

10 pitfalls when working remote under German law

The German government is encouraging „home office“ working. Based on new regulations announced by the Federal Ministry of Labor and Social Affairs on 19 January 2021, employers are permitted to allow all suitable employees to work at a „home office“ in the future. Has the Covid-19 pandemic indirectly brought a right to work from a „home office“? How does a „home office“ differ from „mobile work“? What are the unknown risks? And who is responsible if an accident or damage were to occur in the „home office“? Employers are facing increasing requests from employees regarding remote working. There are various pitfalls employers need to bear in mind before agreeing to a remote working model.

1 Home Office

A “home office” only exists if the employer sets up a fixed workplace for the employee outside company premises and the employee works from there. In the case of the “home office”, the (partial) performance of work is rendered at a permanently installed workplace outside company premises, typically “within one’s own four walls”. There are two main issues that must be considered:

- The employer must ensure that the “home office” workplace meets the same legal requirements as the workplace at company premises.
- In case of “home office” work, the employee cannot freely choose their non-office workplace, but must render their services from a fixed, approved workplace at home.

2 Mobile Work

Mobile work means performing work with mobile devices at typically changing locations outside the company premises (e.g. when travelling by train, staying in a hotel or on even in bed at home). The employee does not necessarily have to work from home. He only has to ensure his availability.

3 No entitlement under German law (currently)

In Germany there is (currently) no legal entitlement to work from home or to mobile work. The employee is therefore only allowed to work from home or remotely if this is permitted either under an employment contract, a company agreement or provided for on a case-by-case basis as approved by the employer.

4 Working time issues

The employer is responsible for complying with the provisions of the Working Time Act (*Arbeitszeitgesetz*) even if the employee is not bound to a specific location. The employer must ensure that the provisions of the Working Time Act are complied with, e.g. provide employees with breaks and rest periods. The employer must also record and control working time that exceeds eight hours in the case of a location-independent activity. The employer, however, can delegate the recording of time to the employee. Violations of the Working Hours Act can result in substantial fines and the health and safety authorities can issue orders to ensure proper recording of working hours.

The total working time in any given workday is permitted up to a maximum of 8 hours. This can be extended to up to 10 hours if the extra hours are compensated within 6 months or 24 weeks. This maximum limit of 10 hours of daily working time may not be exceeded even when undertaking mobile work.

After the end of the maximum working day, the employee must observe a rest period of 11 hours. By collective agreement, this rest period can be reduced to nine hours, which is already used in Tariff Agreements for the metalworking industry.

Break times must also be observed during mobile work. They may not simply be deducted by the employer, nor may they be taken at the beginning or end of working hours. Breaks serve as the employee's rest periods between work hours.

5 Occupational health and safety issues

The distinction between home office and mobile work is particularly relevant with regards to occupational health and safety. If the employer sets up a "home office", it must ensure that this workplace meets the requirements of occupational health and safety standards. For this purpose, the employer must carry out a so-called "risk assessment" when setting up the workstation. This means that the employer must be able to identify and eliminate risks in the "home office". Notwithstanding the above, the employer is not allowed to enter the employees home without consent.

The requirements for mobile work are more flexible. Especially the Workplace Ordinance (*Arbeitsstättenverordnung*) does not apply - understandably, as it would be impossible for the employer to guarantee the safety of a table in a hotel room or a chair in a café. The other occupational health and safety regulations such as the risk assessment, however, also apply to mobile work, albeit only to a limited extent. In this case the testing and documentary obligations should be carried out by the employer.

6 Data Protection issues

Data protection considerations do not cease to exist when working remotely. Especially when setting up a "home office", it is still the employer's obligation to assure data security through a data protection concept that also provides for suitable technical and organizational measures (widely known as *TOM*). These include, for example, the employee's obligation to keep work related documents in a lockable cabinet, to log on to the Internet only via VPN or tunnel solutions and not to store passwords in a freely accessible way. Printouts with sensitive company information that are no longer in use should be destroyed or at least not put in the general waste bin. Awareness must be created among the company's mobile workers of the issues surrounding the confidentiality of company information, especially when working in public places when having phone calls or working on laptops in order to avoid confidential information being inadvertently seen by surrounding people.

7 Accident Insurance

It is also important to know what law applies if an employee has an accident in the "home office" or while undertaking mobile work. According to case law, an accident in the "home office" is only insured if there is an internal connection between the event leading to the accident and the business related activity. According to the German courts, the intended action of the insured person is essential for the assessment of this question, i.e., whether the insured person wanted to perform an activity serving the employer in the specific case and whether this intended action is confirmed by the objective circumstances of the individual case. Walking into the "home office" room, e.g. is a regular activity associated with work, so therefore an injury while doing so would likely be covered. Making sandwiches in the kitchen and cutting off a finger, on the other hand, is not. When in doubt, the employee must prove that an insured activity existed. Thus, it is advisable either to include employees in an employer's group accident insurance policy or to recommend that employees take out private accident insurance that also covers accidents in the "home office" or during mobile work that are not covered by statutory accident insurance.

8 Costs

Due to occupational health and safety and data protection considerations, it is advisable for the employer to provide the employee with work equipment (i.e. laptop or printer) as required for the "home office" workplace and, in some cases, also furnishings (office chair, desk, etc.). However, this also means that the introduction of a "home office" often involves higher costs for employers than mobile work. If work equipment or furnishings are not or only partially made available for a "home office", the employee has the right to claim expenses, which are to be borne by the employer. Therefore, contractual cost regulations are advisable. If the employee is mobile working, they usually only need a laptop and/or a smartphone, and possibly a headset. According to sec 670 German Civil Code (*Bürgerliches Gesetzbuch*), the costs for the acquisition of electronic devices are also to be borne by the employer - unless otherwise contractually agreed. However, these costs are likely to be much lower overall than providing a fully equipped "home office".

9 PE Risk

If a German entity is yet to have been set up, there will be a risk that the employee's activities or presence in Germany will create a permanent establishment for the Employer. This would be the case if, for example, the employee has a sales or business development role and is habitually exercising an authority to conclude contracts in the name of the employer while in the host country.

If a permanent establishment is created, the profits attributable to that establishment would be subject to corporate tax in that country. It would also mean that the income tax exemption in the DTT would not apply. While this may be less of a problem if your business already has established operations in the host country, it could be a real issue if not.

10 Working from anywhere in the world?

Employers also should be aware of further social security/tax implications when the remote working request is cross-border related. The remote working activity may under certain circumstances lead to a change in taxation rights or change in the tax and social security status of the employees concerned. The relevant double taxation agreements and social security treaties must also be observed and each individual's situation should be thoroughly investigated prior to agreeing any remote working arrangement.

Contacts



Dr. Michael Beer

Senior Associate, Munich
+49 89 21038-259
m.beer@taylorwessing.com



Dr. Christian Maron

Salary Partner, Munich
+49 89 21038-257
c.maron@taylorwessing.com



Dr. Benedikt Groh

Associate, Munich
+49 89 21038-414
b.groh@taylorwessing.com