

The Future is Now: The New World of Work in Belgium



As a result of COVID-19 and measures put in place in response to the pandemic, businesses around the world – including in Belgium – have adopted new innovations in the area of employment. One such innovation relates to the increased need to conduct work from home.

A year after the pandemic began, home-office remote work has proven so effective, many believe it will become a fixture of our post-pandemic future. But remote work raises a host of legal and administrative challenges. This article – based on the 16 February 2021 webinar *The Future is Now: The New World of Work in Belgium* and hosted by CMS legal experts Katrien Leijnen and Sofie Kusters with CMS Belgium – explores the impact of homeworking in Belgium for both workers and companies.

Remote work in Belgium

The Belgian government has earmarked working from home as an important instrument to protect citizens and bolster the economy. "Remote working is currently compulsory in Belgium due to COVID-19," explains CMS Senior Associate Katrien Leijnen.

In late October 2020, the Belgian government issued a Ministerial Decree – effective from 2 November 2020 until 1 April 2021 at the time of writing – making 'teleworking at home' mandatory for employees of all companies, associations and services in the country, unless the nature of a given company's operations make remote work impossible.

If a company cannot sustain home working, says CMS labour law expert Leijnen, "their employees must be provided with a certificate or other proof confirming the necessity of their presence in the workplace."

Furthermore, adds Leijnen, officials with Belgium's Social Inspection Services are visiting businesses across the country to ensure that employers are enforcing this decree.

In many sectors, such as the hotel and restaurant industries, businesses have been forced to close completely. As a result, the government has created a financial support programme for workers who are temporarily unemployed due to the pandemic.

New Collective Bargaining Agreement (CBA)

According to CMS's Leijnen, the legal justification behind 'Working from home' continues to get stronger. As recently as 26 January 2021, a new national bargaining agreement was passed

(CBA No. 149), which directly addresses Telework during the pandemic, but is not the only legislation on the matter.

Teleworking was already regulated before in a 5 March 2017 Act, which lays the legislative foundation for "feasible and flexible work", when it comes to occasional telework and an earlier CBA No. 85 when it comes to structural telework. In addition, homeworking is governed by a 3 July 1978 law.

The above legislation establishes the basic distinction between Homeworking and Teleworking, which is: Teleworking requires a direct communication link with an employer via modern information technology while Homeworking has no such requirement.

In short, CBA No. 149 (enacted 26 January 2021) applies to recommended or mandatory telework in the context of the pandemic and to companies, which prior to 1 January 2021, had no "structural or occasional telework arrangement" with employees.

This CBA was essential because it has provided a legal framework for these companies in the areas of employee rights, work control and drafting employment agreements, and also defines how Teleworking employees could be supported in their daily duties, both financially (e.g. costs and expenses) and technologically (e.g. the provision of computers, phones and internet connections, etc.).

Future of Working from home

CBA No. 149 provides a legal structure for companies to allow employees to Work from Home for the immediate future (i.e. until the end of the pandemic). However, as the benefits of Telework become more evident in many sectors (e.g. cost savings, employee convenience, etc.), more and more companies are interested in adopting it beyond the current crisis.

"A lot of companies and many of our clients are really changing the way in which work is conducted in their companies," explains CMS labour expert Leijnen, "and as a result they want to introduce Teleworking or Homeworking on the long run on a more structural basis."

Belgian law, Leijnen says, allows for this. In fact, Belgian companies have the option of implementing three types of Work-from-home systems:

Structural telework – which would be part of a regular arrangement (i.e. not done occasionally) and voluntary (although the arrangement can be refused or reversed). In this case, the duration of the agreement would be indefinite and an employee would be able to receive extra compensation for expenses. Lastly, this arrangement could be ratified in an employment agreement or annex, which would include certain conditions set down by Belgian law and could also specify sanctions if an employee violates the terms of the agreement.

Occasional telework – which would be occasional telework (i.e. not a regular arrangement) and

used under certain conditions, such as a force majeure event (e.g. a fire) or for personal reasons of the employee (e.g. a doctor's appointment). In this instance, the employer can refuse such an arrangement, but if adopted it can be formally entrenched in an employment agreement or an addendum to an agreement. General rules on occasional telework within the company can also be specified in the company's work rules. In this instance, the definite time frame for occasional telework would be set and compensation for expenses, etc. would have to be negotiated on a case-by-case basis.

Homework – which allows for employees to fulfill their work duties at home independent of any direct supervision by an employer. The exact characteristics and modality of each arrangement must be negotiated and clearly defined in the employment contract, which must also include certain clauses (and sanctions) defined the law. The duration of this arrangement is also up for negotiation (in general, it is equal to the duration of the employment contract), as is compensation for expenses, although if no specific arrangements are made Belgian Homeworkers are entitled to receive up to 10% of their salary to cover costs.

The best way to implement work from home

For those companies wishing to implement a work-from-home arrangement within their organisations, there are procedures to be followed to ensure that both the firm and its employees are protected, explains CMS's Leijnen.

But implementation depends upon whether or not the company already has Teleworking employees on staff and existing Teleworking agreements in place.

- **No Teleworking agreements**

For those companies who are implementing work from home for the first time, it is recommended they do the following:

- Establish the conditions for Teleworking in a broad CBA applicable to all staff, the company's work rules, internal company polices or in the employment contracts sealed with each worker;
- Ensure that any works council or other employee representative body associated with the company is informed or consulted where required before finalising the terms;
- Ensure that all employees are fully informed of the terms for Teleworking;
- Ensure that employees know about the well-being policy in place in the company and any monitoring of their work;
- Ensure all communications or arrangements with employees are conducted or established in one or both of Belgium's official languages in line with the nation's language laws.

For companies that have already implemented Teleworking, they do not need to take any special action to expand work-from-home among their staff, but should:

Check to ensure if modifications to agreements, policies or CBAs are necessary further to any government regulations surrounding the pandemic or in view of increased Teleworking over the long run after the pandemic.

Travel and staff mobility

According to CMS legal expert Leijnen, another important issue connected to Teleworking is Belgium's legal framework surrounding staff mobility, which includes employee travel and movements in and out of the country.

Basically, Leijnen explains, regulations on staff mobility depend on whether an employee is travelling inside Belgium or across the Belgian border.

Within Belgium

General mobility is limited by state-imposed restrictions, such as a prohibition on travel on public roads between midnight and 5 am, which does not apply to essential travel, such as work-related trips or commuting.

Foreign travel

The following regulations apply to employees travelling to or from Belgium:

- Non-essential travel into the country is banned for foreign residents, although professional and business travel is considered essential and is permitted.
- COVID-19 protocols for people entering Belgium depend on their country of origin and their infection-level designation (i.e. red, orange or green). Individuals arriving from a red zone must enter immediate quarantine.
- When leaving Belgium, individuals must adhere to the regulations of the destination country.

Telework and staff mobility

According to CMS labour expert Leijnen, the growing adoption of Telework has created another staff-mobility issue – the question of what social security scheme applies to Teleworkers conducting operations outside of Belgium.

According to EU Regulation No. 883/2004, the social-security system of the country of employment applies to cross-border workers (e.g. an employee of a Belgium company working from home in the Netherlands) unless the workers spend more than 25% of their professional time in the member state of residence.

During the current crisis, Belgium has placed a temporary moratorium on this staff mobility regulations. "We have a lot of clients who are asking us what they should do because they are in this position," says Leijnen, "and we tell them that the Belgian social-security authority has stated that periods of Teleworking have been neutralised as of 13 March 2020 until 30 June 2021".

Health and safety

Another major issue surrounding Teleworking is health and safety, and in particular the question: what are an employer's responsibilities in terms of health and safety for its workers during the pandemic.

As touched upon earlier in this article, a 28 October 2020 Ministerial Decree requires companies to have their workers operate from home unless the company's business activity makes this impossible. In the situation where a worker must continue working on a jobsite (e.g. a factory or warehouse), CMS Associate Lawyer and labour law expert Sofie Kusters states that each company must enforce the following rules:

- Social distancing (ensuring that employees are kept at a 1.5-metre distance from each other);
- State protocols that require each worker to be issued a certificate attesting to the need to continue work on the jobsite;
- Appropriate preventative measures to keep workers safe from infection.

If a company is unsure what the appropriate preventative measures are, Kusters states that the Belgium government has issued a general guide for combatting the spread of COVID-19 at work, which includes a variety of protocols to be considered by employers.

In addition, there is a guide related to the re-opening of businesses (e.g. stores and shops) in a way that minimises the risks of spreading the virus.

If an employee becomes ill with COVID-19, the employer should follow the general procedures surrounding worker illness, as outlined in Belgian law.

Otherwise, employers cannot demand information from employees regarding possible exposure to COVID-19 or the risk of exposure. According to CMS expert Kusters, employers can encourage their workers to voluntarily report incidences of possible exposure.

If an employee shows symptoms, they cannot be forced to take a COVID-19 test, but they can be

referred to the company doctor (i.e. the occupational health physician).

Importantly, states CMS's Kusters, a company must ensure that all efforts to prevent the spread of COVID-19 among employees and any management of an employee's health data must strictly adhere to Belgian and EU data-protection regulations.

Employee rights during COVID-19

A company can protect itself from both disease and liabilities in this respect by establishing an appropriate "pandemic policy", involving the workers and their representatives. It is recommended that a 'contact person' be appointed, who can respond to an employee's concerns.

But what if an employee remains uncertain about a company's safety regime and refuses to come to work? In other words, can an employee unilaterally decide not to come to work? According to Kusters, the answer is no.

If a company's operations preclude employee Teleworking and the employer has implemented appropriate precautionary measures, employees must come to work. Not doing so would constitute an "illegal absence" and leave the employee open to sanctions, as set out in the company's work rules. The only exception to this is the existence of a "serious and immediate threat". Kusters believes if appropriate precaution measures are taken by the employer, it is unlikely an employee can argue that a serious and immediate threat exists.

Vaccinations

According to CMS's Kusters, another vital health-and-safety issue surrounding COVID-19 concerns vaccinations and specifically the question: can an employer force a worker to receive an inoculation?

The answer, says Kusters, is no, although employees in the medical sector can be required by law to have certain vaccinations.

Belgian companies, however, are obliged to provide workers with the "opportunity" to be vaccinated (further to Belgian law passed in response to EU Directive 2020/739) for workers who are not already immune to the virus.

Digitalisation

Lastly, compulsory Teleworking has increased the importance of digital tools and equipment in the daily operations of Belgian business.

Employees, for example, can sign e-employment contracts using digital signing systems so long as the technology adheres to the EU's eIDAS Regulation.

Article 3bis of the Belgian Labour Act (1978) recognises e-signatures under the following conditions:

- The electronic signature is created through eID (<http://eid.belgium.be>);
- A qualified e-signature device (recognised by eIDAS) is used;
- All obligations regarding the archiving of the contract are followed, although Belgium currently has not yet established a properly qualified electronic archiving service.

According to the Labour Act, a traditional hardcopy signing must take place if one of the parties does not wish to use the digital option.

To ensure that employees fully understand e-signing procedures, companies are encouraged to draft a comprehensive policy on this, and ensure employees are fully aware of their obligations and options.

For more information or advice on implementing Structured Teleworking, Occasional Teleworking or Homeworking in Belgium, contact your CMS client partner or local CMS expert:

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