New Agreement on Teleworking

Since the start of the health crisis, the use of teleworking has been a major factor, enabling companies to continue their activities in compliance with safety instructions when the nature of the work so permits. Considered an exception until a year ago, teleworking has now become the rule for a large number of workers.

In this context, and particularly in view of the increasing digitization of companies, it has become urgent to modernize the legal framework for teleworking, which has remained unchanged since the national teleworking agreement of 2006 was signed.

Thus, social partners signed a **new interprofessional agreement** on teleworking on 20 October last. Before entering into force and being applicable to all companies, the new agreement had first to be declared a general obligation by means of a Grand-Ducal regulation. This has now been done since the **Grand-Ducal Regulation of 22 January 2021.** The new agreement thus **entered into force on 2 February last.**

This new agreement is for the long haul and is not intended to regulate teleworking due to the health crisis. It also maintains the voluntary nature of teleworking for both employers and employees a fundamental point for trade unions and employers alike. Conversely, it innovates on various aspects which we will detail below.

I. Definition of teleworking

The **new definition** of teleworking is probably the major breakthrough of this new agreement.

Firstly, teleworking is still defined as a form of organizing or performing work, usually using information and communication technologies, so that work, which would normally have been carried out on the employer's premises, is performed outside those premises.

However, the new agreement no longer refers to the "employee's home" as a place of teleworking and, above all, it now recognizes **occasional teleworking**, which can be granted more easily to employees.

Occasional teleworking shall refer to teleworking carried out in order to cope with **unforeseen events** (e.g. force majeure such as COVID-19) **and/or** teleworking representing **less than 10% on average of the teleworker's normal annual working time**. In this context, **written confirmation** from the employer, e.g. by SMS or email, to telework will be sufficient. The need for an amendment to the contract will therefore no longer be compulsory. In this sense, the new agreement is consequently much more flexible towards the employers.

In all other cases, teleworking will be considered regular.

II. Scope of application

The scope of application of the new agreement is now **defined with greater precision** than in its previous version. More specifically, whereas all employees covered by the Labour Code, excluding those with public law or similar status, fall within the scope of the agreement, it is clearly stated that:

- employees posted abroad,
- employees in the transport sector in the broad sense of the term (except administrative staff),
- sales representatives
- employees in co-working spaces (work performed in a satellite office of the company) or in smart working (occasional intervention by mobile phone or laptop outside the workplace/usual teleworking),
- as well as employees providing services to customers from outside the company,

are also to be excluded from the scope of application of the agreement.

III. Voluntary nature of teleworking

Teleworking is always of a voluntary nature between the parties, i.e. the implementation of teleworking must be the result of an **agreement by and between the employer and the employee.** However, the agreement provides for a different formalism depending on whether regular and occasional teleworking is involved. In the former case, a common **written agreement (contract/amendment)** between the employer and the employee is necessary, whereas a simple **written confirmation** from the employer is sufficient in case of occasional teleworking (SMS, email).

Under no circumstances can teleworking be imposed on the employee through the unilateral modification procedure provided in the Labour Code.

Finally, in addition to the drafting of an amendment to the contract, it is strongly recommended that an **internal policy** on teleworking be charted, thus making it possible to detail all the procedures for the application of this mode of work. This policy can also set the framework for the notification/confirmation of occasional teleworking.

IV. Role of the staff delegation

The **role** of the staff delegation **has been strengthened**. From now on:

- If the company has **fewer than 150 employees**: the staff delegation must be **informed and consulted** prior to the introduction and modification of a specific teleworking regime in the company.
- If the company **has more than 150 employees**: its **consent** must be obtained on this matter, so there will be co-decision.
- Finally, the staff delegation will in any case have to be **informed regularly** (once or twice a year) about **the number of teleworkers** and **its evolution** in the company.

V. Mandatory stipulations in the contract

Compared to the previous agreement, the mandatory stipulations in the event of regular teleworking have been considerably reduced. The contract must indicate:

- the **location of the teleworking** or the procedures for determining it;
- the **hours and days of the week** during which the employee is teleworking and must be reachable for the employer, or the procedures for determining these periods;
- the **procedures for possible compensation** in case of loss of a benefit in kind to which the employee would normally have been entitled in case of work in the company;
- the **monthly flat-rate payment**, if any, to be made by the employer to cover connection and communication costs; and
- **the procedures for switching or returning to the conventional work formula.**

In the contract of employment, references to the place of teleworking and to the hours and days of the week during which the employee must be reachable while teleworking are always required. However, the new agreement only allows the parties to define "the procedures for determining them," in case this is not possible when the agreement is concluded.

In addition, the agreement abolished the requirement to indicate the title of the teleworker, the description of his or her tasks and the objectives to be achieved, the department to which he or she belongs and his or her classification under a collective agreement, his or her line manager and contact persons, as well as the exact description of his or her working tools and the insurance policies taken out by the employer.

Furthermore, alongside the teleworking contract, the company can also define these elements under a specific teleworking regime devised in the company or the sector of activity by means of a

collective or subordinate agreement, or at company level in accordance with the competences of the staff delegation.

VI. Equal treatment

The idea here is that **an employee who teleworks is not discriminated against because of his or her status as a teleworker**. Thus, he or she should be treated in the same way as a regular employee. This **equal treatment** is therefore **reinforced**.

The employer will have to ensure that the principle of equal treatment is respected in terms of the:

- working conditions;
- working time;
- pay conditions;
- conditions and access to promotion;
- collective and individual access to continuing vocational training;
- respect for privacy and the processing of personal data for surveillance purposes.

Where regular teleworking entails a loss of benefit in kind for the teleworker, compensation will have to be paid. Nevertheless, if this benefit in kind is closely linked to the presence of the teleworker in the company (e.g. parking space, canteen, fitness facility in the company), then no compensation is due.

VII. Health, safety and privacy of employee

The agreement entails a real **enhancement of the employee's privacy**. From now on, right of access to the teleworking place previously enjoyed by the employer, is purely and simply abolished. The teleworker may however voluntarily request an inspection visit from the company's occupational health service, the safety and health officer or the Labour and Mines Inspectorate.

Teleworking was hitherto covered by the Accident Insurance Association (AAA in its French initials) as soon as an amendment to the contract introducing teleworking had been signed by and between the parties. Now the AAA indicates that teleworking will be covered on condition that it complies with the provisions of the legal regime for teleworking introduced by the new agreement.

VIII. Work equipment

In the context of regular teleworking, the new agreement requires the employer to provide the **equipment necessary** for teleworking and to cover the **costs directly generated by teleworking**, in particular those relating to communications. The agreement also stipulates that this coverage may take the form of a monthly lump sum to be mutually agreed in writing. At present, inland revenue

has not yet given any indication of what it would accept in terms of a "monthly lump sum." The agreement also implies that the teleworker could use his or her own equipment for occasional teleworking.

The employer remains, however, as before, fully responsible for the costs relating to the loss or damage of the equipment and data used by the teleworker, except in cases of gross negligence or acts of wilful damage.

The teleworker is required to take care of the equipment entrusted to him or her and he or she must notify his or her company in case of breakdown or malfunction thereof.

An **IT policy** may therefore have to be implemented, in particular in order to list the equipment made available to the employee, indicate how the employee should use this equipment or how he or she should communicate a malfunction. Said policy could also describe the technical support available, as well as possible sanctions for which the employee could be liable in the event of damage to the equipment made available to him or her or in the event of negligence or gross misconduct.

IX. Organization of teleworking

The new agreement stipulates that "***the organization of working time shall follow the rules applicable in the company.***" Perhaps this should be seen as a renewal of the willingness of the social partners to ensure equal treatment between teleworkers and employees working on the company premises. In the previous version, the teleworker had the right to manage the organisation of his working time, within the limits of the applicable working time limits.

In addition, it is also stipulated that the parties have to agree on the procedures for overtime, in line with internal procedures insofar as possible. The employer will have to ensure that the teleworker works overtime only in exceptional cases.

Furthermore, it is specified that any provisions on the right to disconnect (the employee's legal right not to reply to work emails outside working hours) must apply equally to that of conventional workers.

X. Transition or return to the conventional work formula

The employer and the teleworker alike are free to request a return to the conventional working formula at any time. Conversely, the new agreement removes all reference to the old adaptation period when teleworking is introduced during the performance of the contract.

It will therefore be **crucial that the rules on the abolition of teleworking be clearly laid down.** It is strongly recommended to provide a clear list of the cases which may lead to the abolition or suspension of this mode of work, e.g. in the event of a move outside Luxembourg or of failure to comply with the notification/confirmation procedure or with the availability periods.

Conclusion:

There is no doubt that this new agreement provides a **more modern legal framework** for teleworking by introducing, in particular, the notion of occasional teleworking which is widespread in Luxembourg. The agreement also modernizes the channels available for introducing teleworking in companies and clarifies the role of staff representatives in this context.

Although this new agreement has benefited from the experience of teleworking carried out on a massive scale in recent months, it is not intended to regulate teleworking put in place by companies in response to the exceptional situation we have had to face which moreover is still seriously disrupting the functioning of our companies.

While we cannot predict the scope of teleworking under this new agreement for the years to come, it is certain that it will be more popular and used by employees and companies that have experienced it in recent months.

Many practical questions still remain unresolved, however. For example, the application of the agreement will continue to be hampered by tax and social security rules that restrict teleworking performed by cross-border employees. Today, outside the crisis period, cross-border workers can benefit from only a certain number of teleworking days (19 in Germany, 24 in Belgium, 29 in France) before being taxed in their country of residence. A European rule also requires them not to telework more than 25% of their working/remuneration time in their country of residence, at the risk of having to join the social security system in that country. Finally, the agreement does not settle the question of the right to teleworking, which is still strongly contested in Luxembourg.