



University
of Basel

Faculty of Law



Work at home – legal questions

Syndicom office hour for google employees

Work at home: legal aspects
26th October 2020

Prof. Dr. iur. Kurt Pärli

Agenda

I.) Introduction

II.) Infrastructure & costs compensation

III.) Working time, health and safety, data protection

IV.) Homeoffice abroad

V.) Summary

VI.) Appendix

I) Introduction

Google Switzerland,
Zurich (employer)

Duty of care



Googler (employee)

Duty of loyalty

Workplace

Place of residence

Holiday residence
(permanent or
temporary)



Agenda

I.) Introduction

II.) Infrastructure & cost compensation

III.) Working time, health and safety, data protection

IV.) Homeoffice abroad

V.) Summary

VI.) Appendix

II.) Infrastructure and cost compensation

The legal framework:

- The employer must provide the equipment for the work to be carried out (see article 327 para 1 Code of obligation)
- Cost participation by the employer if the employee needs his own equipment (article 327 para 2 Code of obligation)

What does this mean?

- The employer must provide the infrastructure for the work or compensate the employee for the costs
- According to a Federal Supreme Court ruling, the necessary expenses under Art. 327a CO also include the rent for a workroom at home

Effects on Tax and Social insurance

- for the company
- for the employees

Agenda

I.) Introduction

II.) Infrastructure & cost compensation

III.) Working time, health and safety, data protection

IV.) Homeoffice abroad

V.) Summary

VI.) Appendix

III.) Working time, health and safety, data protection (1)

The legal framework:

- Freedom of contract, but....
- Limits in the Labour Code
 - Ban of Sunday- and night work
 - Regulation about maximum hours, rest
- Obligation for the *employer* to let record the working hours of the employees
- Non-applicability of the rules if....
 - Higher management
 - Employees with salaries above 120 000, a great deal of autonomy and, if they are covered by a collective agreement
- Easier use of rules if
 - There is an agreement between management and employee representation in the company

Further important to know

- Definition of working time

III.) Working time, health and safety, data protection (2)

What does this mean?

- Provisions of the Labour Code apply to work in the company as well as in the home office
- Google has to make sure that the working hours are correctly recorded, also when working in homeoffice
- Appropriate measures must also be taken to ensure that the ban on night and Sunday working is not violated
- Overtime bonuses according to the labour law are owed (if no compensation is possible)
- By the way: Holiday also exists during times of homeoffice
 - Answering business e-mails during holidays = working time
 - Any interruption of rest (which is the purpose of holidays) is harmful and jeopardises health in the medium and long term.

III.) Working time, health and safety, data protection (3)

Legal framework

- Art. 6 Labour Code and Art. 328 Code of obligation = employers have to take all measures to protect the health of their employees that are necessary according to experience, can be applied according to the state of the art and are appropriate to an individual company
- Data-protection and surveillance of employees = part of health (Art. 26 of Ordinance 3 of the Labour Code)
- Art. 10 para 1 lit. a of the Codetermination Act = employee representation committee has a right to information and consultation
- By the way: Unions can see a court ruling, if the Codetermination Act is broken
- Employers can be sanctioned by state authorities when violating the Labour Code

III.) Working time, health and safety, data protection (4)

What does this mean?

- Provisions of the Labour Code apply to work in the company as well as in homeoffice
- Need for appropriate infrastructure for homeoffice
- Need for measures against social isolation

How state authorities can control health and safety regulations in the case of homeoffice?

- Legal situation is unclear, no right to access to private homes
- Basic obligation to protect health of the employees for the employer

The problem of presenteeism

- Risk that employees are working although they are medically ill
- Negative mid- and long-term consequences
- Responsibility for the employer to avoid such behavior of the employees
- How can line-managers identify presenteeism when employees are working all the time at home?

III.) Working time, health and safety, data protection (5)

Legal framework

- Art. 328b Code of obligation
 - Data processing is only permitted if the suitability of the employee is at stake or if the data processing is necessary for the execution of the employment contract.
- Art. 26 Ordinance No 3 of the Labour Code
 - Limitation of permitted monitoring of employees
- Data Protection Act
 - Guidelines of data processing

What does this mean

- Monitoring employees while there are in homeoffice = same rules are applicable
- Of particular importance are the principles of transparency and proportionality

Agenda

I.) Introduction

II.) Infrastructure & cost compensation

III.) Working time, health and safety

IV.) Homeoffice abroad

V.) Summary

VI.) Appendix

IV) Homeoffice abroad

The key issues:

1. Place of jurisdiction and applicable law in the case of an employment conflict
2. Change of social security status
3. Taxes
4. Data protection and data-processing
5. Health and Safety

IV.1) Jurisdiction and applicable Law

Legal framework

- Lugano-Convention (for EU and EFTA-Member States)
- Right to jurisdiction at the foreign residence if employees spend the majority of working time there
- Agreements on jurisdiction = ineffective unless providing a further place of jurisdiction for employees
- Applicable Law = rules of International Private Law in state of residence

What does this mean?

- Case of a Google Zurich Employee working permanently in homeoffice in Germany

IV.2 Change of Social Security Status

Legal framework

- Art. 11 et seq. of EU Regulation No. 883/2004
- Applicable in relations between Switzerland and the EU states
- Art. 11 of Regulation No. 883/2004
 - A person subject to the Regulation should be subject only to the law of one Member State (Switzerland is considered a Member State here)
 - the competent State is the State in which the person concerned is employed
- Article 13 of Regulation 883/2004 and Art. 14 (8) of the implementing Regulation 987/2009/EC
 - 25% (and more) of the activity in the State of residence = subject to social security law as if they were carrying out their entire work in the state of residence

What does this mean?

- Permanent homeoffice 25% and more = Change of social security Law
- Standstill during covid-19 crisis

IV. 3) Other issues

- "long-term homeoffice" and taxes = place of business (with corresponding tax consequences)
- Impacts on the tax liability of the individual employee are possible
- Increased complexity in terms of data protection compliance
- Health and safety = employer and employee jointly responsible for ensuring regulations are observed

Agenda

I.) Introduction

II.) Infrastructure & cost compensation

III.) Working time, health and safety

IV.) Homeoffice abroad

V.) Summary

VI.) Appendix

V) Summary (Take home message....)

- Swiss labour = costs of infrastructure should be paid by the employer (Art. 327 and 327a Code of Obligations)
- Labour Code provisions about recording working hours, prohibitions on working at night and on Sundays and maximum working hours continue to apply
- Health protection = of particular importance in homeoffice
- Role of the employee representatives
- Monitoring performance of employees = limits of data protection law
- Cross-border home office leads to some rather sensitive tax and social security issues

Appendix I: Legal Sources

Contract law

- Art. 321a (duty of loyalty)
- Art. 321d (right to give instructions)
- Art. 328 (obligation to protect employees health and personal integrity)
- Art. 328b (date protection in employment)
- Art. 327 Code of obligation (Work tools, materials and expenses)
- Art. 327a Code of obligation (expenses)
- 351 Code of obligation (special regulation for homework)

Public Labour Law

- Art. 6 Labour Code
- Art. 26 Ordinance 3 of the Labour Code (Limitation of surveillance)

Social Security Regulation

- Regulation (EC) No 883/2004
- Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems

Judgments

- Federal Court, 4A_533/2018 of 23 April 2019.

Appendix II

Important Links:

https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/publication/wcms_745024.pdf

http://ilo.ch/ifpdial/information-resources/national-labour-law-profiles/WCMS_158921/lang--en/index.htm

<https://www.ch.ch/en/working-night-or-sundays/>
<https://www.ch.ch/en/overtime-and-extra-hours/>



University
of Basel

Faculty of Law



Thank you
for your attention

kurt.paerl@unibas.ch