. by taking materials from the office and actually working at home. A written agreement is the safest from a legal point of view and therefore recommended.

Just as there is no obligation to work from home, there is no right to work from home - even in Corona times.

If there are enough workplaces available and hygienic safety precautions have been taken, there is nothing to prevent working in an office. Even if schools or day-care centres close, employees with children have no right to go to home office. Though, the employer should check whether home office is a possibility or whether children can be brought into the office.

However, the employee has a right to go to home office if this is laid down in the employment contract, a shop agreement or a collective bargaining agreement. If a right to recall (*Rückholrecht*) was contractually agreed upon, the employer can, however, under certain circumstances demand to work in the office. Even without a corresponding contractual provision, the employer may recall the employee, e.g. if the technical requirements for working from home are not met and cannot be met and the employer is threatened with damage as a result. This again only applies if the employer has taken the appropriate safety and hygiene precautions.

Furnishing and equipment of the home office

The occupational safety standards apply in the office as well as in the home office. The employer must ensure the safety and health of the employee by taking the necessary technical, organisational and per-

sonal measures. To this end, the employer may have to equip the employee's home office with an ergonomic chair, desk, laptop, printer, office supplies, etc. at his own expense. However, this does not open the door for a comprehensive, expensive re-equipment of the already properly equipped home office.

For reasons of secrecy and data protection - more on this at once - the employee should work in the home office with operating equipment provided by the employer. The use of private PCs, notebooks and also smartphones (*bring your own device / BYOD*) would require considerable additional security measures. For PCs and laptops, the software must always be up-to-date and an anti-virus program must be installed. The internet must be sufficiently fast to allow videoconferences, for example. Otherwise, the employee must order a tariff with a higher bandwidth at the employer's expense.

The set-up and equipment of the home office should be agreed in writing between the employer and the employee. In reality, however, implementation and control often fail. The employer cannot control whether the employee always sits in the ergonomically equipped home office or on the sofa. Furthermore, the ownership of the purchased items should be recorded and the private use of equipment purchased by the employer should be excluded.

The employee has a duty to cooperate in ensuring his safety and health at work. The employer, for his part, must inform the employee in detail about the correct setup of the home office. In addition, the employer should offer to visit the employee's home office and assess whether the required standards have been met or need to be improved. One problem is that the employer has no right to visit the employee's home office. The German constitution protects spatial privacy. However, the employee should be cooperative. If he denies access, photos of the workplace can be sent to the employer. If the employee also refuses to do so, the workplace regulations may be partially exempted in favour of the employer.

Protection of secrets and data protection

Companies are subject to increased due diligence obligations with regard to the protection of trade secrets. If companies do not protect confidential information by taking appropriate secrecy measures, this information may lose its legal protection as a trade secret. As a result, companies are not entitled to any legal claims if third parties obtain information against the company's will.

When working from home, there is an increased risk that unauthorized third parties may gain access to confidential data and documents. This can happen by connecting private devices, which may not comply with data and secrecy protection requirements, to professionally used and protected devices or by listening to business calls by other people living in the household or voice assistants such as Google Home, Siri or Alexa.

Since secrecy and data protection is extremely sensitive, a written agreement is required. This agreement regulates which measures the employee has to take in the home office in order to guarantee the increased protection standards.

In order to meet the standards, an employee in the home office may not use his private devices for reasons of secrecy protection - legally, he does not have to. For this reason too, the employer should provide company equipment and keep its software up to date.

The employee may not store sensitive data on external devices, but only on the company server, and he may only use VPN connections. The hard disk of the company PC or laptop should be encrypted. The employee is obliged to set up secure passwords and not to pass them on. Professional e-mails may not be forwarded to the private mailbox. If the employee does not live alone in the household, he must activate the screen lock when leaving the workplace. Confidential documents must be stored in a lockable room in a lockable cupboard; and he must prevent

family and friends from accessing the documents. If documents are no longer required and can be destroyed, he must dispose of them in accordance with data protection regulations, for example by using an appropriate shredder with particle cut or by tearing them into very small pieces (confetti).

Reimbursement of expenses for resources of the employee

The employee can basically demand reimbursement of the - necessary - expenses incurred by the home office from the employer. For this purpose, it should be laid down in writing whether and if so, which costs the employer will bear. The employee must provide evidence of the costs incurred. These are likely to be mainly electricity and working materials such as paper or toner. If an internet flat rate exists, the employee cannot demand reimbursement from the employer due to increased internet use, as the costs for the flat rate would have been incurred anyway.

Since it can be difficult to break down the expenses incurred (especially for electricity, water, heating), a monthly flat rate is recommended, e.g. EUR 50.00. The employee can only demand reimbursement of a part of the rent from the employer if the private use of the own flat during home office is considerably restricted and the flat is therefore partly "useless".

Working time recording

The employee is also subject to the same working time rules in the home office as in the office. For this purpose, the employer should set fixed working hours, similar to those in the office.

To enable the employer to track the working hours, the employee must document the start of the workday, break times and the end of work. In principle, the employer must also provide the employee with remote access to the company's legally compliant time recording system. The employer cannot check whether the employee actually works as specified. He

must trust the employee. Similarly, the employee must trust the employer to ensure that he is not monitored, for example by webcam or keyloggers that record the employee's keystrokes. For monitoring purposes, the employer should therefore not only have time statements presented to him, but also, at certain intervals, proof of performance.

Compliance with rest periods required by law

The scope of the working time to be performed results from the employment contract or collective bargaining agreement. In the home office, the German Working Hours Act (*Arbeitszeitgesetz*) applies just as in the office.

The employee may not work more than eight hours per day or ten hours if the average working time of eight hours per working day is not exceeded within six calendar months. The employee must also observe breaks and rest periods as in the office: After six hours of work, the employee is entitled to a 30-minute break, after nine hours to a 45-minute break. Between the end of work and the start of work the next day, there must be at least eleven hours without interruption. As with daily working hours, the rest period can be shorter on some days. Therefore, it must be at least twelve hours on another day - and this within a calendar month or within four weeks.

Particularly problematic when working from home is an interruption of the rest period, usually due to communication. This is because the interruption of the rest period causes the eleven hours to start again.

It is controversial and not clearly clarified in court whether there is an interruption if the employee gives a short information by telephone or sends e-mails in the evening. It is argued that every interruption is working time because the rest period is for recreation. Other opinions weight the activity and assume an interruption only if a certain threshold is exceeded. This can easily be the case if a supervisor

becomes active and requires the employee to answer technical questions, for example.

It is advisable to define times in which the employee must be available. This helps to ensure that rest periods are observed. The working time recording not only helps as a control instrument for the employer, but also for the employee himself. It is hardly possible to ensure that rest periods are observed. As an extreme measure, the employer can prohibit work during the rest period. A North German automobile company has even switched off its mail server at night to ensure that rest periods are observed.

Incidentally, the employee himself is responsible for observing the rest periods. Working from home requires more self-discipline and self-organization than work in the office.

Insurance cover in the home office

If the employee suffers a damage in the office or otherwise in connection with his professional activity, this is a case for the statutory accident insurance or the liability insurance taken out by the employer.

The employee is also subject to the statutory accident insurance in the home office. The decisive factor is that the damage occurs during an activity that is factually related to work. This is where things get complicated because there are considerable differences between home office and office work: The statutory accident insurance applies if the employee is injured in the office on the way to the coffee machine, but it does not apply in the home office when getting a coffee from the own kitchen. Accident-insured activities in the home office are, for example, accepting a parcel with office supplies needed for work and fetching company documents from the printer. Accepting a private parcel or getting a drink from the kitchen during working hours is not covered by accident insurance.

In the event of damage, the employee should gather precise evidence as quickly as possible that the accident occurred in connection with his professional activity. If he cannot prove this, the statutory accident insurance will not pay in case of doubt and the employee must pay for the damage himself. Therefore, he could document when he is working on which document, save his call lists or take screenshots.

If an employee wants to make sure that he is fully insured, he should take out insurance himself. In addition to occupational disability insurance, private accident insurance can also be considered.

Conclusion

There are three points to consider when working from home:

- Information
- Written agreement
- Trust

In the home office, the employer has fewer possibilities to control compliance with data protection, technical and health requirements. Therefore, a precise education of the employee is indispensable by information meetings or information brochures, in which employees are sensitized for questions, problems and obligations around home office. A written home office agreement with detailed regulations is also important. Such regulations impose increased duties of care on the employee. Apart from that, employer and employee must trust each other.

It is important that all measures and regulations are not limited to the current Corona pandemic but are always applicable when employees work from home. The current Corona crisis is the cause, but not the reason, for the need to regulate the work of employees in the home office.

In fact, to the surprise of many, it turns out that the remote work for the company works better than expected: The systems and networks withstand the strain, the processes are inevitably more structured, digital document management more disciplined. And it turns out that many time-intensive and cost-intensive business trips can be replaced by video conferencing. But new perspectives are also opening up for employees: They can better organize family care, such as the distances and background to day-care centres or school.

Experts not only see the Corona crisis as a boost for further digitization, but also expect a new mix of work arrangements in the future based on this experience. Employers should prepare for this in good time.

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For further information please contact:

Antonia Herfurth

Attorney at Law

Ulrich Herfurth

Attorney at Law

Herfurth & Partner Rechtsanwalts-gesellschaft mbH
Luisenstr. 5
30159 Hannover
Germany

Tel.: +49 (511) 30 75 6-0
Fax: +49 (511) 30 75 6-10
herfurth@herfurth.de
www.herfurth.de

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ALLIURIS

The ALLIURIS GROUP, consists of 20 law firms and 320 corporate lawyers within Europe, Asia and America. (www.alliuris.org).

.....
Your contact:

Alisha Daley-Stehr,
Alliuris Communication

info@alliuris.org

Fon 0049-511-307 56-0

Fax 0049-511-307 56-10

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EDITORS

ALLIURIS

ALLIANCE OF INTERNATIONAL

BUSINESS LAWYERS A.S.B.L.

Luisenstr. 5, D-30159 Hannover

Fon +49-511-307 56-50 505056-20 Fax +49-511-307 56-60

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