

## CHANGES IN THE LABOUR CODE – NEW CHALLENGES FOR EMPLOYERS

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**Abstract.** The COVID-19 epidemic affected the labour market in an unprecedented way and forced employers and employees to switch to remote work. The idea of home office garnered many supporters, both among employers and employees. Remote work during the epidemic was, in many cases, a necessity, and now it is becoming an opportunity and a choice. Although existing in the previous legislation, provisions on remote work were adjusted in response to and following the epidemic and lockdowns. The relevant amendment to the Labour Code offers employers an opportunity to control the sobriety of employees and control the presence of substances having a similar effect to alcohol. This legal solution had been awaited and proposed by employers' organisations for several years. The article aims to discuss the most important changes in the amended Labour Code and to indicate challenges that employers are soon to face.

**Keywords:** remote work; Labour Code; employee sobriety check

### INTRODUCTION

The Labour Code of 26 June 1974, which is currently in force, has already been amended dozens of times, which is understandable because the regulation has inevitably lost its relevance. Due to the COVID-19 pandemic that broke out in 2020, many employers directed employees to work remotely. From remote work, introduced by the special regulation contained in the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them<sup>1</sup> was used by many employers.

In the literature, the concepts of remote working and telework were sometimes regarded as the same and used interchangeably [Dolot 2020, 36]. As D. Makowski rightly notes, remote work and telework do not remain in relation to each other in the conceptual "absorption", because not every case of remote work is telework and not every telework has the characteristics of remote work [Makowski 2020, 12]. In the current Labour

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<sup>1</sup> Journal of Laws of 2021, item 2095 [hereinafter: the COVID-19 Act].

Code (before the amendment) only telework was regulated. In accordance with Article 67<sup>5</sup> of the Labour Code, work can be performed regularly outside the workplace, using electronic means of communication as defined in regulations on the provision of electronic services (telework). On the other hand, the COVID-19 Act in Article 3(1) introduced into the legal order the concept of remote work, which should be understood as the right of the employer to commission the employee to perform the work specified in the employment contract, outside the place of its permanent performance for a specified period of time during the validity period, as well as up to 3 months after the cancellation of the epidemic emergency or epidemic state, announced due to COVID-19.

In June 2022, the Sejm received a government bill amending the Act – the Labour Code and some other acts, but work on the bill itself had been underway for almost three years. The amendment introduces a group of regulations setting remote work and sobriety control or control of substances having a similar effect to alcohol. The introduction of the regulation of remote work permanently into the Labour Code is to contribute, among others, to improve the employment opportunities of people in a special situation on the labour market – including pregnant women, parents of young children or people caring for another member of the immediate family or another person remaining in the common household, having a disability certificate or a certificate with a significant degree of disability. An important and necessary change contained in the amendment is to enable employers to preventively control employees for the presence of alcohol or substances having a similar effect to alcohol. According to the amended changes, the employer will gain a number of tools that will allow them to independently check the sobriety of their employees and apply new disciplinary actions to the employees.

This is one of the most anticipated regulations on the Polish labour market. Employers have finally obtained a legal basis for organizing such work after the pandemic, but will the solutions contained in the revised Labour Code meet their expectations? It is difficult to answer this question unequivocally at the moment but probably the practice of application will allow to do it.

Due to the framework of the study, the aim of the article is to discuss the most important changes contained in the amendment to the provisions of the Labour Code and to indicate the challenges associated with them. Unfortunately, the analysis of the regulations probably raises doubts because, in my opinion, the regulations concerning remote work are too formalised and will make it difficult for employers to widely use remote work as a flexible form of employment. The excessive formalization of remote work in the course of preparation of the analysed bill was also indicated by,

among others, the Polish Banks Association, PGNiG or the Civil Aviation Authority.<sup>2</sup>

On December 1, 2022, The Sejm passed a bill amending the Labour Code. 430 deputies voted in favour of the amendment, 12 voted against (11 deputies from the Confederation and 1 deputy from the Law and Justice party), no one abstained. On December 2, 2022 in accordance with Article 52 of the Rules of Procedure of the Sejm, the text of the Act of 1 December 2022 amending the Act – the Labour Code and some other acts<sup>3</sup> was sent to the Senate and to the President of the Republic of Poland. On 15 December 2022, the Senate passed a resolution on the adoption of the Act amending the Labour Code Act and some other acts with 4 amendments. 99 senators voted in the Senate. 97 senators voted for the resolution with four amendments, no one was against it, and two abstained from voting. On 13 January 2023, the Sejm rejected all amendments of the Senate, and on January 27, 2023, the President of the Republic of Poland signed a law amending the Labour Code.<sup>4</sup>

## 1. REMOTE WORK

The implementation of remote work into the applicable provisions of the Labour Code was demanded by both employees, employers and representatives of the doctrine [Mitrus 2020a, 8; Idem 2020b, 4]. The remote work provided for in the Act replaced telework which was abolished. Remote work is also based on teleworking regulations as to how it should be implemented and the formal requirements enabling it to be applied to a given employer.<sup>5</sup> The legislator, taking into account the fact that in some workplaces telework was adopted and is still used, allowed employers to apply the provisions regulating teleworking in the current wording for 6 months from the date of entry into force of the Act amending the Labour Code.

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<sup>2</sup> List of comments submitted as part of public consultations of the bill amending the Labour Code, the Act on occupational and social rehabilitation and employment of disabled people and the Act on employment promotion and labour market institutions pp. 6-15 [hereinafter: List of Comments], <https://legislacja.rcl.gov.pl/projekt/12356556> [accessed: 01.12.2022].

<sup>3</sup> Hereinafter: the Code of Administrative Procedure.

<sup>4</sup> Act of 1 December 2022 amending the Act – Labour Code and some other acts, Journal of Laws of 2023, item 240.

<sup>5</sup> In the opinion of the Centre for Research, Studies and National Legislation of the Council of Legal Advisors approximately 90% of the provisions of Chapter II of the second section of the Labour Code were directly or with minor changes transferred to the designed section II c (second section) of the Labour Code – p. 4, <http://obsil.kirp.pl/wp-content/uploads/2021/08/Opinia-z-14.06.2021-r.-KP-praca-zdalna-final.pdf> [accessed: 12.12.2022].

In accordance with the Act, remote work may be performed in whole or in part in a place indicated by the employee and each time agreed with the employer, including the employee's address of residence. Remote work will primarily be carried out using means of distance communication (Article 67<sup>18</sup> of the Labour Code). This means that the work can be performed on a full-time basis as a remote job or in a hybrid form, e.g. 3 days a week at the employer's office and 2 days at the employee's place of residence. The place of remote work will always be the place indicated by the employee, and then each time agreed with the employer. And the word "each time" raised a number of objections, according to the Polish Bank Association. The content of this article raises the question of whether the employee can indicate more than one workplace for the purposes of remote work and whether the employee will be obliged to inform the employer where they are currently performing remote work? Indicating the place of remote work by the employee and at the same time agreeing on this place with the employer will be administratively burdensome for both the employee and the employer because the employee will have to obtain the employer's consent to perform remote work each time if he/she wants to change this place. Allowing remote work should give the employee the freedom to choose the place from which he/she provides work without the need to obtain consent for its provision from a given place, as long as the employee is able to provide work effectively from a given place. Despite the conclusions, the word "each time" has not always been deleted. In connection with it, the provision does not allow complete freedom to choose the place of remote work by the employee, i.e. without agreeing on this place with the employer. Arrangements for remote work can be made when concluding an employment contract or during employment – at the initiative of the employer or at the request of the employee.

Another solution contained in Article 67<sup>19</sup>(3) of the Labour Code is that the employer will be able to issue an order to perform remote work in the following cases: a) during the period of the state of emergency, epidemic emergency or epidemic state and within 3 months after their cancellation b) or during a period in which the employer's provision of safe and hygienic working conditions at the employee's current workplace is not temporarily possible due to force majeure, if the employee submits a statement in a paper or electronic form immediately before issuing the order that he/she has the housing and technical conditions for performing remote work. It should be emphasized that the instruction to perform remote work by the employer may be issued only for objective (random) reasons and independent of the employer and only for a specified period of time [Florek 2021, 3-4]. However, in order to be able to order remote work at all by the employer, the employee will have to submit immediately before

issuing the instruction – a statement in a paper or electronic form that he/she has the housing and technical conditions to perform such work. Pursuant to the amendment, in some situations listed in Article 67<sup>19</sup>(6) of the Labour Code, the employer will be obliged to take into account the application for remote work in the case of: 1) employee – the parent of a child with a declaration of disability or a certificate of a moderate or significant degree of disability, 2) employee – the parent of a child who has an opinion on the need for early childhood development support, a decision on the need for special education or a decision on the need for revalidation and educational activities, 3) pregnant workers, 4) an employee raising a child up to the age of 4, 5) an employee with custody of another member of the immediate family or another person in the common household who has a disability certificate or a severe disability certificate.

The employer will be able to refuse only if this is not possible due to the organization of work or the type of work performed by the employee. The employer shall inform the employee about the reason for refusal to take into account the application in a paper or electronic form within 7 working days from the date of submission of the application by the employee.

The amendment in Article 67<sup>20</sup>(1-5) of the Labour Code indicates that the rules for performing remote work should be specified in an agreement concluded between the employer and the company trade union organization, and in the event that more than one company trade union organization operates at the employer – in an agreement between the employer and these organizations. In the event that, within 30 days from the date of submission of the draft agreement by the employer, the parties are unable to reach an agreement, the employer will be entitled to determine the rules for performing remote work independently in the regulations after taking into account the arrangements made with the company trade union organizations in the course of agreeing on the agreement [Baran 2022, 22-25]. If there are no company trade union organizations at the employer, then the employer will be entitled to determine the rules for performing remote work in the regulations after consulting the representatives of employees selected in the manner adopted by the employer. However, remote work will also be allowed if no agreement has been concluded or regulations have been issued. The employer should then specify the rules for the performance of work in the instruction to perform such work or directly in the agreement concluded with the employee. When introducing remote work, the employer should specify in this agreement, in particular: the group of employees who may be covered by remote work, the rules for determining the equivalent or lump sum, the rules for conducting inspections, the method of communication with the employee, including the method of confirming the presence at work, the principles of personal data protection and conducting training

in this field (Article 67<sup>20</sup>(6) of the Labour Code). These are activities that are likely to be problematic in some workplaces. As a result of workplaces where the possibility of working outside the company's office concerns only a small group of employees, they may not decide to take this mode.

In this context, it is important to oblige employers to finance expenditures related to the use of the remote mode of performance. Pursuant to Article 67<sup>24</sup>(1) of the Labour Code, the employer will be obliged to: provide employees performing remote work with appropriate materials and tools, as well as their installation, service or maintenance or cover the costs associated with it; cover the costs of electricity and telecommunications services necessary to perform remote work, and the rules for covering them should be specified in agreements or regulations; provide the employee performing remote work with training and technical assistance necessary to perform this work. The employer will be obliged to cover labour costs or to pay the equivalent in its place. The amount of the allowance should correspond to the expenses incurred by the employee, i.e. there must be a reasonable relationship between the amount paid to the employee and the value of the tools, materials or equipment belonging to the employee used for the employer's purposes. Here is the basic difficulty that employers indicate, i.e. how to interpret this vague criterion. This requirement can also be met by the payment of a lump sum, the amount of which corresponds to the expected costs incurred by the employee in connection with the performance of remote work. This solution is beneficial for employees, but in the opinion of employers, it may cause doubts because it is imprecise. The regulations will not eliminate the problems that may arise with the calculation of the equivalent or lump sum because they assume that these issues will be determined in the in-house files or independently by the employer. It should be noted that in this respect, it was postulated, among others, to legally determine the minimum amount of the lump sum or that the amount of the lump sum (or the method of its calculation) should be determined by means of a regulation.<sup>6</sup> In addition, at the meeting of the Extraordinary Committee for Amendments in Codifications – Standing Subcommittee on Amendments to the Labour Code and the Code of Administrative Procedure. A. Kuchta, a member of the NSZZ Solidarność National Committee, demanded the implementation of minimum amounts of equivalent or lump sum, and clarification of these amounts or extension could take place already in agreement with the employee, in collective agreements or in the work regulations.<sup>7</sup> However, it did not gain the support of other members of the committee. Importantly,

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<sup>6</sup> Such a proposal was made by BOP Kraków Solidarność and PGNiG SA, see Summary of comments, p. 11, 54.

<sup>7</sup> See Full record of the meeting of the Standing Subcommittee on Amendments to the Labour Code and the Code of Administrative Procedure (No. 3) of 13 September 2022, p. 18.

these amounts will not constitute an employee's income within the meaning of the provisions of the Personal Income Tax Act (Article 67<sup>25</sup> of the Labour Code).

Another novelty is the introduction to the Labour Code – occasional remote work (Article 67<sup>33</sup>(1) of the Labour Code). Unlike regular remote work, occasional work will not require agreement with company trade union organizations or fulfilment of numerous obligations. For the employer, it will also not be associated with burdens such as a lump sum for electricity consumed or the employee's Internet. It will be possible at the request of the employee to submit in a paper or electronic form. However, the bone of contention between company trade union organizations and employers' organisations remained the dimension of such work. Union members proposed that this should be the shortest possible period, a maximum of 12 days a year. They pointed out that the employer would not incur additional costs for this form of performance of tasks. In their view, the excessive lengthening of the period of occasional remote work will make it easier for employers to avoid its additional costs (provision of equipment, the Internet, etc.). Employers, on the other hand, strived for 36 or more such days a year, claiming that not every company would introduce remote work according to the new rules. Then occasional work at the request of the employee can become an opportunity for him/her to stay at home and thus save time and travel costs. The Ministry of Family and Social Policy indicated that the compromise solution would be to leave 24 days as part of this solution. As K. Moras-Olaś rightly points out, the proposed regulation does not refer expressly to the situation of a part-time employee starting work during the calendar year, and legitimate problems may arise on the part of the employer with counting the period of occasional remote work of part-time employees [Moras-Olaś 2022, 26].

It should be noted that the employer, in accordance with Article 67<sup>28</sup>(1) of the Labour Code, will be entitled to carry out control over the performance of remote work by the employee (but only during the employee's working hours), including in the field of health and safety and control of compliance with procedures in the field of security and information protection, including the protection of personal data on established terms. The performance of control activities will not be allowed to violate the privacy of an employee performing remote work or other persons (accompanying the employee in his/her remote workplace) or hinder the use of home rooms in a manner consistent with their purpose (Article 67<sup>28</sup>(2) of the Labour Code). If the employee refuses such control or during the inspection, it turns out that the position threatens the safety of the employee. In this case the employer, due to their responsibility, will be obliged to withdraw such an employee from remote work and return to stationary work.

On April 7, 2023, the amended provisions of the Labour Code regarding remote work will enter into force. Thanks to the 2-month period of *vacatio legis*, employers gain valuable time to prepare for the upcoming changes, although in the opinion of many entrepreneurs, it is still not enough.

## 2. CONTROL OF EMPLOYEE SOBRIETY AND CONTROL OF THE PRESENCE OF SUBSTANCES HAVING A SIMILAR EFFECT TO ALCOHOL

An important change that has been introduced into the Labour Code is to allow employers from February 21, 2023 to introduce control of the sobriety of employees (including contractors or B2B associates) – and control for the presence of substances having a similar effect to alcohol, when it will be necessary to ensure the protection of life and health of employees, other people or property protection (Article 22<sup>1c</sup>-22<sup>1f</sup> of the Labour Code). This is a change expected by employers, thanks to which the employer has obtained a number of tools that will allow them to independently check the sobriety of their employees for the presence of substances acting similar to alcohol. The new rules provide for two forms of sobriety testing (and, accordingly, alcohol-like testing): a preventive test; a test in the event of reasonable suspicion that the employee appeared to work in a state after using alcohol or in a state of intoxication or consumed alcohol during work. The decision of the employer depends on whether they will carry out both forms of testing or only one of them. It should be noted that employers called for the introduction of the principle of “zero tolerance” or “full sobriety” in the Labour Code, i.e. total sobriety wherever it may affect public safety, health and life – both employees and outside person, but the legislator did not decide to introduce this principle. This means that, in principle, there will be no grounds for preventing an employee from working if the alcohol content in the employee’s body is below 0.2‰ of blood alcohol concentration or 0.1 mg of alcohol in the exhaled air. If the inspection shows the employee’s condition after drinking alcohol, the employer does not allow the employee to work, informing him/her of the reason for such a decision, and the time of not performing work is sometimes unpaid. In the event that the employee disputes the employer’s decision in this regard, at the request of the employer or an employee not admitted to work, the sobriety test is carried out by the police. In practice, this will probably cause a problem because employers will not be able to introduce the requirement of “zero” concentration of alcohol in internal company regulations (collective agreements or labour regulations), because they cannot be less beneficial for employees than the provisions of labour law, and on the other hand, the measurement of consumption will be made at a given moment, and the employer



will not be able to predict whether the concentration of alcohol will decrease or whether it will increase. For example, for the studied bus driver and the responsibility for allowing the employee to work “under the influence” will lie with the employer [Leśniak 2022].

The employer, as in the case of the sobriety check, will be obliged to prevent the employee from working if the inspection shows the presence in the employee’s body of substances having a similar effect to alcohol or if there is a reasonable suspicion that the employee appeared to work in the state after using such substance or took some substance during work. The Regulation of the Ministry of Health indicates that substances having a similar effect to alcohol are: opioids; amphetamine and its analogues; cocaine; tetrahydrocannabinols; benzodiazepines.<sup>8</sup> The employer will be able to carry out such an inspection using methods that do not require laboratory testing (narcotics tests). It should be noted that some of these substances are components of drugs used in various therapies, often very serious diseases. Benzodiazepines, in particular, are quite common in use, as a result, they can be detected in the drug tests used by employers. Therefore, employers will have the opportunity to obtain information that the employee is being treated with the use of certain substances. Those who use different drug therapies can feel uncomfortable when the company orders a drug test. Many people are also often unaware that their drug contains a substance indicated in the new regulations as undesirable during work and may find out about it only during the study. Both the employer and the employee will have the opportunity to challenge the result of the survey carried out by the employer. At the request of the employer or an employee not admitted to work, such a test will be able to be carried out by the police, while a blood or urine test will be carried out in situations indicated in the Labour Code, e.g. an employee will refuse to undergo a non-laboratory test, the condition of an employee not admitted to work will prevent the performance of a test using a method that does not require a laboratory test (Article 22<sup>1d</sup>(5) and Article 22<sup>1f</sup>(3) of the Labour Code).

A problematic issue from the employer’s point of view may be the requirement to regulate the principle of inspections (sobriety of employees and the presence of substances similar to alcohol) in internal sources of labour law. According to Article 22<sup>1c</sup>(10) of the Labour Code in the content of the collective agreement or in the work regulations or in the notice, if the employer is not covered by the collective agreement or is not obliged to establish the work regulations, it will be necessary to determine: the introduction of the control itself; the determination of the groups or groups

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<sup>8</sup> Regulation of the Minister of Health of 16 February 2023 on tests for the presence of alcohol or substances having a similar effect to alcohol in the employee’s body, Journal of Laws, item 317.

of employees covered by the control; the method of conducting sobriety control, including the type of device used for control, the time and frequency of its performance (whether it will perform it only before the employees start their work on a given day or also during work). This means that some employers will have to agree with company trade union representatives.<sup>9</sup> Importantly, the employer will be obliged to inform employees about the introduction of sobriety control or control for the presence of substances having a similar effect to alcohol – in the manner adopted by the employer, no later than 2 weeks before the commencement of its performance. In the above-mentioned internal acts, the employer will also specify the method of carrying out inspections. It should be noted that testing of employees can only be carried out with correctly calibrated devices, having calibration certificates (Article 22<sup>1c</sup>(4) of the Labour Code). Three types of breathalysers are allowed on the market, i.e. electronic (semiconductor), electrochemical and spectrophotometric. However, the cost of specialized equipment can be as much as PLN 20,000, which for many business owners can be a prohibitive amount.

In addition, the legislator *expressis verbis* stipulated that the control of sobriety must not violate the dignity and other personal rights of the employee. When controlling the content in the bodies of employees of both alcohol and substances having a similar effect to alcohol, the employer must not violate the dignity and any other personal rights of the employee, and during the inspection should respect the intimacy of the employee.

Subsequent obligations of the employer are associated with the appointment of dedicated employees for control, their appropriate training in the operation of equipment and compliance with the new procedure in accordance with respect for the privacy of other employees. At the same time, those who accept the obligation to carry out an on-the-job examination must sign a confidentiality clause, as they will have direct access to sensitive personal data.

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<sup>9</sup> Objections to this article were raised by, among others Employers of the Republic of Poland, in the assessment of which trade unions will gain rights, which in practice will result in an extension of the period of entry into force of the proposed changes, and the role of company trade union organizations in this respect should be limited only to the consultative function. They demanded that the maximum negotiation time with company trade union organizations be limited to 14 days, and in the absence of a consensus, the possibility of introducing the control procedure unilaterally by the employer, i.e. similarly to the regulation of remote work. However, according to the Ministry of Family, Labour and Social Policy, the proposed solution would lead to a reduction in the powers of company trade union organizations, therefore the comment was not taken into account.

## CONCLUSIONS

After almost three years of work, the Sejm adopted a law that introduced the permanent possibility of performing work in the form of remote work into the Labour Code and amended the sobriety test for employees. This is a regulation that has been expected and demanded by employers' organizations for several years. Remote work is to be used in typical conditions – and not only in emergency conditions, as it was done to counteract COVID-19. In turn, regulating the issue of sobriety control and control of the employee in terms of substances having a similar effect to alcohol in the workplace is very important for the employer, who is responsible for ensuring safe working conditions for all people performing work in the workplace. The amendment contains many guidelines, but it does not dispel all doubts and does not reduce the challenges faced by the employer. Probably the biggest problem that employers will face in the initial stage will be the implementation of these solutions to enterprises. New solutions represent a certain compromise between the expectations of unions and employers, and such a compromise rarely fully meets the expectations of all parties. Probably the practice of applying the revised Labour Code will allow assessing its consequences and usefulness in practice.

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