

Teleworking : Up against social and fiscal constraints

Teleworking refers to a particular organisation of work. Long bereft of a legal definition, teleworking is now defined as *“a way of organising and/or performing work, using information and communication technologies under a contract of employment so that the work which could have otherwise been carried out on the employer’s premises, is usually done outside those premises and more specifically at the employee’s home.”*

Teleworking therefore refers to an occupational activity carried out in a regular and habitual manner, fully or partially, from a distance. Most often it will entail working at home, but also to work carried out in a telecentre.

Although Luxembourg is not one of the pioneers of teleworking, this work organisation method, which concerns ca. 7% of workers, is nonetheless developing more and more in the Grand Duchy. And yet this development benefits above all resident employees (an increase of ca. 12% between 2010 and 2015 according to a Statec study). In fact, we shall see that the tax and social policy for frontier workers is not really motivational, since it imposes de facto certain quota on them.

Legally, teleworking stems from two main sources in Luxembourg:

-**A framework agreement** on teleworking concluded by and between the social partners at European level on **16 July 2002**

- **A Grand Ducal Regulation of 15 March 2016** making mandatory the agreement by and between the social partners of 15 December 2015 on the legal regime of teleworking, valid from 2016 to 2018.

1) General rules on teleworking

First of all, before a teleworking system can be put in place, the joint works council or, in the absence thereof, the staff delegation must be informed and consulted.

Then, the choice of teleworking must materialise either through the employee’s initial contract or in a subsequent amendment. More specifically, this modus operandi must be on a **voluntary basis** on the part of the employer and the employee. It must therefore be accepted by both parties to the contract. It is consequently imperative to have a formal agreement concluded by and between the employer and employee so that the latter is protected in case of an occupational accident. A simple exceptional agreement will not suffice.

An employee's refusal to accept a proposal for teleworking from his employer shall not constitute a reason to rescind the contract in and of itself. Similarly, as the workplace is a substantial element of the employment contract, the employer may not impose this unilateral form of work.

It is important to note that certain **additional indications** shall be required in the contract of employment (or its amendment) over and above those required by law for all employment contracts:

- The place from which the employee will perform the teleworking
- The precise description of the teleworker's position and the tasks to be performed, and where applicable, the objectives to be reached
- The classification of the employee if an collective bargaining is applicable in the company
- The hours and days of the week during which the employee must be reachable
- The department and branch of the company to which the employee is assigned
- The employee's superior(s)
- The employee's contact person(s)
- The precise description of the teleworker's work tools
- The insurance policies taken out by the employer to cover the disappearance or damage of equipment (fire, water damage, theft, etc.). It should be noted that the employer has no obligation to take out such insurance.

As the employee will work exclusively and regularly from his home, a certain number of rules must be observed. The employee must not be discriminated against in any way because of his status as teleworker, particularly as regard the conditions of remuneration, access to promotion and collective and individual access to ongoing vocational training.

Thus, when the teleworking formula entails a loss of a benefit in kind enjoyed previously by the teleworker, or when the latter cannot enjoy the benefits in kind that are granted to other employees of the company, the employer shall compensate that loss. It shall be incumbent on the parties concerned to reach an agreement on the terms and conditions of such compensation on a case-by-case basis.

Furthermore, the employer shall in principle be responsible for providing, installing and maintaining such equipment as needed for teleworking. The employer shall moreover assume the costs relating to the loss or damage of equipment and data used by teleworkers. Conversely, a teleworker must take good care of equipment entrusted to him.

In parallel, the employer must assume all costs incurred directly owing to said teleworking, in particular for communications (e.g. Internet connection). Conversely, the relevant legislation does not stipulate any lump-sum to be allocated to the teleworker to cover expenses relating to teleworking. The employer and employee shall therefore remain free to negotiate such compensation together.

For his part, the employer shall be required to take such measures as necessary to protect data used and processed by the teleworker. The employer must thus ensure that no third party can gain access to the company's data. He must moreover prevent any fraudulent use by his employees. The teleworking shall consequently have to be clearly supervised to ensure compliance with the relevant

legislation: Can the employee take files home? Could he store data and if so, where? It is vital to be able to guarantee the same level of data protection whether the work is performed remotely or not.

Teleworking consequently does entail constraints for the company. To a certain degree, it can however mean savings in terms of fixed costs relating to the rental of parking spaces and workspace (reduced number of floor space needed). For employees in search for a better balance between private and working life, it appears as a real remedy to daily traffic jams and therefore as a real way to save time. Nevertheless, the international rules on social security and taxation loom as genuine sources of obstruction.

2) Impact of social security rules on teleworking

Regulation (EC) no. 883/2004 on the coordination of social security systems, which entered into force on 1 May 2010, replacing Regulation (EEC) no. 1408/71 has established a general principle according to which **an employee may be affiliated only in one state: the state of that employee's activity**. In the past, an employee who worked simultaneously in two countries could have double social security.

The important criterion in the case at hand is the employee's substantial activity in his country of residence. When an employee is going to work 25% of his working time or receive 25% of his remuneration in his country of residence, all remuneration received in the different countries shall be subject to a single social security regime, that of the employee's country of residence.

Consequently, teleworking days shall feed this counter of 25%, whilst limiting the possibility for frontier workers to engage in teleworking if they wish to remain affiliated with the Luxembourgish social security system. More specifically, the consequences of a change in social security are substantial for employer and employee alike.

The Luxembourgish company must first of all become affiliated as a "foreign company" with the foreign social security system (ONSS in Belgium; URSAF in France). It must then pay the employer's contributions of that foreign company which are far higher than in Luxembourg. Finally, the employer will not benefit any longer from reimbursements from the mutual health insurance if the employee is ill.

The consequences will be even more significant for the employee. First of all, he too shall have to assume generally higher contributions, whether he is a German, Belgian or French resident. Furthermore, the employee shall not be covered by the CNS any longer, Luxembourgish allowances will no longer be paid, and his years of work shall not be taken into account for the Luxembourgish pension, since the right to a pension is determined on the basis of years of affiliation.

To avoid this pitfall, therefore, it is essential for the employer to limit the duration of teleworking to one day (or two half days) per week maximum for a frontier worker who works full time.

Moreover, for each case of teleworking by a frontier worker, the Common Social Security Centre (CSSC) must be informed by the Form A1 "Request for a certification in case of work abroad."). When

the request is made over a long period (example: 1 day of teleworking per week for a year) it is also necessary to inform the employee's country of residence.

3) Impact of international taxation rules on teleworking

In a general manner, income earned by a frontier worker from his work in Luxembourg is taxed in Luxembourg. **Nevertheless, this rule may not apply for the days worked in the employee's country of residence.** In such a case, the employee shall assume the income tax costs and shall be solely responsible for his tax obligations. For his part, the employer will not be directly impacted, although he will probably have to assume higher costs relating to a more complex administrative management.

Pursuant to the agreements against double taxation concluded between Luxembourg and neighbouring countries, it is worth drawing a distinction depending on whether the employee of the Luxembourgish employer is Belgian, French or German.

German frontier worker:

For the German resident, the situation is as follows: the employee's income is taxable in Germany, except if the work is physically performed in another country (e.g. Luxembourg).

Nevertheless, an amicable agreement concluded by and between the two countries on 26 May 2011 provides a tolerance threshold of **19 days** worked outside Luxembourg (in Germany or in a third country) or 2 days per month in the event of partial occupation over the year.

Thus, the frontier worker resident in Germany will be taxed a priori in Luxembourg for the teleworking days if he does not exceed the 19-day limit. Conversely, as of the 20th day of teleworking in Germany, the employee will be taxed in Germany and in Luxembourg in proportion to his work performed in each country.

For the calculation of the tolerance threshold, each hour worked outside Luxembourg shall count for a full day. Furthermore, days worked in a third country (e.g. in Poland) shall also count in the 19 days and shall a priori be taxed in Germany.

Belgian frontier worker:

The income earned by workers shall be taxable in Luxembourg only if the work is physically performed on Luxembourgish territory. When the work is performed outside Luxembourg, those days are in principle taxed in Belgium.

An exception was nonetheless provided by a Belgo-Luxembourgish agreement. Thus, there is a tolerance of **24 days** worked per calendar year in the employee's country of residence (or in a third

country). Under that threshold, the frontier worker residing in Belgium would continue to be taxed entirely in Luxembourg.

According to the circular of the Belgian Inland Revenue, which sets the conditions applicable to this agreement, any fraction of a day, however brief, counts for an entire day. Teleworking before the work day of a worker is not considered as a day. However, it becomes an issue as of 2 hours.

It is important to note that all days worked in a third country also fall within the 24-day period.

French frontier worker:

Income earned by workers are taxable in Luxembourg only when the work is physically performed on Luxembourgish territory. When it is performed outside Luxembourg, those days are in theory taxed in France.

Contrary to Germany and Belgium, no tolerance threshold has been fixed between France and Luxembourg. Thus, a frontier work residing in France will be taxed in France for all his teleworking days. Only one answer to a parliamentary question, in April 2012, provides more clarification. The Socialist MP Christian Eckert had obtained the following answer: *if a worker of a Luxembourgish company works one day a week in a telecentre in France, the remuneration he gets as a result shall remain taxable in Luxembourg if it is assumed and paid by the company situated in the latter state.*"

The conditions therefore seem a little more flexible in France, all the more so as the checks by the French authorities are less frequent than for the two other tax authorities. Yet that could change rapidly. Moreover we must not lose sight of the 25% threshold for social security which already impedes the use of teleworking.

Conclusion:

Teleworking appears as a real balance solution for the employees. Yet although it can be easily implemented for resident workers, things are different for frontier workers. For the latter, it is primordial to inform them about the consequences that such a regime could have on the social and fiscal front. In this respect, a detailed analysis must be conducted on a case-by-case basis. Finally, the two parties must be aware of the need to keep a register of the days worked outside Luxembourg.

The information published in this article is valid only on the date of publication of said article. As social legislation is frequently amended, please contact us concerning any question or intended use based on this article or a previously published article.

Pursuant to Article 2, §2 of the Act of 10 August 1991, as the Legal Department of SECUREX Luxembourg SA is not authorised to practice law, it shall limit its action at all times to disseminating information and documentation.

Such documentation and information thus provided under the legal subscription always constitute typical examples or summaries, are of indicative value, and lay no claim to being exhaustive. The addressee is solely responsible for the use and interpretation of the information or documentation referred to in this article, advice or acts he deduces as well as the results he obtains from them.