

Employment effects of coronavirus (II): previously unfeasible, now essential; teleworking as a measure of "physical distancing"

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In the activities where it has been possible to establish it, teleworking has become a business, labour and health ally to prevent the spread of viral infection. However, some companies have improvised this transformation of face-to-face work into remote working and others, with existing telework protocols in their organisation, are now trying out its generalised implementation.

1. Teleworking and remote working

- 1.1. The need to not spread contagion has led the health authorities, first, to recommend and the Spanish Government, now, with the declaration of a 'state of alarm', to impose teleworking whenever and to the extent possible. This is a method of working that is not new, but it does seem novel despite the rapid and generalised adaptation that Spanish companies have demonstrated - except in the necessarily face-to-face activities - and because, suddenly, there is a staff of "teleworkers" who, possibly, have not been trained or informed for this purpose before this emergency situation arose.

Since the Workers' Statute Act (LET) was passed in 1980, there has been *home-based working* which, with the 2012 amendment, became known as *remote working* and which is defined in Art. 13 LET as that which is carried out "predominantly at home or in another different place chosen by the worker as an alternative to face-to-face work in the workplace". When this more modern redefinition of classic home-based working was approved, the lawmaker appealed to the need to make the organisation of production more flexible, to the capacity to increase opportunities for employability and to the convenience of optimising the relationship between working time and personal and family life. And, although it is true that teleworking can be from home or from another type of mobile or itinerant office, in the absence of specific regulation, this provision on remote working is its main legal reference.

The definitions, however, do not match. Teleworking was considered more precisely in the European Framework Agreement on Telework, signed in 2002 by the social partners, where it was defined as that "form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis". Similarly, the International Labour Organisation, in its 2017 report "Working anytime, anywhere: The effects on the world of work", points out that teleworking is a form of work carried out in a place far from the central office or production centre that involves new technology allowing for separation and facilitating communication. For this purpose, it distinguishes between people who regularly work from home with information and communication technologies; occasional workers, with a medium or low level of mobility and frequency of work outside the employer's premises and, finally, workers with high frequency of work from different locations, even from home. Finally, the Royal Spanish Academy defines telework as "work that is carried out from a location outside the company using the telecommunications networks to perform the assigned workloads".

- 1.2. However, when the Spanish legislator modernised the wording of Art. 13 of the Workers' Statute Act, he did not, logically, have in mind a crisis situation such as the current one to regulate this type of work. On the contrary, the aim was to encourage, basically for work-life balance reasons, teleworking - perhaps more partially than totally - in Spanish companies. Before the coronavirus, approximately 5% of the Spanish workforce used this service provision mechanism - in 2019 it increased to approximately 10% -, compared to almost 30% in other European countries. The situations are quite different, since a distinction should be made between regular teleworking and occasional teleworking, between self-employed teleworking and employee teleworking, between teleworking in a large company and teleworking in a small or medium-sized company, and between teleworking in the public sector and teleworking in the private sector, which has been more common until now.

2. The transformation of face-to-face work into remote work and the refusal to telework

- 2.1. The employment situation resulting from the state of alarm is exceptional – because of the

emergency - but generalised - insofar as it is mandatory - and it should be considered to what extent the legislation governing this "new" form of service provision for many workers and companies introduces or not changes to the employment contract, unless the adoption of equally extraordinary (labour) measures in this respect is decided.

Both the national law and the European agreement stress that the change in the way services are provided (from face-to-face to remote work) must be voluntary for both the worker and the employer, so that, when faced with an offer from one or the other, either of them can refuse it. However, "the passage to telework as such, because it only modifies the way in which work is performed, does not affect the teleworker's employment status", states the European framework agreement. Apart from this, of course, there are those workers who have been hired *ab initio* with a remote working contract, who would not be affected by these vicissitudes. In any case, the decision to switch to teleworking is reversible by both individual and collective agreement.

2.2. However, it would not be appropriate to refer to a situation of voluntariness in emergency situations such as the present one, and it should therefore be considered whether the imposition of this transformation by the employer, at least as regards the place of work - rather than the contract - should be governed by the provisions of Art. 41 of the Workers' Statute Act. Not for nothing is this the employment law provision that allows for substantial modification of the employment contract, in addition to (or instead of) other measures of a collective nature - whether agreed or unilateral - that the company may adopt in this exceptional situation. Because the employer has the capacity to organise his company and with full freedom can reorganise his productive capacity. However, if he decides to substantially modify the worker's contract -and the imposition of teleworking seems to be the case-, he must resort to the procedure provided for in Art. 41 of the Workers' Statute Act, even if, strictly speaking, the transformation of a "face-to-face" contract into a "remote" one is not included among the conditions that would require the application of such procedure. However, if the new type of contract is going to entail other types of changes (in salary, with bonuses that may no longer be received; or in working hours, with new measures of control over them), it is necessary to resort to the procedure set out in that provision. In it, the event would appear to be justified (even with possible reference to force majeure, with all the nuances that underlie its use - see, in this regard, CARRASCO PERERA, Á., *Derecho de los contratos*, Pamplona, Aranzadi, 2017, pp. 929 et seq.) and the consultation of workers' representatives would seem appropriate. Why "appropriate" and not "obligatory"? Well, because, in the face of a state of generalised and obligatory closure of companies, the refusal of workers' representatives would become unjustified, except in those cases in which, the work activity being possible, they would propose another type of alternative measures, other than teleworking.

2.3. However, consideration should be given to what solution the company should adopt in the event of one or more employees refusing to provide services remotely. In such cases, it would be appropriate to reach an agreement with the workers concerned, otherwise unilateral suspension - not without difficulty - or dismissal would be appropriate. In this case, the company's action would not be in line with the classification of a disciplinary dismissal

- although it would be possible to assess the seriousness and the guilt of the worker, subject to proof thereof - nor would a collective dismissal be appropriate - unless the workers massively refused to accept teleworking - and therefore the redundancy device could be used.

In principle, Art. 52(c) of the Workers' Statute Act would mean that, if the centre is closed and the entire workforce starts to work remotely, there is no possible justification for a worker's refusal, unless it is shown that the company has another organisational alternative and that its unilateral decision does not weigh up all the conflicting interests. It is true that the worker could claim that he or she has the right to actual occupation (Art. 4.2(a) LET) and attempt a "constructive dismissal" (Art. 50 LET) to obtain, if necessary, greater compensation. But it would be difficult to admit it as such, since the employer is offering him "possible" actual occupation: that of teleworking. However, this type of dismissal contained in Art. 52(c) of the Workers' Statute Act is not without risk, since the employment courts could object to a measure of a definitive nature for a temporary situation.

3. Adapting the main working conditions of the face-to-face worker, now a teleworker

3.1. With regard to the new 'status' of the worker, we ought to start from an initial premise: although the teleworker must continue to enjoy the same rights and fulfil the same duties as before - and those of other workers, if comparable face-to-face workers are still providing services in the company - the specific characteristics of teleworking may make it advisable to adopt specific supplementary agreements, whether individual or collective. In principle, the teleworker will manage the organisation of his/her working time, unless there are other instructions from the company. However, the workload and results must be equivalent to those previously carried out - and, where appropriate, to those of the face-to-face workers.

This premise, however, may pose application-related problems in categories of interest. Such is the case of the teleworker's working hours. On the one hand, because doubts arise as to whether employment rules and regulations regarding working hours (Arts. 34 et seq. LET) are also applicable to teleworking. It is not without reason that employment courts have considered that "home-based work" cannot be subject to either working hours or schedule because of the intrinsic difficulties of control that it entails for the employer. On the other hand, these doubts could be resolved if the latter thesis were considered applicable only to traditional home-based work where, as a general rule, there were no telematic control mechanisms, but not in the case of current teleworking. Not surprisingly, the rules on working hours apply to "all" workers and the rules on remote work do not exempt the application of the general legislation on working hours, maintaining identical rights and obligations for teleworkers, except for those rights that "are inherent in the performance of the work" in a face-to-face manner (Art. 13(3) LET).

3.2. However, the question of control is an additional difficulty. Not all telework is the same. Apart from the fact that it is carried out without computer or telematic means, where control by the company can only be carried out by means of indications, results or indirect

activity evaluation mechanisms, teleworking is normally carried out using information and communication technologies. And so, in international reports on telework, a distinction is made between *offline and online* teleworkers (who connect only at certain times to the company, usually at the beginning and end of the working day, but operate completely independently), the *unidirectional or on way line* teleworker (which allows the worker to communicate with the company at any time within his working hours, but not vice versa) and the *connected or on line* teleworker (with communication possible in both directions, from the company to the worker and vice versa, and at any time, within the working hours). Of course, the latter will allow for greater control of the working hours by the company - perhaps even more comprehensively and incisively than in face-to-face stages. The company, do not forget, is now obliged to record the worker's daily working hours, unless the emergency situation also allows this obligation to be relaxed, as would be desirable.

In any case, it will also depend on the indications of the company, depending on whether it operates granting full autonomy to the worker in his productive organisation or not. It is the responsibility of the worker to ensure that this greater autonomy does not invade his private life, ending up spending more time than he should - and than is paid for - on his work for the company. And it will be important, to this effect, to establish limits in this respect to avoid "tele-availability" - that is, full availability for the company outside the working hours - without monetary compensation in this respect. To avoid conflicts, the work duties and the distribution of the working hours in the new mode of remote service provision should be specified.

- 3.3. Because, in principle, teleworking does not mean "no work". Unless ad hoc working arrangements are made for business closure due to the declaration of a state of alarm or the company opts for other measures involving suspension or termination of employment, teleworking involves the 'same' work, but remotely, or, where appropriate, work indicated by the company and which, for organisational reasons, may be less than usual. If this were the case, if the company had less activity or no activity at all, it would be able to take advantage of the measures which, exceptionally, are also provided for by employment law - and others which it will certainly provide for. But the work, adapted to the exceptional situation, must be that indicated by the company.

If so, or if so arranged by the company, the salary should be kept on the same terms. Certainly, it may happen that, even though the teleworker has the same rights as the workers who carry out the same activity face-to-face, he does not obtain other rights that derive precisely from this form of service; for example, all those remuneration bonuses that value trips or characteristics of the job that are no longer carried out because they are not in the workplace (hardship, danger, etc.). However, there is nothing to prevent the worker from being paid in full as if he were at his workplace. If the company decides to modify the salary as a consequence of the exceptional situation, it must resort to other measures instead of or in addition to teleworking (consider the possibility of reducing the working hours and, in addition, implement teleworking for those hours that remain).

- 3.4. There is another issue to be considered: teleworking will normally take place at the worker's home. This will mean that any measures to supervise or control the worker, if adopted, will have to be weighed up. Of particular interest here are the surveillance mechanisms that lie between the employer's power of direction - who may be viewing the computer screen to check the duration and content of the work in an interactive teleworking environment - and the worker's privacy - who may be at home with people unrelated to the work. The reasonableness and proportionality of the means used for the purpose pursued are two criteria suitable for this situation. Moreover, if any kind of search or inspection is required, it cannot be carried out, unless prior notification and express consent of the worker is given.

In principle, it will be the company that has to bear all the costs of provision, installation, maintenance and operation of the equipment necessary to provide services remotely. However, if the work is carried out with an instrument that is privately owned by the worker, the latter must assume such costs, unless otherwise agreed. To this end, the company must check that the use of both the device and the data in a private environment such as the home - or any other place used by the teleworker other than the workplace - can be controlled by the company.

The Public Administration, which is more advanced in terms of regulations and material in the implementation and application of teleworking, requires, in order for teleworking to be feasible, that the teleworker see the computer desktop of his or her work station reproduced on the computer -owned by him or by the company- that works at home. For this purpose, a computer, an ADSL line, an e-mail account and compatible computer software are needed to connect to the company's server. As the basis of the work will be the use of the company's own applications or software, the data used and processed by the teleworker for professional purposes must be guided by clear and precise indications from the employer which the teleworker must comply with in full; for example, limitations on the use of equipment, tools, platforms, professional data, whether or not they are confidential to the company, etc., with an indication of the penalties laid down in this respect.

Similarly, the employer is responsible for the occupational health and safety of the teleworker, in accordance with national and European occupational health legislation. The teleworker must be informed adequately about health protection measures, with particular emphasis on those involving the use of display screens (Directive 90/270 of 29 May, OJ of 21 June). In this respect, the employer must check that the required health and safety measures are also in place for teleworking, since the employer is not exempt from liability for accidents suffered by the worker as a result of or in connection with the work, even outside the workplace.

4. Teleworking: the irreversibility of the situation

- 4.1. As is always the case, when faced with a need, a virtue is observed. We have now discovered that one mechanism for maintaining - in a basic way and in those cases where it is possible - professional, commercial, labour or productive activity is teleworking.

In a very short time, teleworking has gone from being a way of inserting certain groups into the labour market (disabled people with mobility problems, people -mainly women- with family needs, young people with training interests, unemployed people on a part-time basis or inhabitants of the famous "Emptied Spain" who, from rural areas and provided that there was a connection, were able to perform a job, even across borders) to the only -or almost the only- way of providing services in a state of alarm (another form of "Emptied Spain").

- 4.2. However, although the emergency situation - with preventive and curative physical distancing measures - now projects the exceptional advantages of - occasional - teleworking, the truth is that it also has drawbacks. Isolation at work, less continuous communication with colleagues in the performance of the service, the existence of unresolved doubts and concerns due to the lack of permanent contact in the work environment, the difficulty in generating a sense of common unity in the demands of the job, the possible overexposure to work if there is no control of the schedule by postponing for hours of greater tranquility work responsibilities, habits that are generated in the personal environment and not in the work environment -food, coffee, tobacco- or costs that the worker did not bear before -increase in the consumption of electricity, telephone, etc.-, constitute some disadvantages. Now, some of these disadvantages of professional isolation are perceived more directly in the confinement.

But, taking up again the employment-related consequences, the company, apart from the advantage that work can still be carried out even if remotely, also assumes disadvantages. Not in vain, the adaptation of the organisation of remote work can involve an infrastructure that is not free of costs, the confidential information of the company goes out of its own environment, the lack of contact between the workers can weaken the attachment to the company and, of course, even if mechanisms of online control are developed, remote monitoring diminishes control in the execution of the production, unless performance by results is imposed, which is not always possible.

- 4.3. In any case, it seems unquestionable that this pandemic will mean, among other consequences and at least at the working level, a before and after in the use of telework. There are several reasons for this. Firstly, because it will now be more difficult to find justification for objecting to the use of teleworking as a work-life balance measure. It will be noted that this is an exceptional and widespread situation which has forced companies to adopt a measure which is also exceptional and general. However, when the situation is no longer global, but individual or plural, and one or more workers request the adaptation of their working hours, they will have previously checked that teleworking in their company is possible. The second is because the company may start to consider the benefits of teleworking. It saves costs, increases the net productivity of workers, enhances their responsibility and contributes to social evolution through the work-life balance. Perhaps the most immediate formula is not to convert face-to-face work into teleworking, but to adopt mechanisms for partial and rotating teleworking: part of the working hours and part of the workforce, depending on the organisation of the business schedule. However, this change should be accompanied by three vectors: specific

legislation for this type of service provision, collective bargaining to promote technological evolution in employment and a public-private collaboration committed to social evolution.

In a state of alarm, with almost total business closure, companies, self-employed workers and employees expect exceptional measures to alleviate their situation. There are even calls for a certain flexibility in the application of employment legislation in a situation of generalised crisis. The same applies to teleworking, where not all the rules designed to ensure standardised implementation are fully applicable. However, when the health and social emergency situation passes - and it will pass - the accumulated experience should serve as an incentive to reconsider teleworking as a non-residual modality of work.