



**A strategic-legal approach to flexible and decentralized working is inevitable for agile innovation, business continuity, risk management, and legal compliance**

**EXECUTIVE LEGAL BRIEFING SERIES**

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## **An Advance Legal Teleworking Policy Creates Value for the Public and Private Sectors**

The COVID-19 Pandemic Forces Every Organization to Regulate IT and Corporate Data for its Employees

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LEGAL BRIEFING #1: Teleworking

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## LEGAL BRIEFING #1: Teleworking

### Headlines

- Tele (home) work has undergone an enormous development over the past 50 years. Thanks to advancement of digital technology, it evolved to modern working, largely independent of place and time. Employer, employee and even society as a whole can benefit in various ways by "working where you are", as is superlatively shown during the worldwide outbreak of the SARS-CoV-2, the virus that causes COVID-19, and the urgent advice to work from home as much as possible.
- A *strategic-legal approach* to decentralized working and the undefined workplace (in the office, at home and elsewhere), with a sharp focus on digital technology and corporate data processing, is inevitable for agile innovation, business continuity, and regulatory and contractual compliance, including risk management. Every company and every public sector organization today needs (i) *well-informed executive management* and (ii) *advanced legal policies*. Digital transition changes everything; even more extensive when a pandemic accelerates the urgency for organizational change through the deployment of information technology.

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### Analysis

- In many European jurisdictions the current legal framework forms no an obstacle for new ways of dispersed working. Depending in part on the legal construction of the work, however, there are various legal aspects, some of which are mandatory in nature (employment contract). This is especially of importance in the traditional legal relationship between employer and employee, but also bears relevance for the relationship with the self-employed workforce, and sometimes also for business and chain partners.
- The fact that an employee uses its own notebook, tablet and / or smart phone for work is not so much about the hardware in policy terms (although security measures, including updating software remain important) but of great importance is what they do with these devices, such as installing and using non-validated software, apps and cloud services.
- Understanding the evolution of digital working and the advancement of digital technology in conjunction with the law forms the basis to properly manage structured homeworking at every company or government organization, regardless the sector.
- Data privacy law plays an important role in the relationship between employer and employee, but with the General Data Protection Regulation (GDPR) in force on May 23, 2018, the current Corona crisis and the massive teleworking from home, various issues arise. Employees must at all times handle personal data (especially as customer data) very carefully. Caution is required for employers when taking control measures per individual employee, while the employer is in principle not allowed to process medical data of his staff, according to the GDPR.
- Cloud computing remains a main driver of the digital transition, including facilitating teleworking. In fact, without cloud services there are no ways of working independently of time and place with IT. The cloud delivery model concerns a partly different legal framework, but should per organization in alignment with the regulation of digital working, especially the processing of corporate data.
- Binding policy rules in addition to the employment contract and other work-related (business) agreements are essential for a lasting success of the new ways of working. These rules provide direction, guidance and create clarity.

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### Multiple grounds for dispersed working

As the motives for implementing a dispersed organizational model differed - from harnessing an unused workforce to reduce daily commuting time – at this time teleworking focusses primary on operational continuity and economic survival during a pandemic. Initially, the sometimes strong opposition to teleworking *among employers* was based on the idea that managing and especially exercising control over dispersed “invisible” staff is hardly possible.

#### Attractive and diverse benefits

Later, however, employers started to address teleworking more as a business case, albeit cautiously. For example, a lower ratio between the number of employees and the number of workplaces in the office may save on square meters and facility management budget. In addition to cost reductions, it subsequently emerged that working independently of place and time can lead to other attractive, even structural benefits at the organizational level.

The benefits span from the increase of productivity to an advanced organizational flexibility for adapting to changing market conditions. In addition, the option of part-time telework can act as an important employment condition, which in a tight labor market achieves better results for retaining employees and recruiting new staff than a lease car.

In addition, it became a matter of national economic importance. Working independently of place and time with information technology fits in perfectly in a public policy of economic growth, strengthening competitiveness, increasing employment, flexibility of the labor market, reducing traffic mobility and protecting the environment. Moreover, working digitally can stimulate personal entrepreneurship, which in turn leads to self-development and value creation; also for disabled employees. It is also interesting that the employee is enabled to take more responsibility for managing his work ("guided autonomy") and to achieve a better balance between work and other life, the work-life balance.

Traditional office work - Since the sixties	Telecommuting / Telework - Since the eighties	New ways of work - Since 2010
Place and time dependent organizational culture	Partly place and time independent organizational culture — based on individual privileges	Organization-wide place and time independent organizational culture where knowledge sharing and customer focus are central goals
Fixed, regular working hours (9 to 5)	Combination of fixed and flexible working hours	Flexible working hours, extended opening hours of offices, corporate network is open 24/7
Centralized location: working only at the office	Centralized / decentralized locations: working at the office and at home and/or at telework center	Fully decentralized locations: in and out-of-office — including third workplaces
Dedicated fixed workplace at the office — one workplace per employee	Usually two dedicated fixed workplaces at the office and at home and/ or at telework center — two or more workplaces per employee	Flexible (unassigned & activity-based) workplaces at the office — fewer workplaces than employees (optimizing utilization rate)
Typical employee-only workforce	Emerging of the temporary and free-lancer	Dynamic mix of internal and external

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	workforce	knowledge workers
Traditional work environment and standard office layout	Traditional work environment and standard office layout — standard workplace at home and/or at telework center	Open, activity-based work environment and office layout, custom developed for the organization — third workplaces
Steering employees based on presence	Steering employees based on presence and work (result) output	Steering employees based on result and/or contribution (output/outcome) mainly through self-guidance (guided autonomy)
Employer has direct supervision	Employer has indirect supervision	Employer has primarily a facilitating and supporting role
Employee has limited responsibility for the organization of his work	Employee has more responsibility for the organization of his work — where and when	Employee has the premier responsibility to organize his work on the basis of guided autonomy
Strict segregation between work and private life	Less strict separation between work and private life	Separation between work and private life fades eventually largely
Standard use of IT through fixed workstations and during regular working hours	Standard use of IT, also remotely from the office, primarily during regular working hours	Interactive, real-time, place and time independent use of IT everywhere, every time — (often) through BYOD
Mainframe computing and accordingly client/server computing	Client/server computing and accordingly Internet 1.0 (e-mail, surfing) via fixed line dial-up and PCs	Cloud computing and Web 2.0 through wired and wireless broad-band Internet and multiple devices
Limited body of computer law for the employer (and hardly for employees)	Increase of digital technology law for employer and employee	Extensive cluster of digital technology and data laws for employers and employees (also as a citizen, consumer, patient)

Figure 1: Understanding the advancement of digital working chronologically

### Business continuity

After the attacks of 9/11 and the outbreak of SARS virus at the beginning of this century, it became clear that diversified forms of organizations, including using the private living space as a workplace, are useful in terms of process and business continuity. This argument turned-out superlative in fight against the spreading of COVID-19.

But there are also down-points. Homeworkers complain about their solitary professional life or are afraid of missing a promotion, while Netflix's chairman recently said that he does not see "any positives" when staff works from home and that this working model hurts creativity. Interesting note: the expectation, however, is that after the pandemic one day a week at home will be new standard.

### The Massive Rise of Digital Law and Regulation

Not only has digital working developed unprecedented; the same applies to digital law and regulation in general, also in the perspective of work. Here, two areas primarily determine the borders: employment law and IT law. Employment law does not usually stand in the way of new ways of working, although that depends on the national employment law *per jurisdiction*. The most complex challenge, however, concerns the protection of the employer's fair and necessary interests — such as innovation, business continuity, and legal compliance — through the consolidation and fine-tuning of laws and regulations, with a dedicated focus on the broad and divergent body of digital law.

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We note a number of *important growing legal trends* in Europe, which also play a key role in managing the legal side of modern working with IT. Among them, the following specialized legislation in the domain of:

- *privacy law* (General Data Protection Regulation – EU 2016/679, the draft ePrivacy Regulation (which will replace the ePrivacy Directive of 2002);
- *cybersecurity law* (Network and Information Security Directive - EU 2016/1148);
- *digital security breach notification law* (codified in various European and national legislation);
- *trade secret law* (Trade Secrets Directive - EU 2016/943);
- *statutory powers of supervising bodies*, including their increasing competence to impose heavy fines (codified in various European and national legislation).

### **First and second generation telework agreements**

In the 1980s, the introduction of remote working with computer and network technology came with special legal consequences. That was a first. In the United States so-called 'telecommuting agreements' saw the light. Important to realize: these agreements did not change the formal legal position of the knowledge worker. An employee who started working part-time or full-time out-of-office — from home or in a telecentre locates in a suburbs — remained in traditional employment and did not suddenly turn into a self-employed freelancer. That important premise still applies today.

At that moment in time teleworking contracts were often limited to a number of simple, rather practical matters, such as the loan agreement for a personal computer and telephone or the financing of the home office; sometimes supplemented with performance and control measures.

This approach was inadequate from the start, because it blindly ignored the special legal aspects of digital technology and data processing, such as software licensing, information and network security, privacy and the legal aspects of email. For example, for software in principle the rule applies that the employer is legally responsible for the professional use by its staff.

The next approach to digital working resulted in an employee e-code of conduct, mainly driven by the Internet. No pornography, no surfing for private purposes, dealing carefully and neatly in e-mail correspondence, formalizing appointments by fax or on paper, and so on. These rules subsequently added a regulation for the use of social media. For example, who “owns” the followers of the professional Twitter account of a sales manager? What business-related information may an employee publish online? And many issue more.

### **Compelling Reasons to Take Action**

Today, executives have to deal with the different circumstances. A the office the fixed workplace made way for an activity-based flexible working environment with less square meters, while employees have to ability — thanks to corporate information “at their fingertips” — to work where they are. However, these developments lead to far-reaching consequences.

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- *The procurement of digital technology (products and services)* increasingly escapes the corporate IT department. Employees also use their own devices and self-selected and installed software, apps, network infrastructure and cloud services for their labor.
- *Corporate data processing* literally is withdrawn from the actual possession and control of the board of a company or the administration of a public sector organization. No one has an overview where all the corporate data are located, let alone whether or not data is being processed in compliance with all the applicable statutory, contractual and business rules.
- Due to diverse reasons — the deployment of weak and not-updated digital technology, inadequate security measures (products, services and organizational measures), relaxed or even non enforcement of internal rules, and advanced and large-scale cybercrime — *breaches of IT systems and networks* are the order of the day.

### Key Issues to be Addressed

Well considered there is little choice. Any organization in any sector should address the legal and policy aspects of modern digital working, that more and more often is done in a time and place independent matter. In fact, on account of the COVID-19 pandemic large-scale telework could very well become a permanent situation. But executives have options in terms of subject-matters and the scope of the regulation; also the extent to which one and the other is regulated. Think of strictness and the decree of detailing, and the deployment of control measures and penalty clauses.

Options also arise in the regulation *process* itself: in (formal) consultation with (representatives of) employees or simply top-down. An easily overseen advantage is that the choices to be made may reflect the core values of the organization.

An overview in outline of areas for regulation to be considered:

- Digital technology, especially software and software licensing, update policies
- Corporate data, including trade secrets and personal data, and storage, retention and archiving
- Cybersecurity, including passwords and encryption technology requirements
- Use of tools for internal and external communication
- Digital behavior, and more in particular for written, voice and visual internal and external communication
- Use and ownership of social media accounts and published content, such as tweets, blogs and other postings
- Permission process for the use of other technology, such as own devices and cloud services, etc?
- Relationship and balance between the business and private lives
- Control measures and transparency of its use
- Work place conditions
- Continuity and contingency measures (e.g. in case of illness of the employee)
- Exit clauses

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### **Conclusion**

The emerging ubiquity of digital technology and data processing — pervasive computing — at today's undefined workplace (in and out-of-the office, including at home, at the site of a customer, during business travel, and more), challenges executives at the turbulent start of the third millennium of the twenty-first century to necessarily implement digital law strategically, both in their internal and external business processes.

In our view the law entails more than regulatory compliance or traditional risk management by limiting liabilities. An advanced legal approach optimizes assets and creates economic value. Unavoidable benefits for every smart organization.

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