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SCOPE OF CONTROL AT THE PLACE OF PERFORMANCE OF REMOTE WORK

Abstract

Following the Covid pandemic, solutions pertaining to remote working were introduced into the Polish Labour Code, having entered into force on 7 April 2023. Remote work is performed entirely or partially at a place indicated by the employee and agreed with the employer, in particular by means of direct communication at a distance. The employer has the right to control the performance of remote work at the place where it is carried out and also when that takes place at the employee's place of residence. The purpose of this paper is to analyse the scope of the control that may be conducted at the remote workplace. The inquiry encompasses conducting controls of the employee's performance of obligations to deliver work, compliance with healthy and safe working conditions, as well as compliance with information and personal data protection requirements. It also discusses the possibilities for conducting sobriety checks on remote workers and monitoring remote work, including monitoring the email communication of an employee who performs work remotely. The article will also draw attention to the limitations of carrying out such controls.

Keywords: control, remote work, employee.

INTRODUCTION

In Poland, remote working was introduced in order to protect the life and health of employees in view of the threat posed by COVID-19. During the

SARS-CoV-2 virus pandemic and the state of epidemiological emergency, Polish employers were entitled to instruct employees that, for a specified period of time, they could perform the tasks referred to in the employment contract outside the place where they are usually performed (remote working). After the pandemic, it turned out that numerous employees, as well as employers, wanted the employment relationship to continue in that particular form¹. However, this required much more detailed solutions than those adopted during the pandemic. After all, it was only when the parties to the employment relationship functioned in the remote mode in practice that the advantages and shortcomings of providing work on such a basis were revealed. Moreover, it showed the direction of the necessary legal changes that need to be introduced into the Labour Code so as to guarantee appropriate regulations in this respect. The performance of employee and employer obligations, including proper management of remotely working staff, required new solutions, which had no equivalent in the existing provisions of the Labour Code. Relying on the experience gained during the pandemic as well as to meet the expectations of employees and employers in this regard, the lawmaker introduced the anticipated changes. To this end, the previous regulation on remote working, i.e. Article 3 of the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them (cons. text Journal of Laws of 2023, item 1327, as amended) was rescinded. It was repealed under Article 15 of the Act of 1 December 2022, amending the Labour Code Act and certain other acts (cons. text Journal of Laws of 2023, item 240, as amended). Furthermore, pursuant to Article 1 of said Act, the lawmaker introduced Chapter IIc into the Labour Code, which sets out detailed solutions concerning remote working. The latter amendment to the Labour Code came into force on 7 April 2023. Its provisions regulate the concept of remote work, the principles of its performance, as well as the rights and obligations of the parties to the

¹ M. Rycak, Nowe regulacje dotyczące pracy zdalnej, „Edukacja Prawnicza” 2022-2023, No. 2, p. 5.

employment relationship arising in the case of remote working. That particular modality of performing work is indeed special.

The employee performs work outside the employer's premises, in a place indicated by them and approved by the employer. Simultaneously, it is the employer who—upon undertaking and carrying out a particular activity—must be aware of the risk which they incur, e.g. in connection with the staff employment and the subsequent performance of remote work by such employees. The risk, especially relating to persons, may be mitigated by controlling the work². Controlling how remote work is performed bears significant influence on both parties to the employment relationship, as the outcomes may have an influence on, e.g. the decision as to further work being performed in this mode. Hence, exploring the issue in this paper is thoroughly legitimate.

The aim of this inquiry is to analyse the scope of control of remote work at the place where it is performed. To accomplish that goal, the concept of remote working and the object of control are discussed below. The analysis is concerned with controlling work as it is performed by the employee, occupational health and safety, and compliance with security and information protection requirements, including personal data protection procedures. Other issues examined here are sobriety checks of remote workers and the monitoring of remote working. The analysis is carried out using the dogmatic-legal and the theoretical-legal method.

THE CONCEPT OF REMOTE WORK AND THE RULES GOVERNING ITS IMPLEMENTATION

The concept of remote work is defined in Article 67¹⁸ of the Labour Code (Act of 26 June 1974, Labour Code, Journal of Laws 2023, item 1465), according to which work may be performed in full or in part at a place stated by the employee, which must be agreed upon each time with the employer. The employee may also perform work at their place of residence, in particular, using means of direct communication over a distance. This means that remote work essentially consists of being performed entirely or partly outside

² M. Głądoch, *Praca zdalna*, [in:] *Prawo pracy dla sędziów i pełnomocników*, K. Walczak, M. Wojewódka (ed.), Warszawa 2023, p. 132.

the employer's premises, whereby it does not have to be one's place of residence. It is also possible to change the said location at any stage of performing work in this form. In each instance, however, the place of work must be approved by the employer, as it needs to be noted that one of the characteristics of the employment relationship is that the employee discharges their duties at a place and time determined by the employer. Therefore, it is the employer who organizes the entire work process and bears the risk involved in the operation of the establishment. Hence, the employer determines the rules governing the performance of work. They also decide where and at what times such work will be performed³. Remote work takes place using means of direct communication over a distance. Depending on the ICT systems used at the workplace, the following remote work models are currently distinguished in the literature: 1) remote work model relying on IT resources in the so-called cloud; 2) remote work model relying on IT resources available on-premise; 3) remote work model relying on mixed IT resources, i.e. both in the cloud and on-premise⁴.

Remote work may be carried out with the employee's consent or at the employer's instruction. Pursuant to Article 67¹⁹ §1 and 2 LC, the performance of remote work may be agreed upon between the employee and the employer upon executing the employment contract or in the course of employment. Agreeing on the performance of remote work while the employment relationship is being established will correspond formally with the employment contract. On the other hand, if it takes place during the employment relationship, the agreement may be made at the initiative of the employer or at the request of the employee, submitted in paper or electronic form. Since the lawmaker does not specify the form in which such a request should be accepted, even an oral approval will be valid. However, for evidentiary reasons, it would be advisable to have the acceptance of the request recorded⁵. It appears that by submitting such a request, the employee declares that they meet the requirements in terms of premises and

³ P. Prusinowski, *Umowne podstawy zatrudnienia*, Warszawa 2012, p. 52-53.

⁴ T. Izydorczyk, *Praca zdalna – aspekty IT*, [in:] *Praca zdalna. Aspekty prawa pracy, BHP, IT, RODO i HR*, Ł. Prasolek (ed.), Warszawa 2023, Legalis/el.

⁵ A. Sobczyk, *Objaśnienia do art. 67¹⁹ k.p.*, [in:] *Kodeks pracy. Komentarz*, A. Sobczyk (ed.), Warszawa 2023, p. 428.

technical capacity to perform remote work. Indeed, pertinent legislation is lacking, but if the employer refuses to have work performed in this manner, the employee should attach such a statement to the request for the sake of clarity. The rules of its submission should be set out in the regulations or in the agreement concerning the performance of remote work. Moreover, the legislator has provided that remote work may be performed at the employer's instruction during a state of emergency, a state of epidemic threat or a state of epidemic and for a period of three months after such a state is lifted or for the duration of a period in which it is temporarily impossible for the employer to ensure safe and hygienic working conditions at the employee's current workplace due to force majeure. However, in such a situation, the employee must make a declaration immediately before the instruction is issued, in paper or electronic form, that they have the premises and technical capacity to perform remote work (Art. 67¹⁹ § 3 LC). The occurrence of an epidemic threat or a state of emergency entitles the employer to require employees to start working remotely. The same will apply in events resulting from force majeure, i.e. such an external event which is impossible (or virtually impossible) to predict and whose consequences cannot be prevented (e.g. terrorist threat, ecological threat, fire, civil engineering disaster, etc.). The only limitation on the employer's prerogatives in this respect is whether the employee has the capacity to work in this mode. Therefore, it is the employee's duty to provide a true statement as to whether they have such a capacity. Refusing to provide such a statement or making a false one will constitute a breach of the employee's fundamental obligations. In view of the fact that the designated parties have the right to request remote work, it should be presumed that the refusal should be justified⁶.

The employer may withdraw the instruction to undertake remote work at any time. However, they shall do so with at least two days' notice (Article 67¹⁹ § 4 LC). Should the circumstances relating to the premises and technical capacity change, making remote work impossible, the employee shall inform the employer immediately. At that point, the employer immediately revokes the instruction to perform remote work (Article 67¹⁹ § 5

⁶ Ibidem, p. 430.

LC), whereas the employee shall be obliged to start performing work in-house, i.e. at the employer's premises or at another appropriate location. It should also be noted that submitting a request to discontinue remote work cannot constitute grounds for the employer to terminate the employment contract⁷.

In certain situations, the employer is obliged to take the employee's request to work remotely into account. Pursuant to Article 67¹⁹ § 6 LC, such an obligation arises if the request is submitted by the parents of a child holding an opinion on the need for the early support of the child's development, a certificate of the need for special education or a certificate of the need for revalidation and education activities. Furthermore, the employer is also obliged to consider such a request from a pregnant employee, an employee bringing up a child under the age of 4, an employee taking care of another member of the immediate family or another person in the same household who holds a certificate of disability or a certificate of a significant degree of disability. These safeguards reflect the family-friendly policy pursued by the state. However, the above prescription applicable to the employer is not absolute. They may refuse to grant the request when the performance of remote work is not possible due to the organization of work or the type of work performed by the employee⁸. The employer shall advise the employee of the reason for refusal of the request in paper or electronic form within seven working days from the date of submission of the request by the employee. In the event of an unfounded refusal, it may be examined whether it was discriminatory with respect to parental. An employee taking care of a child with a disability may also apply to the employer for remote work even after the child has reached the age of 18.

The principles of remote work are defined in an agreement concluded between the employer and the establishment's trade union organization and, where more than one trade union organization exists at the establishment, in an agreement between the employer and such organizations. When the content of the agreement cannot be successfully negotiated with all trade

⁷ R. Terlecki, N. Szok, *Prawo pracy w praktyce*, Warszawa 2023, Legalis/el.

⁸ See: M. Rotkiewicz, *Praca zdalna rodzica dziecka z opinią o wczesnym wspomaganie rozwoju*, Legalis/el 2023.

union organizations involved, the employer shall define the content of the agreement with the representative trade union organizations, whose members account for at least 5% of the employees employed by the employer. If no agreement with the trade unions is reached within 30 days from the date a draft agreement is presented by the employer, the employer specifies the principles of remote work in the internal regulations, taking into consideration the arrangements made with the establishment's trade union organizations in the course of agreeing upon the agreement. On the other hand, if there is no establishment's trade union organization—this is effected upon consultation with the employees' representatives chosen according to the procedure adopted at that particular employer. Remote work is also permissible if no agreement has been concluded or no regulations have been issued. Occasionally, an employer may decide that it would not be reasonable to regulate remote work for a broad group of employees due to the work organization in place. Therefore, it will not be performed universally; even so, situations may arise where remote work will indeed be performed for the employer. This will be the case if an employee makes a request that the employer is obliged to accept or in a situation where the employer has to issue an instruction to perform work in this mode, e.g. due to an epidemiological threat. Should this take place, the rules governing such work must be set out either in the instruction or in an individual agreement with the employee ⁹.

In the case of remote work, the employer is obliged to: 1) provide the employee working remotely with the work materials and tools, including technical devices that are necessary to perform remote work; 2) provide the employee working remotely with the installation, service, maintenance of the work tools, including technical devices that are necessary to perform remote work or cover the necessary costs related to the installation, servicing, and maintenance of the work tools, including technical devices that are necessary to perform remote work, as well as cover the costs of electrical energy and telecommunication services necessary to perform remote work; 3)

⁹ K. Wrońska-Zblewska, Regulacje dotyczące pracy zdalnej w zakładzie pracy, Legalis/el 2023.

cover other costs than those listed above but directly related to the performance of remote work, if the reimbursement of such costs has been specified in the instruments regulating performance of remote work at the employer, e.g. in an agreement or internal regulations ; 4) provide the employee who performs remote work with the training and technical assistance necessary to perform such work (Article 67²⁴ § 1 LC). The parties may agree on the rules which specify how an employee performing remote work utilizes work materials and tools, including technical devices necessary for performing remote work, which have not been provided by the employer and meet the requirements specified in Chapter IV, Section X of the Labour Code. In such cases, the employee performing remote work is entitled to a cash equivalent in the amount agreed with the employer (67²⁴ § 2 and 3 LC). The obligation to cover the indicated costs or to pay an equivalent may be replaced by an obligation to pay a lump sum, the amount of which corresponds to the anticipated costs incurred by the employee in connection with the performance of remote work (67²⁴ § 2 and 3 LC). When determining the amount of the equivalent or lump sum, particular attention should be paid to the norms of wear and tear on materials and work tools, including technical devices, their documented market prices, the amount of material used to meet the employer's needs and the market prices of such material, as well as the norms of consumption of electrical energy and the costs of telecommunication services (67²⁴ § 2 and 3 LC). The reimbursement obligation lies with the employer. An employee cannot effectively waive the employer's covering said costs that the former incurs in connection with remote work. The waiver of costs is inadmissible and invalid. However, reimbursement of costs does not apply to occasional remote work¹⁰.

For the purposes of remote work, the employer shall determine data protection procedures and provide, where necessary, instructions and training in this respect. The employee performing remote work confirms, in paper or electronic form, that they have been acquainted with these procedures and are obliged to comply with the latter (Article 67²⁶ LC).

¹⁰ M. Rotkiewicz, Brak możliwości zrzeczenia się kosztów pracy zdalnej, Legalis/el 2023.

The employee performing remote work and the employer shall convey the information necessary for mutual communication by means of direct communication over distance or by any other means agreed with the employer (Article 67²⁷ LC). Work may also be performed remotely on an intermittent basis. The legislator has provided for the possibility of performing it occasionally. This is possible after the employee has submitted a request in paper or electronic form. The occasional remote work may not exceed 24 days per calendar year.

CONTROL OF THE EMPLOYEE AT THE PLACE OF REMOTE WORK

The lawmaker has laid down the rules for controlling the performance of remote work. The employer is not under obligation to carry it out, but they are entitled to do so. The control may concern: 1) the performance of remote work by the employee, 2) occupational health and safety or 3) compliance with security and information protection requirements, including personal data protection procedures. The control may be carried out either at the place where work is performed or remotely. The control shall be carried out in consultation with the employee at the place where remote work is performed during the employee's working hours. This means that the control is not conducted without prior agreement as to the date and time. Its purpose is not to surprise the employee with an inspection. In addition, the employer shall adapt the manner of conducting the control to the place where remote work is performed and its type, while the involved control activities must not violate the privacy of the employee performing remote work and other persons or else impede their use of the household in a manner consistent with their purpose (Article 67²⁸ LC). This means that the control does not encompass the entire household but remains confined to the room where the work is performed, meaning the workstation exclusively, and may not go beyond such area. The control must be conducted in compliance with the principle of proportionality¹¹. It should be noted that the methods of control have not been provided for in detail by the lawmaker.

¹¹ M. Mędrala, *Praca zdalna. Komentarz do nowelizacji Kodeksu pracy*, Warszawa 2023, Lex/el.

However, the employer is enjoined to adapt the method of control to the location of remote work and the scope of the latter. This means that the employer has to use a method which is commensurate with the type of work. Hence, they may also carry out the control remotely, using appropriate communicators such as Teams. A physical presence at the place where the remote work is performed, e.g. at the employee's place of residence, will not always be necessary¹².

The rules of conducting controls are to be decided by the employer in consultation, in internal regulations or in an individual agreement with the employee, depending on whether remote work is performed permanently and universally or whether it takes place by way of exception. The employee should be informed which employees are authorized to conduct controls on behalf of the employer. The employee is obliged to agree to the control, also at the place of residence if this is the location which they have agreed with the employer to be the place where they will be working. Potential refusal to have the control conducted may be considered a breach of the employee's fundamental obligations. In consequence, the employment contract with the employee may be terminated with immediate effect, i.e., without having to comply with the notice period due to the employee's fault. Controls may also be carried out in the case of occasional work. In practice, however, such a measure will rarely be applied due to the short-term nature of occasional work. If, in the course of control of remote work, the employer determines non-compliance with the health and safety regulations and rules set out in the information or non-compliance with information security and protection requirements, including procedures for the protection of personal data, they shall either oblige the employee to rectify such shortcomings within a specified period of time or withdraw consent for that employee to perform remote work. In the latter case, the employee shall start working at their previous workplace on the date specified by the employer (Article 67²⁸ § 3 LC).

CONTROL OF REMOTE WORK

¹² M. Gładoch, *Praca zdalna* [in:] *Prawo pracy dla sędziów i pełnomocników*, K. Walczak, M. Wojewódka (ed.), Warszawa 2023, p. 133.

Deliberations on the subject matter of control must begin with an analysis of the scope applicable in the assessments of employee's performance of remote work. The right to control derives from the managerial prerogatives of the employer. The employment contract is characterized, among other things, by the fact that the employee performs work under the direction of the employer. The obligation arising as part of employment involves subordination of the employee. It is the employee's duty to comply with the order rules defined in the work regulations, which set out the rights and obligations of employees and employers as they pertain to order at the workplace (Article 104¹ LC). In the case of remote work, the rules governing its performance will also be specified in the agreement or internal regulations in the instruction to perform remote work or in the agreement concluded with the employee concerned, whichever is applicable. The basic manifestation of an employee's subordination to the employer is the dependence in terms of delivering work, whereby the employer assigns tasks to be performed to the employee, specifies the manner in which they will be performed, as well as the methods and means by which they will be performed¹³. When engaging in a certain activity, the employer also bears the associated risk. Therefore, they must allow for the consequences of events that may be disadvantageous to their undertaking, such as those related to the hiring of workers. Therefore, the employer's activity invariably involves risks, including organizational and personnel risks. Organizational risk may entail negative consequences for the employer if the work processes are disrupted due to breakdowns, energy supply shortages or various deficiencies in the organization of work. On the other hand, the fact that the employer is in charge of selecting employees entails a personnel risk. Thus, the employer will be responsible for organizational disruptions at the workplace which arise through no fault of the employees, as well as the consequences of errors at work that are not caused by the employees¹⁴. In the case of remote work, the control will not focus on how work is performed.

¹³ Judgment of the Supreme Court of 24 June 2015, ref. no. II PK 189/14, Legalis no. 1421837.

¹⁴ M. Gersdorf, K. Rączka, E. Maniewska, M. Rączkowski, *Prawo pracy. Pytania i odpowiedzi*, Warszawa 2018, p. 131-132.

It is noted that the change in the methods of controlling the employee working remotely is associated with the phenomenon of autonomous subordination¹⁵. With autonomous subordination, the employer assigns tasks to the employee but does not interfere in the manner in which they are carried out. Here, the employee is not at liberty to determine their current tasks, as this belongs to the employer, who is responsible for organizing the work process¹⁶. An employee performing work in the circumstances of “autonomous” subordination organizes the work themselves whilst not being subject to constant, direct supervision of a person acting on behalf of the employer¹⁷. At the same time, as M. Gładoch observes, attention should be drawn to the element of personnel and organizational risk on the part of the employer, particularly employee anomie¹⁸. Here, the employee may seek to cheat the employer and engage in behaviour that involves exploiting the workplace for one’s own benefit. In the case of remote working, this could manifest in, e.g. using company equipment for personal purposes or running private errands during working hours. An effective control procedure is the primary tool available to the employer to combat such practices¹⁹.

CONTROL OF HEALTH AND SAFETY AT WORK AND CONTROL OF COMPLIANCE WITH SECURITY AND INFORMATION PROTECTION REQUIREMENTS, INCLUDING PERSONAL DATA PROTECTION PROCEDURES

The employer’s essential obligations include ensuring safe and hygienic working conditions and conducting systematic training of employees in this respect (Article 94(4) LC). For their part, the employee is obliged to comply with the regulations and rules pertaining to occupational health and safety as well as fire safety (Article 100 § 2 (3) LC). The employer’s core obligations and the employee’s rights and obligations with regard to occupational health and safety are regulated in Section X of the Labour Code. It is the employer

¹⁵ See: M. Gładoch, *Praca zdalna. Kontrola trzeźwości. Nowelizacja Kodeksu pracy*. Komentarz, Warszawa 2023, Legalis/el.

¹⁶ Judgment of the Supreme Court of 18 February 2016, ref. no. II PK 352/14, Legalis No. 1421837.

¹⁷ Judgment of the Supreme Court of 8 June 2017, ref. no. I UK 240/16, Legalis no. 1715202.

¹⁸ M. Gładoch, *Praca zdalna* [in:] *Prawo pracy dla sędziów i pełnomocników*, K. Walczak, M. Wojewódka (ed.), Warszawa 2023, p. 131-132.

¹⁹ *Ibidem*, p.132.

who is responsible for the standard and quality of occupational health and safety in the workplace. The scope of that responsibility is not affected by the obligations of employees in terms of occupational health and safety or the delegation of occupational health and safety services to experts from outside the workplace. The employer has a duty to protect the health and life of employees by ensuring safe and hygienic working conditions, relying on appropriate implementation of scientific and technological achievements. The lawmaker states that this obligation consists in particular in: 1) organizing work in a manner which ensures safe and hygienic working conditions; 2) ensuring workplace compliance with occupational health and safety regulations and rules, issuing orders to remedy shortcomings in this respect and control the execution of such orders; 3) responding to the needs in the area of ensuring occupational health and safety and adjusting the measures taken to improve the current level of protection of the health and life of employees, taking into account the changing conditions of work; 4) ensuring the development of a coherent policy for the prevention of accidents at work and occupational diseases given technical considerations, work organization, working conditions, social relations and the impact of factors involved in the working environment; 5) ensuring that the adopted preventive measures take into account protecting the health of juveniles, pregnant or breastfeeding workers and disabled employees; 6) ensuring that the orders, addresses, decisions and decrees issued by the competent regulatory authorities are implemented; 7) ensuring that the recommendations of the social labour inspector are implemented. The costs of actions undertaken by the employer to ensure occupational health and safety may in no way be charged to the employees (Article 207 § 1 - 2¹ LC). Moreover, the lawmaker has imposed a broad information obligation on the employer with respect to employees. The solutions adopted in Article 207¹ LC implement the solutions adopted in Article 10 of the Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJEU, L 1989 No. 183, p. 1). The EU legislator asserts in Article 10 (1a) Council Directive that the employer should take appropriate measures so that, in line with national legislation and the procedures in place that

may be taken into account, as well as given the size of the enterprise or establishment, the workers or their representatives at the workplace are provided with the necessary information concerning safety and health risks and the type of adopted protective and preventive measures as well as actions applicable to both the enterprise and/or establishment as a whole and to particular workstations or jobs²⁰.

Considering the peculiar nature of remote work, the lawmaker has excluded the application of certain provisions on occupational health and safety in Section X to remote workers (specifically, Article 208 § 1, Article 209¹, Article 212 (1) and (4), Article 213, Article 214, Article 232 and Article 233 LC). Employers have thus been relieved of numerous obligations relating to health and safety. This seems logical, because when an employee performs work in a location which remains outside the employer's control, the employer's capacity to take relevant action is limited. Consequently, the employer's capacity to influence the health and safety conditions in remote work is not as extensive as when the employee performs work at the workplace, i.e. at a location that such an employer administers on a day-to-day basis. The employee must, therefore, be aware of such limitations.

In addition, the nature of certain jobs or workstations precludes performing the work remotely. They have to be performed at the particular location designated by the employer, "in-house", as it were. Thus, the lawmaker has excluded the possibility of remotely performing work which: 1) is particularly hazardous; 2) results in exceeding the permissible standards of physical factors established for residential premises; 3) involves hazardous chemical agents referred to in the provisions on health and safety at work concerning the presence of chemical agents at the workplace; 4) involves the use or release of harmful biological agents, radioactive substances and other substances or mixtures emitting offensive odours; 5) causes excessive soiling (Article 67³¹ § 4 LC).

It should be noted that each employee, including remote workers, must undergo initial health and safety training. However, due to the

²⁰ See more: K. Walczak, W. Witoszko, *Objaśnienia do art. 207¹ k.p., [in:] Kodeks pracy. Komentarz*, W. Muszalski, K. Walczak (eds.), Warszawa 2021, p. 739.

characteristics of remote work, an administrative or clerical employee may attend such training exclusively through electronic means of communication. The curricula of initial and periodic training specify particular topics, forms and durations of training for each group of workstations or positions. They should be adapted to the types and conditions of work performed by training participants (§ 7, Regulation of the Minister of Economy and Labour on training in the area of occupational safety and health, Journal of Laws 2004 No. 180, item 1860, as amended). Such training should also accommodate the unique circumstances of remote work.

Before one is allowed to work remotely, the employer must carry out an occupational risk assessment of remote work, paying particular attention to its impact on vision and the musculoskeletal system, as well as psycho-social ramifications. Based on the results of such an assessment, the employer shall draw up information stating: 1) the rules and means for the proper organization of remote workstation, taking ergonomic requirements into account; 2) the rules for safe and hygienic performance of remote work; 3) the actions to be performed following the completion of remote work; 4) the rules applicable in emergency situations which represent a threat to human life or health. Prior to performing remote work, the employee must become acquainted with the occupational risk assessment formulated by the employer. This is confirmed by means of a statement in paper or electronic form (Art. 67³¹ § 5 and 6 LC). It is the employee who, having taken ergonomic requirements into account, organizes the remote workstation²¹.

While performing their duties, the employee often has access to confidential information and personal data. Remote working poses a greater risk of disclosure of confidential information and breaches of data privacy than work performed in the usual manner. Such breaches may occur through failure to implement adequate safeguards or through employee misconduct. The security of an employer's information is likely to benefit the most from the employee's obligation to uphold the good of the workplace and

²¹ A. Sobczyk, *Objaśnienia do art. 67³¹ k.p.*, [in:] *Kodeks pracy. Komentarz*, A. Sobczyk (ed.), Warszawa 2023, p. 454.

to maintain the confidentiality of information whose disclosure might expose the employer to harm or loss (Article 100 § 2 (4) of the Labour Code). In order to safeguard their interests, the employer should introduce specific provisions on the protection of information in the remote working regulations or in the agreement. For the purposes of remote working, the employer shall also determine procedures for the protection of personal data, with particular emphasis on the procedures for personal data processing. With that goal in mind, the employer also provides instruction and training to employees. It is the employee's duty to adhere to such procedures, while their compliance will be subject to control (Art. 67²⁶ of the Labour Code). It is worth noting that data protection procedures constitute a separate act issued by the employer. They may be set out in the rules and regulations or in a dedicated instrument²².

If, in the course of controlling remote work during employment, the employer determines non-compliance with the regulations and rules on occupational safety and health specified in the information provided to the employee or finds that the employee has failed to meet the requirements on information security and protection, including procedures for the protection of personal data, they oblige the employee to rectify such shortcomings within a specified period of time or withdraw consent for that employee to perform remote work. If the latter is the case, the employee shall start working at their previous workplace on the date specified by the employer (Article 67²⁸ § 3 LC). Moreover, regardless of whether the employer requires that the shortcomings be rectified or withdraws their consent to remote work, the employee may additionally be subject to a disciplinary penalty for failure to comply with health and safety rules²³. An employee performing remote work is under obligation to perform their duties with due diligence. Should the latter be breached, the employee may be subject to disciplinary and financial liability. The employer will also be entitled to terminate their contract, even without notice - i.e. with immediate effect - in view of the employee's fault.

²² A. Sobczyk, *Objaśnienia do art. 67²⁶ k.p., [in:] Kodeks pracy. Komentarz*, A. Sobczyk (ed.), Warszawa 2023, p. 445.

²³ M. Mędrala, *op., cit.*

SOBRIETY CHECKS FOR REMOTE WORKERS

Provisions pertaining to sobriety checks and testing for other intoxicating substances were introduced into the Labour Code as of February 2023. The lawmaker has introduced preventive control, as well as laid down principles to be followed by the employer when responding to an employee's unlawful conduct. Preventive sobriety checks of employees may be introduced by the employer if it is necessary to protect the life and health of employees or other persons or to protect property. Such checks must not violate the dignity or personal rights of the employee. The test shall be carried out using a suitable device which does not require a laboratory procedure. The purpose of the test is to determine whether the state of the person demonstrates prior consumption of alcohol (presence of 0.1 mg - 0.25 mg of alcohol in 1 dm³ in exhaled air) or whether that person is intoxicated (presence of more than 0.25 mg of alcohol in 1 dm³ in exhaled air). These thresholds are specified in Article 46(2) and (3) of the Act of 26 October 1982 (Journal of Laws of 2023, item 2151). The rules for carrying out sobriety checks are regulated by the relevant instruments, usually collective agreements or internal regulations at the workplace. They should contain information on the possibility of conducting such checks at the employer's premises, list employee groups that are subject to testing, specify whether the test will be random and how frequently it will be conducted, and the type of testing equipment should also be stated. Workers should be advised that checks will be carried out with two weeks' notice. Such information must be provided prior to the control (Article 22^{1c} LC).

Since the employer is responsible for the standard of health and safety at work, it is their duty not to allow an employee who is under the influence of alcohol or any other intoxicating substance to work. A breach in this respect will be tantamount to failure to comply with health and safety regulations or rules and may result in the employer being fined (Article 283 § 1 LC). Therefore, the employer shall not allow the employee to work if the sobriety check reveals the presence of alcohol in the employee's system, in line with the thresholds specified above. At the request of the employer or the employee, a sobriety check is conducted by the police. The test is

generally carried out using a suitable device in a non-laboratory manner. Occasionally, however, the police may request to have a blood test performed. If the result of the test is negative and does not indicate prior consumption of alcohol or a state of intoxication of the employee, then the period in which the employee has not been permitted to work is treated as a period of excused absence from work, for which the employee is entitled to remuneration (Article 22^{1d} LC). Analogous rules apply to the employer when testing the employee for the presence of intoxicating substances. The latter include: (1) opioids; (2) amphetamine and its analogues; (3) cocaine; (4) cannabinoids; (5) benzodiazepines (§ 10 of the Regulation of the Minister of Health on employee tests for the presence of alcohol or intoxicating substances in the system, Journal of Laws 2023, item 317). When introducing that legislation as well as adopting relevant solutions on remote working, the lawmaker did not specify the rules under which the sobriety checks of remote workers may be carried out. However, those provisions have not been excluded from being applicable to remote working. Therefore, it would appear that conducting such controls is justified and admissible when that mode of work is involved, but the practical aspects of such a procedure remain doubtful. The rules for carrying out a sobriety test may be included in the internal regulations concerning remote work, whereby it should also be included in the overall work regulations. However, in such a situation, it might prove problematic to enter the employee's home to carry out the test without their consent. Therefore, one should concur with the position advanced in jurisprudence, namely that the employer should issue an official order for the employee to report to the workplace and then conduct the test in accordance with the general rules. Even so, the internal regulations on remote work should set out the rules of compulsory appearance on the employer's order²⁴.

THE MONITORING OF REMOTE WORK

The rules governing visual and e-mail monitoring have been laid down in the Labour Code. The employer may introduce special surveillance of the

²⁴ Ł. Prasolek, *Praca zdalna – aspekty prawa pracy*, [in:] *Praca zdalna. Aspekty prawa pracy, BHP, IT, RODO i HR*, Ł. Prasolek (ed.), Warszawa 2023, Legalis/el.

workplace premises or the surrounding area, using technical means of image capture if it is necessary in order to ensure employee safety, protect property, control production processes or maintain the confidentiality of information, the disclosure of which could be harmful to the employer. This is visual monitoring (Article 22² LC). The employer may also monitor the employee's business e-mail when necessary to ensure the organization of work that will enable full use of working time and the proper use of the work tools provided to the employee (Article 22³ LC). E-mail monitoring is geared towards controlling the use of the equipment entrusted to the employee, which constitutes their work tool. Here, the aim is to ensure proper and effective work organization. Monitoring, construed as ongoing control, implies that the nature of the control measure implemented by the employer is permanent²⁵. According to the Supreme Administrative Court, monitoring must be lawful and meet the requirements of transparency, proportionality, and legitimate purpose, as with regard to the protection of personal data. Employees must be aware that they are subject to monitoring²⁶. The lawmaker has also provided that the employer may introduce other forms of monitoring if they deem it necessary to ensure proper work organization, as in the case of e-mail monitoring. Remote work monitoring represents such a different form of monitoring. Here, the IT department at the employer verifies the employee logging into the employer's system (to determine the origin and the system used) and checks whether the employee is working and which browsers are being used. With the development of modern tools, the employer can verify the remote employee's activity online²⁷. However, the possibility of remote work monitoring must be regulated in the work regulations, and the employees must be advised of its application two weeks in advance. The employee must be informed in writing about the objectives, scope and methods of monitoring. On the other hand, where monitoring is

²⁵ J. Jarguz, *Objaśnienia do art. 22³* [in:] *Kodeks pracy. Komentarz*, A. Sobczyk (ed.), Warszawa 2023, p. 161.

²⁶ Judgment of the Supreme Administrative Court of 13 February 2014. I OSK 2436/13, Legalis no. 909366; see more: M. Nałęcz, *Objaśnienia do art. 22³ k.p.*, [in:] *Kodeks pracy. Komentarz*, W. Muszalski, K. Walczak (ed.), Warszawa 2021, p. 63-64.

²⁷ see more in Łukasz Prasolek, *Praca zdalna – aspekty prawa pracy* [in:] *Praca zdalna. Aspekty prawa pracy, BHP, IT, RODO i HR*, ed. Łukasz Prasolek, Warszawa 2023, Legalis/el.

already in place at the employer, then any employee who starts working for that employer and will be working remotely must be provided such information before being allowed to work.

EXAMPLES OF REGULATIONS IN PUBLIC HIGHER EDUCATION INSTITUTIONS

In public higher education institutions, the employer bears the same responsibility as in other state institutions for the state of occupational health and safety in the workplace (Article 207 of the Labour Code), as well as for their proper control. He is obliged to protect the health and life of employees by ensuring safe and hygienic working conditions with appropriate use of scientific and technical achievements. It should shape the work process through internal procedures in accordance with the law and OSH principles and exercise effective management and supervision in this regard.

Acting on the basis of the disposition of the Minister of Science and Higher Education of 23 March 2020 on the temporary restriction of the operation of certain entities of the higher education and science system in connection with the prevention, prevention and combating of COVID-19 (Journal of Laws of 2020, item 511, as amended) and the Ordinance of the Council of Ministers of 2 May on the establishment of certain restrictions, orders and prohibitions in connection with the occurrence of an epidemic state, the sanitary regime system was implemented. In agreement with the Crisis Management Team appointed in accordance with Order No. ROP-0101-110/20 of the Rector of the Catholic University of Lublin John Paul II of 16 April 2020 on the appointment of the Crisis Management Team at the Catholic University of Lublin John Paul II in connection with the outbreak of the SARS-CoV-2 coronavirus, a catalogue of measures for counteracting and controlling remote working was defined.

To this end, relevant regulations were adopted by the university authorities, such as two documents of Occupational Risk Assessments for the SARS-CoV-2 virus epidemic situation at workplaces at the John Paul II Catholic University of Lublin (Document AOCR/1/2020 and Document AOCR/2/2020). In addition, two Preventive Action Plans for health

protection of employees of the John Paul II Catholic University of Lublin in Lublin against the spread of the SARS-CoV-2 virus were introduced as implementing documents.

The Department of Protection, Safety and Hygiene at Work was responsible for the supervision and control of the provision of safe working conditions on the basis of Order No. ROP-0101-159/20 of the Rector of the Catholic University of Lublin John Paul II of 21 May 2020 on the principles of operation of the Catholic University of Lublin John Paul II.

CONCLUSIONS

In view of the above, one should concur with the position expressed in jurisprudence, namely that control is an important tool for mitigating the risk incurred by the employer, personnel risk in particular²⁸ (Głądoch 2023a, p. 132). The scope of control encompasses the fulfilment of obligations resting with remote workers as regards the performance of the work, compliance with health and safety requirements with respect to working conditions, and the protection of information and personal data. It should be stressed that the particulars concerning the performance of remote work, procedures relating to the health and safety of remote work and the protection of information and personal data should be formally specified by the employer, and the employee should be familiarized with them. It may sometimes be necessary to provide appropriate instruction and training to remote workers in this regard. The employee must be aware of the employer's procedures that they are obliged to follow since their breach may entail severe liability. The fact that a violation of the kind has occurred may be determined by means of control, which enables one to ascertain compliance with the law. On these grounds, the employer establishes the state of fact, compares it with the desired state and, subsequently, formulates the conclusions resulting from the control. Once the employer finds that shortcomings are indeed in evidence (depending on the type and seriousness of the infringements and their consequences, as well as on the

²⁸ M. Głądoch, *Praca zdalna* [in:] *Prawo pracy dla sędziów i pełnomocników*, K. Walczak, M. Wojewódka (ed.), Warszawa 2023, p. 132.

degree of the employee's fault), they either oblige the employee to remedy them within a specified period of time or withdraw their consent for the employee to perform work remotely. In addition, as remote workers are obliged to perform their duties with due diligence, they may also be subject to disciplinary and financial liability for the breach of said duties. The employer will also be entitled to terminate the employee's contract, even without notice, if the employee is at fault.

At the same time, given the peculiar nature of remote work—which may be performed at the employee's place of residence—the scope of control is limited due to the need to protect the right to privacy of the employee and other persons who reside with them at the remote working location (e.g. in an apartment). Therefore, the control may only be carried out during the employee's working hours, by prior arrangement, and may only cover the workstation, e.g. the specific interior in the apartment where the work is performed, not the entire household. Furthermore, such a control must necessarily respect the right to privacy of the employee or other persons, being conducted subject to the principle of proportionality. Therefore, it may be carried out remotely if such a method suffices to effect it²⁹.

In addition, the Polish lawmaker provides for the possibility of conducting employee sobriety checks as well as monitoring remote work. However, such control modalities are not exclusive to remote working, as pertinent provisions are formulated outside Chapter IIc of the Labour Code. Nevertheless, controls of this kind are not statutorily prohibited with respect to remote workers.

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²⁹ M. Mędrala, op., cit.; M. Gładoch, *Praca zdalna [in:] Prawo pracy dla sędziów i pełnomocników*, K. Walczak, M. Wojewódka (ed.), Warszawa 2023, p. 133.

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ZAKRES KONTROLI W MIEJSCU WYKONYWANIA PRACY ZDALNEJ

Streszczenie

Po okresie pandemii Covid do polskiego kodeksu pracy wprowadzono rozwiązania dotyczące wykonywania przez pracowników pracy zdalnej. Obowiązują one od 7 kwietnia 2023 r. Praca zdalna polega na wykonywaniu pracy całkowicie lub częściowo w miejscu wskazanym przez pracownika i uzgodnionym z pracodawcą, w szczególności z wykorzystaniem środków bezpośredniego porozumiewania się na odległość. Pracodawca ma prawo kontrolować wykonywanie pracy zdalnej w miejscu jej wykonywania, także jeżeli jest to miejsce zamieszkania pracownika. Artykuł ma na celu przeprowadzenie analizy zakresu kontroli jaka jest prowadzona w miejscu świadczenia pracy zdalnej. Obejmuje on rozważania odnoszące się do prowadzenia kontroli w obszarze realizacji obowiązków pracownika dotyczących wykonywania pracy, przestrzegania bezpiecznych i higienicznych warunków pracy oraz ochrony informacji i przestrzegania danych osobowych. Podejmuje również kwestie związane z możliwością prowadzenia kontroli trzeźwości pracowników zdalnych oraz prowadzenia monitoringu pracy zdalnej, w tym monitoringu poczty elektronicznej pracownika świadczącego pracę zdalną. Artykuł zwraca również uwagę na ograniczenia w zakresie przeprowadzania wskazanej kontroli.

Słowa kluczowe: kontrola, praca zdalna, pracownik.