New Ways of Working

01. Has the government introduced any laws and/or issued guidelines around remote-working arrangements? If so, what categories of worker do the laws and/or guidelines apply to – do they extend to “gig” workers and other independent contractors?

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The first French law on teleworking was adopted on 22 March 2012. It was subsequently modified by an ordinance dated 22 September 2017. Today, three articles of the labour code cover the implementation and the functioning of teleworking (articles L. 1222-9 to L. 1222-11). In addition, two national collective agreements were concluded between employers' representatives and trade unions in 2005[1] and 2020.[2]

The definitions of teleworking given by article L. 1222-9 and by the agreement of 19 July 2005 provide that the rules on teleworking only apply to employees with an employment contract. These rules do not apply to self-employed workers.

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[1] National collective agreement on Teleworking – July 19, 2005

[2] National collective agreement for a successful implementation of teleworking – November 26, 2020

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02. Outline the key data protection risks associated with remote working in your jurisdiction.

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Employers must ensure the protection of their company’s data but also of employees’ data.

According to article L. 1222-10 of the French labour code, the employer must inform the teleworking employee of the company's rules regarding data protection and any restrictions on the use of computer equipment or tools. Once informed, the employee must respect these rules.

The collective national agreement of 26 November 2020, provides more details in article 3.1.4. It is the employer's responsibility to take necessary measures to protect the personal data of a teleworking employee and the data of anyone else the employee processes during their activity, in compliance with the

GDPR of 27 April 2016 and the rulings of the National Commission for Technology and Civil Liberties (the CNIL).

The CNIL said in its 12 November 2020 Q&A on teleworking that employers are responsible for the security of their company's personal data, including when they are stored on terminals over which they do not have physical or legal control (eg, employee's personal computer) but whose use they have authorised to access the company's IT resources.

The National Agreement of 26 November 2020 recommends three practices:

- the establishment of minimum instructions to be respected in teleworking, and the communication of this document to all employees;
- providing employees with a list of communication and collaborative work tools appropriate for teleworking, which guarantee the confidentiality of discussions and shared data; and
- the possibility of setting up protocols that guarantee confidentiality and authentication of the recipient server for all communications.

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03. What are the limits on employer monitoring of worker activity in the context of a remote-working arrangement and what other factors should employers bear in mind when monitoring worker activity remotely?

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The rules for monitoring employees do not differ between teleworkers and office workers. Thus, like any employee, teleworkers must be informed in advance of the methods and techniques used to monitor his or her activity (article L. 1222-3 of the labour code).

The implementation of a device allowing the control of the employee's working time must be justified by the nature of the task to be performed and proportionate to the purpose (National Agreement of 26 November 2020).

The CNIL said in a Q/A on 12 November 2020 that the devices used to monitor employees' activity must not be aimed at trapping employees and cannot lead to permanent surveillance of employees. Thus, audio or video devices, permanent screen-sharing or keyloggers must not be implemented.

If the employer exercises excessive surveillance on his employee, it may receive a financial penalty.

Finally, the CNIL advises employers to prioritise monitoring the completion of missions by setting objectives rather than monitoring the working time or the daily activity of employees.

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04. Are employers required to provide work equipment (for example, computers and other digital devices) or to pay for or reimburse employees for

costs associated with remote working (for example, internet and electricity costs)?

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French law has no provision for this.

It is, therefore, necessary to refer to the two national agreements of 2005 and 2020. These agreements stipulate that the costs incurred by the employee in the performance of his or her employment contract are borne by the employer. This obligation also applies to teleworkers. However, the national agreement of 2020 sets a few conditions for this coverage: the prior validation of the employer, the expense must be incurred for the needs of the professional activity of the employee and in the interests of the company.

The organisation responsible for collecting social security contributions (URSSAF) has issued a list of expenses that must be covered by the employer. These costs include ink cartridges, paper, telephone and internet subscriptions, electricity, heating, a proportion of rent in certain cases (see below) and home insurance.

The terms and conditions for covering business expenses (maximum amount, the procedure to follow, etc.) may be defined unilaterally by the employer, by mutual agreement between the employee and the employer, or by a collective agreement between the employer and the company's unions. Article 3.1.5 of the national agreement of 2020 and the Ministry of Labour recommend doing everything possible to reach an agreement between the employer and the unions.

If teleworking becomes permanent and the employee no longer has an office on the company's premises, the employer must pay a home occupation allowance.[3]

As for the use of the employee's personal equipment, the principle is that the employer must provide the employee with a computer for teleworking. However, if the employee agrees, they can use their personal equipment (article 7 of the national agreement of 19 July 2005).

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[3] Cass. Soc, 14 septembre 2016, n°14-21.893

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05. What potential issues and risks arise for employers in the context of cross-border remote-working arrangements?

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Cross-border remote working can accentuate some of the problems caused by teleworking or create new ones.

Among the existing problems, the loss of social ties is accentuated if the teleworker decides to work from another country. Indeed, the employee abroad will never physically see his colleagues, which will create a distance between the employee working from abroad and other employees.

Similarly, employers must ensure the protection of the health and safety of workers (article L. 4121-1 labour code). This is a difficult obligation to meet in teleworking, especially because employers do not have access to remote employees' workplaces. It is even more difficult if the employee works from another country because the sanitary, electrical and other standards are different and potentially less protective than French rules.

As for social security law, in principle, the employee depends on the social security system of the country where they work. The employee can only continue to benefit from the French social security system if they are in a secondment situation. Moreover, this is only a temporary solution because the secondment implies a temporary mission. The employer will therefore have to register the employee with the social security system of the country where they are working, which will cause problems in terms of social contributions.

Another question that may arise is whether an employer should accept a work stoppage prescribed by a foreign doctor.

Finally, another problem that may arise is the employee's right to disconnect. Indeed, the employer and the employee must agree on a time slot during which the employee can not be contacted to respect his private life as much as possible.[4] It can be difficult to establish a time slot that suits both the employee and the employer in case of major time zone discrepancies.

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[4] National agreement of November 26, 2020

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06. Do employers have any scope to reduce the salaries and/or benefits of employees who work remotely?

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Teleworkers have the same rights as employees who work from a company's premises (article L. 1222-9 III of the Labor Code).

Employers cannot modify employees' remuneration without obtaining agreement.[5] This rule also applies to teleworkers.

In some countries such as the United States, employers can adjust the remuneration of teleworking employees to the cost of living in the employee's place of residence. This practice is not prohibited in France but the employer must be careful in doing so as it could constitute discrimination based on the place of residence, which is prohibited by the labour code[6]if it is not justified by objective elements.

However, employers can withdraw a few benefits from teleworking employees. Indeed, even if the Ministry of Labor says in a Q&A that the telecommuting employee must receive lunch vouchers like other employees, some jurisdictions believe that the employer can stop paying these vouchers to teleworkers because they are not in a comparable situation to employees who work from a company's premises.[7]

As for transportation costs, the employer must cover half of the cost of the transportation pass used to travel to the office and to return home from the office (article L. 3261-2 of the labour code). If the employee does not have to travel to work during the month, the employer does not have to pay transportation costs.

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[5] Cass. Soc, 18 oct. 2006, n°05-41.644

[6] Article L. 1132-1 Labour code

[7]TJ Nanterre, 10 mars 2021, n° 20/09616

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07. Do employers have a legal duty to provide covid-19-safe working environments? If so, what practical steps can employers take to satisfy this duty?

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The French Labour Code imposes on all employers a general obligation to protect the health and safety of their employees. Employers must, therefore, take all possible measures to prevent employees from endangering their health. To that effect, employers must update the "DUER" (a mandatory document that identifies and evaluates all occupational risks) to identify situations, conditions or workstations that could lead to transmission of the virus, and propose measures to avoid such risks.

The employer can take the following measures to provide Covid-19 safe working environments:

- Remind employees to systematically respect the rules of hygiene and social distancing;
- Take all necessary organisational measures to limit the risk of crowding, crossing (flow of people) and concentration (density) of staff and clients to facilitate physical distancing;
- Remind employees to wear a mask;
- Make alcohol gel available to employees;
- Ventilate the premises and clean surfaces regularly;
- Provide floor markings to enforce social distancing;
- Define a gauge (4m² per person as an indication) specifying the number of people who can be present simultaneously in the same enclosed space while respecting the rules of physical distancing and wearing a mask;
- Provide for separation devices between employees or between employees and other people present in the workplace (clients, service providers) such as transparent separations;
- Promote the vaccination of employees, including during working hours; and
- Check compliance with vaccination requirements for health professionals and compliance with screening requirements by employees engaged in certain activities (bars and restaurants, public transport etc), based on the proof presented to them.

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08. Can employers require or mandate that their workers receive a covid-19 vaccination? If so, what options does an employer have in the event an employee refuses to receive a covid-19 vaccination?

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Employers can require that their employees are vaccinated only if the vaccination is made mandatory by the French Public Health Code.

In France, vaccination against covid-19 has not been made mandatory (except for health professionals). Therefore, French employers cannot force their employees to be vaccinated. However, they can recommend it to their employees without forcing them (please note that due to the Law of 5 August 2021, employees are entitled to leave to attend covid-19 vaccination appointments).

Please note that a law was passed by Parliament on 5 August 2021 and states:

1. To make access to certain places, establishments or events conditional upon the presentation of either a negative PCR test, or proof of vaccination status concerning covid-19, or a certificate of recovery following covid-19 infection.

This would only cover the following activities:

- recreational activities;
- bars and restaurants (except company restaurants), including terraces;
- department stores and shopping centres by decision of the Prefect of the district in the event of risks of contamination under conditions guaranteeing access to essential shops and transport;
- seminars and trade fairs;
- public transport (trains, buses, planes) for long journeys; and
- hospitals, homes for the elderly and retirement homes for companions, visitors and patients receiving care (except in medical emergencies).

In those specific cases, from 30 August 2021, an employer undertaking the above activities may ask their employees to present one of these documents, including proof of vaccination status. If an employee is unable to present such documents and chose, in agreement with their employer, to not use paid holidays, the employer can suspend the employee's contract, on the same day. This suspension, which can lead to an interruption of salary, ends as soon as the employee produces the required proof.

If the suspension goes beyond three working days, the employer shall invite the employee to a meeting to attempt to rectify the situation, including the possibility of temporarily reassigning the employee to another position within the company not subject to this obligation.

2. Mandatory vaccination for health professionals, including those working in an occupational health service according to article L.4622-1 of the labour code.

The health professionals listed in article 12 of the law of 5 August 2021 (doctors, nurses, doctors working in occupational health services, osteopaths etc) must be vaccinated as of 9 August 2021, unless there is a medical contraindication or a certificate of recovery can be presented.

Please note that the law provides for a transition period as follows:

- up to and including 14 September, the staff concerned may present a negative test that is less than 72 hours old (RT-PCR screening test, antigen test or self-test carried out under the supervision of a health professional) if they are not vaccinated;
- between 15 September and 15 October inclusive, when an employee has received the first dose of vaccine, he or she may continue to work provided that he or she can present a negative test result; and
- from 16 October 2021, they must present proof of the complete vaccination schedule.

This obligation does not apply to people who perform occasional tasks. The Ministry of Labour defines "occasional tasks" as a very brief and non-recurring intervention that is not linked to the normal and permanent activity of the company. Workers who carry out these tasks are not integrated into the workgroup and their activity is not public-facing.

This may include, for example, the intervention of a delivery company or an urgent repair.

On the other hand, the following are not occasional tasks: carrying out heavy work in a company (eg, renovation of a building) or cleaning services, because of their recurrent nature.

When carrying out an occasional task, the workers concerned must ensure that they comply with social distancing rules.

Employees who have not presented one of these documents can no longer work. Thus, when an employer finds that an employee can no longer carry out their work, the employee must be informed without delay of the consequences of this prohibition, as well as the means to rectify the situation. A dialogue between the employee and employer to discuss ways of rectifying this situation is encouraged. An employee who is prohibited from working may, with the employer's agreement, use days of rest or paid leave. Otherwise, their employment contract will be suspended.

The suspension of the contract, which leads to the interruption of salary, ends as soon as the employee fulfils the conditions necessary to continue working.

When the employer or the regional health agency finds that a health professional has not been able to carry out their role for more than 30 days, it informs the national council of the order to which they belong.

Please note that, according to the law of 5 August 2021, the employer must inform the new works council (CSE) of measures taken to implement any obligations to verify the vaccination of health professionals or the health passes of employees who come under the aforementioned sectors.

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09. What are the risks to an employer making entry to the workplace conditional on an individual worker having received a covid-19 vaccination?

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For employees for whom vaccination is not mandatory, employers cannot make entry to the workplace conditional on vaccination, nor can they threaten to dismiss the employee if they have not had the vaccine.

If an employer makes the return to the company premises conditional on vaccination, they are violating the employees’ privacy and medical confidentiality, and employees may freely refuse it. In case of dismissal, it could be judged null and void since it may violate the employee's privacy and medical secrecy.

On the other hand, for employees working in the above-mentioned establishments (bars, restaurants, department stores, shopping centres etc.), the employer may make the return of the employee to work conditional on the presentation of a health pass (either a negative PCR test, or proof of vaccination status concerning covid-19, or a certificate of recovery following a covid-19 contamination).

Finally, for health professionals, there will be no risk for the employer. The employer will be able to condition the return to the premises on proof of vaccination status.

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10. Are there some workplaces or specific industries

or sectors in which the government has required that employers make access to the workplace conditional on individuals having received a Covid-19 vaccination?

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Please see above (questions 8 and 9) regarding the workplaces and specific industries concerned by making the access to the workplace conditional on individuals having received a Covid-19 vaccination.

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11. What are the key privacy considerations employers face in relation to ascertaining and processing employee medical and vaccination information?

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Moreover, regarding the processing of data relating to an employee's vaccination, the CNIL has not yet issued a directive on the specific subject of the processing of employee vaccination data by employers. Because of their sensitive nature, data relating to employee health are subject to special legal protection: they are in principle prohibited from being processed. Employers, therefore, may not keep a list of vaccinated employees, or disclose the names of those who do not wish to be vaccinated.

In fact, according to the CNIL, *"because of their sensitive nature, data relating to a person's health are subject to special legal protection: they are in principle prohibited from being processed. In order to be processed, its use must necessarily fall within one of the exceptions provided for by the GDPR, thus guaranteeing a balance between the desire to ensure the security of individuals and respect for their rights and fundamental freedoms. Moreover, their sensitivity justifies that they be processed under very strong conditions of security and confidentiality and only by those who are authorized to do so.*

The exceptions that can be used in the context of work are limited and can generally be based on either :

- *the need for the employer to process this data to meet its obligations in terms of labour law, social security and social protection: this is the case for the processing of reports by employees,*
- *the need for a health professional to process such data for the purposes of preventive or occupational medicine, (health) assessment of the worker's capacity to work, medical diagnoses etc.*

For these reasons, employers who would like to initiate any steps aimed at ascertaining the state of health of their employees must rely on the occupational health services.

The CNIL points out that only competent health personnel (in particular occupational medicine) may collect, implement and access any medical forms or questionnaires from employees/agents containing data relating to their health or information relating in particular to their family situation, their living conditions or their possible movements"

However, we find these exceptions difficult to apply in the context of covid-19.

For employees subject to mandatory vaccination, the law allows the employer, or regional health agency if applicable, to store the result of the check on the proof of vaccination status.

Please note that the employer may not keep the proof of vaccination. In other words, the employer may not keep the QR code, only the “Yes/No” result of the test. Keeping the result is limited in time (currently until 15 November 2021).

The information thus collected is personal data subject to the General Data Protection Regulation (GDPR).

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12. What are the key health and safety considerations for employers in respect of remote workers?

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The health and safety considerations for employers in respect of remote workers are the following:

- Modes of work time control or workload regulation;
- Determination of the time slots during which the employer can usually contact the remote worker to respect the right to disconnect and the right to privacy;
- Organise an annual meeting to discuss working conditions and workload; and
- Evaluate professional risks, in particular those linked to the employee's distance from the colleagues and regulating the use of digital tools.

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13. How has the pandemic impacted employers’ obligations vis-à-vis worker health and safety beyond the physical workplace?

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The pandemic does not strictly speaking have an impact on employers' obligations towards workers' health and safety beyond the physical workplace. But the National Interprofessional Agreement on remote status was renegotiated on 26 November 2020 and strongly raised awareness among employers on those issues to:

- Communicate within the work community;
- Adapt the managerial practices: trust and definition of clear objectives;
- Train managers and employees;
- Maintain social ties and prevent employees from isolation: it is useful to plan group time, to set up remote communication means to facilitate exchanges, to assist in case of difficulties with computer tools, etc; and
- Make available to all employees, including those working from home, relevant contacts so that

employees in vulnerable situations can use them.

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14. Do employer health and safety obligations differ between mobile workers and workers based primarily at home?

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No, the legal and conventional provisions on health and safety at work apply to both mobile workers and workers based primarily at home. It must be taken into account that the employer cannot have complete control over the place where teleworking is carried out and the environment, which is part of the private sphere. This implies an occupational risk assessment adapted to the case of mobile workers and the case of workers based primarily at home.

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15. To what extent are employers responsible for the mental health and wellbeing of workers who are working remotely?

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Employers are liable within the limits of their obligations (see question 12). As long as employers respect these obligations, in case of litigation, it will be up to the employee to demonstrate that the deterioration of their health is related to the employer's failure to respect its obligations.

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16. Do employees have a “right to disconnect” from work (and work-related devices) while working remotely?

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The National Interprofessional Agreement on remote status provides that *“the implementation of telework*

takes into account the right to disconnect, which must be the subject of an agreement or a charter dealing with its implementation, under the conditions provided for by the provisions of the Labour Code relating to mandatory negotiation in companies. The right to disconnect aims to respect rest and vacation times as well as the personal and family life of the employee. It is the right for any employee not to be connected to a professional digital tool outside of working hours."

The Q&A from the Ministry of Labour updated to 10 June 2021 provide that *"the employee's right to rest and all working hours rules remain applicable to the telecommuting employee. The employer must precisely determine the time slots during which you must be available. The distinction between working time and rest time must be clear and guarantee the right of employees to disconnect".*

Employees have a right to disconnect and they must not be disturbed outside of these hours or during the lunch break. On the other hand, employees must be operational and available during their fixed hours.

The employee's entitlement to break and lunchtime remains unchanged. The total working time of the employee is the same whether present in the office or teleworking.

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17. To what extent have employers been able to make changes to their organisations during the pandemic, including by making redundancies and/or reducing wages and employee benefits?

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During the pandemic, employers were able to carry out reorganisations involving collective redundancies for economic reasons (subject to justifying a real and serious economic reason as defined by article L.1233-3 of the labour code).

They were also able to negotiate collective performance agreements to meet the needs linked to the operation of the company or to preserve or develop employment by adjusting the working hours of employees, remuneration, and determining the conditions of professional or geographical mobility within the company.

Employers may also have to negotiate or renegotiate agreements or charters on remote status or review their organisation by developing a co-working space, different from the company's premises, on a regular or occasional basis or in case of exceptional circumstances or *force majeure*.

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18. What actions, if any, have unions or other worker associations taken to protect the entitlements and rights of remote workers?

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In general, employees and new works council members have a right to alert and withdraw from any situation which they have reasonable grounds to believe presents a serious and imminent danger to their life or health (article L.4131-1 and L.4121-2 of the labour code).

Apart from these actions, the new works council or the unions will always have the ability to report to the employer any malfunction affecting the entitlements and rights of remote workers.

In any case, please note that employees who wish to terminate their status as a remote worker will have priority to assume resume a non-teleworking position that corresponds to their professional qualifications and skills and to inform the employer of the availability of any such position (article L.1222-10 of the labour code).

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19. Are employers required to consult with, or otherwise involve, the relevant union when introducing a remote-working arrangement? If so, how much influence does the union and/or works council have to alter the working arrangement (for example, to ensure workers' health and safety is protected during any period of remote work)?

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Remote-working is implemented within a collective agreement negotiated with the unions or, failing that, within a charter drawn up by the employer after the opinion of the new works council if it exists (article L.1222-9 of the labour code).

The collective agreement or, failing that, the charter drawn up by the employer specifies:

- The conditions for switching to remote status, in particular in case of a pollution episode, and the conditions for returning to performance of the employment contract without remote working;
- The terms of acceptance by the employee of the conditions of implementation of remote status;
- The modes of control of the working time or regulation of the workload;
- The determination of the time slots during which the employer can usually contact the remote worker; and
- The modes of access to a telework organisation for disabled workers.

The way of negotiation seems to be prioritised by the legislature. Apart from those mandatory clauses, the social partners have every interest in being a force of proposals, which will be accepted or refused by the employer. If the unions refuse to sign the agreement, the employer may provide for these measures in the framework of a charter, which it may implement after the opinion of the new works council (non-binding opinion).

Finally, in the absence of a collective agreement or charter, when the employee and the employer agree to telework, they may formalise their agreement by any means.

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