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## EMPLOYERS' OPENNESS TO TELEWORK

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### **Abstract**

*"Work from home" and "telework" are, according to the law, two distinct legal institutions (of labor law). Hybrid work, i.e. work performed partly from home, partly from the office is considered a new form of telework can be used by employers. If the employee requests a flexible work schedule, which could allow him to work from home, employers are obliged to give reasons for their refusal in writing, "within five working days of receiving the request". And in Romania, as in most European countries, the right to disconnection is not contemplated in the current legislation. However, it is necessary to specify that in Romania the "very restrictive duration of working time and, respectively, rest time and its limits, as well as the organization and maintenance of records of working time" are regulated.*

**Keywords:** *home work; telecommuting; working in a hybrid regime; the workplace of the teleworker; the right to disconnect.*

### **INTRODUCTION**

#### **GENERAL CONSIDERATIONS**

Telework activity is no longer "a niche option, but an integral component of the European labor market". Compared to other countries in Europe, "Romania currently does not offer an absolute right to telework to any category of employees, only forcing employers to justify their refusal against employees' requests". (Voiculescu, 10 noiembrie 2023, [www.avocatnet.ro](http://www.avocatnet.ro))

With the exception of Sweden, Finland, Cyprus and Denmark, all states in the European Union have regulated telework.

Although Romania is at the bottom of EU statistics in terms of frequent/occasional use of home work, according to the latest Eurostat data (Popa,

Lungu, 22 august 2023, [www.juridice.ro](http://www.juridice.ro)), the COVID-19 pandemic has caused an exponential increase in interest in telework/home work.

"Work from home" and "telework" are, according to the law, two distinct legal institutions (of labor law). In the specialized legal literature it has been shown that, taking into account the existing similarities between the two forms of work organization, the differentiation between home work and telework, seen as distinct legal institutions, seems artificial,... between the two institutions there is, in several cases, a relationship from the whole to the part, even if, as we will show, the rights and obligations of the parties have, to some extent, a different content... the only relevant distinction, which determines the application of the legal regime of work at home, resides in the performance of the activity from home without the use of information technology" (Vlăsceanu, Iordache, 2023, p. 36).

As it was shown in the doctrine, in the conditions where "the place of work is the domicile of the employee, telework is sometimes identified with work at home" (Țiclea, 2015, p. 377), but "the object, the content, but especially the purpose of the two individual employment contracts are totally different" (Ștefănescu, 2008, p.76), the regulations contained in Law no. 81/2018, which was very little modified during the pandemic, when the need arose to resort to this form of work on a large scale, configures "a legal regime specific to this type of contract"(Vartolomei, 2018, p. 46). Thus, significant differences refer to the quality of the workers and the specifics (Țop, 2022, p. 276) of the employees' activity: in the case of telework, the worker is qualified by law as a teleworker, a qualification that we do not meet in the case of the worker working at home; the telecommuter uses information and telecommunications technology, while the home-based employee uses, as a rule; machines, equipment, mechanical, electrical installations, etc. classics; hence the specifics (Țiclea, 2018, p.192) of the profession/trade/qualification of the two categories of workers; in the case of home work, the salaried activity can be carried out by a wide range of employees, for example, accountants, economists, researchers, turners, locksmiths, tailors, etc., while in the case of telework, the workers have a strict specialization that refers to processing, transformation, manipulation and dissemination of information (such as, for example, analysts, programmers, computer scientists, etc.). (Vartolomei, 2016, pp. 192-193)

Only in our country, in Spain and in Portugal, the definition of telework is strictly related to the use of information and communication technology.

In the context of the pandemic, several European states have changed the legislation regarding telework. (Voiculescu, 10 noiembrie 2023, [www.avocatnet.ro](http://www.avocatnet.ro))\* In Croatia, for example, from January 1, 2023, employees can request telework in cases established by law (e.g.: pregnancy, caring for a family member) and employers must respond with reasons within 15 days (note that in our country the term is of five working days). Greece allows, also this year,

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employees with certain conditions to request telework. The request must include a medical opinion, and in the absence of an answer, it is considered accepted. In Ireland, the right to telecommute came this spring, accompanied by an obligation for employers to comply with a statutory Code of Practice when assessing applications for telecommuting. The Dutch legislative proposal "Work Where You Want" ("Work from where you want") makes it more difficult for employers to reject requests from employees to change jobs - the proposal is awaiting Senate approval.

By far the most favorable law for employees would be in Portugal, according to the European report, where employers cannot unjustifiably refuse requests for telework, there it is compatible with the specifics of the activity. Also, parents with children under the age of eight and people who informally care for certain people can request telework without opposition from the employer under certain conditions.

### I. WORK IN HYBRID REGIME

Hybrid work, i.e. work performed partly from home, partly from the office, considered a new form of telework can be used by employers, especially since by Law no. 241/2023 to supplement Law no. 53/2003 - Labor Code, a new article is introduced, article 1181, which provides in paragraph 1 that, "upon request, employees who have dependent children up to 11 years of age benefit from 4 days per month of work at home or telework, under the conditions of Law no. 81/2018 on the regulation of telework activity, with subsequent amendments and additions, except for situations where the nature or type of work does not allow the activity to be carried out under such conditions".

It was said that "the purpose of the law which provides for the four days of work from home for those who support children up to 11 years of age is, of course, to be appreciated and is part of the European desire to strengthen the balance between professional and family life . But the law does not solve a current problem of the labor market that we encounter both here and in other European countries or in the United States - the openness of employers to telework (where possible, of course). In reality, in companies where hybrid work has been embraced in the long term, employees with children have obtained the benefit of working from home anyway". (*Voiculescu, 24 iulie 2023, www.avocatnet.ro*)

Recently, employers, under the influence of the impact generated by the pandemic, combined with the desire of employees to have more flexibility in terms of organizing their work, are focusing on the implementation of hybrid work programs, which, in essence, involve a time interval given (as a rule, the reference is given by the working week) for employees to work from workplaces organized by the employer, as well as from other workplaces of their choice. (*Vlăsceanu, Iordache, 2023, p.97*)\*

It was mentioned that "employers who have not provided anything regarding the performance of the activity from the headquarters in the telework contracts have difficulties in bringing teleworkers to the office, even for one day a month." Any renegotiation of the terms and the transformation of telework exclusively from home into telework in a hybrid regime requires the agreement of the parties. On the other hand, although the law does not oblige them to provide the places from which the telework activity is performed, the parties can agree to provide those places, and the employer has an interest". (*Voiculescu, 31 august 2023, www.avocatnet.ro*)

Because Law no. 81/2018, or the rules of the Labor Code, do not take into account the hypothesis that the employee comes to the office when he wants, in the "hybrid" work regime, i.e. work performed partly from home, partly from the office, considered a new form of telework, should be expressly provided (*Țop, 2023, p.212*) for in the Labor Code.

Although not expressly regulated, hybrid work is a reality (Dimitriu, 2023, <https://webinar-hr.legislatiamuncii.ro>) that cannot be fully encapsulated in the concept of telework. As far as the Romanian legislation is concerned, I think there are still steps to be taken in the direction of making the hybrid employment relationship more flexible, so that it reaches its goal. Let's not forget that its widespread use was associated with a completely exceptional situation, namely the Covid 19 crisis. However, after the end of the pandemic, the percentage of employees who work, even partially, remotely, will never return at the low rates observed before the crisis, so that it has become a phenomenon that no longer has health causes, but is directly related to party choices.

Some studies show that telecommuting – especially hybrid models – has continued after the pandemic, as its widespread use has increased awareness of its benefits and shown that obstacles can be overcome. Workers who have gone through a process of integration and learning between work and private life are pushing employers to maintain flexible working patterns. In addition, hybrid work models are pushing companies to rethink the role of the office: the office of the future will be designed as a place for collaborative and creative work, socializing and experiencing company culture.

## **II. THE WORKPLACE OF THE TELEWORK**

Currently, the legislation no longer requires the parties to provide for the "place(s) of the telework activity" in the individual labor contracts. Thus, in the contracts we can now have no reference to a place of performance of the activity or the places can be specified, in the terms agreed by the parties, for example, to mention that the activity is carried out only in Romania, or to show the exact address of employee's domicile, city, etc.

In certain situations, however, the provision of the place of activity is important. "If the teleworker is sent by the employer to a different location than

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those agreed by the contract, he has the right to all benefits provided by art. 44 para. 2 of the Labor Code". The employee who, at the discretion of the employer, must temporarily exercise his duties and responsibilities outside his workplace benefits from the payment of transport and accommodation expenses (as the case may be), as well as a delegation allowance, under the conditions provided by law or the applicable collective labor agreement, more precisely. The Labor Code defines delegation as "the temporary exercise, at the disposal of the employer, by the employee of certain works or tasks corresponding to the duties of the service outside his workplace", and in the case of the two types of contracts (we could still say «atypical» or «special»), work at home and telework, if a period or days were not foreseen in which the employee with work at home or the teleworker should carry out his activity « at a workplace organized by the employer", we are in the presence of the delegation with all the rights provided by law". (*Năstase, 28 octombrie 2023, avocatnet.ro*)

If the employer does not restrict the scope of the teleworker's workplace to the territory of Romania, there may be various fiscal consequences if the teleworker decides to become a digital nomad in another state.

It should be noted that employees do not have the right to telework, and failure to show up at work, as stipulated in the contract, is practically equivalent to unjustified absence from work. Law 81/2018 is not always respected, so occasional work from home, without legal formalities, happens in practice and not infrequently. The context of her pregnancy. In the absence of an additional act to the individual employment contract regarding the telework regime, the employee is obliged to report to the workplace and the employer has the right to request this. The occasional permission to work from home does not give the employee a right in this sense. (*Voiculescu, 11 septembrie 2023, www.avocatnet.ro*)

Employers are required to give reasons for their refusal to accept employees' request to work remotely. Thus, if the employee requests a flexible work schedule, which could allow him to work from home, employers are obliged to give reasons for their refusal in writing, within five working days of receiving the request. (*Țop, 2022, pp. 7-17*)

The Bucharest Court of Appeal decided, e.g., that "the fact that the employer remained inactive for a longer period of time, as claimed by the appellant, cannot be considered as evidence of telework, the Court also noting the fact that the employer sent her notices to show up to discuss the employment relationship situation. Also, during this period, the appellant's activity was sporadic, although she was not prevented from performing her work".

Employers "must ensure that all specific clauses are found in the telework contract, such as those provided by art. 5 para. 2 of the Telework Law. The lack of specific clauses in telework contracts is sanctioned with a fine. It often happens that one or more of these clauses are forgotten in the content of teleworker contracts, or companies limit themselves to extremely brief provisions, which do

not tick the requirements of Law 81/2018, for example employers forget or do not know that telework contracts must specify how the timekeeping is done".

Even if the Labor Code gives employers the right to keep records as they see fit, electronically, on paper, etc., a matter also valid in the case of telework, it does not oblige them to put in the individual contracts how the time will be done. The telework law, however, requires this: "the method of highlighting the hours of work performed by the teleworker" must be stipulated in the contract.

There is no "one-size-fits-all formula for success in the use of telecommuting, as the range of activities and internal structures of organizations differ from one entity to another." However, useful guidelines such as simplifying regulations, achieving clear objectives of cost and management efficiency, increased but carefully weighted flexibility and, last but not least, optimal use of technology can transform the usual concept of telecommuting into an innovative concept of intelligent telecommuting, which could ultimately overturn modern work values and make use of the opportunities opening up for organizations'. (*Popa, Lungu, 22 august 2023, www.juridice.ro*)\*

### **III. THE RIGHT TO DISCONNECT - A FUNDAMENTAL RIGHT IN THE E.U.**

Although there is the advantage that, thanks to information and telecommunications technologies, teleworkers can organize their working time according to their own needs, there is a risk that there is no longer a clear demarcation (*Țop, 2023, pp.1271-1283*) between working time and rest time. The increasing use of digital tools for professional purposes has led to the emergence of an "always on" culture. This has a negative impact on the work-life balance of employees.

Working from home has been critical to protecting certain jobs and businesses during the COVID-19 crisis. However, the combined effects of longer working hours and increased demands have led to increased cases of anxiety, depression, burnout and other physical and mental health problems.

The development of digital technologies has facilitated work from anywhere and, implicitly, created the conditions for workers to remain, in one way or another, "connected" to the professional environment. In addition, the spread of remote working has again contributed to the blurring of the boundaries between work and personal life and has in some cases coincided with employers' expectation that workers remain available even outside of agreed working hours.

In the EU, all states have legislation (*Voiculescu, 10 noiembrie 2023, www.avocatnet.ro*)\* guaranteeing the right to mandatory rest outside working hours. Furthermore, countries such as Spain have developed rules for recording working time which help to comply with and enforce working time regulations. However, it is debated whether the application of the traditional right to rest is sufficient to ensure that employers properly regulate the use of ICT devices and

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flexible working arrangements, thus allowing employees to plan their working hours and free time effectively.

At the level of the European Union, there are a number of instruments that indirectly address the issue of the right to disconnect.

Before the pandemic, according to the report of the European Agency for Safety and Health at Work (EU-OSHA), only four European countries had regulated the right to disconnect: Belgium, France, Italy and Spain. As of 2020, laws regarding the right to disconnect had been passed in Croatia, Greece, Ireland, Portugal, Slovakia and Spain. In all these countries, with the exception of Greece and Slovakia, the right to disconnect formally applies to all employees, not just telecommuters. In Greece and Slovakia, the right is mainly limited to teleworkers. In Belgium, the right to disconnect has been introduced since 2018, and from January 2023, employers with at least 20 employees are required to develop internal procedures for applying the right to disconnect at company level, including mandatory minimum policies. Croatia regulated this right through amendments to the Labor Code at the end of 2022, prohibiting employers from contacting employees outside of working hours, with some specific exceptions. In Greece, the right to disconnect allows workers to completely refrain from work-related activities or communication outside of working hours. Ireland approved a so-called code of practice in 2021 that directs employers to allow disconnection, without precisely defining this right. Portugal has defined the right to disconnection as an employer's obligation to refrain from contacting employees during rest periods, and there may be contravention sanctions for non-compliance. Spain strengthened regulations on the right to disconnect with the 2020 telework law and can impose penalties for not having a disconnection policy. In Slovakia, the right to disconnect is linked to labor market reforms and allows employees working from home not to use work equipment during daily rest or holidays.

In our country, as in most of the member states of the European Union, the right to disconnection is not regulated in the current legislation. However, it is necessary to specify that in Romania the "very restrictive duration of working time and, respectively, rest time and its limits, as well as the organization and maintenance of records of working time" are regulated. The guarantees that accompany this right may derive, in part, from the mandatory regulation of the Labor Code regarding working time, rest time and the record of hours worked, against which Law no. 81/2018 which regulates telework activity, does not include exemptions to the detriment of the worker (*en pejus*).

Since the outbreak of the COVID-19 pandemic, "the proportion of remote work has increased by almost 30%. The figure is expected to remain high or even increase in the future. Eurofound research shows that people who regularly work from home are more than twice as likely to work more than the prescribed maximum of 48 hours per week compared to people who work at their employers' workplaces. Almost 30% of people who work from home say they also work in

their spare time, either daily or a few times a week, compared to less than 5% of office workers."

The European Parliament adopted a resolution urging the European Commission to prepare a directive on the so-called "right to disconnect". It is emphasized that the need to adopt a European directive and its subsequent transposition into national legislation throughout the EU is particularly important in the context generated by the COVID-19 crisis. Given that the pandemic has produced a significant increase in remote working, "which amplifies workplace stress and blurs the line between work and private life, it becomes even more urgent to ensure that workers can exercise their right to disconnect."

Taking into account the resolution of the European Parliament regarding the right to disconnect, it follows that the provisions of Law no. 81/2018 must be duly completed with the express consecration of this right and the guarantees that accompany it.

Among them, those that refer to the obligation of employers to establish an objective, reliable and accessible system that allows the measurement of the duration of the daily working time of teleworkers, as well as those that require written information from the worker, the assessment of the risks to your health. Also of particular importance to workplace safety are those related to the right to disconnect and awareness of remote workers, including through on-the-job training.

Although, compared to the provisions of the legislation, we can see, in the case of Romania, "a strict formal delimitation between working time and rest time, in practice, however, this delimitation is rarely respected, and employers face multiple problems in regarding the organization of additional work, both in the case of full-time employees and (in particular) in the case of part-time employees". Such a delimitation, by no means easy, "can be attributed both to the continuous digitization and to the transition that we observe in Romania, from the "classic" working schedule to a new flexible working schedule, so that a real right of employees to disconnect completely after the end of the working day, which will include the right to refuse to consult e-mails received after this moment, to the extent that this will also be regulated in Romania".

In the absence of establishing some common minimum standards at the EU level, the regulation of the law risks losing its imperative character, as a fundamental right, as the preamble of the proposed directive calls it, and can be restricted without limitations, by conventional means.

The right to disconnection is a "fundamental right", (*Vernea, 2023, p. 81*) and also "an inseparable component of the new work models of the new digital era". This right should be seen as an important tool of social policy at the level of the European Union to ensure the protection of the rights of all workers; Also, the right to disconnect takes on importance for the most vulnerable workers, as well as people with caring responsibilities.



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According to the legislation in force as well as the jurisprudence of the CJEU, "workers must not be at the disposal of the employer constantly and uninterruptedly; There is a difference between working time, in which case the worker must be at the employer's disposal, and non-working periods, in which case the worker is not obliged to remain at the employer's disposal, and on-call time is considered time. To work"; The European Parliament recognizes, however, that the right to disconnection is not explicitly regulated in Union law.

The European Parliament has shown that it is necessary to adopt specific regulations that guarantee the right to disconnection, in compliance with the existing directives in the matter, which refer at least to the following aspects:

- the right to disconnect, which enables remote workers to "carry out tasks, activities and electronic communications for professional purposes - such as phone calls, e-mail and other messages - outside working hours, including periods of rest, official and annual leave, maternity or parental leave and other types of leave, without facing negative consequences";

- to take necessary measures to ensure that new ways of implementing worker surveillance and work performance, which allow employers to track workers' activities on a large scale, are not seen as "opportunities for systematic worker surveillance";

- to inform workers about the processing of their personal data;

- respects working time and its predictable character;

- prohibits employers/colleagues from asking their employees to be available or accessible directly or indirectly outside of their working hours or tries, pursuing professional purposes, to contact them, even beyond the limits of the agreed working hours.;

- the express framing of the time in which a worker is at the disposal of the employer or in which he can be contacted by the latter as "working time";

- to inform workers about work conditions, in a timely manner and in written or digital form, to which workers can easily access.

The European authorities have been working since 2021 on a draft directive by which employers will be obliged to respect a new right of employees - that of being inaccessible outside working hours, stating that "this directive establishes the minimum requirements to allow workers who use digital tools, including ICT, for professional purposes, exercise the right to disconnect and ensure that employers respect workers' right to disconnect. The directive applies to all sectors, both public and private, and to all workers, regardless of their status and working arrangements". The right to disconnect "will mean, in practice, that employees will not have to engage in activities or communications related to their professional activity, through digital tools (for example, by phone or laptop), outside of working hours". (*Voiculescu, 10 noiembrie 2023, www.avocatnet.ro*)\*.

## CONCLUSION

*The evolution of telework has not been significant in Romania over the last decade, occupying the last position in the EU ranking annually, according to the total percentage of workers, and it went from 0.1% of employees who occasionally worked from home, only 0, 6% in 2019. In 2021, the proportion increased to 24% of the total number of employees who worked or worked only remotely, a situation that made Romania climb six positions among the member states of the European Union.*

*In our country, there is no regulation of an "absolute right to telework" for any category of employees, but the legislation obliges employers, in case of rejection of a request to work telework, to justify this refusal.*

*In Romania, at the moment, no regulations have been adopted that expressly refer to the right to disconnection, but it is expected that in the current context, the Romanian legislator will address this issue and advance a proposal for a regulatory act in this regard. Otherwise, to the extent that a directive is adopted at the level of the Union to guarantee the right to disconnect, the Romanian state will have the obligation to transpose this directive. Until then, and in the absence of the express enshrining of this right, the applicable legal provisions prohibit the performance of overtime without the consent of the worker, which is equivalent to the prohibition of the employer to impose on the worker the obligation to remain connected/available. outside of work hours.*

*It is desired to adopt a European-level directive that would require member states, including Romania, to implement the right to disconnection in their national legislation.*

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