

The remote working model for Polish labour law

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1. Introduction. 2. Teleworking - a form of remote work in Poland - the current model. 3. Civil law contracts as a “danger” for employment of teleworkers in Poland. 4. A new model of “teleworking” in Polish labor law - raising doubts. 5. Conclusions.

Abstract

The concept of “remote work” in Poland appeared in connection with the introduction of the epidemic in March 2020. The provisions of the anti-covid-19 act in article 3 introduced remote work, which excluded the practical significance of telework, currently regulated in the Labor Code due to the pandemic. The new vision of remote working in Poland assumes the voluntary nature of remote work by the parties and its obligation in emergencies. This is the basic premise of the proposed regulations. The current provisions on teleworking ensure full freedom of the parties to the employment relationship in the field of remote or stationary work. However, the Polish legislator is looking for an alternative to telework based on labor law provisions, which, as this article will show, is a complicated procedure because the difference between remote work and teleworking is slight. The author analyzes and evaluates the current model of teleworking in the Labor Code and the model proposed by the legislator in the draft amendment. At the same time, the article aims to answer the remote working model in Polish labor law.

Keyword: Teleworking; Remote Work; Covid-19; Polish Labour Law; Model of teleworking in Poland; Civil Law Contracts.

1. Introduction.

The year 2020 has brought unprecedented changes to the global economy and the world of work. In 2020, teleworking (remote work) has become a contemporary challenge for the world. Teleworking is an essential element of the EU employment policy, which has expanded impulse, especially after the COVID-19 epidemic, which has rapidly spread across the globe. The meaning and definition of telework, i.e., remote work, has also changed dramatically in Poland. The assumptions of telework are based on the flexicurity concept.¹

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¹ See more: Bekker S., Wilthagen T., *Europe's Pathways to Flexicurity: Lessons Presented from and to the Netherlands*, in *Intereconomics: Review of European Economic Policy*, 43, 2, 2008, 68.

In Poland, teleworking before the outbreak of the coronavirus pandemic was used incidentally - statistical data show that, according to Eurostat's research in 2018, less than 4.6% of professionally active Poles between 15 and 64 years of age worked remotely in 2018,² the same is the situation in 2019.³ Nevertheless, already in 2020 (the period of the COVID-19 pandemic) 8.9% of professionally active Poles worked in you remotely (including both teleworking and remote work)⁴.

The problem of remote work remains fundamental because, in the context of the growing popularity of this form of work during the SARS-CoV-2 pandemic, the Polish legislator announced the adoption of an act amending the Labor Code, the aim of which is to introduce remote work to the Polish labor law system on permanent and replacement of remote work, i.e., telework, present in the labor code.⁵ It is currently not known yet what the Polish legislator will choose the final remote work model and whether it will replace telework with a new form of distance work, which is to be remote work. There is no doubt that this issue is fundamental, which prompts the search for an appropriate model and the interpretation of regulatory problems in this area. In the European Union, teleworking is regulated by the European Social Partners' Framework Agreement on teleworking of 16 July 2002⁶ (from now on "the agreement on teleworking"). One of the teleworking agreement goals was, inter alia, "Establish a general framework at European level for the employment conditions of teleworkers and reconcile the flexibility and security needs shared by employers and employees. It provides teleworkers with the same overall level of protection as workers who work on the employer's premises"⁷. Primarily, teleworking as a new form of remote work

<https://core.ac.uk/download/pdf/81899211.pdf>; Latos-Milkowska M., *Elastyczność czasu pracy*, in *Monitor Prawa Pracy*, 3, 2009, 117-122; Wilthagen T., Tros F., *The concept of flexicurity a new approach to regulating employment and labour markets*, in *Transfer, European Review of Labour and Research*, 10, 2, 2004, 168-186.

² How usual is it to work from home?, <https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/ddn-20200206-1>, (access: September 16, 2021).

³ Eurostat, *How usual is it to work from home?*, 24th April 2020. <https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/ddn-20200424-1>, (access: September 16, 2021).

⁴ *Ibid.*

⁵ The concept of remote work into the Polish legal system, introduced in March 2020, along with the regulations on preventing, counteracting and combating COVID-19. So far, the text of the draft amendments to the Labor Code in the field of remote work of 18/09/2020, <https://absl.pl/storage/app/media/covid/Projekt%20ustawy%20reguluj%C4%85cej%20prac%C4%99%20zdaln%C4%85.pdf> (access: September 16, 2021), draft of 08/02/2022, <https://legislacja.rcl.gov.pl/projekt/12346911/katalog/12789150#12789150> (access: May 4, 2022) and the latest draft of 02/05/2022:

<https://legislacja.rcl.gov.pl/projekt/12354104/katalog/12835646#12835646>.

⁶ Available at: <https://eur-lex.europa.eu/legal-content/MT/TXT/?uri=LEGISSUM:c10131>; (access: September 16, 2021).

⁷ It is worth mentioning in this paper that the ILO Work from Home Convention (No. 177), passed in 1996, and entered into force in April 2000. Its aim is to promote equal treatment of home workers (or remote workers) and other workers; https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/genericdocument/wcms_753334.pdf, 14; (access: September 16, 2021); and No. 184 supplements the Work from Home Convention with some more specific provisions. It provides, inter alia, that the regulation of working from home (or working remotely) should be adopted with the participation of the social partners (paragraph 3 (2) R184) and that collective bargaining should be promoted as a way of determining working from home conditions (paragraph 9 R184). In addition, as recommended, the competent authority at national level should ensure the registration of home workers employers, specifying the data that

provides flexibility for the parties to the employment relationship, enables employees to reconcile work and family life, and aims to increase women's participation in the labor market. The European Trade Union Confederation rightly pointed out that teleworking is a new form of work, not a separate employment contract.⁸ Notably, the European Commission uses “teleworking models”⁹ (remote working models), thus indicating a flexible approach to this form of work.¹⁰ In June 2020, the European social partners concluded a (autonomous) framework agreement on digitization covering four specific areas: digital skills and workplace security; principles of connecting and disconnecting; artificial intelligence and maintaining human control; respect for human dignity and supervision. Under the Treaty's provisions on the Functioning of the European Union (Article 151 et seq. TFEU), EU Member States can take a legislative initiative at the European and/or Member State level to protect and implement workers' rights to be offline, which is still an issue.¹¹

Regulations on teleworking in the Labor Code (Art. 67 (5)-67 (17)) are considered inadequate to the current needs of the market and the employer. Despite the aforementioned partial regulations contained in the Act of March 2, 2020, on unique solutions related to the prevention, counteraction, and combating of COVID-19, other infectious diseases, and emerging crises, there is still no stated model of remote work that could help solve many problematic issues. Malgorzata Mędrala indicates that currently the employer has a choice of three possibilities of using remote work. Firstly, it can choose a teleworking institution regulated under the Labor Code; secondly, it can use a home office, home working, which consists of performing work from home on an ad hoc basis, as a benefit for the employee or perhaps pursuant to Art. 3 of the covid act, apply the institution of remote work, which the employer may commission under the order for a specified period, during the period of the epidemic threat or epidemic state announced due to COVID-19, and within 3 months after their cancellation, in order to prevent COVID-19.¹² The Polish legislator decided to create a new remote work model and replace the current regulations contained in the labor code. The first problem that I want to draw attention to in this article in the context of the proposed new form of remote work proposed by the Polish legislator is whether the Polish labor code needs to replace telework with remote work. The second question concerns the unpopularity of distance work in Poland and the reasons for this situation.

employers should provide or keep at the disposal of the authority (paragraph 6). It has not been ratified in Poland.

⁸ See more: Voluntary agreement on Telework, https://resourcecentre.etuc.org/sites/default/files/2019-09/Telework_ETUC%20interpretation%20guide%20-%20EN.pdf; (access: September 16, 2021).

⁹ See more: Telework in the EU before and after the COVID-19: where we were, where we had to, https://ec.europa.eu/jrc/sites/default/files/jrc120945_policy_brief_-_covid_and_telework_final.pdf; (access: September 16, 2021).

¹⁰ EU social partners reach agreement on digitalisation: https://www.ceep.eu/wp-content/uploads/2020/06/Final-22-06-20_Agreement-on-Digitalisation-2020.pdf; (access: September 16, 2021).

¹¹ Consolidated version of the Treaty on the Functioning of the European Union, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT;).; (access: September 16, 2021).

¹² Mędrala M., *Praca zdalna a wykluczenie społeczne*, in Mędrala M. (ed.), *Praca zdalna w polskim systemie prawnym*, Warsaw: Wolters Kluwer Polska, 2021, 183 ff.

2. Teleworking - a form of remote work in Poland - the current model.

Despite the increase in the popularity of distance work during the pandemic, traditional employment in the meaning of the labor code and attachment to the traditional model of work, which guarantees a sense of employment stability, still dominates in Poland.¹³ Moreover, Polish labour law struggles with another problem, the so-called “junk contracts”, replacing an employment contract with civil law contracts, which do not guarantee employee rights. Disseminating this practice also among teleworkers has been detrimental to the perception of teleworking for many years.¹⁴

Most Polish definitions of teleworking recognize the differences between teleworking and remote work.¹⁵ Most of them emphasize the performance of work outside the company's premises, and some refer to the performance of work from home. The primary element of remote work is performing work using ICT devices outside the employer's premises. Therefore, it is accurate to conclude that the Polish legislator must distinguish between the definition of telework and remote work before replacing telework,¹⁶ because “remote work” in a “covid model” is any job that can be performed entirely or partially (that is, a hybrid model) in a place indicated by the employee and agreed with the employer. Unlike telework, which is defined by the labor code as work that is performed outside the employing establishment regularly using information technologies within the meaning of the applicable provisions on services provided electronically. The European Commission report from 2000 proposes a remote working model. “Teleworking means the transfer of a workplace, for part or all of the working time, from the company's premises to the employee's home”. Notably, the report indicates that we can distinguish teleworkers from employees who “occasionally

¹³ See more Bombiak E., *Elastyczność czy stabilizacja – dylematy polityki zatrudnienia we współczesnych organizacjach*, in *Marketing i rynek*, 3, 2016, 50-59.

¹⁴ See Chief Labor Inspector's report on the activities of the National Labor Inspectorate - 2018, <https://www.pip.gov.pl/pl/o-urzedzie/sprawozdania-z-dzialalnosci/104556,sprawozdanie-glownego-inspektora-pracy-z-dzialalnosci-panstwowej-inspekcji-pracy-2018.html>; See: Chief Labor Inspector's report on the activities of the National Labor Inspectorate - 2019, <https://www.pip.gov.pl/pl/o-urzedzie/sprawozdania-z-dzialalnosci/119986,sprawozdanie-glownego-inspektora-pracy-z-dzialalnosci-panstwowej-inspekcji-pracy-2019.html>; Chief Labor Inspector's report on the activities of the National Labor Inspectorate - 2020 in progress, <https://sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=526DB25CCDF3AC5CC125870500353EBC>; (access: September 16, 2021).

¹⁵ See for instance: Teleworking is defined as work performed on a regular basis outside the workplace with the use of electronic communication means within the meaning of the provisions on the provision of electronic services (Article 67(5) § 1 of the Labor Code). A teleworker is an employee who performs work under the conditions specified in § 1 and provides the employer with the results of work, in particular via electronic means of communication (Article 67(5) § 2 of the Labor Code); Spytek-Bandurska G., *Telepraca jako nietypowa forma zatrudnienia w Polsce. Aspekty prawne i społeczne*, Warsaw: Aspra, 2015, 15, “Provision of work away from the conventional place of employment, with the use of modern information and communication techniques (devices) and with individually shaped working time”.

¹⁶ Chobot A., *Nowe formy zatrudnienia – kierunki rozwoju i nowelizacji*, Warsaw: Wydawn, 1997, 13; Kwiatkowski E., *Problem regulacji rynku pracy w alternatywnych opisach gospodarki*, in Frieske K. W. (ed.), *Deregulacja polskiego rynku pracy*, Warsaw: IPiSS, 2003, 19; Florek L., *Prawne ramy elastycznych form zatrudnienia*, in Machol-Zajda L. (ed.), *Elastyczne formy zatrudnienia sposobem na efektywność firm*, Warsaw: IPiSS, 2001, 27; Latos-Milkowska M., *Telepraca jako sposób upowszechniania zatrudnienia*, in Florek L. (ed.), *Prawo pracy a bezrobocie*, Warsaw: Wolters Kluwer Polska, 2003, 64-65.

bring work home” by specifying a minimum threshold at which at least one full day per working week is spent at home.¹⁷ The setting of a minimum threshold is intended to help distinguish between regular teleworking and occasional remote work.

Although the idea of remote work is not unique, the scale on which it took place in Poland before the pandemic was unprecedented and underestimated. It is widely speculated that both employers and employees will continue to work remotely after the pandemic.¹⁸ However, in Poland, in the third quarter of 2020, as a result of the loosening of restrictions in business activity, the percentage of people working remotely decreased to 5.8%, which shows that the popularity of remote work may return to the level from before the pandemic.¹⁹ In Poland, the institution of telework was introduced to the labor code under the amendment of August 24, 2007, by adding chapter II b to section II of the Labor Code entitled “Employing employees in the form of teleworking”. Teleworking is understood as work performed outside the employer's premises (at the employee's home or in other places where the employee is currently staying) using information technology, which is provided based on an employment contract. Aside the 2007 provisions, telework may also be undertaken based on civil law contracts, including mandate and specific-task contracts.²⁰ At this point, it is worth pointing out that this definition goes beyond the definition of an employee according to the Polish Labor Code (Article 2), because it includes the possibility of performing work under a civil law contract.²¹ However, employee's employment rights are granted only to those teleworkers who concise a traditional employment relationship.²² According to the above definition, the essential elements of telework are: a) regularity of its performance, b) performance of work outside the workplace, c) use of electronic communication means, d) type of work.²³ Under the Polish provisions on teleworking included in the Labor Code, the basis for performing work is only an employment relationship, although this form of work

¹⁷ Benchmarking Progress on New Ways of Working and New Forms of Business Across Europe, 8; <https://web.fhnw.ch/personenseiten/najib.harabi/publications/books/benchmarking-progress-of-telework-and-electronic-commerce-in-europe>; (access: September 16, 2021).

¹⁸ See: <https://www.smallbizdaily.com/office-be-obsolete-post-covid-19-world/>; (access: September 16, 2021).

¹⁹ GUS, *Wpływ epidemii COVID-19 na wybrane elementy rynku pracy w Polsce w III kwartale 2020*, <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/popyt-na-prace/wplyw-epidemii-COVID-19-na-wybrane-elementy-rynku-pracy-w-polsce-w-trzecim-kwartale-2020-roku,4,3.html>; (access: September 16, 2021).

²⁰ Janiec M., Czerniak T., Kreft W., Piontek R., *Prowadzenie działalności biznesowej z zastosowaniem telepracy – poradnik*, Warsaw: PARP, 2006, 27-28.

²¹ Art. 2: “An employee is a person employed under an employment contract, appointment, election, appointment or a cooperative employment contract”.

²² In Poland, the legal basis for performing work is irrelevant to being subject to compulsory social insurance. This has been confirmed many times by the Supreme Court and Appeal courts, and so, for example, “Including the definition of an employee for the purposes of social security law not only for employees in the sense provided by the provisions of the Labor Code, but also for persons employed under civil law contracts (agents, contractors, contractors).), means the simultaneous extension of the employee's title of compulsory social insurance, which affects the method of determining the basis of assessment of contributions for this insurance”; Poznań Court of Appeal judgment of 28 November 2018 III AUa 1003/17; See also: The judgment of the Supreme Court of November 5, 1998, I PKN 339/98, OSNAP 1999/24/776, and of February 22, 2010, I UK 233/09, LEX No. 585720 and on September 24, 2009, II PK 58 / 09, LEX No. 558303.

²³ Jaśkowski K., *Art. 67 (5)*, in Maniewska E., Jaśkowski K., *Komentarz aktualizowany do Kodeksu pracy*, in LEX/el. 2021, 2021.

may also be provided on the basis of a civil law contract, with the difference that such a person will not be an employee within the meaning of the Labor Code (art. 2: “an employee is a person employed under an employment contract, appointment, election, appointment or a cooperative employment contract”).

In Polish law, teleworking is work defined in Art. 67 (5) § 1 of the Labor Code, according to which teleworking is work performed regularly outside the workplace using electronic communication means within the meaning of the provisions on the provision of electronic services. In turn, following Art. 67 (5) § 2 of the Labor Code, a teleworker is an employee who performs work under the conditions specified in Art. 67 (5) § 1 of the Labor Code and provides the employer with work results, in particular via electronic means of communication. It should be emphasized that the term "telework" may be used only for work that meets all the conditions set out in Art. 67 (5) § 1 of the Labor Code is performed as part of an employment relationship. A work that does not meet the conditions mentioned above cannot be referred to as telework in Polish labor law.

As in the case of the definition included in the Commission's report, the Polish definition of teleworking contains three crucial elements:

- 1) work is performed outside the workplace;
- 2) is regular;

3) is performed using electronic means of communication within the meaning of the provisions of electronic services.²⁴ The Polish Labor Code clearly describes the catalog of the employer's obligations towards the employee. The employer is obliged to provide the equipment necessary to perform work in the form of telework and to bear all related costs, including insurance of the equipment supplied by the employer, installation and servicing of the equipment (Art. 67 (11) of the Labor Code). The employee can use his equipment, but in such a situation, is entitled to a cash equivalent determined in the amount specified in the agreement or regulations referred to in Art. 67, or in the contract. When determining the amount of the equivalent, the equipment consumption norms, its documented market prices and the amount of material used for the employer's needs and its market prices are taken into account in particular. The employer's obligations regarding the organization of equipment may be specified in a separate contract with the teleworker.

According to the provisions of the Labor Code currently in force, remote work must be performed regularly outside the workplace, and some forms of remote work, e.g., occasional remote work (e.g., home office), are included in the definition of telework. It seems that due to the increased flexibility of work by employees, the changing economic conditions and the possibility of working with mobile devices, and the principle of freedom of contracts in labor law, it should be considered permissible to introduce the broadest possible definition of remote work by the Polish legislator.

²⁴ Pursuant to Art. 2 point 5 of the Act of July 18, 2002 on the provision of electronic services (Journal of Laws of 2020, item 344), electronic communication means are technical solutions, including ICT devices and software tools cooperating with them, enabling individual communication remotely using data transmission between ICT systems, in particular electronic mail.

3. Civil law contracts as a “danger” for employment of teleworkers in Poland.

As already noticed, teleworking can be performed on the basis of a civil law contract. When the provisions on employing workers in the form of telework were introduced into the Labor Code in 2007, there was already a severe problem of replacing employment contracts with civil law contracts.²⁵ The reason for this issue was the willingness of employers to reduce labor costs. Notably, the employers' organization “Employers of the Republic of Poland” has recently indicated that the number of people working based on civil law contracts is growing again in Poland.²⁶ The purpose of applying for a civil law contract is to relieve employers of the costs related to, for example, bearing social burdens, e.g., maternity and childcare leaves.

The Polish legislator presented a certain inconsistency concerning, for example, the definition of remote work in Art. 3 sec. 1 of the covid act. According to this provision, “during the period of the epidemic threat or epidemic state announced due to COVID-19, and within 3 months after their cancellation, in order to counteract COVID-19, the employer may instruct the employee to perform, for a specified period, the work specified in an employment contract, outside the place of its permanent performance (remote work)”. According to the literal wording of the provision, remote work may only be provided by employees within the meaning of the Labor Code, thus excluding persons performing work based on civil law contracts. Only the amendments to the covid act of November 29, 2020²⁷ and December 5, 2020²⁸ provided for the possibility of remunerated work by employees and “other employed persons”, subject to compulsory quarantine or compulsory isolation at home, with the consent of the employer or the employee. A person performing work based on a civil law contract is not an employee within the meaning of the Labor Code, and thus is not entitled to employee rights. For example, based on Art. 281 point 1 of the Labor Code, the inspector may find that the civil law contract was concluded under the conditions specified in Art. 22 § 1 of the Labor Code and issue a ticket or apply to the court for punishment for an offense against the employee's rights. Based on Article. 63 (1) of the Act of November 17, 1964 - Code of Civil Procedure, such a person who is employed under a civil law contract may a lawsuit to establish the existence of an employment relationship.²⁹ Teleworking or remote work in the draft of the new act may be provided based on a civil law contract.³⁰ Therefore, Arkadiusz Sobczyk correctly points out that in such a case there is no obligation to apply legal provisions regarding telework “although it may be at the choice of the parties”³¹. At this point, it will be justified to conclude that the problem of replacing

²⁵ Rączka K., *Stosunek pracy a cywilnoprawne umowy o świadczenie pracy*, in *Praca i Zabezpieczenie Społeczne*, 11, 1996, 39 and Judgment of the Supreme Court of 2 September 1998, I PKN 293/98, OSNAPiUS 1999 No. 18, item 582.

²⁶ <https://pracodawcyrp.pl/aktualnosci-koronawirus/wg-zus-liczba-pracujacych-rosnie-ale-do-poziomu-sprzed-kryzysu-brakuje-jeszcze-ok-100-tys;> (access: September 16, 2021).

²⁷ Article 4h was added by the Act of October 28, 2020 (Journal of Laws, item 2112, as amended).

²⁸ Article 4ha was added by the Act of November 27, 2020 (Journal of Laws, item 2157).

²⁹ Journal of Laws of 2014, item 101, as amended.

³⁰ Judgment of the Supreme Court on December 9, 1999, file ref. no. I PKN 432/99.

³¹ Sobczyk A., *Commentary art. 67(5)*, in Sobczyk A. (ed.), *Kodeks pracy. Komentarz*, Warsaw: C. H. Beck, 2020.

employment contracts with civil law contracts, even assuming the replacement of teleworking in the Labor Code with remote work, will remain valid.³²

4. A new model of “teleworking” in Polish labor law - raising doubts.

As I mentioned, the provision of remote work officially appeared in the Polish legal space at the time of the announcement of the COVID-19 pandemic and was introduced into the Polish legal system by the Act of March 2, 2020, on unique solutions related to the prevention and combating of COVID-19, other diseases infectious and the resulting crises, which entered into force on March 8, 2020 (also as: the covid act)³³. Remote work was indicated as a matter of "urgency" matters with the solution in Art. 3 of the covid act. The legislator decided that the employer may order an employee for a specified period, work specified in the employment contract, outside the place of its permanent performance (remote work) during the period of an epidemic threat or epidemic state announced due to COVID-19, and during 3 months after their cancellation, in order to counteract COVID-19. The legislator laconically, though appropriate to the urgent need to introduce remote work, indicated that, remote work may be recommended if the employee has the technical and local skills and capabilities to perform such work and the type of work that allows it. Remote work may be performed using means of direct remote communication or concern the performance of manufacturing parts or material services. The tools and materials needed to perform remote work and logistics support for remote work, as a rule, are to be provided by the employer.

According to the Central Statistical Office (GUS) research, it shows that the popularity of working remotely has changed due to the announcement of the COVID-19 epidemic. In accordance with GUS data, at the end of March 2020, the share of people who worked remotely in the total number of employees was 11.0%. This form of work was dominant in the public rather than the private sector. At the end of June 2020, 10.2% of the employed were covered by remote work. However, the scale of remote work in private (over 9%) and public entities (approx. 11.5%) has changed. Unfortunately, in the third quarter, along with the loosening of business restrictions, the percentage of people working remotely fell to 5.8%. The scale of using remote work in the private sector (over 6.5%) was twice as large as in the public sector. In the first quarter, most people worked in: education, information, and communication as well as scientific and technical activities; in the second and third quarters, information and communication came first, followed by professional scientific and technical activities, and financial and insurance activities came third.³⁴ One of the factors limiting the

³² In 2019 estimated number of people with whom a civil contract or a specific specific task contract has been concluded, and who were not employed anywhere on the basis of an employment relationship² in 2019 amounted to 1.2 million and decreased by approx. 8% compared to the previous year; Wybrane zagadnienia rynku pracy (liczba osób z minimalnym wynagrodzeniem, “samozatrudnieni”, umowy zlecenia, umowy o dzieło), <https://stat.gov.pl/wyszukiwarka/szukaj.html?query=zlecenie>.

³³ Act of March 2, 2020 on special solutions related to the prevention, prevention and combating of COVID-19, other infectious diseases and crisis situations caused by them, Journal of Laws No. 2020 item 374.

³⁴ GUS, Impact of the COVID-19 epidemic on selected elements of the labor market in Poland in Q1 2020, <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/popyt-na-prace/wplyw-epidemii-COVID-19-on->

broader use of telework in Poland is its too detailed regulation in the Labor Code and the considerable resistance of employers related to the use of remote work and the lack of control over employees, or a significant limitation of this control.³⁵

Currently, according to art. 4 point 1 and art. 13 point 1 of the Act of July 24 2020 amending the Act on the posting of an employee as part of the provision of services and some other acts³⁶ from September 5, 2020, the use of remote work has been extended for the entire period of the epidemic threat or epidemic state announced due to COVID-19, and within 3 months after their cancellation. Discussions on replacing the current teleworking rules emerged as early as 2020 and immediately disagreed with the social partners on the definition of remote work and the provisions on health and safety at work. The first draft of the provisions to replace the current teleworking regulations appeared in the Polish legal space on May 19, 2021 and immediately caused much controversy among social partners in the public space.³⁷ On May 19, 2021, the Ministry of Labor and Development applied to social partners for consultations³⁸ and public consultations³⁹. First of all, attention should be paid to the position of the largest Polish trade union, NSZZ "Solidarność", which questioned the possibility of introducing permanent remote work due to the tragic social isolation.⁴⁰ First of all, attention should be paid to the position of the largest Polish trade union, NSZZ "Solidarność", which questioned the possibility of introducing permanent remote work due to the tragic social isolation. The second problem pointed out by the trade union concerned the shoulder of regulating the minimum lump sum in the draft for the employee to cover the costs related to remote work (electricity, internet connection, service, maintenance). On the other hand, the employers' organization (Lewiatan Confederation) indicated a questionable solution - an unclear definition that it is possible to indicate more than one place in an agreement on remote work.⁴¹ At the same time, no approval was given for the precise

selected-labor-market-elements-in-Poland-in-the-first-quarter-2020-year, 4.1.html; GUS, Impact of the COVID-19 epidemic on selected elements of the labor market in Poland in Q2 2020, <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/popyt-na-prace/wplyw-epidemii-; COVID-19-for-selected-labor-market-elements-in-Poland-in-the-second-quarter-2020-year, 4.2.html>; GUS, Impact of the COVID-19 epidemic on selected elements of the labor market in Poland in Q3 2020, <https://stat.gov.pl/obszary-tematyczne/rynek-pracy/popyt-na-prace/wplyw-epidemii-COVID19-nawybrane-labor-market-elements-in-Poland-in-third-quarter-2020-year, 4.3.html>; (access: September 16, 2021).

³⁵ Mitrus L., *Praca zdalna de lege lata i de lege ferenda – zmiana miejsca wykonywania pracy czy nowa koncepcja stosunku pracy?*, in *Prawo i Zabezpieczenie Społeczne*, 10, 1, 2020, 4.

³⁶ Journal of Laws item 1423.

³⁷ See <https://legislacja.rcl.gov.pl/docs//2/12346911/12789150/12789151/dokument503604.pdf>, (access: September 16, 2021).

³⁸ See <https://legislacja.rcl.gov.pl/docs//2/12346911/12789150/12789152/dokument503610.pdf>; (access: September 16, 2021).

³⁹ French - Polish Chamber of Commerce, Polish Chamber of Legal Advisers, PGE Lublin, PGNiG, Polish Trade and Distribution Organization, Polish HR Forum, Polish Bank Association, Student Law Clinic of the Jagiellonian University, Union of Polish Provinces, Union of Financial Companies, Civil Aviation Authority; <https://legislacja.rcl.gov.pl/projekt/12346911/katalog/12789144#12789144>.

⁴⁰ The same goes for the Polish Alliance of Trade Unions:

<https://legislacja.rcl.gov.pl/docs//2/12346911/12789150/12789153/dokument516590.pdf>;

(access: September 16, 2021).

⁴¹ See: <https://legislacja.rcl.gov.pl/docs//2/12346911/12789150/12789153/dokument516589.pdf>; (access: September 16, 2021).

determination of the lump sum amount for the costs incurred in connection with the performance of remote work. The organization of employers of the Republic of Poland indicates an urgent need to introduce a new definition of "accident at remote work" to exclude situations related to the regular use of living quarters.⁴² On July 22, 2021, the Minister of Labor, Development and Technology again asked social partners, the Social Insurance Institution and the National Labor Inspectorate to take positions as part of consultations, because on July 23, 2021, a new version of the bill on remote work appeared of 16 July 2021.⁴³

According to the draft amendments to the Labor Code, the current provisions on teleworking are to be replaced by the provisions of Chapter IIc entitled "Remote work". It is justified at this point that the conditions for performing telework, the obligations and rights of the employer related to it, and the possibility of agreeing on remote work are mainly similar to the shape of the current provisions on teleworking, with some elements to improve the flexibility of remote work. A detailed analysis of the proposed regulations will not be the subject of a minor publication due to their breadth and dynamics of changes. At this point, it is enough to point out that it is essential for the definition itself and the way of introducing remote work.

According to the latest version of the legislative proposal of May 2, 2022⁴⁴ with the proposed Art. 67 (18) remote work is work wholly or partially in a place indicated by the employee and agreed with the employer in each case, including at the employee's residence address, in particular with the use of means of direct remote communication. It follows from this definition that remote work is performed - outside the employer's seat, including the employee's place of residence.⁴⁵ In addition, further provisions indicate that remote work may be performed on the basis of an agreement between the parties to the employment contract:

- 1) when concluding an employment contract or
- 2) during the period of employment.

Remote work may be performed at the request of the employer:

- 1) during the state of emergency, state of epidemic threat or the state of the epidemic and within three months after their cancellation or
- 2) during a period in which it is temporarily impossible for the employer to ensure safe and healthy working conditions at the employee's current workplace due to force majeure
- 3) occasional remote work 24 days a year.

If the regulations enter into force, remote work will be a new labor law institution with a broad definition of remote work. It will provide work in whole or in part in the place indicated by the employee and agreed with the employer, including the employee's place of residence, in particular with the use of means of direct remote communication.⁴⁶ However,

⁴² *Ibid.*

⁴³ <https://legislacja.rcl.gov.pl/projekt/12346911/katalog/12789138#12789138>; (access: September 16, 2021).

⁴⁴ Draft act amending the act - Labor Code.

⁴⁵ This solution was supported by the Employers of the Republic of Poland:

<https://legislacja.rcl.gov.pl/docs//2/12346911/12789150/12789153/dokument516591.pdf>.

⁴⁶ Drafted art. 67(18).

with the exception that if the permanent place of work is not specified, it will be the seat of the employer with reference to the Civil Code. This solution will exclude the possibility of the employee to work from any place of choice, which is to allow the employer to take action in the event of an accident at work.⁴⁷ Basically, the employer is required to provide the employee with the tools and materials necessary to perform remote work; cover the costs related to the installation, service, operation, and maintenance of work tools, including technical devices necessary to perform remote work, the costs of electricity and the necessary access to connections,⁴⁸ although this may be waived if the employee has the appropriate tools to perform remote work. However, the employer must pay the employee a cash equivalent. In this respect, the provision's wording is almost the same as the current provisions on teleworking in the Labor Code. The only novum is the cash equivalent. The proposed regulations solve many key problems but leave some of them unanswered. The draft act allows the employer to control remote work performance,⁴⁹ and at the employee's place of residence.⁵⁰ The control at the remote workplace should take place during the employee's working hours, respecting the employee's privacy and other people's. The existing regulations on teleworking in the Labor Code provide for control only after the employee's consent (current Art. 67 § 1)⁵¹. In the draft act on remote work, the legislator provides three ways of introducing remote work: agreement of the parties, the employer's instruction, and the employee's request. By mutual agreement, the parties may decide to work remotely before concluding an employment contract or during employment.⁵² The arrangement regarding remote work may be made in paper or electronic form and no written form is required.⁵³ When it comes to remote work, the place of remote work might be the place indicated by the employee, but it must be accepted by the employer. It will be justified to find that this aspect will not make it possible to distinguish remote work from work performed traditionally.

The employee's admission to perform remote work depends on the employee submitting a statement confirming that the remote work position indicated by the employee ensures safe

⁴⁷ The definition of an accident involving remote work is the same as for an accident at work at the employer's premises. In order to recognize an event that an employee has suffered as an accident at work, the normative conditions for the definition of an accident at work provided for in the Act of October 30, 2002 must be met. In order for the event to be considered an accident at work, according to Art. 3 of the Accident Act, the following conditions must be met jointly: suddenness of the event, external cause of the event, employee injury or death, work-related relationship; See: Social insurance against accidents at work and occupational diseases, Journal of Laws 2019.1205, i.e. of 2019.06.28.

⁴⁸ (drafted art. 67(24)).

⁴⁹ (drafted art. 67(28) § 1).

⁵⁰ (drafted art. 67(28) § 2).

⁵¹ The National Labor Inspectorate, in its comments to the draft act amending the Labor Code, indicated that the rules of conducting inspections at the place of remote work should be specified in more detail in the Labor Code. Leaving this issue to the parties to the agreement to settle this issue may turn out to be an insufficient guarantee of securing the employee's interests, the more that in the event of failure to agree, the rules of remote work are determined by the employer: drafted art. 67(28) § 1 k.p.: <https://legislacja.rcl.gov.pl/docs//2/12346911/12789138/12789139/dokument514252.pdf>; (access: September 16, 2021).

⁵² (drafted art. 67(19) § 1).

⁵³ (drafted art. 67(19) § 2).

and hygienic working conditions.⁵⁴ The employee is responsible for the proper organization of the remote workplace.⁵⁵ A unilateral order to work remotely will be possible during the state of emergency, epidemic threat or epidemic state and within 3 months after their cancellation, or if it is necessary due to the employer's obligation to provide the employee with safe and hygienic working conditions.⁵⁶ The condition for a unilateral order to work remotely will be the employee's declaration that he has the local and technical conditions to perform remote work and it will be up to the employee to choose the place of remote work.⁵⁷ An employee may refuse to work remotely when there are no local and technical conditions. How should the conditions for remote work be understood? The legislator does not specify this; however, it is assumed that an employee should have a separate room for work, possibly a place for a desk, and Internet access allowing for constant contact with the supervisor and colleagues. When talking about the housing and technical conditions, one should also consider the protection of the privacy of the household members and their comfort.⁵⁸

Remote work can also be performed at the employee's request. An attractive solution is introducing remote work "occasionally performed" at the employee's request, 24 days in a calendar year, although initially it was indicated as 12 days.⁵⁹ It is impossible not to remark that there is no reservation that an employee may not have the skills required to perform remote work in the draft amendment to the Labor Code. Therefore, an employee cannot refuse to perform remote work only due to the lack of skills required to perform remote work.

So far, the legislator did not agree to the indication of the minimum amount of the lump sum postulated by trade unions for costs related to the installation, service, operation, and maintenance of work tools, including technical devices necessary to perform remote work, costs of electricity and necessary access to connections telecommunications, which is to establish an agreement between the employee and the employer each time. The same applies if the employee uses own equipment necessary to perform remote work. The legislator continues to use in the bill the notions of "parties may establish rules" which are repeatedly vague.

Another problem that is beyond the interest of the draft act is the time record of the teleworker. The Polish Labor Code introduces several work systems, but the most optimal one is the above-mentioned basic working time system or task-based working time, as it gives the teleworker the possibility to organize their working time independently. There is no need to introduce specific provisions on working time concerning teleworking into the Labor Code. At this point, it is worth indicated the problem of practitioners, which was the subject

⁵⁴ (drafted art. 67(31) § 7)

⁵⁵ (drafted art. 67(31) § 8)

⁵⁶ (drafted art. 67(19) § 3)

⁵⁷ (drafted art. 67(18) § 3).

⁵⁸ Matyjas-Łysakowska P., *Praca zdalna w Kodeksie pracy*, in Medrała M. (ed.), *Praca zdalna w polskim systemie prawnym*, Warsaw: Wolters Kluwer Polska, 2021.

⁵⁹ (drafted art. 67(33)).

of analysis by doctrine and judicial decisions, i.e. overtime work.⁶⁰ In Polish labor law, work above the norm of working time is work above an employee's basic working time system, approx. In Art. 129 § 1 of the Labor Code. The legislator in Art. 151 of the Labor Code assumed that overtime work is "work performed" more than the standards applicable to the employee and it will not be just being at the employer's disposal. A breakthrough decision in determining the conditions for the use of telework was the judgment of the Polish Supreme Court of September 4, 2019.⁶¹ The Supreme Court unquestionably found that only "an agreement with the employer as to the working time necessary to perform the tasks entrusted to him in the standard working time may prove agreement on the possibility of their performance within the limits of full-time employment in the form of telework. In the event of a dispute in this regard, the employer is obliged to prove that he has entrusted the employee with tasks that can be performed within the limits of normal working time"⁶². In Polish labor law, the employer is obliged to record the working time to avoid the employee's accusation of not paying the remuneration for overtime work. An important issue related to the recording of working time is the control of work performance to verify whether the employee performs work in person and whether there is overtime work at night.

At the end of this rapid confrontation between the proposal for a new law about remote work and the current regulation there is the problem of remote work in the event of domestic violence. The Polish legislator completely denies this important problem and points to the provisions of other acts in the field of assistance to victims of domestic violence. Poland has not yet ratified the Convention of the International Labor Organization No. 190. It is only worth mentioning that Poland belongs to the group of countries that have ratified the Convention on preventing and combating violence against women and domestic violence (the so-called "Istanbul" Convention) developed by the Council of Europe in 2011 and has so far been signed by 45 countries out of 47 members of the Council of Europe. Poland signed the "Istanbul" Convention in 2012 and ratified it three years later. The provisions of the Convention focus on preventing and combating violence and the policy of equality towards women and men. Although the Convention is a set of the best equality and anti-discrimination principles, Poland wants to terminate the Convention because the opponents of the Convention believe that it ignores the family's educational rights. They indicate that, contrary to constitutional standards, it orders the authorities to "eradicate traditions and customs concerning the roles of women and men"⁶³. In Poland, during the pandemic in Poland, there is an increase in the number of victims of domestic violence. In February 2020, the police carried out 27,719 domestic interventions, and police officers filled out 5,733 blue

⁶⁰ Rycak M.B., *Wymiar i rozkład czasu pracy*; Wolters Kluwer, Warsaw, 2008, 19; Supreme Court judgments: of September 10, 1998, I PKN 301/98, OSNPAPiUS 1999 No. 19, item 608; of August 4, 1999, I PKN 181/99, OSNPAPiUS 2000 No. 22, item 81, of February 5, 2008, II PK 148/07.

⁶¹ II PK 172/18.

⁶² See also: judgments of the Supreme Court: of March 15, 2006, II PK 165/05, OSNP 2007 No. 5-6, item 69; of February 5, 2008, II PK 148/07, OSNP 2010 No. 2, item 22; of 19 January 2016, I PK 24/15, LEX 1994278.

⁶³ Convention on preventing and combating violence against women and domestic violence, <http://niebieskalinia.info/pliki/dokumenty/Wazne%20dokumenty/Konwencja%20o%20zapobieganiu%20i%20zwalczaniu%20przemocy%20wobec%20kobiet%20i%20przemocy%20domowej.pdf>; (access: September 16, 2021).

cards. In March, when due to the pandemic there were, among others, by the closure of schools, they have already carried out 32,615 interventions, during which 5,438 blue cards have been completed.⁶⁴ One of the forms of counteracting domestic violence under Art. 9d paragraph. 1 of the Act of July 29, 2005 on Counteracting Domestic Violence,⁶⁵ which provides that in the event of suspicion of using violence against family members in the course of business or professional activities (e.g. a police officer, doctor, social worker) or as a result of reporting performed by a family member or by a person who is a witness of domestic violence, a person committing violence against family members is established the so-called Blue Card. The commission in a given locality to assess the help to the family selects a recovery plan for the family. The "blue card" is not equivalent to submitting a notification of a crime and does not constitute grounds for initiating criminal proceedings. There will be voices of criticism in the Polish legal space, as many aggrieved people often withdraw from helping. In turn, according to art. 11a if a family member living together makes a living together particularly inconvenient with his behavior involving the use of domestic violence, the person affected by this violence may demand that the court oblige him to leave the jointly occupied apartment and its immediate surroundings or forbid him to approach the apartment and his immediate surroundings. The Polish criminal code defines physical and mental abuse as a crime. Art. 207§ 1 states that "Whoever physically or mentally abuses the closest person or another person in a permanent or temporary relationship, depending on the perpetrator, shall be punishable by imprisonment from 3 months to 5 years"⁶⁶. The Polish legislator does not see the need to regulate this issue due to the current provisions regulating "domestic violence". I observe at least a gap in the current legal status in Poland. Abusers of domestic violence against employees who take up remote work may try to interfere with the employee's professional life by creating a destructive environment, limiting or threatening to limit access to technology. Domestic violence in remote work is one of the essential elements of ensuring safe and hygienic conditions in remote work. People who use violence against a household member working remotely are easier to monitor the employee, which facilitates the social distance with other co-workers, and the employer or organizations supporting domestic violence are significantly reduced. *De lege ferenda*, the Polish legislator, should consider extending the obligations of employers in the context of remote work by employees, e.g., in terms of clarifying safe communication with an employee during remote work (e.g., cameras turned on or off) or discussing the provision of remote work in places other than home.

5. Conclusions.

At the end of this short polemic between the draft provisions on remote work and the provisions on teleworking in the Labor Code, one observation should be made: the new model of remote work, which may soon replace the provisions on teleworking in the Labor

⁶⁴ <https://www.rp.pl/prawo-karne/art568481-przemoc-domowa-jakie-sa-statystyki>; (access: September 16, 2021).

⁶⁵ Journal of Laws 2005 No.180, item. 1493.

⁶⁶ The Act of June 6, 1997, Penal Code (Journal of Laws 1997 No. 88 item 553).

Code, is based on the vision of working from home or another permanent job the employee's place of residence (the so-called home office). The vision of remote work, which is unique in Poland, does not assume the entirely voluntary nature of remote work by the parties because the legislator provides for the obligation to provide it in emergencies. During legislative work on remote work, social partners, especially employers, indicate that the current provisions on teleworking in the Labor Code impose many obligations on employers, which makes this form of work overregulated. At the same time, the Polish legislator proposes almost identical solutions in the project regarding remote work, and one may even be tempted to say that even limiting the rights of employees to the concept of remote work. Although the proposed provisions on remote work in Poland are critical changes in Polish labor law, two issues may require attention.

The first question concerns the adopted model of remote work in the proposed regulations. The legislator basically refers to establishing criteria for when remote work may be performed. The legislator resigned from specifying the objective scope, leaving the decision on remote work to the parties to the employment relationship. The definition of remote work is broad and allows for occasional remote work up to 24 days a year. Does the definition of occasional remote work by the legislator affect the definition of remote work? It seems that it is not, and the legislator has re-regulated the definition itself in this respect. In this respect, it could leave this decision to the parties to the employment relationship, the more so, the changes intended to introduce maximum freedom in choosing this form of work. Moreover, the question in Polish labor law concerns the popularity of remote work after the end of the pandemic. Will employers in Poland be able to give up the sense of employee control in favor of trust? In any case, this hypothesis deserves to be put forward.

The second doubt concerns the popularity of remote work performed under an employment contract and not under a civil law contract. As mentioned, this problem in the pandemic era and the kind of popularity of introducing the idea of remote work was sidelined. The relative lack of a ban on the use of civil law contracts in place of employment contracts causes abuses in this respect. The Polish legislator ignores this problem, which translates into the lack of discussions by social partners. In conclusion, it should be emphasized that the draft regulations on remote work are detailed, but not complete. Many of the issues mentioned will form part of the debate between social partners and doctrine representatives.

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