

Working from home in Germany: What you need to know

Arbeitsrecht



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Since the beginning of the corona pandemic, many employees who are given this possibility are working at home. The implementation of working from home raises many questions for employers and employees.

In relation to the current situation, the Federal Ministry of Labour prepared a draft law on “mobile work” at the beginning of October (“Das Mobile-Arbeit-Gesetz”). This draft law allows employees to work from home or do mobile work for 24 days per year (on a full-time working contract basis). However, it is unclear if this new law becomes effective and when. The Minister of Labour, Hubert Heil, has deferred the draft law for the moment.

By the current state, the rules applicable to working from home are the following:

1. Can the employer order working from home unilaterally?
2. Does the employee have the right to work from home without the agreement of the employer?
3. Is the employer obligated to provide technical equipment?
4. Is the employer responsible for health and safety protection of an employee working from home?
5. What are the rules concerning the working hours while working from home?
6. Is the travel to work considered as working time in case of alternating working from home and working in the office?
7. Who is the responsible for data protection?
8. Accident insurance for activities while working from home
9. How can an employer control employees working from home?

¹ Can the employer order working from home unilaterally?

Generally, no. The employer cannot declare working from home without a legal basis, which can be i.e. part of the employment contract, a separate agreement or a company agreement concluded with the works council.

In times of crisis, implementing the work from home is part of the authority of employers: the employer is obliged, in view of his fiduciary duty, to take the necessary arrangements to protect the employees facing increased health risks.

As the high court has not made a decision for the employer to order working from home, we recommend to obtain approval before implementing new rules by concluding a contract with the employee.

Caution: If your company has a works council (“Betriebsrat”), the introduction of working from home for a group of employees has to be permitted by this council via a works council agreement.

Practice tip: An agreement about working from home should always include a clause about the right of withdrawal, in order to allow ending the agreement on working from home unilaterally.

² Does the employee have the right to work from home without the agreement of the employer?

Generally, no. In exceptional cases, the employee may refuse to work in the office. But only if he proves that there is an increased risk of infection at the workplace, especially when the employer does not adhere to his duties concerning protection measures for health and the safety of his employees (i.e. a default of hygiene rules or a default of the minimum distance).

This draft law of the Federal Ministry of Labour contains the possibility for employees to work from home for 24 days per year (on a full-time basis).

Practice tip: The employer must do any effort to ensure compliance with the SARS CoV-2 health and safety standards. It is therefore necessary to be informed of the rules and to ensure they are properly applied.

³ Is the employer obligated to provide technical equipment?

Generally, no. Nevertheless, it is advisable to supply the necessary work equipment to ensure proper work. The allocation of equipment should be documented. It may also be necessary to restrict the use of the equipment for work purpose only in order to guarantee the data privacy law.

If the employer provides work equipment for the employee (usually a mobile phone and a laptop), the employer must pay all the costs of acquisition, maintenance and repair.

As a matter of principle, the employer is also urged to bear the employee's expenses resulting from the work at home, such as electricity and heating costs, or even part of the lease.

Practice tip: We recommend defining the rules for reimbursement of expenses in the agreement of working from home or expressly excluding reimbursement if the employee has to pay these costs.

⁴ **Is the employer responsible for health and safety protection of an employee working from home?**

The employer has very limited responsibilities regarding health and safety of employees working from home because he has no right of access to the employee's home. The employer's obligations concerning the health and the safety rules at work are thus limited by organizational and informational obligations.

Practice tip: We advise to give employees a handout concerning working from home, which contains some information on working hours, workplace equipment, installation of an ergonomic workstation, etc.

⁵ **What are the rules concerning the working hours while working from home?**

The German Working Hours Act ("Arbeitszeitgesetz") also applies to any activity when working from home. Therefore, employees working from home are not allowed to exceed the daily and weekly working hours and must respect the rest periods. It is the responsibility of the employer to control the working time of the employees. However, as this possibility is very limited in the case of working from home, we advise to delegate to the employee the obligation to document his daily working time.

Practice tip: This documentation can be done by introducing an appropriate electronic time recording system in which the employee registers his daily working time. It may also be possible to ask the employee to record the working time in a diary, which must be submitted to the employer on a weekly or monthly basis.

Attention: If there is a works council ("Betriebsrat") in your company, it should be involved in the working time monitoring system.

⁶ **Is the travel to work considered as working time in case of alternating working from home and working in the office?**

No. The employee's journey to and from work does not represent actual working time for which remuneration is payable, regardless of the means of transport used by the employee.

In the case of customer visits, the travel time is actual working time for which remuneration is

payable, independently of whether the employee travels from his office at home or at the company.

⁷ Who is the responsible for data protection?

The employer is also responsible for data protection when the employee works from home. The employer is obliged to take appropriate technical and organizational policies to ensure data protection. It is recommended to conclude a separate data protection agreement with employees working from home, in which it is explicitly mentioned that sensitive data used are only accessible via encrypted electronic communication channels. The responsible party, especially the IT specialists, should be obliged to fully document all measures taken to protect all data.

⁸ Accident insurance for activities while working from home

Any accident regarding the employee is in general covered by accident insurance “if it occurs in the course of an activity to serve the company”. In other words, as long as the employee actually works for the employer from home, any accident is generally covered by statutory accident insurance.

⁹ How can an employer control employees working from home?

Surveillance measures, such as the use of keyloggers to control keystrokes or the taking of screen shots, are in principle not permitted. These methods are only allowed if the employer has a good reason to suspect a criminal offence by the employee or a serious injury of duty.

Practice tip: We recommend asking the employee to report his activities at regular intervals and, if necessary, to provide details about his results. It is also advisable to regularly organize conference calls, videoconferences, virtual coffee breaks, etc., not only to control the work, but also to avoid isolation or feelings of isolation while working at home. In general, the employer is expected to be present and ensure a continuous contact.

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