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Draft Bill on Telework – Debated at the House of Representatives. Comments by Julián A. de Diego

Draft Bill

The House of Representatives is debating a bill for the National Telework Act to amend part of the text of the Employment Contract Act and set out rules, which sometimes seem redundant, with the aim of ensuring certain special rights to remote workers.

Key terms and scope

First of all, Section 102 bis is added to Chapter VI of the Employment Contract Act - "Telework"-, establishing that Telework occurs whenever works or services are performed under the terms of Sections 21 and 22 of this Act, whether totally or partially from workers' home or at locations other than company facilities thanks to the use of ICTs.

This Bill deals with Telework under an employment relationship, but it may also apply to freelance work, in which case the Civil and Commercial Code of Argentina is applicable, in particular for services or work contracts, as appropriate.

The use of the word "Telework" is also debatable; actually the best term would be "remote work", a genre that includes all types, including the sense the lawmaker gives to the term in this Bill.

Equal rights and duties

The newly-added Section 102 bis also establishes that specific regulations for Telework shall be issued for each industrial sector through collective bargaining in accordance with the principles of public order set forth in the law. Reference to collective bargaining is redundant; in fact, there are some collective bargaining agreements that have already dealt with the issue of remote work.

The lawmaker has intended to put workers who go to the office on an equal footing with remote workers to enjoy the same rights and duties, indicating that their compensation cannot be lower than the salary they receive, or would receive, should they go to work at

their employer's premises. The regulation for this Act and collective bargaining agreements should contain provisions dealing with a combination of office work and telework.

Working hours

Section 4 of the Draft Bill states that working hours should be agreed previously in writing under the employment contract in accordance with the restrictions set forth in the law and collective bargaining agreements, concerning both offline and online services. In addition, the platforms and/or software created by employers for telework in particular and registered as provided by Section 18 about the power of control and inspection of the enforcement authority shall be used during the agreed working hours, and not outside of the regular work schedule.

The law refers to offline and online work, using a mechanism typical of subsystems, to which in general an abstract rule should not make reference to avoid self-limitation. It also states that there should not be connection outside working hours, forgetting that our legal system contains provisions about overtime and other cases where the workday must be mandatorily extended based on the needs of the business.

Right to disconnect

In contradiction with Section 4, Section 5 refers to the seemingly restricted use of overtime when stating that teleworkers shall be entitled to disconnect from any digital devices and/or information and communication technologies, and not to be reached outside working hours and during leaves.

In addition, teleworkers shall not be punished for exercising this right or rewarded for not doing it, regardless of the surcharges that may apply to overtime worked. In a clearly paranoid attitude, the lawmaker states that workers may refuse to work when they do not have to work. Along this line, they cannot be punished for not working outside their regular schedule, which is unquestionable today. In turn, any rewards for work outside working hours is forbidden, which is also a common practice in office work, to which telework is assimilated.

Then, the lawmaker should be reminded that overtime is not forbidden if it does not exceed a maximum number of hours per day allowing a twelve-hour break between one workday and the other.

Caregiving responsibilities

Another interesting provision refers to caregiving responsibilities, which is not included in office work. As a matter of fact, Section 6 states that teleworkers who give proof that they look after children below 14, persons with disabilities or older adults shall be entitled to agree on a work schedule compatible with their caregiving duties and/or interrupt their workday in accordance with the applicable collective bargaining agreement. Any action, conduct, decision, retaliation or obstacle from employers contrary to these rights shall be deemed to be discriminatory, and the non-discrimination provisions shall be enforced.

Again, this is a rule that has nothing to do with office work, in which case workers organize their schedules so that the persons under their care are properly looked after in their absence.

Voluntary acceptance

Section 7 refers to the change from office work to remote work, and states that those who work in an office may move to telework provided they voluntarily agree on this in writing, except in case of force majeure with the respective supporting evidence.

It is widely understood that remote work or telework is a more favorable form of work for workers, except for the lawmaker who provides protection beyond *ius variandi* (the employer's right to change working conditions) and when it does not affect the essential elements of the employment contract and it is not unreasonable.

Reversibility

The right to reversibility only applies in those cases where workers can go back to pre-existing working arrangements; no reversibility is possible if under the initial employment contract the parties agree on remote work. Again, with a paranoid attitude the lawmaker alters the parties' will through mechanisms that are alien to the contract by stating (Section 9) that the consent given by workers who used to work at the office and now have moved to telework may be revoked by them at any time during employment.

In this case, employers must assign workers tasks at the company facilities where they used to work, or alternatively, at a company location near workers' home where they may provide services. Failure to comply with this obligation shall be deemed to be a breach of Section 78 of the Employment Contract Act No. 20744 (consolidated text 1976), as amended, about the employer's duty to provide work to do.

The employer's refusal to provide work entitles workers to consider that they have been constructively discharged or file an action seeking restoration of the conditions that have been changed.

Then, under the new contracts where the parties agree on telework from the start, the right to reversibility shall be exercised in accordance with the guidelines set out under collective bargaining.

Reversibility may turn out to be impossible when employers usually adapt their premises to office workers, and remote workers work online.

In general, there is mobile and rotating work and cases where remote workers need to access the employers' facilities for any reason.

The funny thing is to think of reversibility where there has never been any preexisting physical workstation for workers. In other words, it is absurd to reverse from remote work to office work when there has never been a place, tasks or functions performed at the office.

It is even more grotesque to expect that this kind of situations could be resolved by collective bargaining, when this practice largely affects exempted employees or employees who are not covered by collective agreements. In any case, a collective bargaining agreement could not reverse a contract whose purpose is remote work.

Business tools

As to business tools, this Bill states that employers must provide equipment –hardware and software- business tools and the necessary support for the performance of the job, and cover the costs of installation, maintenance, reparation and/or compensation for the use of the tools that belong to workers.

This provision shall take effect in accordance with the guidelines set out in collective bargaining.

Teleworkers shall be responsible for the proper use and maintenance of the business tools and elements provided by employers, and see to it that they are not used by anybody but them.

By no means shall workers be responsible for reasonable wear and tear or aging. In case of defective or damaged elements, instruments and/or technological devices that prevent workers from performing their tasks, employers must replace or repair the equipment for workers to resume work. The time that the employer may take to meet this obligation shall not impact workers' right to collect their usual compensation.

This scheme contains many errors. On the one hand, workers should not "see to it" but rather the use of equipment by third parties should be forbidden. The Employment Contract Act already deals with misuse. Any reparation expenses, maintenance, and so forth should be covered by employers, unless workers have committed negligence or willful misconduct that result in damages against the equipment provided. In this case, workers must compensate the employer for the damages caused. Misuse is a valid reason to impose disciplinary actions and even termination with fair cause, as appropriate, which is also already handled under the Employment Contract Act.

In 1974 the Employment Contract Act, Section 76 about Reimbursement of Expenses and Compensation for Damages, establishes that employers must reimburse workers for any expenses incurred in the performance of their job, and compensate them for any damages to their property as a result.

Then Section 86 of the Employment Contract Act about Orders and Instructions states that workers must observe the orders and follow the instructions given by their employers or agents about the performance of the job.

Workers must keep the instruments or devices provided for the performance of their job; they shall not be liable for the normal wear and tear.

Section 87 of the Employment Contract Act about Responsibility for Damages states that workers are responsible to employers for any damages caused due to serious negligence or willful misconduct in the performance of their job.

Expenses

As to Expenses (Section 10) teleworkers shall be entitled to compensation for greater expenses of Internet connection and/or higher utility rates.

This Compensation shall be paid in accordance with the guidelines set out in collective bargaining, and shall be exempt from Income Tax.

For validity purposes, expenses should be supported by receipts or other evidence of payment, an essential element that is not included in this Bill.

Again reference is made to collective bargaining for rules that are already contained in Section 106 (Employment Contract Act) about traveling expenses, which are precisely expenses incurred by workers in the performance of their jobs and that should always be supported by receipts.

The amounts that are not paid as benefits to workers but as reimbursement for expenses with the respective supporting documents or evidence of payment shall not be subject to Income Tax.

Training

Section 11 stipulates training for remote workers with a rather confusing language when referring to a safe Internet connection, and emphasizes that training can be taken at the Department of Labor or Union, who have not been exactly efficient in providing this service, with a few exceptions.

Union rights

Section 12 of this Bill tries to ensure union rights, which are already contained in other laws, including union representation that has been extensively dealt with under Act No. 23551.

Hygiene and safety

With regard to hygiene and safety, the Bill suggests that the integral sense of this concept should be the responsibility of workers because it is in the privacy of their own home that they should take any preventative measure. In turn, when remote workers work from any other location, they shall also be responsible to ensure these measures.

Hygiene and safety standards shall be determined locally and based on the Workers' Compensation Act No. 24557, because any incident at home was not deemed to be an occupational accident or disease. But now it has become a job-related accident or disease, as provided by the special law.

Right to privacy – Confidentiality

This Bill contains a declaration of principles about the right to privacy (Section 15) and rather strangely in order to protect employers' property and confidential information, unions must be involved to safeguard workers' privacy, remote work and home privacy.

There is no correlation between employer's property and confidentiality, and workers' privacy, and it would be absurd for a company to entrust volatile unions with business secrets. Unions' mission is to defend workers' professional interests, and they are not –and have never been- the custodians of secrets, let alone the sensitive information of a company. This is a rather peculiar statement that needs clarification for sure.

Data protection shall be employers' responsibility, in accordance with the law currently in force, and software should be approved by the enforcement authority within this framework.

Private International Law on labor and employment

This Bill also touches on private international law on labor and employment, and migration law, introducing a sort of exception to the lex loci actus scheme (i.e. the law of the place where the act occurred that gave rise to the legal claim) for mixed cases where the applicable law for an employment agreement is the law of the place of performance of services or the law of employer's address, whichever is most favorable to workers.

In the case of hiring foreign people who do not reside in Argentina, the enforcement authority must provide authorization first. Again this Bill refers to collective bargaining agreements and regulations to resolve the issue of the maximum number of foreign workers that may be hired locally.

Enforcement authority

Finally, the Department of Labor shall be the enforcement authority. It shall create a registry of companies implementing remote work (virtually all); they shall report the software or platform to be used and the list of workers who shall work remotely upon registration of each worker or on a monthly basis.

This shall be public information and should be provided to the respective union. Inspection shall be conducted in accordance with Act No. 25877, with the particularity that workers should give their consent.