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REGULATION OF REMOTE AND HYBRID WORK IN SOUTH AFRICA

Considerations and regulatory responses to address problems faced by remote workers

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SUMMARY

In the context of hybrid and remote work, the Policy Brief highlights challenges in working time, the organisation of work, and work-life balance, and the tendency for remote workers to extend working hours, as well as the potential for classification issues faced by remote platform workers, and advocates for regulation including the right to disconnect from work.

The Brief considers resource challenges such as access to technology and associated costs and underscores the employers' responsibility to provide access to necessary resources. Surveillance and performance management concerns are raised, highlighting the need for transparency and adequate regulation to protect worker privacy.

Occupational safety and health risks, particularly psychosocial and ergonomic, are considered, stressing the employer's responsibility for risk assessment and mitigation.

Drawing on comparative examples, the Policy Brief advocates for policy responses and codes of good practice to clarify and protect workers' rights in the context of hybrid and remote work, including the right to disconnect and to ensure occupational health and safety in the remote work environment.

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1. WORKING TIME, WORK ORGANISATION & WORK-LIFE BALANCE

1.1 Working time

Employees who work from home tend to work longer hours than they would at the premises of the employer.¹ This normally occurs because of the blurring between work life and personal life, changing work routines and the time normally reserved for the commute to and from work being replaced with work activities.² Due to this, remote workers often tend to work during evenings and weekends as well.³ Employees who have dependants at home often have to find additional time in the workday to complete their work, usually either early in the morning or in the evening.⁴ A branch of a financial service provider in Poland addressed this issue by allowing greater flexibility regarding their employees' working hours.⁵ This was done by managers accommodating requests by employees for changes in their working times, often to adapt to the caring responsibilities of the employees.⁶ This allowed employees to better manage their working schedules.

Unrealistic demands and added pressure on remote workers who are already overstretched generally leads to disengagement and a greater chance of burnout.⁷ Proper management therefore plays an important role in addressing the abovementioned problem of overwork and erratic work routines, often by effectively communicating realistic expectations to the employees, setting achievable deadlines in the context of remote work, while maintaining the same required level of performance.⁸ Management may thus have to adjust to remote work in terms of workload, deadlines

and tasks.⁹ Steps employers may take include asking employees to develop workplans, which should be discussed with their supervisors, that complement existing procedures and are more suitable to remote working.¹⁰

Teleworking employees may be supported by remote work regulations, including protection standards for remote workers, recognising the right to disconnect from work during breaks, hygiene and safety measures, and collective rights.¹¹ Remote workers can also be assisted through being given flexibility in their work schedules such as starting and finishing the workday earlier in order for them to have time for care responsibilities at home.¹² Additionally, while not related to working hours, employees may also be assisted through tax measures that may be introduced for remote workers to avoid paying double tax when they are working in a country other than the country in which the premises of the employer are situated.¹³

1.2 Remote workers labelled as independent contractors

Remote platform workers often are classified as freelancers or independent contractors, affecting their social benefits and job security, which increases the vulnerability of these workers.¹⁴ Furthermore, while some remote platform workers are categorised as independent contractors by the platforms they use, these workers often have very little control over their work hours and schedules, and have to follow the platform's rules, failing which their ratings and potential access to more work may be negatively impacted.¹⁵ In addition, platform algorithms are used to measure the performance of remote platform workers and their interaction with clients, and

¹ Messenger J *et al* 'Teleworking during the COVID-19 pandemic and beyond: A Practical Guide' (2020) 5.

² Messenger J *et al* (2020) 5.

³ Messenger J *et al* (2020) 5.

⁴ Messenger J *et al* (2020) 6.

⁵ Messenger J *et al* (2020) 6.

⁶ Messenger J *et al* (2020) 6.

⁷ Messenger J *et al* (2020) 6.

⁸ Messenger J *et al* (2020) 6.

⁹ Messenger J *et al* (2020) 6.

¹⁰ Messenger J *et al* (2020) 6.

¹¹ Messenger J *et al* (2020) 23.

¹² Messenger J *et al* (2020) 23.

¹³ Messenger J *et al* (2020) 23.

¹⁴ Contouris N *et al* 'The future of remote work' (2023) 36.

¹⁵ Contouris N *et al* (2023) 40.

since the platforms have exclusive control over how these algorithms are designed, they can greatly influence the employability of the workers, and can even remove them from the platform without a reason.¹⁶

In order to address the issues faced by many remote platform workers, comprehensive regulations may need to be created, such as making sure that the employment status of remote platform workers is correctly classified, ensuring they enjoy the right to collective bargaining, providing for fair termination processes, payments and working hours, and ensuring adequate social security benefits are enjoyed.¹⁷

In El Salvador the Telecommuting Regulation Law was enacted, which establishes modalities in terms of the working hours, location and tasks of remote workers.¹⁸ Importantly, employers retain the same obligations as they had for employees who work on their premises, and have the additional responsibility of provision of necessary tools for remote work.¹⁹ Remote working employees furthermore have the same rights as those established under labour law, such as rights surrounding occupational health and safety, social security and freedom of association.²⁰ A legal framework is therefore necessary to ensure that there are decent working conditions and social protections for remote workers, which includes remote worker's right to disconnect from work during breaks, weekends and public holidays.²¹

Furthermore, a guideline or code of good practice developed in line with the Basic Conditions of Employment Act that recognises the right to disconnect could reduce the occurrence of remote workers working outside of established working hours.²² The right to disconnect is the right of an employee to

cease their work and disconnect from any work-related electronic communications with the understanding that no penalty, nor preferential treatment of colleagues, will result from this. If remote workers are aware in terms of this proposed code of good practice that they may disconnect from their work as soon as their official workday ends without any consequence, the blurring between their work lives and personal lives will likely also end. Importantly, a code of good practice providing for a right to disconnect should also provide that employers who fail to comply or are shown to punish or discriminate due to employees exercising the right, should face penalties.

2. DIGITISATION

In countries where internet coverage is weak and power cuts are frequent, teleworking is very difficult for employees unless their employers provide them with broadband and the necessary hardware.²³ This is especially necessary as working on sub-par equipment increases the likelihood of frustration, disengagement and a lack of productivity.²⁴ Therefore, to ensure remote workers are as productive as they would be at the office, the employer needs to ensure they have access to the necessary technology that they would have access to were they at the employer's premises.²⁵

Employers may therefore need to determine the remote worker's technological needs, resources and skills in working with the relevant technology, revise policies on whether workers can use their own devices, or instead the employer's ICT equipment to connect to work servers and work with the employer's data, include in policies certain requirements for reimbursements of employees in order to ensure that they are supported in having access to the necessary

¹⁶ Contouris N *et al* (2023) 40.

¹⁷ Contouris N *et al* (2023) 41.

¹⁸ Messenger J *et al* (2020) 23.

¹⁹ Messenger J *et al* (2020) 23.

²⁰ Messenger J *et al* (2020) 23.

²¹ Contouris N *et al* (2023) 24.

²² Sibanda OS '[Why remote employees should have the right to disconnect after working hours](#)' Daily Maverick 5 February 2023 (accessed 16 September 2023).

²³ Messenger J *et al* (2020) 9.

²⁴ Messenger J *et al* (2020) 9.

²⁵ Messenger J *et al* (2020) 9.

technology for the tasks, or possibly allow remote workers to take the relevant technology at the employer's premises home.²⁶ Employers may also provide training to remote workers and ensure they know how to use the relevant technology and how to access the technical support personnel if information is required.²⁷

Problems associated with remote working also include costs, including of equipment, broadband and energy, as well as risks, such as health and safety at work, being externalised to remote workers due to them no longer working at the employer's premises.²⁸ Since employers are required to provide employees with the necessary equipment to perform their tasks, employers should also provide remote workers with the necessary equipment and compensate them for any costs associated with their work, including broadband, electricity and mobile phone service.²⁹ Employers should also keep remote workers informed regarding national allowances or tax benefits associated with remote work.³⁰ Enterprises may therefore also be assisted financially by organisations through financial support for SMEs to buy equipment for employees who have switched to remote work or giving subsidies for SMEs to pay for training services in order to support the transition to remote work.³¹

3. SURVEILLANCE & PERFORMANCE MANAGEMENT

3.1 Surveillance

Remote working often leads to managerial practices that extend to remote surveillance to monitor the productivity of remote workers in their own homes, showing a general extension of managerialism and control.³² Examples of invasive management include the use of logging keystrokes, tracking the

physical locations of employees, spyware, analysis of all electronic communications sent, and stealth screenshots.³³ Remote platform workers therefore are often subject to greater monitoring and control by their employers, such as having to install hardware and software programs that enable employers to monitor their efficiency in increasingly invasive methods, which has the potential to undermine worker privacy and autonomy.³⁴ These tools and methods should not replace management by results and by clear communication to employees of the tasks they are required to complete.³⁵ The use of surveillance tools to track workers, store their data and use stored information in disciplinary proceedings should be regulated, and restricted if it violates the privacy of the remote worker.³⁶ Preferably workers and trade unions should be made aware of which tools are being used and to participate in the implementation of said tools.³⁷ Consultation and clarification with remote workers and trade unions regarding the use of surveillance software is important in order to ensure that all parties are aware of the rights and responsibilities of the remote worker before the software is implemented.³⁸

Certain policy responses may assist significantly with the abovementioned problems faced by remote workers. Notably reliable and accessible information should be available to employers and remote workers surrounding remote work by clarifying the applicability of the existing rights and obligations that apply in the remote work context, issuing guidance on the necessary hardware for remote work, raising awareness on health and safety of remote workers, and issuing recommendations on how employers can comply with privacy regulations, as well as on how to prevent cybersecurity threats.³⁹

²⁶ Messenger J *et al* (2020) 9.

²⁷ Messenger J *et al* (2020) 9.

²⁸ Contouris N *et al* (2023) 11.

²⁹ Contouris N *et al* (2023) 133.

³⁰ Contouris N *et al* (2023) 133.

³¹ Messenger J *et al* (2020) 22.

³² Contouris N *et al* (2023) 10.

³³ Contouris N *et al* (2023) 13.

³⁴ Contouris N *et al* (2023) 40.

³⁵ Messenger J *et al* (2020) 9.

³⁶ Contouris N *et al* (2023) 135.

³⁷ Contouris N *et al* (2023) 135.

³⁸ Contouris N *et al* (2023) 135.

³⁹ Messenger J *et al* (2020) 21.

3.2 Performance management

Another problem related to employees being contacted outside of working hours is that they are often expected to work through their breaks and are penalised for not being available outside of their working hours, in which case other employees receive preferential treatment for working extended hours and staying connected beyond their typical working hours.⁴⁰

Another disadvantage faced by some remote workers is their resulting lack of visibility to employers or managers, and thus reduced career prospects.⁴¹ Often due to the idea of the private space of the home being non-productive, a perception exists with certain managers or employers that the physical absence of the remote worker from the employer's premises is seen as a lack of commitment, which often leads to these remote workers being penalised in the form of being overlooked for promotion, or facing a lack of trust by management.⁴²

In terms of the Employment Equity Act (EEA), employers may not discriminate between employees in any policy or practice, and therefore employees may be assisted if a code of good practice is developed in line with the EEA in terms of which employers are prevented from using disproportionate measures against remote workers that are not used against employees at the employer's premises. In addition to giving remote workers equal career opportunities to their counterparts working at the employer's premises, employers should also be required in terms of the code of good practice to take active measures to promote equal access to

training.⁴³ Such a code of good practice should also include sanctions for employers who fail to comply with these provisions.

The right to disconnect is the right of a worker to disengage from their work and to refrain from 'engaging in work-related electronic communications, such as emails or other messages, during non-work hours', and while this right may help primarily with the issue of working hours, it may also prevent the situation where a remote worker who does not work after established working hours is treated differently from colleagues that do work outside of working hours.⁴⁴ The protection of the right to disconnect has been shown in countries such as Belgium, which passed a law protecting civil servants from punishment for disengaging from work emails, texts and phone calls that they received after working hours.⁴⁵ Several other countries such as Portugal, France, Chile and Ireland also have legislative protection of the right to disconnect.⁴⁶

Currently the Basic Conditions of Employment Act and the Labour Relations Act makes no provision for the right to disconnect after working hours.⁴⁷ However, in terms of the employment contract, the right to disengage exists by implication. Therefore, codes of good practice in terms of the BCEA should preferably extend the protection of the BCEA by covering the right to disengage and deal with the issue of employees working extended hours in the remote work context. Therefore, a code of good practice on the right to disengage, like the Irish Workplace Relations Commission's Code of Good Practice for

⁴⁰ Sibanda OS '[Why remote employees should have the right to disconnect after working hours](#)' Daily Maverick 5 February 2023 (accessed 16 September 2023).

⁴¹ Contouris N *et al* (2023) 70.

⁴² Contouris N *et al* (2023) 70.

⁴³ Contouris N *et al* (2023) 134.

⁴⁴ Sibanda OS '[Why remote employees should have the right to disconnect after working hours](#)' Daily Maverick 5 February 2023 (accessed 16 September 2023).

⁴⁵ Sibanda OS '[Why remote employees should have the right to disconnect after working hours](#)' Daily Maverick 5 February 2023 (accessed 16 September 2023).

⁴⁶ Sibanda OS '[Why remote employees should have the right to disconnect after working hours](#)' Daily Maverick 5 February 2023 (accessed 16 September 2023).

⁴⁷ Sibanda OS '[Why remote employees should have the right to disconnect after working hours](#)' Daily Maverick 5 February 2023 (accessed 16 September 2023).

Employers and Employees on the Right to Disconnect, should be adopted.⁴⁸

Kenya is another country which has taken steps towards protecting the right to disengage of employees through the Kenyan Employee (Amendment) Bill 2022, which, if enacted will prevent employers expecting employees to answer calls, texts or emails outside working hours or during public holidays and weekends.⁴⁹ Article 27A (1) of the Bill specifically says that ‘an employee has the right to disconnect from their employer’.⁵⁰ Article 17A(7) also says that if an employer contacts an employee outside of mutually agreed working hours, the employee is not obliged to respond and has the right to disconnect, or may choose to respond and be entitled to compensation.⁵¹ The Bill further says that employees shall not be reprimanded or punished if they do not respond to work-related communications outside of their agreed upon working hours, failing which the employer may face fines or imprisonment.⁵² Article 27A (5) further elaborates that the right to disengage may only be limited to address a work-related emergency which falls within the employee’s responsibility.⁵³ Therefore, South Africa should develop codes of good practice recognising the right to disconnect of remote workers, including the parameters of when work-related emails or texts may be sent, and working hours of remote workers.⁵⁴

In order to normalise remote work, amendments to labour laws or codes of good practice need to be made that outline general provisions for remote working, including a clear definition of what it entails, the responsibilities and rights of the parties, and working hours, data security and leave.⁵⁵ Policies in South Africa should therefore be developed in accordance with the Basic Conditions of Employment Act, which specifies the terms and conditions of remote work, including guidelines for performance evaluation of remote workers, equipment provision and protection measures.⁵⁶

⁴⁸ Sibanda OS [‘Why remote employees should have the right to disconnect after working hours’](#) Daily Maverick 5 February 2023 (accessed 16 September 2023).

⁴⁹ Sibanda OS [‘Why remote employees should have the right to disconnect after working hours’](#) Daily Maverick 5 February 2023 (accessed 16 September 2023).

⁵⁰ Sibanda OS [‘Why remote employees should have the right to disconnect after working hours’](#) Daily Maverick 5 February 2023 (accessed 16 September 2023).

⁵¹ Sibanda OS [‘Why remote employees should have the right to disconnect after working hours’](#) Daily Maverick 5 February 2023 (accessed 16 September 2023).

⁵² Sibanda OS [‘Why remote employees should have the right to disconnect after working hours’](#)

Daily Maverick 5 February 2023 (accessed 16 September 2023).

⁵³ Sibanda OS [‘Why remote employees should have the right to disconnect after working hours’](#) Daily Maverick 5 February 2023 (accessed 16 September 2023).

⁵⁴ Mpedi LG [‘The way we work is evolving quickly and legislation must evolve accordingly’](#) Daily Maverick 26 July 2023 (accessed 16 September 2023).

⁵⁵ Mpedi LG [‘The way we work is evolving quickly and legislation must evolve accordingly’](#) Daily Maverick 26 July 2023 (accessed 16 September 2023).

⁵⁶ Mpedi LG [‘The way we work is evolving quickly and legislation must evolve accordingly’](#) Daily Maverick 26 July 2023 (accessed 16 September 2023).

4. OCCUPATIONAL SAFETY & HEALTH (OSH)

The characteristics of the home office and work habits of remote workers are of great importance regarding the ability to perform work effectively.⁵⁷ Regarding occupational safety and health (SH), the employer is generally responsible for protection, and employers have the same responsibilities for remote workers as they do for employees who work at the employer's premises, and as such their responsibilities include identification and management of occupational risks of remote workers.⁵⁸ The two most common challenges are psychosocial risks and ergonomics, which is closely linked to higher anxiety levels in remote workers.⁵⁹

Due to the increased working hours and availability of remote workers, and the resulting blurring between their working lives and personal lives, many remote workers experience an increase in anxiety, fatigue and physical symptoms such as eye strain and headaches.⁶⁰ Often this is also due to employees being expected to be available at all times on phones or via email, and as such basic conditions of work have been affected.⁶¹ As recommended by Professor Calitz, this may be addressed by recognising burnout as a distinguishable disease with necessary amendments to the Occupational Health and Safety Act 85 of 1993, and the recognition of the right to disconnect from work.⁶² This may also require revising the Basic Conditions of Employment Act and related employment codes to further recognise the right to disconnect.⁶³

As mentioned previously, a code of good practice in line with the Basic Conditions of Employment Act should preferably be developed to recognise the right to disconnect, which will likely greatly reduce the blurring between work and personal life, and thereby reduce the abovementioned physical and psychological strain. Since slow internet and technology can cause frustration and irritability by obstructing the remote worker's work, well-functioning tools should also be ensured.⁶⁴ Prolonged isolation, which may increase the likelihood of burnout and the feeling of being left out, also may require additional effort on the part of employers, management or colleagues to extend mutual support.⁶⁵

Since the ergonomics of home furniture is not ideal for prolonged remote working, employers should inform employees about important ergonomics issues, including through training.⁶⁶ Furthermore, remote working may lead to an increased risk of technology-enabled violence, cyberbullying and harassment, and therefore occupational safety and health measures should be strengthened to prevent and address psychosocial risks, including violence and harassment, and actively promote the mental health and wellbeing of employees.⁶⁷ Therefore, a code of good practice in terms of the Occupational Health and Safety Act which provides that employers have the responsibility to perform inspections and risk assessments would likely contribute significantly to addressing occupational health and safety risks faced by remote workers.

⁵⁷ Messenger J *et al* 'Teleworking during the COVID-19 pandemic and beyond: A Practical Guide' (2020) 12.

⁵⁸ Messenger J *et al* (2020) 12.

⁵⁹ Messenger J *et al* (2020) 12.

⁶⁰ Contouris N *et al* (2023) 72.

⁶¹ Sibanda OS '[Why remote employees should have the right to disconnect after working hours](#)' Daily Maverick 5 February 2023 (accessed 16 September 2023).

⁶² Sibanda OS '[Why remote employees should have the right to disconnect after working hours](#)'

Daily Maverick 5 February 2023 (accessed 16 September 2023).

⁶³ Sibanda OS 'Why remote employees should have the right to disconnect after working hours' Daily Maverick 5 February 2023 available at <https://www.dailymaverick.co.za/opinionista/2023-02-05-why-remote-employees-should-have-the-right-to-disconnect-after-working-hours/> (accessed 16 September 2023).

⁶⁴ Messenger J *et al* (2020) 13.

⁶⁵ Messenger J *et al* (2020) 13.

⁶⁶ Messenger J *et al* (2020) 13.

⁶⁷ Messenger J *et al* (2020) 13.

Through a global survey conducted by the ILO, it was also found that many platform remote workers are required to be available to work at asocial hours due to many clients being based in different time zones, which has negatively affected the work-life balance of these employees, and had negative health implications.⁶⁸ Several provisions in the ILO Occupational Safety and Health Convention, 1981 (NO. 155) and the accompanying Recommendation (No. 164) offer measures aimed at addressing negative health and safety effects experienced by many remote workers.⁶⁹

Suggestions for an OSH update and related actions include clarification of the employer's responsibilities for the protection of the occupational health and safety of remote workers by taking note of health and safety risks and hazards, stress and other mental health issues, the home office environment of teleworkers, and the equipment and ergonomics of the home office.⁷⁰ Furthermore, the rights and responsibilities in terms of health and safety while working from home should be clarified, managers and remote working staff should receive training on the importance of sufficient breaks, and clarification on the fact that these breaks will not have negative consequences for their employment should be provided.⁷¹ In addition, in order to address stress-related problems with insufficient equipment, as well as ergonomic issues, remote workers should preferably be allowed or even encouraged to borrow equipment from the workplace while working from home.⁷²

Importantly, the right to disconnect, or right to disengage, which is the right of a remote workers to disconnect from work and any work-related communications outside of working hours without facing consequences, is a particularly effective measure to prevent the blurring of work and private lives of remote workers, and can play a significant role in

addressing the increase in working hours and resulting exhaustion.⁷³ However, while the right to disconnect has been found to be effective in certain EU nations, it is also necessary to ensure that the obligations of employers in terms of occupational health and safety legislation applies to remote workers in their own homes, and that there are appropriate safeguards for the privacy of remote workers.⁷⁴ An example is Spain, which established requirements for risk assessment, and aims to prevent psychosocial or ergonomic risks to remote workers.⁷⁵

⁶⁸ Contouris N *et al* (2023) 40.

⁶⁹ Messenger J *et al* (2020) 14.

⁷⁰ Messenger J *et al* (2020) 14.

⁷¹ Messenger J *et al* (2020) 14.

⁷² Messenger J *et al* (2020) 14.

⁷³ Contouris N *et al* (2023) 75.

⁷⁴ Contouris N *et al* (2023) 75.

⁷⁵ Contouris N *et al* (2023) 75.