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NEDLAC LABOUR LAW REFORM

Remote and hybrid work(ers): Considerations for regulating remote working arrangements and a code of good practice for remote work

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THE FUTURE OF WORK IS HYBRID

UNIVERSITY of the WESTERN CAPE

Remote and hybrid work(ers): Considerations for regulating remote working arrangements and a code of good practice for remote work

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ABSTRACT

Globally, the COVID-19 pandemic intensified the focus on remote work and raised the need to evaluate the adequacy of labour legislation and workplace policies in the context of hybrid and remote-work arrangements. Remote work is characterised by the use of digital technology to perform tasks outside of the employer's premises, often at the employee's home. While it offers flexibility, inclusivity, and environmental benefits, it presents challenges too, for example in regard to enforcing employment standards, maintaining work-life balance, privacy, health and safety, and avoiding the risk of worker invisibility. Similarly, remote work poses difficulties for performance management and access to the workplace for inspection purposes.

Key issues explored in this report include the regulation of working hours, occupational health and safety concerns, and compensation for occupational injuries. The report proposes the development of regulatory mechanisms — regulations and a Code of Good Practice — for remote work to provide certainty to remote workers and safeguard their well-being while balancing this with the interests of employers. The report provides guidance on remote-work policies in the workplace. Additionally, it considers legislative developments on flexible working arrangements that respond to the evolving nature of work in the digital era, promote work-life balance, and support gender equality.

Key words

Remote work; hybrid work; work from home; right to disconnect; flexible working arrangements; work-life balance; gender equality; employment conditions; digital technology; future of work

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ACRONYMS AND ABBREVIATIONS

BCEA	Basic Conditions of Employment Act, 1997
CENTROW	Centre for Transformative Regulation of Work
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act, 1993
DoEL	Department of Employment and Labour
EEA	Employment Equity Act, 1998
EU	European Union
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	Information and communication technology
IES	Inspection and Enforcement Services
ILO	International Labour Organization
LRA	Labour Relations Act, 1995
NEDLAC	National Economic Development and Labour Council
OHS	Occupational health and safety
OHSA	Occupational Health and Safety Act, 1993
POPIA	Protection of Personal Information Act, 2013
RICA	Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002
UIA	Unemployment Insurance Act, 2001

1. INTRODUCTION

The topic of this report is the adequacy of labour law in South Africa in the context of **remote work**.[1] Specifically, the report is concerned with **workers in an employment relationship**[2] and **who perform work**, typically using digital technology, **at a location other than the employer's workplace**,[3] whether on a full-time, part-time, or hybrid basis combining in-office with remote work.[4]

While remote work (sometimes referred to as **telework**)[5] has been in use for decades, the COVID-19 pandemic precipitated its rapid adoption by innumerable organisations. The aim of the report is to examine whether existing labour legislation adequately protects workers and addresses the needs of both workers and employers in **remote-work arrangements** and, if not, to propose the development of regulatory mechanisms applicable to remote-work arrangements.

Many employees perform their work away from an employer's premises, challenging the traditional concept of a workplace. Remote work involves performing work at a location "other than one's primary office",[6] and

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1 In regard to the regulation of remote work in South Africa, we have considered the views of several authors, including Rammila D "Teleworking in South Africa: Laws and challenges in an unequal society" ILAW Network (2023); Mpedi LG "Beware the ethical and legal considerations of using wearables in the workplace" (12 July 2023a) *Daily Maverick* and "The way we work is evolving quickly and legislation must evolve accordingly" (26 July 2023b) *Daily Maverick;* Van Staden M "The digital ties that bind – South Africans need the right to disconnect and slip the work leash" (3 November 2021) *Daily Maverick*; Sibanda OS "Why remote employees should have the right to disconnect after working hours" (5 February 2023) *Daily Maverick*; and James JA "Remote working and labour legislation in South Africa", LLM research paper, University of the Western Cape (December 2022a).

2 The rights of **self-employed remote workers,** including **workers engaged as independent contractors** in "gig" or digital platform work, are considered in Collier D, du Toit D, Jacobs M & Osiki A (2024) *Workers who are (not) employees: Promoting decent work and access to labour standards and social protection* NEDLAC Labour Law Series No. 2.

3 This includes working from home, co-working spaces, or any other location which is not the employer's workplace.

4 Noting that, in October 2024, the Department of Home Affairs introduced a **remote work visa** (a **"nomad visa"**) which permits high-income-earning foreign nationals to work remotely for a foreign employer while residing in South Africa for up to 36 months. The application of labour law in this context requires further consideration, together with issues relating to tax obligations and employer liability. At the time of finalising this report, liability for skills development levies and Unemployment Insurance Act (UIA) contributions was unclear. See Bouwer A & Loubser C "South Africa: The 'digital nomad visa' – Take 3" *Bowmans* (14 October 2024). See also *Rheeder and Searlco Ltd* (2024) 45 ILJ 230 (CCMA) at 230, where the court found that the Commission for Conciliation, Mediation and Arbitration (CCMA) does not have extra-territorial jurisdiction where the employee's workplace is in the United Kingdom.

5 Different, and sometimes overlapping, definitions are used interchangeably to refer to work arrangements where workers work from a distance and/or work from home. In the United States and India, the term **"telecommuting"** is used, for instance, while in Europe, the term "**telework/ICT-mobile**" is used to refer to the same phenomenon. More recently, the International Conference of Labour Statisticians has described remote work as "situations where the work is fully or partly carried out on an alternative worksite other than the default place of work". **"Telework"**, on the other hand, is said to be remote work in which personal electronic devices such as computers, tablets or telephones are used to perform work. Authors have also used the term **"working from home"** to refer to telecommuting work arrangements. See International Labour Organization (ILO) "Remote work, telework, work at home and home-based work" (October 2023) Room document: 13 *21st International Conference of Labour Statisticians* 1; ILO "COVID-19: Guidance for labour statistics data collection – Defining and measuring remote work, telework, work at home and home-based work" (5 June 2020) ILO technical note; ILO "Towards safe, healthy and declared work in Ukraine" (July 2020) Telework: Online training series – International and EU Labour Standards background paper; Bloom N & Liang J et al. "Does working from home work? Evidence from a Chinese experiment" (2015) 130(1) *Quarterly Journal of Economics* 165.

6 Perry SJ, Rubino C & Hunter EM "Out of office: What type of employee is best suited for remote work?" (1 September 2019) *Keller Center for Research*.

typically through "the use of information and communications technology (ICT), such as smartphones, tablets, laptops and/or desktop computers". [7] Examples of remote locations are the homes of employees, co-working spaces, coffee cafés, and local libraries, among others. Remote working may be on a full-time (or part-time) basis or involve a flexible (hybrid) work arrangement where work is partially remote.

An important characteristic of remote work is that it entails the **use of digital technology** to keep employees and the employer in contact with each other.[8] Remote workers are typically in an **employment relationship**, but they work outside of the employer's premises or designated workplace. This **differs from remote platform workers** (gig workers), who also provide services remotely but are likely to be (mis)classified as independent contractors and use online platforms to access other organisations or individuals to perform tasks or provide specific services in exchange for payment.[9]

Remote work is a form of **flexible working arrangement**,[10] offering **flexibility** in how work is performed and the potential for **inclusivity** and work-life balance, particularly for women (who overwhelmingly shoulder the burden of domestic responsibilities) and persons with disabilities.[11] Remote work contributes to **environmental sustainability**,[12] and can improve efficiency. However, it raises challenges for and concerns about the well-being of workers.

Depending on the personal and professional characteristics and circumstances of individual employees, remote work can impact on the **quality of employment conditions**[13] and **blur the line between work and private time**. Workloads may increase, and employees may take on **financial burdens for work tools** (such as payment for

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[7] Eurofound & ILO *Working anytime, anywhere: The effects on the world of work* Luxembourg and Geneva: The Geneva Publications Office of the European Union and the International Labour Office (2017) 1.

[8] In the context of Mauritius, see Wong AR *An assessment of the legal teleworking framework in the Republic of Mauritius* ILAW Network (2023). See also Annexure A: Extracts from "Working from Home" Regulations, 2019 (Mauritius). However, note Wong's assessment of the regulations and the recommendations she makes for revising them.

[9] Although **remote platform workers** are often classified as freelancers or independent contractors (which affects their access to social benefits and job security), many have little control of their work hours and schedules, and are required to follow the platform's rules, failing which their ratings and potential access to work may be negatively impacted. **Platform algorithms** measure the performance of remote platform workers and influence access to work opportunities. A regulatory framework should be in place to clarify the employment status of remote platform workers; to protect their right to organise and access collective bargaining; to provide for fair termination processes; and to regulate wages, working hours, and access to social security benefits. Countouris N, De Stefano V, Piasna A & Rainone S (eds) *The future of remote work* Brussels: European Trade Union Institute (2023) at 41. On the regulation of platform work, Collier D, du Toit D, Jacobs M & Osiki A (2024) *Workers who are (not) employees: Promoting decent work and access to labour standards and social protection.* NEDLAC Labour Law Series No. 2.

[10] Ireland's Workplace Relations Commission identifies the following types of flexible working: part-time work; term-time work (unpaid leave for certain periods of the year); job-sharing; flexitime (where an employee varies start and finishing times outside of core hours); compressed working weeks (working full-time hours in fewer days); and remote working, which is defined as working "all or part of [a] working week at a location remote from the employer's workplace, which may be the employee's home". See Workplace Relations Commission *Code of practice for employers and employees: Right to request flexible working and right to request remote working* (2023) 7.

[11] See ILO *Teleworking during the COVID-19 pandemic and beyond: A practical guide* Geneva: International Labour Office (2020a) at 18; Gaulfield S "She works hard for the money wherever she is: The need to abandon the physical presence presumption in telecommunication cases following *EEOC v Ford*" (2016) 61 *Villanova Law Review* 262.

[12] For example, research shows that, because daily commutes were all but cancelled during the 2020 lockdown, carbon dioxide emissions decreased globally by 17%. See Le Quéré C, Jackson RB, Jones MW et al. "Temporary reduction in daily global CO_2 emissions during the COVID-19 forced confinement" (2020) 10 *Nature Climate Change* 647.

[13] Lodovici SM (ed) et al. *The impact of teleworking and digital work on workers and society* Luxembourg: European Parliament, Policy Department for Economic, Scientific and Quality of Life Policies (2021).

internet connectivity and other utilities). Remote work can amplify employees' exposure to **pervasive forms of surveillance and control** by the employer. Uncertainty regarding **health and safety protections**, as well as the presence of **ergonomic and psychosocial risks**, is a further concern. In this regard, **isolation** is a significant challenge of remote work and could aggravate psychosocial risks,[14] including that of exposure to **violence and harassment**, particularly for women employees.

Remote work **externalises work, which impacts the employment relationship** and increases the likelihood of **misclassification as an independent contractor**. Employees who work remotely are at risk of becoming **invisible** and being overlooked in the application of employment policies and practices (such as access to benefits and training) and in promotion processes.[15]

Matters for consideration in the context of remote work include (a) trade union (collective) representation; (b) regulation of hours of work; (c) privacy and the right to disconnect; (d) occupational health and safety; and (e) compensation for occupational injuries and diseases.

2. OVERVIEW OF PROTECTIONS AND POTENTIAL GAPS

2.1 Employment, collective bargaining, surveillance and privacy

The Labour Relations Act, 1995 (LRA) gives effect to the constitutional right to fair labour practices, among other objectives, and provides for individual and collective labour rights. However, its protective scope is limited to **employees** as defined in section 213, and excludes independent contractors. Hence, a worker who has entered any contract other than an employment contract may be excluded from protection under the LRA. The LRA will apply to remote-work arrangements if the worker falls within the definition of an employee in terms of section 213.

The exclusion of independent contractors provides an opportunity for employers to put legal distance between themselves and remote employees, particularly as the **characteristics of remote work** – such as **working outside of the premises of the employer** and the **flexibility** afforded to employees **to determine when and how work is done** – are similar to those of **remote platform work** and could lead to the **externalisation of employment** through the conversion of arrangements for remote work into ones for independent contracting.

Within this context, the **dominant impression test**, the **statutory presumption** of who is an employee in **section 200A** of the LRA, and the **Code of Good Practice: Who is an Employee** are relevant in determining the existence of an employment relationship in remote-work arrangements.[16] Moreover, where a remote employee is not a full-time employee, chapter IX of the LRA, as well as the provisions of the Employment Equity Act, requires **equality of treatment**.

[14] See Ha NTT "Workplace isolation in the growth trend of remote working: A literature review" (2021) 14(1) *Review of Economic and Business Studies* 97; Killgore WDS, Cloonan SA, Taylor EC & Dailey NS "Loneliness: A signature mental health concern in the era of COVID-19" (2020) 290 *Psychiatry Research*.

[15] Guyot K & Sawhill IV "Telecommuting will likely continue long after the pandemic" (6 April 2020) *Brookings*.

[16] The **dominant impression test** was developed by the courts to determine whether a worker is an employee or an independent contractor (see para 27 of the Code of Good Practice: Who is an Employee). It requires an evaluation of all aspects of the contract, as well as the realities of the relationship, to determine whether an employment relationship exists. We propose a revision to the Code to ensure that the relevant considerations take account of new forms of work, in particular platform work but so too remote work. See the NEDLAC law reform report, "Workers who are (not) employees: Promoting decent work and access to labour standards and social protection" and in particular Annexure A of the report.

Changes to the terms and conditions of employment should be based on agreement; here, employees have certain protections or remedies in the event of a **unilateral change of terms and conditions**. However, an employer may **vary working arrangements** (changes to work practices typically do not constitute terms and conditions), which could include requirements for remote work without the consensus of employees.[17] Any uncertainty in this regard should be resolved by requiring consultation on matters related to remote work.

Important considerations in this regard are the risks of remote work and its potential impact on employment and on employees, including employees' well-being. As mentioned, **isolation** is a risk of **remote work** that may have psychological consequences, such as depression. The circumstances of some workers, particularly women, such as **family responsibilities** or **domestic violence**, could have implications for workers and their productivity. In addition, the lack of clarity as to who bears the **burden of work-related costs** in the context of remote work can place a burden on employees.[18]

These are matters that we propose should be clarified in regulatory mechanisms for remote work. In particular, arrangements for remote work should be based on consensus or collective bargaining between the parties.[19]

Moreover, there should be clarity on the **financial implications** of remote work. Although there is no express legal obligation on the employer to provide the tools of the trade,[20] employers should ensure that remote workers have the necessary equipment to be as productive as they would be at the office, and that they have access to the technology they would have had at the employer's premises.[21] Employers may therefore need to determine the remote worker's technological needs, resources and skills in working with the relevant technology, and revise policies on whether workers can use their own devices instead of the employer's ICT equipment. Policies should clarify when an employee is entitled to reimbursement for costs related to remote work, and ensure that employees are supported with the necessary equipment, with there being clear rules as to whether an employee may remove equipment from the workplace for use at home.[22] Employers should

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[17] The principle of voluntarism entails that employers are not under a duty to bargain changes to working arrangements.

[18] This could include not only direct costs associated with remote work, but also the possibility of paying "double tax" when a remote worker is based in a country other than the country in which the premises of the employer are situated. Clarity should be provided and appropriate tax measures considered if necessary. ILO (2020a) at 23.

[19] For example, the **Angola teleworking legislation (Presidential Decree No. 52/22)** requires that remote work be established through a **written agreement** between the employer and employee. Similarly, in some countries workers have the **right to request remote work**, which the employer may accept or deny. See, for example, the Australian Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act of 2022. Section 65A "**Responding to requests for flexible working arrangements**" sets out the prescribed steps that an employer must take before the request for flexible work is denied, which establishes the right to request remote work as a form of flexible working arrangements (as above, the employer may accept or deny such request).

[20] Section 83A of the Basic Conditions of Employment Act, 1997 (BCEA) states that the provision of tools of trade or work equipment by an employer is one of the factors in determining whether a worker is an employee. For remote employees, **mobile phones, computers, stationery, vehicles, work chairs and desks, and internet connections** are necessary for the performance of work. In this context, leaving the responsibility for the costs of providing and maintaining work tools and other work-associated costs vague could aggravate the inherent inequality of the employment relationship and create legal distance between an employer and employee. Furthermore, it increases the possibility for remote employees to be reclassified as independent contractors. See Gabel JTA & Mansfield N "On the increasing presence of remote employees: An analysis of the internet's impact on employment law as it relates to teleworkers" (2001) *University of Illinois Journal of Law, Technology & Policy* 233; Lord P "The social perils and promise of remote work" (2020) 4 (COVID-19 Special Issue) *Journal of Behavioral Economics for Policy*.

[21] ILO (2020a) at 9.

[22] ILO (2020a) at 9.

provide training to remote workers to ensure they know how to use the relevant technology and how to access technical support personnel if information is required.[23]

Issues related to cost, including equipment and connectivity costs, should be clarified in remote working arrangements, and employees should be compensated for costs associated with their work, including data costs, electricity, and mobile phone services.[24] Employers should inform workers of any national allowances or tax benefits associated with remote work,[25] as well as of any other forms of financial assistance that may be applicable.[26]

Remote work's broader implications for **freedom of association and collective bargaining** should also be considered. **Collective bargaining** is underpinned by majoritarianism, with minority trade unions having limited collective bargaining rights. (In this regard, section 11, read with sections 12–16 of the LRA, grants organisational rights to trade unions that meet the **representation threshold**.)[27] Freedom of association and collective bargaining rights are applicable to remote workers who are employees within the scope of section 213 of the LRA. However, the framework for effective collective bargaining (envisaging collective agreements and their extension) centres around the notion of a **workplace,** which requires consideration in the context of **remote work** (and other forms of work performed remotely, such as **platform work**).

The "**workplace**" is defined in section 213 of the LRA as

> the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.

In other words, **"workplace"** refers to the place where employees work collectively in a specific location. This was affirmed by Cameron J in *AMCU v Chamber of Mines SA,*[28] where the court expressed the view that

> a workplace is not the place where any single employee works – like that individual's workshop or assembly line or field or desk or office. It is where "the employees of an employer", collectively, work. The statute approaches the concept from the point of view of those employees as a collectivity. This accords with the role the term "workplace" plays in the LRA. This sees workers acting as a collectivity, rather than as isolated individuals. And

[23] ILO (2020a) at 9.
[24] Countouris et al. (2023) at 133.
[25] Countouris et al. (2023) at 133.
[26] ILO (2020a) at 22. For example, subsidies for equipment or training to support remote work.
[27] The rights include the right of access to the workplace; the right to have union subscription and levies deducted; the right to elect trade union representatives; the right to leave for trade union activities; and the right to disclosure of information. Moreover, trade unions are empowered to conclude collective bargaining agreements with employers to regulate matters of mutual interest to the parties. These agreements are binding on members and non-members who fall within the scope of the agreement. In terms of section 23 of the LRA, collective agreement may bind the parties who concluded the agreement; the members of such parties to the extent the agreement applies to them; the members of union parties and of employers' organisation parties; and employees who are not members of the union party (if they are identified in the agreement, if the agreements says it binds them, and if the union party has the majority in the relevant workplace). Section 199 prohibits employers from concluding an employment contract that disregards or waives the provisions of any applicable collective agreement and/or allows treatment or extends benefits less favourable than found in such agreement. Section 64 grants employees the right to strike.
[28] (CCT87/16) [2017] ZACC 3.

> that in turn squares with the statute's objects. The promotion of orderly bargaining by workers, collectively, is one of the statute's express primary objects. That the focus of the definition of "workplace" is on workers as a collectivity rather than as separate individuals fits.[29]

In addition, the Constitutional Court has also taken note of the "relative immateriality of location" in the statutory definition and observed that "location is not primary: functional organisation is".[30] This relates to the "organisational methodology and practicalities"[31] of an employer, which places the emphasis on the **operational aspects of work**.[32]

The definition of a workplace, and the idea of the workplace as the place of functional organisation, coupled with the organising principle of majoritarianism, has implications for collective bargaining and freedom of association, particularly in the context of the increasingly digitalised world of work and complex, externalised work and logistical arrangements. Consider, for example, the following questions if other remote platform workers (for instance Uber drivers) are classified as employees: How would the workplace be determined? How would the principle of majoritarianism apply? How would a trade union determine if it is sufficiently representative?[33] Consideration should be given to the legal framework for organising and collective bargaining and how the regulatory framework may be improved to give effect to core labour standards in this regard.[34]

The right to privacy is also affected by remote work, particularly in the context of **monitoring and surveillance systems** implemented to measure employees' work performance. An implied term in the employment contract is that an employee will perform his or her duties with **due skill and care**, and that the failure to meet an employer's attainable and reasonable performance standard may justify dismissal in terms of section 188(1)(a) of the LRA. However, this dismissal must be substantively and procedurally fair. To establish fairness, the employer needs to show that the employee was **not meeting reasonable performance standards**; that the employee was aware of the expectation to meet the standard; and that a fair opportunity to meet the required standard was given and that dismissal was an appropriate sanction; furthermore, in terms of procedural fairness, an employer is expected to evaluate the employee and provide adequate instruction, training, and a reasonable time to improve.

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[29] At para 25. Emphases added.

[30] At para 25. Emphasis added.

[31] At para 31. Emphasis added.

[32] In other words, on the place of **operational control**: that is to say, finance and production planning, as well as "financial management; human resources; IT systems and procurement". See Khumalo B "Extension of collective agreements in terms of section 23(1)(d) of the LRA and the 'knock on effect' on the right to strike: *AMCU v Chamber of Mines of South Africa* CCT87/16 [2017]" *De Jure Law Journal* (2018) 51(2) 318. Consider as well the virtual spaces where work is performed, such as Zoom and Microsoft Teams, and the collective aspect of this in virtual workplaces.

[33] An example in the context of a locally based 'employer' is that of the Checkers Sixty60 delivery drivers, contracted by the RTT Group (see also Collier D, du Toit D, Jacobs M & Osiki A (2024) *Workers who are (not) employees: Promoting decent work and access to labour standards and social protection.* NEDLAC Labour Law Series No. 2. Assuming that operationally the drivers are centralised at the RTT Group Head Office (located at ACSA Park in Boksburg), one argument could be that there is one workplace for Pingo drivers; alternatively, depending on the arrangements, it could be argued that the operational factors are decentralised to each store that utilises Pingo drivers. This raises questions about the extent to which the **LRA collective bargaining framework** and its current mechanisms for promoting collective bargaining are fit for purpose in the context both of remote work and platform work in particular and of working arrangements in the world of work generally.

[34] See also Collier D, du Toit D, Jacobs M & Osiki A (2024) *Workers who are (not) employees: Promoting decent work and access to labour standards and social protection.* NEDLAC Labour Law Series No. 2.

In traditional employment settings, employers typically use time and attendance systems and direct observation to monitor employee performance[35] and thereby determine whether employees meet the required performance standards. Relevant assistance, training, and counselling might be provided to facilitate employees' productivity.[36] Direct observation also provides an opportunity to identify burnout and emotional exhaustion, and so minimise staff turnover.[37] However, direct observation might not be easy to undertake in a remote-working arrangement.[38] As a result, many employers monitor remote employees by tracking internet activity, taking screenshots, tracking keystrokes, and using GPS tracking, among other things.[39] Constant electronic monitoring has been shown to increase psychological and physical health problems suffered by remote employees, ultimately worsening their performance,[40] in addition to which it erodes trust in the employment relationship.[41] Moreover, as monitoring extends increasingly into private homes, **monitoring or surveillance has implications for the right to privacy of employees and their families**.

The right to privacy is guaranteed in section 14 of the Constitution,[42] but it is not absolute.[43] Various regulatory systems[44] both protect and impact on privacy, seeking to balance the conflicting interests of, on the one hand, an employer's legitimate business interests and assets, and, on the other, an employee's reasonable expectation of the right to privacy of communications. These issues are in need of clarification[45] in the context of remote work in particular and the monitoring and surveillance of platform workers more broadly.

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35 Govender B "How to monitor employees time and attendance" (5 September 2022) *PayDay*.

36 Collier D & Fergus E (eds) *Labour law in South Africa: Context and principles* Oxford: Oxford University Press (2018) at 233.

37 Meinert D "How to prevent employee burnout" (19 July 2017) *SHRM*.

38 Bhave DP "The invisible eye? Electronic performance monitoring and employee job performance" (2014) 67(3) *Personnel Psychology* 605.

39 Trivedi S & Nikhil P "Virtual employee monitoring: A review on tools, opportunities, challenges, and decision factors" (2021) 1(1) *Empirical Quests for Management Essences* 86; Ball K *Electronic monitoring and surveillance in the workplace* European Commission Joint Research Centre (2021).

40 Jeske D "Remote workers' experiences with electronic monitoring during COVID-19: Implications and recommendations" (2022) 15(3) *International Journal of Workplace Health and Management* 393 at 397.

41 Blackman R "How to monitor your employees – while respecting their privacy" (28 May 2020) *Harvard Business Review*.

42 This includes "the right not to have their person or home searched, their property searched, their possessions seized, or the **privacy of their communications** infringed" (emphasis added).

43 The extent to which remote work blurs the public-private divide becomes apparent when considering the *Bernstein v Bester* privacy principle that "[p]rivacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly". See *Bernstein and Others v Bester NO and Others* Z 1996 (4) BCLR 449 para 67.

44 These include the Protection of Personal Information Act 4 of 2013 (POPIA), which guarantees the right to privacy of data subjects, and the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002 (RICA). For example, section 6 of RICA regulates the interception of indirect communications of persons (that is, text or data messages) in connection with the objectives of running a business. It permits monitoring indirect communications and keeping records of them, inter alia, to establish the existence of facts, and requires that reasonable efforts be made in advance to inform a person that communications will be intercepted.

45 For example, clarifying whether evaluating the performance of remote employees via digital monitoring or surveillance falls within the scope of RICAs "indirect communications" in the course of carrying on any business, which may be intercepted. Reasons for lawful interception include, among other things, establishing the existence of facts, investigating unauthorised use of communication systems, or securing an inherent part of the effective operation of the system.

Workers and trade unions should be made aware of the use of monitoring tools. There should be consultation with remote workers and trade unions to ensure that all parties are aware of the rights and responsibilities of the remote worker before monitoring software and other surveillance methods are implemented.[46]

Remote workers should also have the benefit of a **right to disconnect** from their work and the right to refrain from "engaging in work-related electronic communications, such as emails or other messages, during non-work hours" without fear of punitive measures being directed against them.[47]

2.2 Hours of work and the right to disconnect

The Basic Conditions of Employment Act, 1997 (BCEA) regulates minimum conditions of employment, including the **regulation of working time** in regard, for instance, to ordinary hours of work, maximum weekly and daily hours, rest periods, breaks during the working day, and maximum overtime hours. Section 7 of the BCEA requires an employer to regulate working time in accordance with legislation regulating health and safety, giving due regard to the employees' safety and health, the Code of Good Practice on the Regulation of Working Time (Working Time Code), and the employees' family responsibilities.

The Working Time Code was developed to be read in conjunction with the provisions on working hours in the BCEA, and "gives considerable guidance to employers regarding practical matters around working hours".[48] The BCEA and Working Time Code aim to ensure worker protection (in order to prevent exhausting work hours) and allowing employees to have sufficient rest periods.[49] Working hours, which include ordinary hours of work and overtime, are regulated by chapter 2 of the BCEA.[50]

The regulation of working hours is important in the context of remote work,[51] given that many employees are unable to detach or disconnect from work, as they are tacitly expected to be available at all times;[52] the absence

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[46] Countouris et al. (2023) at 135.

[47] For example, Belgium passed a law protecting civil servants from punishment for disengaging from work emails, texts and phone calls that they receive after working hours. Other countries to have passed legislation to protect the right to disengage include Portugal, France, Chile and Ireland. See Sibanda (2023).

[48] Code of Good Practice on the Arrangement of Working Time in GN R1440 in GG 19453 of 13 November 1998 at 3.

[49] Godfrey S & Clarke M "The Basic Conditions of Employment Act amendments: More questions than answers" (2002) 6(1) *Law, Democracy & Development* 1.

[50] **Section 9 of the BCEA** sets maximum weekly ordinary hours of work at 45 hours, which translate into maximum daily ordinary hours of work of nine hours (if working a five-day week) or eight hours (if working more than five days per week). **Section 10** of the BCEA sets the maximum weekly overtime hours at 10 hours, and stipulates that maximum daily hours cannot exceed 12 hours (actual maximum overtime hours will therefore vary according to the ordinary hours in the workplace). **Section 10(6)** provides that overtime may be increased to a maximum of 15 hours weekly by collective agreement. However, this may not apply for more than two months within any 12-month period. Section 10(2) and (3) regulates the payment of overtime benefits to workers. In addition, section 14(1) grants a meal break of at least one continuous hour to an employee who has worked continuously for more than five hours. This may be varied by a written agreement. Section 14(2) prohibits employees from working during their meal interval unless their duties cannot be left unattended. Similarly, section 15 of the BCEA provides that employees must be granted at least 12 hours of daily rest periods between ending and recommencing work (with some exceptions), and at least 36 consecutive hours of weekly rest periods, including a Sunday unless agreed otherwise.

[51] Many remote employees work on average more than 45 hours weekly, as well as working at weekends. See Bolisani E, Scarso E, Ipsen C & Kirchner K "Working from home during COVID-19 pandemic: Lessons learned and issues" (2020) 15(1) *Management and Marketing* 458 at 472.

[52] Yang L, Holt D, Jaffe S, Suri S, et al. "The effects of remote work on collaboration among information workers" (2022) 6 *Nature Human Behaviour* 43 at 46; James JA *Remote working and labour legislation in South Africa* (LLM thesis, University of the Western Cape, 2022b).

of a commute has further blurred the lines between working time and after-hours.[53] Consequently, remote employees work long and intense hours, which violates the minimum standards provided in the BCEA. Longer working hours have had significant negative impacts, such as disruption of family life and harm to employees' mental and physical health – at the time of the COVID-19 pandemic, for instance, this contributed to "the great resignation" witnessed in many countries, among them South Africa.[54]

The statutory protections governing hours of work are difficult to enforce in the context of remote work, particularly when this arrangement is associated with unrealistic demands or expectations. The role of management is thus important in avoiding overwork and erratic work routines. There should be effective communication of realistic expectations and deadlines that maintain the required level of performance; in addition, consideration should be given to adjusting remote work in terms of workload, deadlines, and tasks.[55] To complement existing procedures, employers should consider asking employees to develop work plans for discussion with their supervisors.[56]

As a form of regulation, the **Working Time Code** provides important guidance for shaping aspects of remote work. The norms in item 2.2 relate to health and safety and family responsibilities. As regards health and safety, key issues are raised in item 3, including the requirement that employers conduct risk assessments, that they implement appropriate measures to eliminate the hazards identified, and that they train employees about risks to their health and safety and the measures to adopt in controlling such risks. The Code's focus on working hours enables a line to be drawn between personal life and working time – this helps addresses the challenge of remote workers being available at all times as a result of the access and connectivity provided by technology.[57]

The **right to disconnect** is described as

> the right that [grants] workers the possibility of remaining inaccessible or of not being contacted by any means through digital or other devices for matters related to their work performance, whenever they are out of their work times, that is to say, in their breaks during the workday, daily, weekly and annual rest periods, work leaves, holidays, among others.[58]

Although the **right to disconnect** is not explicitly recognised in South African law,[59] there is growing support for the development of such a right.[60] This would align with developments abroad (see, for example, the

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[53] Davis WA *The use of mobile communication technology after hours and its effects on work-life balance and organizational efficiency* (DAB thesis, Capella University, 2016); Von Bergen CW & Bressler MS "Work, non-work boundaries and the right to disconnect" *Journal of Applied Business and Economics* (2019) 21(2) 51.

[54] Chugh A "What is 'The Great Resignation'? An expert explains" (29 November 2021) World Economic Forum; Liu J "A record 4.4 million people quit in September as Great Resignation shows no signs of stopping" (12 November 2021) Graham Personnel Services; Fokazi S "Global 'great resignation' trend seen in SA as long working hours in pandemic rattle employees" (2 November 2021) *Times Live*.

[55] ILO (2020a) at 6.

[56] ILO (2020a) at 6.

[57] ILO (2020a).

[58] Chiuffo FM "The 'right to disconnect' or 'how to pull the plug on work"' (2019) 4 *SSRN Electronic Journal* 12.

[59] The right is implied in terms of the contract of employment and the provisions of the BCEA.

[60] See Rammila (2023); Mpedi (2023a) and (2023b); Van Staden (2021).

Employment (Amendment) Bill, 2022 in Kenya)[61] and promote compliance with standards under international law.[62]

2.3 Non-discrimination and the right to equal treatment and protection from harassment

In terms of the Employment Equity Act (EEA), employers may not discriminate between employees in any policy or practice.[63] This could protect remote workers (or onsite workers) from unequal and prejudicial treatment in relation to their counterparts working at the employer's premises (or working remotely), although keeping in in mind that categories of workers such as "remote" and "onsite", unless amounting to indirect discrimination (e.g. if all remote workers are men and all onsite workers are women) would be considered as an arbitrary ground and the disgruntled employee(s) would have have to prove that the remote work policy or practice constitutes unfair discrimination. Remote workers have the right to fair labour practices, and should have equal career opportunities and opportunities for training and the like;[64] furthermore, they should not be prejudiced for exercising the right to disconnect.

Also of relevance to remote work is the problem of harassment in the workplace. Section 6(3) prohibits the harassment of an employee on any single or combined grounds of unfair discrimination. The EEA aside, harassment in the workplace is dealt with in terms of the 2022 Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (Harassment Code), which gives effect to South Africa's obligations under the Violence and Harassment Convention, 2019 (No. 190) of the International Labour Organization (ILO). Item 4.1 of the Code describes harassment as

> 4.1.1 unwanted conduct which impairs dignity;
> 4.1.2 which creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences; and
> 4.1.3 is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA. Harassment includes violence, physical abuse, psychological abuse, emotional abuse, sexual abuse, and racial abuse. It includes the use of physical force or power, whether threatened or actual, against another person or against a group or community.

[61] See, for example, the Irish Workplace Relations Commission's Code of Good Practice for Employers and Employees on the Right to Disconnect. Kenya has also recently taken steps to protect employees' right to disengage. If the Kenyan Employee (Amendment) Bill of 2022 is enacted, it will prevent employers from expecting employees to answer calls, texts, or emails outside of working hours, during public holidays, or at weekends. Article 27A(1) of the Bill provides that "an employee has the right to disconnect from their employer"; in terms of article 17A(7), 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. The Bill states, furthermore, 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. Article 27A(5) elaborates that the right to disengage may only be limited to address a work-related emergency that falls within the employee's responsibility. See Sibanda (2023).

[62] This includes the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), which recognises the right of every person to "[r]est, leisure and reasonable limitation of working hours and periodic holidays with pay" (article 7(d)).

[63] This includes job classification and grading; remuneration; employment benefits and terms and conditions of employment; job assignments; recruitment procedures, advertisements and selection criteria; training and development; promotion; demotion; and disciplinary measures short of dismissal (section 1 of the EEA).

[64] Countouris et al. (2023) at 134.

The Code requires employers to ensure that employees are protected against third-party harassment, while section 60 of the EEA indicates the circumstances in which an employer would be liable if an employee experiences discrimination or harassment. The Code requires employers to adopt measures to prevent violence and harassment, including creating effective complaint procedures and ensuring access to remedies. Employers will be liable if they ought to have anticipated harassment and did not take proactive steps.

Item 2.3 of the Code provides a non-exhaustive list of working situations where employees will be protected against harassment. These include both public and private spaces where people carry out their work, as well as work-related communications, including ICT and internet-enabled communications. This is important for remote employees, particularly for women.[65] Item 2.3.8 explicitly states that the Code will be applicable "in the case of employees who work virtually from their homes, or any place other than the employer's premises, [where] the location where they are working constitutes the workplace".[66] This recognition of remote workspaces has implications for remote employees' protection against harassment. In item 4.7, the Code provides an extensive list of types of harassment, which include "surveillance of an employee without their knowledge and with harmful intent".

In the context of remote work, various **risk factors** enable harassment in the workplace. In particular, the isolated nature of this workplace could enable the perpetuation of harassment and reduce the likelihood of others witnessing such misconduct. Moreover, the increased **risk of domestic violence** (as seen during the COVID-19 pandemic) and the impact of domestic violence should inform developments, which in turn should take the ILO standards[67] into account in this regard.[68]

Violence and harassment are recognised as health and safety concerns. Other health and safety challenges in the context of remote work include ergonomic and psychosocial risks, with remote work being linked to higher anxiety levels in remote workers.[69]

2.4 Occupational health and safety concerns and workers' compensation

The Occupational Health and Safety Act, 1993 (OHSA) regulates health and safety in South African workplaces (the mining sector is regulated separately by the Mine Health and Safety Act). The OHSA applies to all employment activities and all instances where machinery is used. The scope of the Act is defined broadly, and an employer's obligation extends to non-employees. The OHSA conceives workplace to mean "**any premises or place where a person performs work in the course of his employment**". This would include premises where remote workers perform work, with such premises including the employee's home.

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[65] Research shows that online harassment became more prevalent during the COVID-19 pandemic as more workers worked from home. UN Women "Online and ICT facilitated violence against women and girls during COVID-19" (2020).

[66] Emphases added.

[67] Convention 190, which South Africa ratified in 2021, and the Violence and Harassment Recommendation, 2019 (No. 206).

[68] Convention 190 recognises the impact of domestic violence on the world of work and provides for measures that "so far as is reasonably practicable, mitigate its impact in the world of work" (article 10(f)); such measures include "legislation recognising the obligations of employers not to discriminate or retaliate against employees who are survivors of domestic violence, and to affirmatively provide paid and unpaid leave from work to address the impact of victimization on their lives without the fear of job loss" (emphases added). See Runge RR "What a feminist international labor standard can teach the US about addressing sexual harassment in the workplace" (2020) 59 *University of Louisville Law Review* 460. Examples include the Domestic Violence – Victims' Protection Act 21 of 2018 in New Zealand.

[69] ILO (2020a) at 12.

Duties which the OHS places on the employers of remote employees include the general duty to ensure that employees work in **a safe and healthy work environment as far as reasonably practicable**. The duty is **preventative** in nature, as it aims to prevent accidents or injuries in the workplace. Section 8(2)(d) requires employers to have knowledge of the hazards within the workplace, and to institute cautionary measures to protect health and safety. Employers are obliged to provide the necessary **information, instruction, training, and supervision** to employees, and to enforce measures as may be necessary in the interests of health and safety, among others. In addition, employers must ensure that work is performed, and plant or machinery used, under the general supervision of a person in authority who is trained to understand the hazards associated with it.

Regulations form part of the framework of the OHSA and provide detailed standards for employers in undertaking risk assessment. One such regulation is the **Ergonomic Regulations, 2019**, which apply to any employer or self-employed person who carries out work at a workplace that may expose people to ergonomic risks. Regulation 1 defines ergonomic risk as "a characteristic or action in the workplace, workplace conditions, or a combination thereof that may impair overall system performance and human well-being". For remote workers, ergonomic risk factors that affect their well-being include awkward posture, repetitive motion, poor workstations, environmental factors (such as room temperature and lighting), and psychosocial factors (such as isolation).[70] Employers in consultation with health and safety committees are required to conduct ergonomics risk assessments and expose employees to training in addressing ergonomic risks.

Remote work poses challenges for the implementation of the employers' obligations to conduct risk assessments and put in place adequate precautionary measures.[71] Even if OHS experts can access employees' premises, accessing the premises of each and every employee is not reasonably practicable. Furthermore, an employee's home as the workplace raises privacy considerations. That being said, employers remain responsible for identifying and managing occupational risks, and should inform remote workers about important ergonomics issues. This would involve, inter alia, providing training and guidance on the health and safety risks and hazards of remote work; the stress and other mental health issues related to it;[72] and the technical aspects of remote-work environments, the ergonomics of home offices, and the use of equipment (while encouraging use of equipment from the office).[73] Rights and responsibilities in terms of health and safety should be clarified, and managers and remote workers should receive training on the importance of adequate breaks.[74] As mentioned, violence and harassment (including bullying) are a health and safety risk, and should be assessed and managed as such.

Section 9 of the OHSA provides that, to the extent **reasonably practicable**, the employer must ensure the health and safety of *everyone* who may be directly affected by its activities. The phrase "**reasonably practicable**" is defined in section 1(1) to mean having regard to –

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[70] Wodajeneh SN et al. 'Ergonomic risk factors analysis in remote workplace' (2023) 24 *Theoretical Issues in Ergonomics Science* 681.

[71] Matisane L, Paegle L, Akūlova L & Vanadzins I "Challenges for workplace risk assessment in home offices: Results from a qualitative descriptive study on working life during the first wave of the COVID pandemic in Latvia" (2021) 18(20) *International Journal of Environmental Research and Public Health* at 3.

[72] Without proper ergonomics and risk assessments, remote employees are prone to developing diseases and injuries such as **musculoskeletal damage, eye strain, and stress**. See Larrea-Araujo C, Ayala-Granja J, Vinueza-Cabezas A & Acosta-Vargas P "Ergonomic risk factors of teleworking in Ecuador during the COVID-19 pandemic: A cross-sectional study" (2021) 18(10) *International Journal of Environmental Research and Public Health* at 5063; Korhan O & Mackieh A "A model for occupational injury risk assessment of musculoskeletal discomfort and their frequencies in computer users" (2010) 48(7) *Safety Science* 868.

[73] ILO (2020a) at 14.

[74] ILO (2020a) at 14.

a) The severity and scope of the hazard or risk concerned.

b) Knowledge reasonably available concerning the hazard or risk and any means of preventing same.

c) Availability and suitability of means to remove or mitigate that hazard or risk.

d) The cost of removing or mitigating the hazard or risk relative to the benefits derived.

Employees are required to take reasonable care of the health and safety of themselves and other persons who may be affected by their conduct. Section 14(b) expressly obliges employees to comply with all health and safety rules and instructions issued by their employers and to assist employers to comply with their statutory health and safety obligations. In the context of remote work, employers can provide employees with information and instructions around health and safety issues such as ergonomics. However, verifying compliance with such information or instruction remains an implementation challenge.[75]

Despite the measures contained in the OHSA as a safeguard to protect health and safety in the workplace, **occupational injuries and diseases** still occur. Compensation for loss of income arising from such injuries and disease is regulated by the Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA). In terms of COIDA, an employee is entitled to compensation for injuries, diseases, or death (with compensation paid out to the employee's dependents) that arise out of, or in the course of, employment. As to the scope of COIDA, section 1 defines an employee as a person who has entered into or works under contracts of service, apprenticeships or learnerships with an employer and who is remunerated for that work in cash or in kind.[76] However, independent contractors, persons performing military service, and members of the permanent force of the National Defence Force and South African Police Service, are not employees within the meaning of COIDA.

COIDA defines an occupational disease as a disease, mentioned in Schedule 3, arising out of and in the course of an employee's employment; it includes different categories of diseases, among them being diseases caused by occupational musculo-skeletal disorders. Section 22 makes provision for occupational injuries if they are a consequence of an accident. The Act defines an accident as "an incident or occurrence arising out of and in the course of an employee's employment and resulting in a personal injury, illness, occupational disease or the death of the employee".[77] This gives rise to the question of the circumstances in which accidents in the context of remote work will be considered to have arisen out of and in the course of employment (for example, accidents that might occur while working remotely in an internet café), and the circumstances in which a claim for compensation may be submitted in terms of COIDA.

As regards diseases, section 65(1)(b) leaves room for other diseases that are not specifically mentioned in Schedule 3 but which arise out of and in the course of employment. Calitz makes the argument for burnout – chronic workplace stress – to be recognised as a distinguishable disease in South Africa,[78] and calls for the following: the OHSA to be amended to require psychosocial risk assessments and measures to address these

[75] A key means of enforcing the provisions of the OHSA is doing so through **self-regulation**, as well as health and safety representatives, where applicable. Section 71 requires employers with more than 20 employees to appoint health and safety representatives and one representative for every 50 employees. The general duties of these representatives include evaluating existing health and safety measures; identifying potential hazards and major incidents in the workplace; investigating health and safety complaints; and inspecting the workplace. Similarly, the role of the labour inspectorate is to ensure compliance with the OHSA and its regulations. This entails, among other things, inspecting workplaces and premises where machinery is used, and conducting investigations into hazardous incidents in the workplace.

[76] This includes casual employees, as well as directors or members of the body corporate, who have contracts of service; it also includes employees provided by labour brokers for clients.

[77] An amendment to the Act was passed (Act 10 of 2022) but at the time of writing (2024) has not yet promulgated. The underlined words are those that have been added by the amendment.

[78] See Calitz K "Burnout in the workplace" (2022) *Obiter* 132.

risks; the Unemployment Insurance Act 2001 (UIA) to provide for extended sick leave for burnout; and COIDA to be amended so as to include burnout as a compensable disease, with provision for psychotherapy, rehabilitation, and the reintegration of employees in the workplace.

In view of the flexibility of remote work, some workers may also work remotely in jurisdictions outside of the place of their employment.[79] In this regard, section 23 of COIDA extends the scope of the Act to employees who are temporarily outside South Africa (but employed in South Africa), limited to 12 months of continuous work outside of the country. (Depending on where the remote workers reside, they may in any event be covered by a workers' compensation scheme in the country where they are residing.)

3. CONSIDERATIONS FOR REGULATING REMOTE WORK

There have been suggestions that remote work be clarified in the context of labour law and that the protection of remote workers be improved, including via the introduction of a right to disconnect.[80] Such considerations in the context of the public sector are included in the Public Service Commission's report on the impact of hybrid work arrangements.

The current regulatory framework (the LRA, BCEA, EEA, OHSA, and COIDA) and related instruments, including regulations and codes of good practice, provide a substantive body of principles that apply to remote work. However, there is room to clarify and develop them. The development of regulatory mechanisms – which may include **regulations, OHSA directions, and/or a code of good practice** – would be a significant step towards addressing concerns related to remote work. This could provide clarity on the right to disconnect (consistent with the provisions of the BCEA and the regulation of working time), as well as address health and safety concerns, including the question of how the Ergonomics Regulations of 2019 issued in terms of OHSA should apply in the context of remote work.

On the prospect of consolidated regulations, the 2010 Regulations on Hazardous Work by Children in South Africa[81] provide a useful example; as regards a consolidated Code, section 203 of the LRA empowers NEDLAC to prepare and issue codes of good practice that (as per s. 203(4)) "must be taken into account **in applying or interpreting any employment law**".[82] Hence, it would appear competent for NEDLAC, or the Minister (s. 203 (2A)), to issue a Code of Good Practice for Remote Work which could draw on provisions and principles in the LRA, BCEA, EEA, OHSA and COIDA and related directions and regulations.

The various ways in which remote work could be regulated include amending existing statutes (introducing new provisions); amending or introducing new regulations and/or codes of good practice; or combining statutory amendments, regulations, and a consolidated Code. We propose the development of consolidated Regulations and a Code of Good Practice incorporating aspects of both **employment standards** and **occupational health and safety.** The elements that should be considered in such a consolidated regulation and code are discussed below.

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[79] Such as foreign workers in South Africa under the **remote work visa**. As previously noted, the latter permits high-income-earning foreign nationals to work remotely for a foreign employer while residing in South Africa for up to 36 months.

[80] See Rammila (2023); Mpedi (2203a) and (2023b); Van Staden (2021); Sibanda (2023); James JA (2022a).

[81] GNR.7 of 15 January 2010: Regulations on Hazardous Work by Children in South Africa (*Government Gazette* No. 32862), published in terms of section 43(1) of the OHSA and section 44(1) of the BCEA.

[82] Emphasis added. "**Employment law**" is broadly defined (**LRA, s. 213**) to include the LRA, EAA, OHSA, and COIDA, as well as "any other Act the administration of which has been assigned to the Minister".

3.1 Definitions of remote work and its associated general rights and responsibilities

The meaning of hybrid arrangements and remote work and its essential features (for example, working outside of the employer's workplace, using ICT to carry out work, and being subject to an online connection with the employer) should be clarified,[83] in addition to which an overview should be provided of the sources of law that determine the responsibilities and rights of the parties in remote work. Definitions of remote work and the workplace should also be considered, taking into account the objective of the definitions.

- **Workplace** should include any public or private space agreed upon by the employee in consultation with the employer where employees perform their work; the relevance of virtual workspaces should also be considered.
- **Remote work** includes telework, virtual work, and telecommuting where the working activity is performed outside of the employer's premises using ICT on a regular basis

Other relevant definitions could include those related to ergonomics and health and safety risks.

3.2 Written particulars of employment and agreement on remote-work arrangements

Section 29 of the BCEA indicates **written particulars of employment** that an employer must supply to an employee on commencement of employment. In regard to remote work, these could include details relating to:

- parties' obligations;
- hours of work, the right to disconnect, and the use of work communication systems after-hours;
- the location where work will be performed;
- description of restrictions and responsibilities regarding equipment, communication systems, confidentiality and data security, monitoring and surveillance, and privacy protection;
- provision of tools and equipment, and reimbursement for work-related expenses;
- criteria for determining performance; and
- procedures for requesting or reversing remote working arrangements, as well as procedures for dealing with OSH matters or risks.

Arrangements for remote work that are introduced after an employee commences employment should be by agreement, and ideally in accordance with a workplace policy on remote work. This agreement should be established in accordance with regulations, OHSA directions,[84] or a Code of Good Practice (or a combination thereof).

[83] In particular, it should be clarified that remote work is not a new form of work but rather a way of performing subordinate work outside of the employer's premises using ICT.

[84] Section 7, OHSA Employer Health and Safety Policy Directions and Guidelines by the Chief Inspector.

3.3 Clarifying hours of work and the right to disconnect

Although not explicitly included as a right in any law, the right to disconnect is implicit in the regulation of hours of work and as an aspect of occupational health and safety.[85] Moreover, there is scope for variation (consistent with the BCEA framework) within particular sectors and industries.[86] In this regard, consolidated regulations could clarify the following:

- the right to disconnect in relation to hours of work and the categories of workers to whom the right applies;
- exceptional circumstances for deviating from the right during which employees may be expected to respond to communications and engage on matters of urgency;
- the use of electronic devices to send or receive work-related communications outside of work hours;
- the circumstances in which employees who work outside of working hours will be compensated and the nature of the compensation, which could include time off and flexibility to adjust working arrangements; and
- monitoring and enforcement, as well as the consultation processes applicable to the right to disconnect.

3.4 Regulating occupational health and safety concerns

In the context of remote work, regulations, directions, and a Code of Good Practice (or a combination of these) should clarify the relevant health and safety challenges as well as roles and responsibilities, with guidance being provided on the regulatory framework and on implementation of the Ergonomics Regulation of 2019. The latter guidance should include guidelines on risk assessment and factors that could cause injuries while working remotely; along with this, it should specify safety checks and lay out requirements for regular training on health and safety and ergonomics risks.

The psychosocial risks associated with remote work should be addressed, as well as the risks related to violence and harassment.[87] The processes and support for remote workers should be clarified, and guidance on the law (the OHS, COIDA, EEA and EEA Codes of Good Practice) should be provided.

In addition, employers should be encouraged to develop workplace policies for access to remote and flexible working arrangements, taking into account the provisions of ILO and European Union (EU) standards and best practice in relation to work-life balance for parents and carers (see Table 1 below).

[85] The right to disconnect (from work-related communications and activities) may be clarified directly in statute (namely, the BCEA).

[86] For example, in Belgium, the right to disconnect was initially applied only to public-sector employees. In 2022, however, it was extended to employers in the private sector with 20 employees or more. See Boucique W & Vets E "The right to disconnect: which countries have legislated?" (26 July 2023) *Ius Laboris*.

[87] This entails recognising that isolation is a risk of remote work, one that may result in psychological challenges, such as depression. It also involves recognising that for some workers, women in particular, their circumstances include family responsibilities, and that exposure to domestic violence could have implications in the workplace.

Table 1. Regulating access to remote and flexible work arrangements

Extract from Violence and Harassment Recommendation 206 (2019)
"18. Appropriate measures to mitigate the impacts of domestic violence in the world of work … could include … leave for victims of domestic violence; [and] flexible work arrangements …"
Extract from EU Directive: Work-life balance for parents and carers (2019)
"(34) In order to encourage workers who are parents, and carers to remain in the workforce, such workers should be able to adapt their working schedules to their personal needs and preferences. To that end and with a focus on workers' needs, they have the right to request flexible working arrangements for the purpose of adjusting their working patterns, including, where possible, through the use of remote working arrangements, flexible working schedules, or a reduction in working hours, for the purposes of providing care."

3.5 The right to fair labour practices and non-discrimination

Important considerations regarding remote-work arrangements include the employee's right to fair labour practices and protection from discrimination. This right should be explained, with detail provided on how the relevant principles apply in the context of remote work.

Policies and practices in regard to performance evaluation, the provision and use of equipment and communication systems,[88] monitoring and surveillance, and privacy should be addressed in the regulations and code, with guidance provided on how to develop the relevant policies and rules in the workplace in consultation with workers (see below on collective bargaining). The associated compliance and enforcement mechanisms should be clarified as well.

Furthermore, the code and workplace policies should clarify who bears the burden of work-related costs (including insurance coverage in relation to tools of the trade)[89] in the context of remote work.

3.6 Collective bargaining as a mechanism to regulate remote work

Arrangements for remote work should be based on consensus or collective bargaining between the parties, whether at the workplace level, the sectoral level, or, as regards the setting of standards, at national level.[90]

Interesting developments in the context of collective bargaining that social partners could consider include the social partner framework agreements, declarations and guidelines[91] that impact on the regulation of remote work. Other developments that enable collective bargaining include recent changes to Belgium's labour law in

[88] Mpedi (2023b).

[89] As noted, work-related costs could include the direct costs of remote work. In addition, there is a possibility of paying "double tax" when a remote worker is based in a country other than the country in which the premises of the employer are situated. There is hence a need for clarity on these matters. See also ILO (2020a) at 23.

[90] See, for example, the Angola teleworking legislation (Presidential Decree No. 52/22) requiring written agreement, and the right to request remote work in the Australian Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act of 2022 (section 65A "Responding to requests for flexible working arrangements").

[91] See, for example, Uni Europa "EU Telecom social partners' guidelines on remote work" (2023).

2022 – these provide for the development of company policy or work rules (including the modalities on the right to disconnect) by way of collective agreement.

3.7 Compliance and enforcement mechanisms

Finally, the processes for addressing concerns and disputes should be clarified. This would cover, inter alia, workplace processes, the role of the labour inspectorate[92] in ensuring compliance with and enforcement of obligations provided in primary statutes, and the role of the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council in the resolution of labour disputes.

4. RECOMMENDATIONS FOR REGULATORY AND LEGISLATIVE DEVELOPMENT

4.1 Development of regulatory mechanisms for remote-work arrangements

The development of comprehensive regulations and a code of good practice aligned with existing statutory principles would provide much-needed clarity and guidance on the application of law in the context of remote working arrangements.[93] The current statutory framework provides a foundation for governing remote work, meaning that legislative amendments are not essential for implementing this recommendation.

The shift to remote and hybrid working arrangements has given rise to the need for the development of regulatory mechanisms and comprehensive remote-work policies. Various instruments could be considered for this purpose.[94] In particular, the development of regulations could provide an authoritative source of law – possibly within a period of 18 to 24 months – governing conditions of employment and occupational health and safety in the context of remote working arrangements.[95] Consolidated regulations under section 86[96] of the BCEA and section 43[97] of the OHSA would provide for the possibility of regulating key issues (summarised in Table 2 below) in a coherent instrument.

[92] The chief inspector's power under section 7 of the OHSA could be used to direct employers to develop a written policy concerning the protection of the health and safety of remote employees. Compliance with this could be achieved (in conjunction with regulations) by requiring employees to prepare documentation demonstrating compliance.

[93] These are matters under consideration within the DoEL and the IES branch.

[94] Including Directions by the Chief Inspector under section 7 of the OHSA.

[95] On the prospect of consolidated regulations, the 2010 Regulations on Hazardous Work by Children in South Africa provide a useful example. See GNR.7 of 15 January 2010: Regulations on Hazardous Work by Children in South Africa (*Government Gazette* No. 32862). The 2010 Regulations are published in terms of section 43(1) of the OHSA and section 44(1) of the BCEA, which make provision for regulation of work by children.

[96] The BCEA (section 86) empowers the Minister, after consulting the National Minimum Wage Commission, to make regulations "regarding any matter that may be necessary or expedient to prescribe in order to achieve the objectives of this Act".

[97] The OHSA (section 43) empowers the Minister to make regulations, after consultation with the Advisory Council for the OHS, on any matters that may be prescribed, including regulations that are "necessary or expedient in the interest of the health and safety of persons at work". Matters that may be regulated include issues of occupational hygiene, measures to be taken by employers; records to be kept; consultations with employees on OHS matters; and regulations regarding the functions, duties and activities of approved inspection authorities.

Table 2. Considerations for consolidated regulations

Occupational health and safety (OHSA)	Conditions of employment (BCEA)
Considerations include – • ergonomic and psychosocial risk assessment and risk management plans; • OHS rights and duties of employers and employees; • regulating access to remote-work premises for inspections, which could entail protocols for virtual inspections (by employers and labour inspectors, including COIDA inspections); [98] and • clarification in relation to COIDA claims.	Considerations include – • contractual arrangements (whether remote work is temporary or hybrid; particulars on remote-work location; and access to remote work premises); • hours of work (and a right to disconnect); • tools of the trade (terms related to tools, work-related expenses, and reimbursements; to equipment responsibilities; and to data security); • privacy and surveillance; • discipline and performance management; • termination of remote working arrangements; and • fair-labour practices more generally (including LRA and EEA principles).
As regards consolidated regulations, although intended for teleworking during the COVID-19 pandemic, and not designed as a comprehensive framework for remote work, Mauritius's "Working from Home" Regulations (2020) provide an example of a remote work agreement and applicable terms and conditions of employment contained in schedules to the regulations.	

In addition, the development of OHS directions and a Code of Good Practice could be considered to support the implementation and enforcement of the regulations.

- **Chief inspector (CI) directions –** requirements and guidelines for employers to prepare an OHS workplace policy, focusing on compliance and mechanisms for inspection; and
- **Codes of good practice –** practical guidance to support employers to implement best practice in managing remote-work arrangements, to ensure certainty and fair labour practices in compliance with the law, and to resolve disputes relating to remote-work arrangements.

Although the absence of an explicit statutory right to disconnect, or a right to request remote or flexible working arrangement, does not impede the introduction or implementation of regulations, directions or a code of good

[98] The right to privacy means that OHS inspections are not easily conducted in private homes. Regulations hold the potential to provide guidance on inspection and enforcement. The possibility of remote inspections, as well as conducting inspections at the request of an employee, should be considered.

practice for remote-work arrangements, consideration could be given to the future introduction of statutory provisions in this regard.

4.2 Potential for future statutory standards governing flexible working arrangements

The development of additional statutory standards could be considered in ongoing policy and law development processes, in addition to an explicit right to disconnect. In this regard, legislative developments on **flexible working arrangements** could promote gender equality, inclusion of vulnerable workers, and work-life balance, particularly for carers and parents. The European Agency for Safety and Health at Work Directive (EU) 2019/1158 on work-life balance for parents and carers (art. 3) clarifies that (see also Table 1)

> **"flexible working arrangements"** means the possibility for workers to adjust their working patterns, including through the use of remote working arrangements, flexible working schedules, or reduced working hours.

However, the broader implications of access to flexible working arrangements would need to be considered, as flexible work may require adjustments in operational practices, organisational culture, and legal compliance processes, while recognising the opportunities for attracting and retaining a more diverse talent pool. Flexible work arrangements may also raise considerations around social protection, tax, and employment benefits, and would need to balance the needs of workers with the sustainability of businesses. Statutory amendments in this regard should be informed by a consideration of the benefits of such rights, weighed against the operational challenges and difficulties of implementation and enforcement.

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ANNEXURE A. EXTRACTS FROM "WORKING FROM HOME" REGULATIONS (Mauritius)

Note that the "Working from Home" Regulations are a response to the COVID-19 pandemic and *not* a comprehensive legal framework for remote ("teleworking") arrangements. See in this regard, and for additional considerations, Wong AR *An assessment of the legal teleworking framework in the Republic of Mauritius* ILAW Network (2023).

THE WORKERS' RIGHTS ACT 2019 (Mauritius)[99]

Regulations made by the Minister under section 124 of the Workers' Rights Act 2019

1. These regulations may be cited as the Workers' Rights (Working from Home) Regulations 2020.

2. In these regulations –

"**Act**" means the Workers' Rights Act 2019;
"**home**", in relation to a worker –
(a) means the place of residence of the worker; and
(b) includes such other place as may be agreed upon by the worker and his employer;
"**homeworker**" means a worker who works from home;
"**work from home**" includes –
(a) work performed on full-time or part-time basis;
(b) work performed on permanent, temporary or occasional basis;
(c) work split between home, office or place of business of the client;
(d) work performed on an hourly rate, a weekly rate, a fortnightly rate, a monthly rate, piece rate or task basis;
(e) work performed through –
(i) teleworking;
(ii) online platform;
(iii) any other form or nature of work, whether performed through electronic devices, IT systems or not.

3. Where a worker is in the employment of an employer –

(a) the employer may require that worker to work from home provided a notice of at least 48 hours is given to the worker and the worker shall comply accordingly; or
(b) the worker may make a request to the employer to work from home and the employer may accede to the request.

4. (1) Where the worker is required to work from home or where his request to work from home is acceded to, under regulation 3, the worker shall inform his employer of the proposed place where work is to be performed.

(2) The employer shall, where appropriate, conduct a suitable and sufficient assessment at the proposed place of work to ensure that performance of work at the proposed place shall not entail any risk to the safety and health of the homeworker and members of his family.

5. Subject to regulation 6, where –
(a) a worker is required to work from home; or

[99] The Workers' Rights Act 2019.

(b) an employer accedes to the request of a worker to work from home, the worker and the employer **shall enter into a Working From Home Agreement in the form set out in the First Schedule.**

6. Where a worker and an employer have entered into a Working From Home Agreement, the employer may, subject to the operational requirements of his business, require the worker to work at his initial place of work.

7. (1) **A homeworker shall be governed by the terms and conditions of employment specified in the Second Schedule.**
(2) For the avoidance of doubt, the general conditions of employment specified in the Act shall also apply to a homeworker.

8. Where an employer remunerates a worker in accordance with these regulations, he shall issue to that homeworker a payslip in the form set out in the Third Schedule.

9. Nothing in these regulations shall –
(a) prevent an employer from –
(i) remunerating a homeworker at a rate higher than that specified in the appropriate Remuneration Regulations or in the National Minimum Wage Regulations;
(ii) providing the homeworker with conditions of employment more favourable than those specified in the First Schedule;
(b) authorise an employer to –
(i) reduce the wages of a homeworker; or
(ii) subject to section 57 of the Employment Relations Act, alter the conditions of employment of a homeworker so as to make them less favourable.

10. Any agreement by a homeworker to relinquish his rights under these regulations shall be void.

11. These regulations shall be deemed to have come into operation on 1 September 2020.

Made by the Minister on 24 September 2020.

FIRST SCHEDULE

[Regulation 5]

WORKING FROM HOME AGREEMENT

This document constitutes an agreement between ...., hereinafter referred as the homeworker and ...., hereinafter referred as the employer.

Details of homeworker

Name ....
National identity card no. ....
Residential address ....
Telephone no. ....
Mobile no. ....
Email address ....

Duration of Agreement

(1) Indeterminate period Commencement date ....
(2) Determinate period Commencement date .... Expiry date ....
Position to be held by the worker ....
Wages per week/fortnight/month ....

Agreed location to work from home ....
Assignment and schedule of work ....
Terms and conditions

1. Hours of work

(1) The hours of work of a homeworker shall be within the normal working hours of the business of the employer or within the time frame agreed between the homeworker and his employer.

Hours of work ....

(2) The homeworker agrees to maintain and update a record of the number of hours and days that he works from home

2. Working tools and equipment

(1) The following installations, working tools and equipment shall be provided by the employer – SN, Quantity of item provided, Description of item and Serial/identification no.

(2) The working tools and equipment shall remain the property of the employer and shall be returned to the employer on request or on termination of the Working From Home Agreement.

(3) The homeworker shall use the working tools and equipment provided by the employer exclusively for official use.

(4) Where the homeworker is provided with any information technology (IT) equipment, he shall not install or download any software without the written approval of his employer.

(5) The homeworker shall take all reasonable precautions to maintain in good conditions all tools and equipment provided by his employer and any installation thereof.

(6) The employer shall, as agreed, provide the homeworker work-related consumable materials.

3. Communication

(1) The homeworker shall be available during such core working hours as may be agreed between the homeworker and his employer, for work-related communication, including receiving instructions, collecting and returning assignments and for reporting.

(2) Any change to the agreed schedule of work shall be discussed and approved in writing by the homeworker and his employer.

4. Performance

The employer and the homeworker shall establish and implement an appropriate procedure to monitor and assess work progress.

5. Confidentiality, data protection and intellectual property

(1) The homeworker shall not, except with the consent of his employer, divulge or use any confidential information obtained in the course of his work for any purpose other than work.

(2) The homeworker shall abide by his employer's policy and the Data Protection Act 2017 in respect of security of confidential information including, but not limited to, technical data, trade data, trade secrets, know-how and confidential information relating to the businesses, finances, accounts, dealings, transactions, methods of operation, assets or affairs of the employer, obtained during the course of his employment.

(3) The homeworker shall comply with laws regarding the protection of intellectual property rights, including – (a) the Patent, Industrial Designs and Trademark Act; (b) the Protection against Unfair Practices (Industrial Property Rights) Act; and (c) the Copyright Act.

(4) Any product invention or discovery made in the course of the employment of the homeworker shall be deemed to be the property of the employer.

6. Safety and health

The homeworker and his employer shall comply with the Occupational Safety and Health Act.

7. Acceptance

We have read and understood the terms and conditions specified in this contract and we accept these terms and conditions.

SECOND SCHEDULE

[Regulation 7]

TERMS AND CONDITIONS OF EMPLOYMENT

1. Normal working hours

(1) Subject to subparagraph (2), no employer shall, except with the written consent of a homeworker, require the worker to work for more than 45 hours in a week in respect of work which is to be performed from Monday to Saturday.

(2) The hours of work of a homeworker – (a) shall not be less favourable than the hours of work prescribed in any Regulations or enactment or specified in an agreement, as the case may be, applicable to the trade or business in which the homeworker is in employment; or (b) shall, where the homeworker is required to work for lesser number of hours, be as agreed between the employer and the homeworker.

(3) Where a homeworker is required to work on flexitime – (a) the work allocated to him shall be performed and completed within a time frame to be agreed with his employer; (b) the homeworker shall be available during the core hours of work to be agreed with his employer for work-related communication.

(4) The hours of work of a homeworker shall include time spent – (a) to collect work and materials; (b) to deliver completed work; (c) waiting at home for working tools and equipment to be repaired or maintained; (d) waiting at home for work to be delivered or otherwise assigned; (e) waiting for instructions to be given over the phone or otherwise; (f) in attending meetings with the employer or his clients for business-related purpose.

(5) A homeworker shall, after completion of his normal day's work, be entitled to a rest period of not less than 11 consecutive hours before resuming work.

(6) A homeworker shall, on every working day, be entitled to an in-work rest break of one hour without pay, to be taken at his discretion where he performs not less than 4 consecutive hours of work.

2. Payment of remuneration

(1) An employer shall pay a homeworker – (a) wages at a rate which shall not be less than the rate specified in any enactment or agreement, as the case may be, applicable to the trade or business in which he is employed; (b) wages which shall not be less than that earned by a comparable worker who performs the same hours of work and the same or similar duties on the premises of his employer.

(2) Where an employer requires a homeworker to work on piece rate or task basis – (a) the task allocated shall be mutually agreed between the homeworker and the employer; (b) the homeworker shall be deemed to have performed a normal day's work if he completes the number of pieces or the task allotted to him before the end of his stipulated normal day's work.

3. Disturbance allowance for work performed during unsocial hours

(1) (a) Where a homeworker performs, with his consent, work during unsocial hours, he shall, in addition to any payment due under any enactment, be paid a disturbance allowance equivalent to one time his hourly basic wage for every hour of work performed during the unsocial hours. (b) In this paragraph – "unsocial hours" – (a) means hours of work performed – (i) between 1 p.m. on a Saturday and 6 a.m. the ensuing Monday; and (ii) between 10 p.m. on a weekday and 6 a.m. the ensuing day; but (b) does not include the working hours of a worker in the ICT-BPO sector whose working hours correspond to the working hours in the market country served.

4. Payment of work-related expenses

(1) Subject to subparagraph (2), an employer shall refund to a homeworker – (a) any costs incurred for the use of electricity, water, telecommunication or any other facility in connection with work performed at home; (b) expenses incurred for the maintenance of tools and equipment provided to the homeworker for the performance of his work; (c) the equivalent of the return bus fare for travelling – (i) to and from the employer's business premises; (ii) to meet customers or any other persons in relation to his work; or (iii) for such other purpose, in relation to his work, as may be agreed with his employer; (d) such other expenses incurred as may be agreed between the homeworker and his employer; and (e) any other costs or expenses incurred in relation to his work.

(2) The employer and the worker shall agree on the amount to be refunded to the worker in respect of work-related expenses specified in subparagraph (1) and the refund shall be made on a monthly basis.

5. Access to place of work

Where a worker works from home, his employer may, with the authorisation of the homeworker and subject to prior notice, have access to the place where work is performed, at a reasonable time agreed between the homeworker and his employer to – (a) install, repair and maintain or retrieve any working tools and equipment provided by the employer; (b) deliver working materials or collect finished products; (c) carry out any risk assessment with respect to safety and health, where appropriate; or (d) undertake such periodic safety and health inspections as may be required.

6. Injury at work

(1) Where a homeworker sustains any work-related injury out of and in the course of employment, he shall, as soon as reasonable and practicable, notify his employer of the injury. (2) Subject to any other enactment, work-related injury sustained pursuant to subparagraph (1) shall be deemed to be injury at work.

THE NEDLAC LABOUR LAW SERIES

The **NEDLAC Labour Law Series** consists of research outputs aimed at supporting NEDLAC and its social partners to develop policy and where appropriate legislative amendments in ongoing labour law reform processes. The series addresses identified areas of labour law that respond to the changing nature of work, the future of work, and the labour market impacts of a just transition to a low-carbon economy. It also focuses on improving social protection for non-standard workers, addressing bottlenecks in existing labour market systems, and enabling economic growth and sustainability for small and emerging businesses.

A collaborative evidence-based approach was used in the development of the outputs, incorporating stakeholder engagement, comparative perspectives, and international labour standards. The outputs are designed to support social partners in shaping responsive labour law and policy and to facilitate capacity building for government, labour, and business constituencies. The series considers the following key concerns

- *Workers who are not employees*
- *Remote work*
- *Enabling a just transition*
- *Efficiency of labour market institutions responsible for adjudication and enforcement of awards*

The outputs in the Labour Law Series were developed through NEDLAC processes including scoping workshops, the preparation of think pieces, stakeholder engagements, and capacity-building initiatives. The outputs are tailored to address South Africa's specific labour market challenges and opportunities.

The **NEDLAC Labour Law Series** consists of the following outputs –

No. 1 | *Efficiency of labour market institutions: Towards effective dispute resolution and labour justice* (2024), by Paul Benjamin and Debbie Collier

No. 2 | *Workers who are (not) employees: Promoting decent work and access to labour standards and social protection* (2024), by Debbie Collier, Darcy du Toit, Mario Jacobs and Abigail Osiki

No. 3 | *Remote and hybrid work(ers): Considerations for regulating remote working arrangements and a Code of Good Practice for Remote Work* (2024), by Debbie Collier and Abigail Osiki

No. 4 | *Optimising labour law for a just transition* (2024), by Debbie Collier, Shane Godfrey, Vincent Oniga and Abigail Osiki

No. 5 | *"Climate-proofing" labour law: Adapting to increased heat and extreme weather events* (2024), by Shane Godfrey and Debbie Collier

The series is designed to encourage social dialogue and critical discourse on the development of labour law and to build the capacity of social partners and enable their engagement in shaping a just and inclusive labour market. The outputs and recommendations are intended as a foundation for future direction, and feedback and comments are welcomed to inform ongoing developments. Correspondence may be emailed to centrow@uwc.ac.za, or to the authors contract details included in each publication.

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