

Protection of the occupational health and safety of teleworkers

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journals.sagepub.com/home/ell**Merle Erikson** 

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Abstract

As a rule, labour law protection, including protection of the employee occupational safety and health (OSH), extends to telework. While it is usually the employer's responsibility to ensure OSH, fulfilling this obligation can be complicated in the case of telework. The unconventional workplace, combined with the employees' constitutional rights, can restrict the employer's possibilities to guarantee the protection of the OSH. Thus, the question of whether the employer OSH obligations should be reduced and the employee responsibilities for their own OSH increased arises. This article examines what the OSH obligations of the employer and employee should be in the case of telework. The article is based on an analysis of European Union (EU), Finnish, and Estonian regulations. While the EU regulation on OSH does not allow for any differential treatment of teleworkers in terms of their OSH protection, in practice, the employer cannot fulfil these duties in the same way as it can in traditional work. Hence, it is reasonable to allow some exceptions. Finnish and Estonian regulations enable the employer to refrain from fulfilling certain OSH obligations, increasing employee responsibility for OSH. In both countries, the employer remains primarily responsible for the protection of OSH, and only the duties that cannot be fulfilled because of the special features of telework are limited. These exceptions must be interpreted restrictively to avoid unnecessarily increasing the employee obligations. In addition, supplementary employee OSH duties must be dependent on and accompanied by significant obligations on the employer's information and training concerning potential risks and their prevention. The revision of the current EU regulation on OSH also needs to be considered to guarantee that OSH duties are fulfilled as much as possible and to avoid the infringement of the regulation because of objective, practical constraints. Since the employee is more autonomous than usual when organising telework, compliance with OSH rules also requires a relationship of trust rather than control between the parties to the employment contract. If the employer suspects that the employee cannot ensure OSH, the employee must be employed on the employer's premises. However, when placing greater responsibility on the employee, care must also be taken to ensure employers do not force employees to telework.

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Keywords

Telework, labour law, occupational health and safety, obligations of the employer, obligations of the employee, the sanctity of the home, risk assessment, instructing of the employee

I. Introduction

Since the COVID-19 pandemic in the early 2020s, the use of telework has become increasingly widespread. If, during the crisis, telework was forced because it enabled the reduction of human contact, now telework is widely used due to its several positive features, such as saving resources, including reducing travel and office expenses,¹ giving the employee more flexibility in organising his or her work and reconciling work and private life, etc. At the same time, telework has also raised many (legal) issues, which may even cause teleworking practices to be abandoned² because, unlike working on the employer's premises, it is impossible for the employer to guarantee similar employment protection to a person working at home or in another place. Among them, the question arises as to how the employer can ensure healthy and safe working conditions for the teleworker.

In Europe, the most often used definition of telework can be found in the Framework Agreement on Telework (Telework Agreement), concluded by the social partners at the EU level in 2002.³ According to Article 2 of the Telework Agreement, 'telework is a form of organising and/or performing work using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis'. Since this definition describes modern telework well, this article considers telework to be work referred to in the Telework Agreement.

Telework enables one to work from home or other places instead of the employer's premises. Places of telework can be classified differently.⁴ From the view of compliance with occupational safety and health (OSH) requirements, Ciccarelli has divided telework locations based on accessibility and working conditions predictability into four: the employer's premises (places of telework controlled by the employer)⁵ one fixed workplace, such as a home;⁶ spaces accessible by the public;⁷

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1. A. Hook, V. Court, B. K. Sovacool, S. Sorrell, A systematic review of the energy and climate impacts of teleworking, *Environment Research Letters*, 2020, Vol. 15, No. 9, p. 5.
 2. See F. Hendrickx, Negotiating telework: thinking outside the comfort zone. Editorial. *Diritti Lavori Mercati International*, 2023, No. 2, p. 4.
 3. Framework Agreement on Telework, 16 July 2002, <https://www.etuc.org/en/framework-agreement-telework>. It is important to note that in 2022, due to the developments in digitalisation and the sanitary crisis on telework, the European social partners agreed to renew the Telework Agreement. European Social Dialogue. Work programme 2022–2024, 28 June 2022, https://www.business-europe.eu/sites/buseur/files/media/reports_and_studies/2022-06-28_european_social_dialogue_programme_22-24_0.pdf. By March 2024, the European social partners have not yet agreed on changes to telework regulation.
 4. See, for example, D. Walentek, Scope and forms of controlling teleworkers. *Business Informatics*, 2021, No. 2 (60), pp. 58-59.
 5. The work environment is both accessible and predictable.
 6. The work environment is not accessible but predictable.
 7. The work environment is accessible but not predictable, for example, cafes, hotel halls, public transport means, stations, and airports.

and other private premises.⁸ The latter three places of telework pose the biggest challenge in ensuring employee OSH because the employer cannot fulfil his obligations in the usual way due to the inaccessibility to the workplace and the unpredictability of working conditions. As Ciccarelli notices, the last option is somewhat theoretical. For this reason, in this article, only telework in one fixed workplace (the worker's home) and public spaces (cafés, etc.) is discussed.

In an employment relationship, the employer is responsible for protecting the OSH of the employee. Although the employee also needs to contribute to implementing OSH rules, their obligations are subsidiary and largely dependent on the employer's fulfilment of the OSH obligations. At the EU level, there is no specific regulation of the OSH in the case of telework. According to Telework Agreement Article 8, the employer is responsible for the protection of the OSH of the teleworker following Directive 89/391 and relevant daughter directives, national legislation, and collective agreements. Therefore, the OSH of the employee is regulated by the Framework Directive on Safety and Health at Work (Framework Directive)⁹, the Display Screens Directive¹⁰, and the Workplace Requirements Directive.¹¹ However, as noted above, the unconventionality and inaccessibility of the workplace can hinder the fulfilment of OSH obligations by the employer in practice. When telework is performed at one's home, the constitutional rights of the employee and possibly others - mainly the right to respect for private and family life - restrict the possibility of the employer providing OSH protection. Although employers can access public teleworking spaces, the scope for them influencing the safety conditions of these places is also limited.

At the same time, teleworkers need protection from several OSH risks. Different studies suggest that the physical separation of the employee from the employer's premises and the intensive use of information and communication technologies (ICT) exposes teleworkers to psychosocial risks connected mainly to long hours and extended availability, as well as physical risks, namely, musculo-skeletal disorders and eye strain.¹² However, the current article deals with OSH issues narrowly and does not examine the problems arising from the incorrect use of working and rest times.

To resolve the conflict between the employer's restricted possibilities for action and the teleworker's need for protection, different EU Member States (MS) have separately regulated on the protection of OSH in the case of telework. For example, OSH protection in the case of homework has been handled in Finnish law, and recently, Estonia has adopted a specific regulation concerning OSH protection in the case of telework. However, the content of these particular provisions is rather vague, and their implementation in practice is unclear. It is also unclear how these national

8. The work environment is neither accessible nor predictable, for example, hotel rooms or other people's homes. F. C. Ciccarelli. Remote work, remote workplaces and implications for OSH. OSHwiki, 3 June 2022, European Agency for Safety and Health at Work. <https://oshwiki.osha.europa.eu/en/themes/remote-work-remote-workplaces-and-implications-osh> (accessed 10 March 2024).

9. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, pp. 1–8.

10. Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ L 156, 21.6.1990, pp. 14–18.

11. Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) OJ L 393, 30.12.1989, pp. 1–12.

12. See Eurofound, *Telework in the EU: Regulatory frameworks and recent updates*, Publications Office of the European Union, Luxembourg, 2022, p. 31.

systems fit into the EU's vision of OSH protection and, more broadly, the idea that a balance exists between the rights and obligations of the employer and employee.¹³

This article aims to answer the question of what the OSH obligations of the employer and employee should be in the case of telework. To achieve this goal, Estonian and Finnish labour legislation are analysed comparatively in the broader context of EU employment law. Estonian and Finnish law are used as examples and for comparison because they use somewhat different approaches to regulate OSH obligations in the case of telework. Also, both countries' regulations are more modern, considering developments in labour relations¹⁴ than the Framework Directive's provisions. The article assesses the suitability of current OSH rules in the case of telework based on comparing the laws of Finland and Estonia.

The article proceeds as follows. First, the OSH obligations of the employer in the case of telework are discussed. Employer's general obligations, the restrictions on the fulfilment of these obligations caused by the protection of the sanctity of the home and other factors and the scope for the employer to take care of the OSH of the employee even if there is no access to the workplace, are analysed. Second, the OSH obligations of the employee, including their general obligations and the obligation to follow the employer's instructions in the case of telework, are discussed.

2. Obligations of the employer

2.1. General principles

Under Article 5(1) of the Framework Directive, the employer must ensure workers' safety and health in every aspect of the work. Based on this principle, the following provisions of the Directive list several employer obligations (to conduct a risk assessment, ensure preventive and protective services, train workers, etc.) that must be fulfilled to achieve this aim. The personal scope of the Framework Directive is broad, guaranteeing that any person employed by an employer is covered by its protection. As such, all the obligations set out in the Directive also apply to telework.

Furthermore, the Telework Agreement explicitly emphasises that the employer is responsible for the protection of the OSH of the teleworker under the Framework Directive, relevant daughter Directives, national legislation, and collective agreements. The interpretation guide of the Telework Agreement explains that 'there is no difference between telework and other forms of work organisation when it comes to the employer's responsibility for occupational health and safety. The employer has the responsibility for the protection of the teleworker ...'.¹⁵

Although the Framework Directive and the Telework Agreement impose duties and responsibility on the employer for ensuring the safety of the working environment in the case of telework, it may not be possible to fulfil these obligations in practice.¹⁶ While the Framework Directive does

13. In traditional employment relationships, the employee is significantly subordinate to the employer, and the employer determines when, where and how to perform work. As a counter to this significantly subordinated position, the employee is guaranteed a range of labour and social rights, including the right to OSH protection.

14. The special regulation on OSH concerning telework entered into force in Estonia at the end of 2022. In Finland, in the case of telework, OSH has been regulated since 1 January 2023.

15. ETUC interpretation guide: Voluntary Agreement on Telework, 2003, https://resourcecentre.etuc.org/sites/default/files/2019-09/Telework_ETUC%20interpretation%20guide%20-%20EN.pdf, p. 20 (accessed 10 March 2024).

16. *Töölepingu seaduse ja tervishoiu ja tööohutuse seaduse muutmise seaduse eelnõu väljatöötamise kavatsus*/ Legislative Intent to Amend the Employment Contracts Act and the Occupational Health and Safety Act, 18 June 2018, pp. 8-9, <http://eelnoud.valitsus.ee/> (in Estonian; accessed 10 March 2024).

not deal with the issues specific to telework, in the interpretation guide of the Telework Agreement, it has been admitted that the protection of the OSH can be problematic if telework is performed at home, mainly because of the constitutional right to privacy. An incomplete solution to this problem has been provided in the last paragraph of Article 8 of the Telework Agreement, which states that for the fulfilment of OSH duties, the employer, workers' representatives and/or relevant authorities need to have access to the place of telework within the limits of national legislation and collective agreements.¹⁷

Even though it appears that the Member States have no right to introduce legislation that would bring about different treatment of teleworkers compared to other workers as regards their OSH protection, for practical reasons, such legislation is on the statute books in several countries, including Finland and Estonia. In Finland, the application of the Occupational Safety and Health Act (OSHA)¹⁸ in the case of work performed outside the employer's premises is separately regulated in Section 5, which provides that the Act also applies to work that employees perform 'in their home or some other place of their choice, in the employer's home or ... in some other person's home or under related conditions.' The work regulated in Section 5 does not precisely respond to the definition of telework included in the Telework Agreement. Section 5 of OSHA regulates work performed using ICT and other work, emphasising work performed in someone's home.¹⁹

In the case of the work arrangements described above, some of the employer obligations in respect of the protection of the OSH are limited. According to Section 5 of the Act, 'regarding compliance with the obligations laid down in sections 9, 10 and 12 and chapters 3 and 5 of the Act, employers' restricted ability to influence the work and working conditions are considered. Even in such cases, employers shall comply with the provisions of this Act governing the use of machinery, work equipment, personal protective equipment and other devices as well as the use of substances hazardous or harmful to health at work.'

Section 9 concerns the employer policies needed to promote safety and health and to maintain the employees' ability to work. Section 10 deals with risk assessment at work and obligates the employer to systematically analyse the risk factors and hazards and assess their impact on the OSH of employees. According to Section 12, when designing the working environment or production methods, the use of machinery, work equipment and other devices or the use of hazardous substances, the employer needs to consider the OSH of employees. Chapter 3 regulates the cooperation between employers and employees as regards the OSH; Chapter 5 includes more specific provisions concerning the protection of the OSH.

According to Section 12(1) of the Estonian Occupational Health and Safety Act (TTOS),²⁰ 'if duties are performed by way of teleworking, the employer must guarantee conformity with occupational health and safety requirements insofar as possible considering the particular nature of teleworking and based on the provisions of Section 13⁵ of this Act.'

Section 13⁵ of the TTOS lists and specifies the employer OSH obligations in the case of telework (for example, conducting a risk assessment and instructing employees).²¹ The Explanatory

17. See more specifically subsection 2.2.

18. *Työturvallisuuslaki*/Occupational Health and Safety Act 23.8.2002/738, <https://www.finlex.fi/fi/laki/ajantasa/2002/20020738> (in Finnish; accessed 10 March 2024).

19. In this article, however, work performed using ICT is discussed.

20. *Töötervishoiu ja tööohutuse seadus*/Occupational Health and Safety Act, 16 June 1999, <https://www.riigiteataja.ee/en/eli/506072023004/consolide> (accessed 10 March 2024).

21. The content of Section 13⁵ of the TTOS is discussed in more detail in subsection 2.3.1.

Memorandum of the TTOS explains that the employer needs to fulfil all the obligations set out in the TTOS as far as possible, considering the particular nature of the telework. For example, in the case of telework, the employer cannot guarantee the presence of a first aider or suitable non-workrooms and their condition. However, the obligations listed in Section 13⁵ must always be fulfilled.²²

Thus, both Finnish OSHA and Estonian TTOS limit employer obligations in the case of telework. The difference between the two legal systems is that according to Finnish law, the employer can refrain from the (entire) fulfilment of the specific provisions listed in Section 5 of Finnish OSHA if it becomes impossible because of the nature of telework. In Estonia, the employer must ensure compliance with all OSH regulations to the extent that this is possible, considering the specifics of telework. However, obligations listed in TTOS Section 13⁵ need to be fulfilled invariably. Therefore, if Finnish law enables the employer to derogate from the fulfilment of specific provisions, under Estonian law, the employer can derogate from all provisions except the obligations set out in TTOS Section 13⁵.

Since the Framework Directive does not foresee any differences in the case of telework, i.e., all the employer obligations should apply to the full extent, the question may arise as to whether Finnish and Estonian laws conform with the Directive. The Framework Directive was adopted in 1989 when the main form of work was a traditional employment relationship.²³ Telework developed afterwards, hand in hand with digital development.²⁴ It is understandable that during the adoption of the Directive, the challenges connected to OSH protection in the case of telework were not foreseeable.

As argued earlier and will be shown later,²⁵ fulfilling all OSH obligations in the case of telework is impossible for reasons relating to the protection of constitutional rights or practical obstacles (for example, the employer cannot make adjustments to public places where the teleworker may work). Hence, the requirement to fulfil all the OSH obligations can make telework a working arrangement that cannot be used in practice. According to Article 3 of the Telework Agreement, telework is voluntary for the worker and the employer concerned, and the employer can refuse to agree to telework.

However, instead of abandoning telework, the role of employer and employee in such a relationship could be rethought. Since the teleworker is more independent in organising his or her work, such work is characterised by trust between the employee and the employer rather than a relationship of direct and precise control, 'thus relying more on personal responsibility than hierarchy'.²⁶ Therefore, choosing to limit the employer obligations and inevitably increasing the responsibilities of the teleworker for his or her own OSH is in keeping with the character of this arrangement. In return for more freedom in the working process, the employee takes more responsibility, and the employer is exempted from obligations that cannot be objectively fulfilled.

22. *Tööohutuse ja töötervishoiu seaduse ja töölepingu seaduse muutmise seaduse eelnõu seletuskiri*/Explanatory Memorandum to the Draft Act Amending the Occupational Health and Safety Act and the Employment Contracts Act 615 SE, 9 May 2022, <https://www.riigikogu.ee>, p. 8 (in Estonian; accessed 10 March 2024).

23. In the case of a traditional employment relationship, the employee works on the employer's premises full-time, based on an open-ended employment contract.

24. Andriessen, J. H. E., Vartiainen, M. (eds.), *Mobile Virtual Work. A New Paradigm?* Springer, Berlin 2006, p. 48.

25. See the following subsections.

26. *Supra* n 2, p. 6.

Earlier studies have proven that specific regulations concerning telework adopted in some Member State can positively impact the OSH protection of the employee.²⁷ Regulating OSH separately in the case of telework does not necessarily mean that the OSH of the teleworker will be weaker. Still, it can motivate employers to follow OSH rules that can be fulfilled objectively. However, it is also observed that most of the Member State regulations are too general. It is suggested that revising OSH Directives pave the way for improving OSH protection in the case of telework.²⁸

For all the reasons presented above, we find that the adoption of the specific provisions by the Member States is well-grounded. The OSH regulation also needs to be renewed to facilitate the use of more flexible forms of work. Instead of banning the adoption of more modern and practical national rules concerning the OSH of teleworkers, the renewal of the Framework Directive and Telework Agreement should be considered.

2.2. Sanctity of the home as an obstacle to the fulfilment of obligations

Although forbidding specific regulation of OSH in the case of telework is not reasonable, this regulation should result in an unnecessary limitation of employer obligations and increase in employee duties. Therefore, limitations to the OSH obligations of the employer should be grounded in objective reasoning. Even though telework can be done in several places agreed upon by the employee and the employer or in a location chosen by the employee (for example, in a coffee shop, library, remote work centre, etc.), in many cases, the work is performed in the employee's home. In this case, the employee's constitutional rights to privacy and sanctity of home often justify limitations to the employer's OSH obligations.

According to Article 8 of the Telework Agreement, for the fulfilment of the OSH obligations set out in the Framework Directive and relevant daughter Directives, 'the employer, workers' representatives and/or relevant authorities have access to the telework place, within the limits of national legislation and collective agreements. If the teleworker is working at home, such access is subject to prior notification and his/her agreement.'

As follows from this Article, the employer must have access to the place where the work is performed. In the interpretation guide of the Telework Agreement, it has been explained that since the employer is responsible for the health and safety of teleworkers, and OSH inspectors are responsible for ensuring that existing provisions are respected, they need to be able to inspect the workplace.²⁹ Although the Telework Agreement emphasises the employer's need to access the workplace, it does not resolve the issue of OSH protection when the employer cannot enter the workplace. The most problematic situation is when the place of work is the employee's home.

During the negotiations of the Telework Agreement, the conflict between the employee's constitutional rights and the employer's need for access was discussed, and the requirement for employee consent was proposed as a solution to this problem. The result of this condition is that without the employee's consent, the employer cannot access the workplace. However, nothing has been said about what happens to the employer's OSH obligations in this situation. Do they remain in force in full, or should we conclude that the employee's right to privacy and the

27. European Agency for Safety and Health at Work, *Hybrid Work: New Opportunities and Challenges for Occupational Safety and Health*, 2023, p. 17.

28. *Ibid.*

29. *Supra* n 15, pp. 20-21.

freedom to damage himself with harmful working conditions are valued as greater goods than ensuring the employee's safety through mandatory intervention by the employer?³⁰

The Government Proposal for the Finnish OSHA explains that Section 5 restricts the employer obligations only if the work is performed in the home of the employee, employer or another person.³¹ When work is performed at home or in comparable situations, the privacy rights provided in Section 10 of the Finnish Constitution limit the legal rights of the employer to fulfil all the obligations foreseen in the OSHA.³² Not only are the privacy rights of the employee considered, but also those of other people.

Section 5 does not exempt but only restricts certain employer OSH obligations. However, no specific instructions regarding the extent of the limitation are given. As the restriction is grounded in the possible intrusion into constitutional rights, the possibility of confining the constitutional right to privacy must be analysed. According to Section 10 of the Finnish Constitution,³³ 'everyone's private life, honour and the sanctity of the home are guaranteed. Measures encroaching on the sanctity of the home, and which are necessary for the purpose of guaranteeing basic rights and liberties or for the investigation of crime, may be laid down by an Act.'

The right to privacy includes the protection of the sanctity of the home. This is not an absolute right, but can be limited if the following conditions are met: restrictions must be based on a parliamentary law; restrictions must be precisely defined and exact; grounds for restriction must be acceptable from the point of view of the fundamental rights system, and required by a pressing social need; ordinary law cannot provide for a restriction that reaches the core of a fundamental right; restrictions must be necessary to achieve the goal and their scope should be proportionate to the legal good protected by fundamental rights; adequate legal protection must be ensured if the fundamental rights are restricted; and restrictions must not conflict with Finland's international human rights obligations.³⁴

This article does not discuss whether employer access to the home of an employee in the case of telework should be allowed from the constitutional rights point of view. It suffices to note that in Finland, no Act provides for the right of an employer to enter an employee's home in order to fulfil his OSH obligations. Therefore, the sanctity of the home is protected fully in the case of telework, and similar to the requirements in the Telework Agreement, an employer can enter a home only with the homeowner's consent. However, unlike the Telework Agreement, Finnish OSHA exempts employers from fulfilling certain OSH obligations without consent.³⁵

The Estonian Constitution³⁶ provides for a similar principle of the sanctity of the home. Under Section 33 of the Estonian Constitution, 'the home is inviolable. No one's dwelling, premises or workplace shall be forcibly entered or searched, except in the cases and pursuant to a procedure

30. K. Künnapas, *Kaugtöö aktuaalseid probleeme/Topical Problems of Teleworking*. Juridica, 2014, No 4, p. 286.

31. *Hallituksen esitys Eduskunnalle työturvallisuuslaiksi ja eräiksi siihen liittyviksi laeiksi/The Government Proposal for the Parliament for the Occupational Health and Safety Act and Other Related Acts*, HE 59/2002 vp, available <https://www.finlex.fi/fi/esitykset/he/2002/20020059.pdf>, p. 26 (in Finnish; accessed 10 March 2024).

32. *Ibid.*

33. The Constitution of Finland, 11 June 1999 (731/1999), <https://www.finlex.fi/fi/laki/ajantasa/1999/19990731> (accessed 10 March 2024).

34. P. Hallberg, H. Karapuu, T. Ojanen, M. Scheinin, K. Tuori, V.-P. Viljanen, *Perusoikeudet/Constitutional Rights*, Helsinki: Sanoma Pro, 2005.

35. The scope of these obligations is discussed below.

36. *Eesti Vabariigi põhiseadus/The Constitution of the Republic of Estonia*, 28 June 1992, <https://www.riigiteataja.ee/en/eli/530122020003/consolide> (accessed 10 March 2024).

provided by a law, to protect public order, health or the rights and freedoms of others, to prevent a criminal offence, to apprehend a criminal offender, or to ascertain the truth in criminal proceedings.’

The right to the sanctity of the home includes not only the home as a person’s main living space, but also as a more expansive physical space that everyone can consider their personal area, which the public authority or third parties generally cannot enter without permission.³⁷ Therefore, as a workplace, a home can also include a summer house, summer home or other place suitable for work. No law in Estonia permits an employer to forcibly enter a home (for example, for health protection). As in Finland, in the absence of legislation, the only alternative for limiting the right to the sanctity of the home is an agreement between the parties.³⁸

Thus, Finnish and Estonian regulations are almost identical, considering the sanctity of the home is a priority – a person’s home can only be accessed if they agree to it. If an employer receives consent to enter a home, there is no significant difference between whether the place of work is on the employer’s premises or the employee’s place of residence when it comes to complying with OSH rules. The employer can fulfil most of his obligations that require familiarisation with the workplace. For example, the employer can conduct a risk assessment (OSHA Section 10, TTOS Section 13⁴) and consider the risk factors of the workplace (i.e., the home) in its policy of action (OSHA Section 9, TTOS Section 13⁴).

Some problems may occur concerning the design of the workplace. Section 12 and Chapter 5 of the Finnish OSHA state that the employer is responsible for designing the working environment and working equipment. Nevertheless, even if the employer has access to the home, the property rights of the employee can restrict the fulfilment of these obligations. The employee can agree that the employer designs the working environment, with a desk, chair, ICT facilities and lighting. However, it is unlikely that the employee will allow considerable changes to be made at home for OSH purposes. In this case, the employer can probably argue that its ability to influence the working conditions is restricted, and based on Section 5 of the OSHA, its obligations as regards the design of the workplace are limited.

The Estonian regulation is more flexible and specific. According to TTOS Section 13⁵(2), the teleworking workplace is governed by the agreement of the employee and the employer. In the Explanatory Memorandum of the TTOS, it is noted that if the employee has a workplace suitable for telework or is ready to provide one, the employer does not have to design a separate place for telework. However, if neither party is willing to design a suitable workplace for telework, no agreement on telework may be concluded.³⁹ Hence, the Estonian regulation places more emphasis on the importance of the agreement of the parties, differing from Finnish law, where workplace design is presumed to be the employer’s obligation.

It can be concluded that Finland and Estonia’s legal approaches in respect of the influence of the sanctity of the home on the employer’s OSH obligations are similar. The starting point is that the OSH requirements also apply in the case of telework, and the employer must first try to follow all of them by asking for the employee’s permission to enter their home. It is only after that permission has not been granted, and the fulfilment of certain OSH obligations becomes impossible in practice,

37. *Eesti Vabariigi põhiseadus: kommenteeritud väljaanne*/The Constitution of the Republic of Estonia: Commented Edition. Ü. Madise (editor-in-chief) and others. 5th revised and supplemented edition. Iuridicum 2020, § 33 comm. 1.

38. *Supra* n 30, p. 286.

39. *Supra* n 22, p. 8.

that the employer's obligations are restricted. Unlike the Telemwork Agreement, these national regulations consider the constitutional rights of the employee and other persons and provide solutions on how the employer can fulfil his OSH in these conditions.

2.3. Other restrictions in the fulfilment of obligations

2.3.1. General limitations. The employer's fulfilment of the OSH obligations is also complicated if there is no access to the workplace. In addition to the constitutional rights described above, other practical obstacles can make it difficult for the employer to fulfil their duties. Even if telework is not done from home, the parties can agree that the employee works in a space that is inaccessible to the employer or chooses the workplace. The employee can also work in a public space such as a library or train, which is theoretically accessible to the employer but in which the working conditions are unpredictable, and the employer cannot change them.

In Finland, Section 5 of the OSHA restricts an employer's responsibility from obligations laid down in Sections 9, 10 and 12 and Chapters 3 and 5 of the Act if his ability to influence the work and working conditions is limited. While the Government Proposal for the Act refers to the constitutional rights described above as one of these limitations, this is the only limitation according to literature. Still, the wording of the provision appears to be broader. Section 5 refers not only to work done in someone's home, but also situations in which the employee chooses the workplace. Additionally, the scope for the employer to influence the working conditions can be restricted even if the work is not performed from home.

Hence, if consent is not granted for the employer to enter the home, or the employer cannot otherwise influence the employment conditions, the employer needs to apply the OSH rules on employer policies for action (Section 9), risk assessment (Section 10), workplace and equipment design (Section 12), cooperation between employers and employees (Chapter 3) and more specific provisions on OSH protection, including for example provisions concerning ergonomics, screen time, solo working and the work environment etc, (Chapter 5) only as far as is reasonably possible. However, even then, the provisions governing the use of work equipment must be complied with.⁴⁰

The approach of the Estonian legislator is somewhat different. While enabling the employer to refrain from fulfilling almost all OSH obligations set out in the TTOS if it is grounded with the specific nature of telework, the TTOS lists duties the completion of which cannot be derogated from. Section 13⁵(1) of the TTOS stipulates that in the case of telework, the employer is required to:

1. set out in the risk assessment of the working environment possible risks arising from the nature of the work and, considering the particular nature of teleworking, apply measures for preventing or reducing health risks posed to employees;
2. instruct an employee before permitting teleworking and on a regular basis as needed (based on the corresponding general rules), and considering the particular nature of teleworking;
3. ensure the provision of proper work equipment for the performance of duties;
4. organise medical examinations of employees;
5. investigate occupational accidents and occupational diseases;
6. pay sickness benefits.

40. See the subsection 2.3.2. for more details.

TTOS Section 13⁵(3) specifies that the employer must perform OSH obligations not set above insofar as possible, considering the particular nature of teleworking. Thus, the specific nature of telework does not provide grounds for refraining from fulfilling the six OSH obligations listed above, and the employer must always perform them. In deciding whether and how far the employer needs to adhere to the rest of the obligations stipulated in the TTOS, it must be considered whether fulfilling these obligations is reasonably possible. If the inaccessibility of the workplace makes the fulfilment of non-listed OSH obligations impossible or partly impossible, the employer is exempted from these obligations wholly or partially.

Section 13⁵(1) of the TTOS regulates two employer obligations particularly precisely, namely, to conduct a risk assessment and instruct the employee. Unlike the usual risk assessment, the employer must determine the *possible* risks. Identifying such risks does not require the employer to visit the employee's workplace. According to the Explanatory Memorandum of the TTOS, when the employer cannot check the workplace or assess the risks on the spot, the possible risks of the work environment can be determined, for example, by interviewing the employee. The interview aims to understand the environment(s) in which the employee works remotely and the dangers that may occur in these workplace(s). The employer can also prepare a risk assessment questionnaire, which is then used when allowing the employee to work remotely. If necessary, the employer can also assess the risks of the work environment with the help of photos, video recordings or other documents.⁴¹

The risk assessment in a generalised form can also reflect the potential risks associated with telework. This means that the employer does not have to assess the possible risks relating to telework for each employee or each place where telework is performed separately, but can map and reflect the risks of telework in a general way in the risk assessment (for example, risks arising from the incorrect working position, poor lighting, psychosocial risk factors, etc.). Therefore, in a situation where the employer cannot assess the risks at the place of work, it must determine the potential risks associated with telework and, considering the special features of telework, adopt appropriate risk mitigation measures.⁴²

Thus, unlike the Finnish regulation, Estonian law does not reduce an employer's responsibilities for conducting risk assessment, even if the possibilities for taking action are restricted. The Estonian regulation can be considered more modern and protective. Instead of enabling the employer to avoid carrying out a risk assessment in the case of telework, the employer is instructed on how to fulfil this obligation in new circumstances.

Another important obligation that the TTOS regulates more precisely is that of instructing employees. Based on the general regulation (Section 13³), in the case of telework, it is important to explain to employees, for example, safety requirements in respect of the work to be carried out and the work equipment used, ergonomically correct working positions and techniques, electrical and fire safety requirements, etc.

Under the Explanatory Memorandum of the TTOS, particular attention must be paid to instructing the employee on measures to prevent the risks associated with telework. Following instruction, the employee should be able to notice the risks themselves and manage them. The employee must be instructed regularly, i.e., if necessary, the employer must repeat the instruction, for example, if there have been significant changes in the place of telework, etc. Regular guidance is essential for

41. *Supra* n 22, p. 7.

42. *Ibid.*

telework, especially given that the employer usually does not have the opportunity to control the employee's working environment. Therefore, the employee has a greater responsibility for ensuring employee safety.⁴³

In Finland, employee instruction in the case of telework is not separately regulated. The general regulation concerning the instruction and guidance of the employees applies. According to Section 14 of the OSHA, employers must give their employees the necessary information on the risk factors and hazards of the workplace.⁴⁴

In the case of telework, comprehensive employee instruction is crucial. If the employer does not have access to the workplace or it is not practical to check all the possible places of work of the employee, the employer can ensure the employee's OSH protection primarily by instructing the employee based on the assessment of potential risks. Both the Estonian and Finnish regulations foresee the instruction of the employee also in the case of telework. However, as in Estonia the instruction of teleworkers is separately regulated, and its importance is articulated in the Explanatory Memorandum of the TTOS, the significance of the instruction can also be better understood by the employer.

In comparing the regulations of Finland and Estonia regarding the employer's obligations, Estonia's approach is more flexible if there is no access to the workplace. It considers the interests of the parties to the employment contract. However, it is unclear which regulation guarantees better protection to the employee. On the one hand, Finnish law enables the employer to derogate only from concrete provisions if their fulfilment is complicated due to the special features of telework. At the same time, the Estonian regulations stipulate the requirements that the employer must meet in the case of telework. Other OSH obligations can be derogated from if their fulfilment is not objectively possible. Therefore, Estonian law appears to have more possibilities for derogation. On the other hand, some of the provisions that can be derogated from (such as risk assessment) according to Finnish law are very important for the protection of the OSH of the employee. The Estonian regulation also enhances employee safety by separately regulating some primary OSH obligations in the case of telework.

2.3.2. Guaranteeing the safety requirements of work equipment. Even if restrictions to the employer's ability to influence working conditions give the employer grounds to refrain from fulfilling certain OSH obligations, the duties relating to the safety of work equipment do not belong to this category. However, in the case of telework, the use of employee-owned equipment is more common than in the case of work performed on the employer's premises, which can create problems regarding safety.

According to Article 7(1) of the Telework Agreement, '... the employer is responsible for providing, installing and maintaining the equipment necessary for regular telework unless the teleworker uses his/her own equipment. If telework is performed on a regular basis, the employer compensates or covers the costs directly caused by the work, particularly those relating to communication.'

Thus, the Telework Agreement generally puts the responsibility for equipment on the employer. If the employee's equipment is used, the employer compensates them the costs. While neither the

43. *Ibid.*

44. In addition, employers are required to ensure that the employees receive a sufficient orientation in respect of the work, working conditions in the workplace, working methods and production methods, work equipment used at work and the correct method of using it, as well as to ensure safe working practices; the employees receive instruction and guidance to eliminate the hazards and risks associated with the work and to avoid any risk or hazard from work endangering safety and health; etc.

Agreement nor its interpretation guide deals more specifically with the OSH aspects of the work equipment, the latter provides some points on standards in relation to the equipment. According to the interpretation guide, the use of employee-owned equipment must be an exception. However, it must be up to the company's standards if it is used.⁴⁵ As company (i.e., employers') work equipment needs to follow, among others, OSH rules under the telework agreement, the employer can only allow employees to use equipment that meets OSH requirements.

In regulating the OSH, the Finnish legislation does not differentiate between work equipment provided by the employer and the equipment owned by the employee. Only equipment that complies with the applicable standards and is appropriate for the work and working conditions may be used as a rule. Equipment must be installed properly, with necessary safety devices and markings, and its use cannot cause a risk or hazard in the workplace (OSHA Section 41).

The employer has a general duty to take care of the OSH of employees (OSHA Section 8), and Section 5 regulating telework explicitly states that the employer must comply with the provisions concerning the use of work equipment. Thus, it can be understood that regardless of the ownership of work equipment, the employer must also ensure the fulfilment of the relevant requirements in the case of telework.

Section 13⁵(1) of the Estonian TTOS, which sets out the employer's obligations in the case of telework, also clearly states that the employer must ensure proper work equipment is provided to perform duties (p. 3). Since there are no special rules regarding telework in this provision, the general requirements in respect of work equipment (TTOS Section 5) apply.

Under Section 5(1) of the TTOS, work equipment must not endanger the health of the person operating it, that of others, or the working and living environment. Under the same provision, the employer must ensure that work equipment is suitable for the work to be carried out and meets the requirements of the work environment, the dimensions of the body and the physical and mental abilities of its operator (Section 5(2) and (3)). As in Finland, the Estonian employer is responsible for the condition and operation of work equipment, regardless of the ownership of the equipment.

If employer-owned equipment is used, there are no restrictions in the case of telework for the employer to take care of the safety and suitability of this equipment. If the employee uses their own equipment, they can refuse to have the work equipment inspected by the employer. However, in that case, based on the right to direct the work and the obligation to protect the OSH of the employee, the employer can prohibit the use of employee-owned equipment and demand that employer-owned equipment is used to protect the OSH.

Even though the employer's obligation to provide suitable equipment includes ensuring it is installed correctly, fulfilling this obligation can be problematic. If the employer physically installs the equipment, access to the employee's home or some other space is needed. Installation in public spaces is also problematic because the employer does not own the space and does not necessarily have permission to make any changes there. Nevertheless, in these cases, the employer can ensure the equipment is installed correctly by giving the employee the necessary instructions. If the employer cannot guarantee the proper use of safe equipment, it can refuse to conclude the telework agreement or terminate it.

To conclude, according to the Telework Agreement and the legislation of Finland and Estonia, it does not matter who owns the equipment in the case of telework. The employer is always

45. *Supra* n 15, p. 18.

responsible for its condition, such as when the work is performed on the employer's premises. Considering that telework is a voluntary arrangement, guaranteeing the OSH of the employee and providing work equipment have historically been the primary responsibilities of the employer, and this approach appears to be justified. Moreover, potential problems relating to the safety and installation of the equipment can be overcome by obligating the employee to use employee-owned equipment or giving proper instructions.

3. Obligations of the employee

3.1. General obligations

Although the Telework Agreement does not regulate employee OSH obligations, a reference to the Framework Directive extends these duties to the teleworker. Article 13 of the Directive establishes that each worker must take care of their own OSH and that of others as far as possible, based on the training and the instructions given by the employer. Based on this, the different employee obligations (to use work and personal protective equipment correctly, cooperate with the employer, etc.) are listed.

Thus, the Framework Directive makes the employee's responsibilities dependent on the training and instructions received, and does not envisage an absolute obligation on the part of the employee to look after their own OSH and that of others. Contrary to the employer's duty to ensure the safety and health of workers in *every aspect* relating to the work, the employee's obligations are limited to looking after OSH *as far as possible*. Hence, according to the Framework Directive, an employee's OSH duties complement the employer's responsibilities.

In Finland, there is no separate regulation concerning the OSH obligations of teleworkers. Similarly to the Framework Directive, general regulation applies. The most important is the employee's duty to look after OSH. The employees must follow the employer's instructions and observe the necessary order, care and caution to maintain safety and health. They also need to look after their own OSH, and that of other employees, according to their experience, occupational skills, and instructions provided by the employer (OSHA Section 18). The OSHA emphasises the need to consider employee experience and occupational skills, as well as the instructions provided by the employer, in determining the scope of their OSH obligations. The Government proposal for the OSHA explains that work tasks and conditions influence the employee's general duty to look after their own OSH. The fact that work is performed at home or in other places the employer cannot access can increase this obligation.⁴⁶

Hence, regardless of the non-existence of separate regulations, in Finland, we can speak about the increased OSH responsibility of the employee in the case of telework. However, it must be emphasised that according to OSHA Section 8, the employer is mainly responsible for the protection of the OSH of the employee. Therefore, the employer must ensure that putting the extra responsibility for OSH on the employee is reasonable, considering their experience and occupational skills. If the employee cannot cope with the additional responsibility, the employer can and should refuse to conclude the telework agreement and ask the employee to work from the employer's premises. Additionally, the employee needs to be provided with complementary instructions and guidance as regards OSH.⁴⁷

46. *Supra* n 31, p. 37.

47. See the subsection 3.2. for more details.

The Estonian TTOS contains special provisions on employee obligations in the case of telework. According to TTOS Section 14(1), employees must arrange a safe workplace and working conditions for teleworking based on their employer's instructions (p. 1¹). The employee must also fulfil all other obligations set out in Section 14(1) of TTOS in the event of telework. Therefore, unlike the employer, the employee is not exempted from fulfilling any responsibilities if the specific nature of telework requires it. This is justified because the employee's duties are more general and, therefore, can also be performed in the case of telework.

It is important to note that Estonian law foresees a more significant role for the employee in ensuring OSH when the employee does not work on the employer's premises. As stated above, the employee must arrange a safe workplace and working conditions in this case. Thus, the TTOS imposes on the employee the usual employer obligations as, generally, the employer must create a safe and healthy workplace and conditions. Under the Explanatory Memorandum of the TTOS, insofar as in the case of telework the employer has limited opportunities to ensure OSH at the place of telework and to control it, the employee bears a greater responsibility for their own OSH protection.⁴⁸

The essential role of the employee in fulfilling OSH obligations in the case of telework is also reflected in TTOS Section 14(4). Generally, the OSH obligations of an employee do not discharge the employer from liability in this field. However, the employer is not responsible if duties are performed via teleworking and the employer has fulfilled all mandatory obligations listed in Section 13⁵. It must be noted that the regulation of Sections 14(1)1¹) and 13⁵ of the TTOS is somewhat contradictory. If it can be read from Section 14(1)1¹) that the primary responsibility for ensuring OSH in the case of telework rests with the employee, this provision must still be implemented in combination with Section 13⁵. The latter section states that the employer's responsibility is transferred to the employee only in respect of those obligations, the fulfilment of which cannot reasonably be expected from the employer.

Thus, Finnish and Estonian law establish different employee obligations regarding OSH. As a rule, general regulation of the employee OSH obligations is also applied in the case of telework. Unlike employer responsibilities, employee obligations are not limited in the case of telework. On the contrary, as the scope for employers to guarantee the protection of the OSH in the case of telework is more restricted than when the work is performed on the employer's premises, the employee's role in looking after their OSH increases.

Estonian law clearly states that the employee must arrange a safe workplace and working conditions for teleworking. This is a counter to the TTOS rules, which allow the employer not to fulfil OSH obligations if this is not possible due to the nature of telework. The Finnish regulation is not that straightforward. Although it has been admitted that in practice the employee's role in looking after their OSH in the case of telework arises, in the OSHA, the primary responsibility for protecting the OSH remains with the employer.

3.2. Following employer instructions

Although the Telework Agreement does not regulate the general OSH obligations of the employee, Article 8 provides for the teleworker's obligation to follow the employer's instructions in respect of OSH. Article 8(2) states that the employer must inform the teleworker of the company's occupational health and safety policy. The teleworker must apply these safety policies correctly. In the

48. *Supra* n 22, p. 9.

Framework Directive, the duty of the employee to look after OSH is bound by the obligation to follow the instructions and training of the employer.

The obligation on employees to look after OSH depends on their experience and skills and the employer's guidance.⁴⁹ Section 14 of the Finnish OSHA states that employers must provide their employees with the necessary information on risk factors and hazards and ensure training is sufficient. Employees also need to be instructed on eliminating and avoiding hazards and risks. These instructions need to be supplemented where necessary.

In the case of telework, the inaccessibility of the workplace may increase or reduce the employer's obligations in respect of providing guidance. On the one hand, the inability to ensure the OSH physically increases employee responsibility for health and safety. As the fulfilment of this obligation depends on the guidance provided by the employer, it can be argued that the employee needs more profound guidance. On the other hand, the scope for employers to provide this guidance may also be limited in the case of telework. If the employer cannot access the workplace, it does not necessarily have the information on the existing risks and, therefore, cannot provide guidance on avoid them.⁵⁰

As stated above, the Estonian TTOS emphasises the special obligation on the part of the employer in respect of guidance in the case of telework. Section 13⁵(1) of the TTOS stipulates that in the case of telework, the employer must instruct an employee before permitting teleworking and on a regular basis as needed (based on the corresponding general rules), and considering the particular nature of teleworking. The complete fulfilment of this duty is significant because the employee is required to arrange a safe workplace and working conditions for teleworking based on the employer's instructions (TTOS Section 14(1)¹)).

As is evident from Finnish and Estonian law, compliance with the employer's instructions is essential in creating a safe and secure teleworking environment. This is more clearly stated in Estonian law, where a special regulation has been introduced on compliance with OSH rules in the case of telework. Since telework is not under the employer's immediate control, the employee must thoroughly know the risks and ways to prevent them. A more specific regulation is also in place because Estonian law puts the primary responsibility for the OSH on the teleworker. At the same time, the special obligation on employers to provide guidance can limit the liability of teleworkers for OSH. Without proper guidance, the employee is not obliged to arrange a safe workplace and working conditions.

4. Conclusions

The main problem in protecting the OSH in the case of telework relates to the unconventional workplace. If the work is performed in a person's home, the constitutional right to the sanctity of the home restricts employer access to the workplace without permission. Employer access to the workplace or the scope for influencing working conditions can also be limited if the employee works in another place (for example, a place belonging to the third person, a remote work centre, public transport, etc.) outside the employer's premises. This again limits its possibility of guaranteeing employee OSH.

While the Telework Agreement and the Framework Directive do not foresee teleworkers being treated differently regarding their OSH protection, the complete application of the OSH rules set out

49. See also subsection 2.3.1. regarding the employer's obligation to provide instructions.

50. See also, *supra* n 31, p. 26.

in the Framework Directive is impossible. It is unreasonable to obligate employers to fulfil OSH duties that cannot be performed in practice. Since the Framework Directive was adopted decades before the widespread use of telework, consideration should be given to amending its principles.

The particularities of telework are acknowledged in the special regulation of the OSH in Finland and Estonia. Both countries enable the employer to derogate from certain OSH obligations if their fulfilment becomes impossible because of the nature of telework. The regulations are well-balanced because the employer's discretion is not unlimited. In Finland's case, the employer can derogate only from specific provisions. According to Estonian rules, the employer must perform some of the most important duties provided by the law.

Telework does not exempt the employer from all the obligations relating to OSH. In addition to the provisions that cannot be derogated from, the employer needs to consider whether it can fulfil other obligations. As a rule, the employer needs to perform all obligations unless it becomes impossible because of the nature of telework. Even though the employer cannot freely access the workplace, it can ask for the homeowner's permission. The employer can fulfil most of the OSH obligations if approval is granted. The situation is more complicated when the employer cannot access the workplace or influence the working conditions. However, even then, the employer can determine the working conditions indirectly, for example, by using questionnaires. Employers can also guarantee better OSH protection through the provision of comprehensive instruction and guidance to employees.

While the employer's obligations are reduced, the employee's responsibility for OSH inevitably increases in the case of telework. The Finnish regulation admits this practical result but does not change the party that is mainly responsible for OSH protection. The Estonian regulation notes that an employee is primarily responsible for OSH protection in the case of telework. However, this approach does not mean that the roles of the parties have changed in ensuring OSH because only those employer's obligations, the fulfilment of which cannot reasonably be expected from the employer, are transferred to the employee.

To conclude, since the employee has more autonomy than usual when organising telework, compliance with OSH rules also requires a relationship of trust rather than control between the parties to the employment contract. Therefore, the employer must make sure that, considering the experience and skills of the employee, they can take care of OSH. If the employer is not convinced, it can abstain from the conclusion of the telework agreement and ask the employee to work at the employer's premises.


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