

Recording remote working hours (2) (2/37/19)

This article completes [what we wrote last week](#).

Night work

Remote work puts employers at risk of employees working not only overtime but also doing night work. This risk may arise where an employee is free to determine the start and end of their working day as well as working hours under section 148(1) of the Labour Code (LC).

LC section 138(1) defines night work as any work that is done at night for more than two hours. Night time is taken to mean the period from 10pm to 6am. Thus, any work done between 10pm and midnight or between 4am and 6am is not considered night work because it does not exceed the statutory two-hour limit.¹

LC section 67(1) provides that an employee who does night work must be paid at least time and a half (i.e. 50% in addition to their agreed hourly, daily or piece rate).

The flexibility of remote work makes it possible that an employee will carry out their job responsibilities, say, from 10pm to 1am, i.e. at night. In that case, under the Labour Code, the employee should be paid time and a half for the three night hours.

Unlike overtime, the Labour Code does not provide for entering into a prior written agreement for night work. If a remote worker does night work, the employer cannot claim that the work was done without entering into a prior written agreement and that the employer is not, therefore, required to pay extra under LC section 67 or 68.

To help the employer avoid having to pay extra for night work, the employment contract should make it clear that the remote worker is free to choose the start and end of work but is not permitted to do night work between midnight and 4am without a prior written agreement with the employer.

Work on public holidays

Under LC section 144(1), employees do not work on public holidays, so those holidays are free of work.

However, considering a remote worker's right to determine their own working hours, it is possible that the employee will decide to work on a public holiday, so the employer may be required to pay at least double time (i.e. 100% in addition to their agreed hourly, daily or piece rate). The employment contract should provide that the employee's right to determine their own working hours does not allow them to work on public holidays.

If the employment contract does not bar the employee from working on public holidays and the employee exercises their contractual rights, then we should note that LC section 144(2) provides that an employee may work on a public holiday if this is necessary for ensuring continuous operations but the employee should be given a day off during the week or paid extra. In other words, it is not sufficient that the employee arbitrarily works on a public holiday, and we should assess whether it was really necessary to

continue operations on the public holiday or whether the employee worked on the public holiday on their own initiative without a good reason. If the employer did not ask the employee to work on a public holiday or if the nature of work does not imply extreme urgency, the employer has grounds for refusing to compensate the employee for working on public holidays.

Given the growing popularity of remote work, questions will keep arising and it will be some time before the answers are included in the legal framework or analysed in case law. The employer should expect a number of problematic aspects of managing working hours and be aware that many risks and issues can be resolved by drawing up an accurate and detailed employment contract for remote workers.

¹ The Labour Code with Commentaries, 2010, page 259