

## DISPATCH NO. 33 – RUSSIA

### THE REFORM OF REMOTE WORK IN RUSSIA

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#### INTRODUCTION

In Russia, like in many other countries, remote work has increased by a multiple of the previous level during the coronavirus pandemic.<sup>1</sup> Before the pandemic, the share of remote work was approximately 2%, and has increased in the course of the pandemic to 16%.<sup>2</sup> The low prevalence of (official) remote work before the pandemic can be explained by the rigid legislative approach to this phenomenon. Remote work was first introduced into the Russian Labor Code (hereinafter – LC RF) in 2013 (Chapter 49.1 on the particularities of the labor regulations of remote employees)<sup>3</sup>; until then, the norms regulating the labor of home workers (Chapter 49 of the LC RF) had been applied to remote workers. The LC RF in its initial version made provisions only for constant (regular) remote work, which should be provided for in the employment contract. This regulation was strongly

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1. Cf. Цифровая грамотность и удаленная работа в условиях пандемии: Совместный аналитический доклад ВЦИОМ и Social Business Group [Digital Literacy and Teleworking in a Pandemic: Joint Analytical Report of VZIOM and Social Business Group], SOC. BUS. GRP. (May 15, 2020), <https://socialbusinessgroup.ru/uploads/s/m/s/i/msiugb4swvjg/file/AMo1W3qz.pdf?preview=1> (Russ.).

2. *Id.*

3. Федеральный закон от 8 декабря 2020 г. No. 407-ФЗ «О внесении изменений в Трудовой кодекс Российской Федерации в части регулирования дистанционной (удаленной) работы и временного перевода работника на дистанционную (удаленную) работу по инициативе работодателя в исключительных случаях» [Federal Law of the Russian Federation of December 8, 2020 No. 407-FZ 'On Amending the Labour Code of the Russian Federation regarding the regulation of remote (distant) work and temporary transferring of an employee to remote (distant) work at the initiative of the employer in exceptional cases'] (Dec. 12, 2020), <http://publication.pravo.gov.ru/Document/View/0001202012080047> (Russ.).

criticized<sup>4</sup> as it impeded the application of alternating remote work; in order to avoid this regulation, informal agreements and civil law agreements were concluded.

Due to coronavirus, many employees were forced to switch to remote work. However, the LC RF does not, in Chapter 49.1, provide for special rules for a transfer to a remote work in such a situation; existing general rules concerning the amendment of the employment contract were also not suitable for this situation. In practice, different legal solutions were elaborated and applied to tackle the situation. To fill legislative gaps and bring more flexibility to the regulation of remote work, on December 8, 2020, Federal Law No. 407 amended the LC RF concerning the regulation of remote (distant) work<sup>5</sup> and came into force on January 1, 2021. The goal of this dispatch is to provide a critical analysis of the most important amendments.

#### DEFINITION, TYPES AND SCOPE OF REMOTE WORK

The revised Art. 312.1 LC RF applies the terms “remote work” (дистанционная работа) and “distant work” (удаленная работа) as synonyms. The sense of the definition of “remote work” has not been changed from the existing one: Remote (distant) work is defined as a performance of labor function specified in the employment contract outside of the workplace,<sup>6</sup> using informational and tele-communicational networks (including the internet) for the performance of labor function and interaction with the employer on issues related to work performance.<sup>7</sup> The revised LC RF, like labor legislation in other countries (e.g., France),<sup>8</sup> moves from regular remote work, to irregular and partial remote work and allows—apart from permanent remote work—also for temporary work (up to six months) and alternating remote work.

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4. See generally Elena Gerasimova, Tatiyana Korshunova, Daria Chernyaeva, *New Russian Legislation on Employment of Teleworkers: Comparative Assessment and Implications for Future Development*, 2 PRAVO. ZHUMAL VYSSHEY SHKOLY EKONOMIKI 116 (2017).

5. Федеральный закон от 5 апреля 2013 г. No. 60-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации» [Federal Law of the Russian Federation of 5 April 2012 No. 60-FZ ‘On Amending Certain Legislative Acts of the Russian Federation’], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 2013, No. 14, Item. 1668.

6. This means outside of the employer’s premises, his/her branch office, representative office, or any other separate structural unit (including those located in another territorial locality), outside of a stationary workplace, territory or object which is directly or indirectly under the employer’s control.

7. The translation has been adopted from Gerasimova et al., *supra* note 4, at 122.

8. Holger Bonin et al., Bundesministerium für Arbeit und Soziales [Fed. Ministry of Lab. & Soc. Affs.], *Verbreitung und Auswirkungen von mobiler Arbeit und Homeoffice* [*Spread and Effects of Mobile Work and Home Office*] 13 (2020) (Forschungsbericht 549) (Ger.), <https://www.bmas.de/DE/Service/Medien/Publikationen/Forschungsberichte/fb-549-verbreitung-auswirkungen-mobiles-arbeiten.html?jsessionid=309B39DE7B633124626C26EF97AAC1DB.delivery2-replication>.

Theoretically, platform workers could also fall under the definition of remote work and enjoy labor rights and guarantees as this definition covers work that is performed on the basis of informational and tele-communicational networks. However, in the first legal disputes concerning the employment classification of offline platform workers (drivers and couriers “on demand”), the courts have adopted a formalistic approach and refused to classify them as employees. A similar approach can be expected also concerning online platform workers.<sup>9</sup>

Even if the revised LC RF provides a broad concept of remote work including not only work from home but also work from any other place outside of the employer’s premises, the existing important gap concerning transborder remote work (i.e., when foreign employees do remote work for an employer located in Russia) has not been closed.

#### SPECIAL RULES APPLIED TO REMOTE WORK

One of the most important methodological features of Russian labor law is “unity and differentiation” of regulation.<sup>10</sup> “Unity” is characterized through the application of certain general labor norms and principles to all employees. By contrast, differentiation is realized through the special norms of the LC RF and devoted to reflecting the specifics of employment relationships with certain groups of employees. The special norms can limit the application of general norms regulating the same issues or provide supplemental rules (Art. 251 LC RF). There are different reasons for differentiation: age, gender, the climate conditions of work, and type of work.<sup>11</sup> In line with Art. 3 of the LC RF, what shall not be considered as discrimination is the establishment of distinctions, exceptions, preferences as well as the limitation of employees’ rights determined by the requirements inherent to a given type of work or stipulated by the increased care of the state to persons requiring greater social and legal protection. However, the International Labour Organization and the Council of Europe consider some special rules of the LC RF as discriminative.<sup>12</sup>

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9. Olga Chesalina, *Digital Platform Work in the Russian Federation*, 1 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* 18 (2019) (Russ.).

10. T.Y. Korshunova & M.A. Vocharnikova, Особенности правового регулирования трудовых отношений отдельных категорий работников: теоретические аспекты [Specific Circumstances of Legal Regulation of Employment for Some Categories of Workers: Theoretical Aspects], in Татьяна Коршунова (Отв. ред.) Особенности правового регулирования трудовых отношений отдельных категорий работников: научно-практическое пособие, Москва: Юриспруденция [Special Circumstances of Legal Regulation of Employment for Some Categories of Workers] 12, 14 (T.Y. Korshunova ed., 2015) (Russ.).

11. Nikita Lyutov, *Blurring the Definition of Employment Relations in Russia: Case Law on the General Notion and Some Atypical Forms of Labor*, 113 *Teisé* 190, 196 (2019).

12. *Id.*

The differentiation of the regulation of employment relations has been strengthened in the past years.<sup>13</sup> At the time of its adoption in 2001, the LC RF contained fifteen chapters on the special features regulating the labor of certain groups of workers, while at present there are twenty-two such chapters in the LC. The Labor Code regulates the specifics of labor of certain categories of workers (e.g., of women, persons with family obligations, the head of an organisation, military servicemen, workers of religious organisations, and homeworkers). It is worth mentioning that the norms concerning labor of non-standard employees like temporary agency employees and remote employees were incorporated in the LC RF through special rules (in separate chapters) that contain a lot of limitations of employees' rights and are therefore considered by some scholars as precarisation of labor.<sup>14</sup>

Chapter 49.1 of the LC RF in its initial version as well as in the new version provides a lot of exemptions and special regulations concerning hiring and firing of remote workers, their occupational safety, working time, and rest time. Some limitations of remote employees' labor rights were abolished in the revised LC RF. For example, before the reform, an employment contract with a remote worker could provide different additional reasons for its termination that are not listed in the LC RF (e.g., changes in the employer's strategy, inexpediency of further cooperation, or lack of a sufficient volume of work). Such unjustified differentiation could be used just to get rid of an employee or to avoid the procedure and state guarantees related to dismissals at the initiative of the employer, e. g. in the case of redundancy.<sup>15</sup> The revised LC has abolished the possibility to regulate in an employment contract additional reasons for its termination in comparison to the reasons listed in the LC RF and, simultaneously provided in Art. 312.8 LC RF, reasons for the termination of the employment contract in two situations which are inherent to the nature of remote work, namely in cases where 1) an employee, without a valid reason, does not interact with the employer for longer than two working days and 2) the employment contract on permanent remote work can be terminated if the employee has changed his or her geographical location. However, the revised Chapter 49.1 of the LC RF has left a lot of open questions concerning the procedure of such dismissals, such as whether the employer

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13. Nikita Lyutov, *Трансформация трудового правоотношения и новые формы занятости в условиях цифровой экономики* [The Transformation of Labor Relations and New Forms of Employment in the Digital Economy], Журнал российского права [J. Russ. L.] 115, 115–16 (2019) (Russ.).

14. See N.V. Chernykh, *Влияние нетипичных форм занятости на теоретические представления о трудовом правоотношении (на примере норм о дистанционном труде)* [Impact of Atypical Forms of Employment on Theoretical Concepts of the Labor Relation (Case Study of the Norms regulating Distance Labor)], 8 Актуальные проблемы российского права [Actual Probs. Russ. L.] 108 (2019) (Russ.), <https://aprp.msai.ru/jour/article/view/1592>.

15. Elena Sychenko, *The Peculiarities of Telework in Post-Soviet Space: Russia, Kazakhstan, Belorussia, and Ukraine*, Comp. Lab. L. & Pol'y J. (2018) (Dispatch No. 7).

has to fulfil the procedure for the disciplinary dismissals (in a case where the employee does not interact with the employer).

#### WORKING CONDITIONS OF REMOTE EMPLOYEES

In Russia, the digitalization of the economy is among the main goals of the country's strategic development plan. In the field of labor law, in 2020, a new regulation concerning electronic workflow was introduced, including the use of electronic labor books (the main document about the concluding, amendment and termination of the employment contracts of employee during his/her entire working life).<sup>16</sup> The former 2013 LC RF version already allowed the conclusion of an employment contract on remote work through the exchange of electronic documents, while for other employees the conclusion of the employment contract in written form was necessary. The revised LC RF has simplified and further broadened the electronic workflow between the remote employee and the employer.

Even after the recent amendments, however, the LC RF provides for neither the right to remote work nor the right to request remote work. During the last drafting process and before, it was widely discussed whether “a right to disconnect”<sup>17</sup> needed to be introduced. This right was included at the early stages in the draft legislation alongside a regulation stating that overtime work is allowed only in cases of industrial (production) necessity and shall be remunerated with a bonus. The adopted text did not incorporate this regulation and establishes only that “the time of the interaction with the employer is included into the working time of the employee” (Art. 312.4 LC RF). On the one hand, the LC RF now stipulates the employer's obligation to record the working time actually worked by each employee (Art. 91). On the other hand, this regulation loses its practical significance since a special working regime—an irregular working day (ненормированный рабочий день)<sup>18</sup>—can be set for remote employees. Unfortunately, the LC RF does not provide an adequate compensation for this working time regime nor enforceable limits for its application – it only

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16. Cf. Mariya Aleksynska, Elena Gerasimova & Nikita Lyutov, *Regulating Digital Online Work in the Russian Federation*, Comp. Lab. L. & Pol'y J., (2020) (Dispatch No. 23).

17. Cf. Nikita Lyutov, *Законодательные инициативы, связанные с дистанционным трудом: временный ажиотаж на фоне пандемии или устойчивая тенденция?* [The Legislative Initiatives Regarding the Remote Work: A Temporary Pandemic Turmoil or Sustainable Trend?], 12 Журнал российского права [J. Russ. L.] 78 (2020).

18. Cf. LC RF art. 101 (Russ.) (“Unregulated working day is a special working regime when individual employees may be engaged in fulfilling their labour functions from time to time at the order of the employer if necessary in excess of the length of the working time established for them. The list of positions of employees with unregulated working day shall be fixed in the collective contract, agreements or local normative acts adopted with account taken of the opinion of the representative body of employees.”), [https://www.wto.org/english/thewto\\_e/acc\\_e/rus\\_e/wtACCrus58\\_LEg\\_363.pdf](https://www.wto.org/english/thewto_e/acc_e/rus_e/wtACCrus58_LEg_363.pdf).

mandates additional holidays of no fewer than three days. The reform of this working regime is currently under discussion.

According to the newly amended Art. 312.4 LC RF, remote employees can determine their working time themselves unless otherwise provided for not only in the employment contract (as it had been regulated earlier) but also in the collective agreement or local normative act. This means that the possibility for employees to determine their working time can be substantially limited. Most employers will adopt an internal regulation (a local normative act) determining the working time of remote workers.

It is also likely that individual employers will take steps to monitor the fulfilment of the working time regulations and evaluate the work performance by means of informational and algorithmic control. In Russia, every kind of technological control (apart from covert surveillance), even permanent monitoring, with formal consent of the employee is allowed. Neither trade unions nor work councils can restrict the employer's power to use the various forms of employee monitoring. In the digital age, there are more and more opportunities to monitor and survey workers' activities to a huge extent and entirely invisibly. There are a lot of companies that offer such software for employers<sup>19</sup> and there is little information about the use of technical tools that allow covert and distant monitoring of employees.<sup>20</sup> Some scholars have argued that it would be opportune to include into Russian labor legislation general limitations regarding the monitoring of employees' activities and an assessment of the necessity and proportionality of employee monitoring.<sup>21</sup>

#### REMOTE WORK WITHOUT THE EMPLOYEES' CONSENT

Usually,<sup>22</sup> the introduction of remote work is based on an agreement between the employee and the employer; this has also been provided for in the LC RF. However, due to the coronavirus pandemic, in many countries (including Russia) working from home has been implemented as a necessary public health measure.<sup>23</sup> The government has encouraged employers to facilitate remote work; moreover, the Mayor of Moscow has established for employers (in Moscow) that 30% of their employees must

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19. You can find numerous websites on the Internet that offer keyloggers and other similar software. Cf. Программы для отслеживания компьютеров сотрудников: что это такое и зачем это нужно? [Software for Tracking Employees' Computers: What is it and Why is it Needed?], KICKIDLER (Dec 17, 2020), <https://www.kickidler.com/ru/for-it/methods-of-working/slezhka-za-sotrudnikami.html>.

20. Olga Chesalina, *'Glass Employees' vs. Platform Workers: Are There Any Differences, in The Value of Work and its Rules between Innovation and Tradition: 'Labour is not a Commodity' Today* 65, 77 (Anthony Forsyth, Emanuele Dagnino & Margherita Roiatti eds., 2020).

21. *Id.*

22. Also, it is in accordance with the European Framework Agreement on Telework of 2002.

23. See INTERNATIONAL LABOUR ORGANIZATION [ILO], *An Employers' Guide on Working from Home in Response to the Outbreak of COVID-19* (2020), [https://www.ilo.org/wcmsp5/groups/public/—ed\\_dialogue/—act\\_emp/documents/publication/wcms\\_745024.pdf](https://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—act_emp/documents/publication/wcms_745024.pdf).

be switched to remote work.<sup>24</sup> The revised LC RF has addressed this challenge and introduced in Art. 312.9 LC RF a regulation on “temporarily transferring to remote work in exceptional circumstances.”<sup>25</sup> The switch to remote work does not require the consent of the employee as it is within the power of the employer; at the same time, bodies of state authority (at federal and local levels) may impose on the employer the obligation to implement such changes. The maximum duration of such remote work is defined only indirectly and is connected to the duration of the unusual circumstance that served as the basis for it. According to Art. 312.1 LC RF, the period of voluntarily temporary remote work should be no longer than six months (unless alternating remote work has been agreed). It is questionable whether such a period is also mandatory for a switch without the employee’s consent. In our opinion, based on an “argumentum a maiore ad minus,” it is. However, another interpretation is also possible: Art. 312.9 LC RF regulates a special situation for which general rules are not applicable. It remains to be seen which interpretation the courts will follow.

Art. 312.9 LC RF provides only two cases in which it is impossible to implement the switch to remote work, namely where the nature of the work does not allow it, and in the case of the employer’s failure to provide the necessary equipment, software, hardware or other tools. In these cases, the remuneration according to the rules for “payment remuneration for a period of stoppage” shall be paid. However, the legislator does not address situations where an employee does not have suitable living conditions for working from home, or in the event that the employee has to care for (a) small child(ren). This means that these risks are shifted to employee. It is interesting to note that in relation to remote employees the employer is exempted from almost all duties in the field of occupational health and safety, except for the following duties: to investigate and record accidents at work and occupational diseases; to fulfil the prescriptions of officials exercising state supervision and control; to insure employees in the mandatory social insurance against accidents at work and occupational diseases. At the same time, the employer is not obliged to ensure that remote workers’ working conditions correspond to the labor protection requirements, even if the switch to remote work occurs without the employee’s consent. The legal consequences of the employee’s refusal to resort to remote work are not regulated in the LC RF. In order to define these consequences correctly, the legal nature of “the transferring to remote work” is questionable. The LC RF gives no answer to this question. Russian

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24. Moscow Mayor’s Decree of October 6, 2020 No. 97-UM, <https://www.mos.ru/upload/documents/docs/97-YM-fjlna.pdf>.

25. Exceptional circumstances in accordance with Art. 312.9 LC RF include natural or man-made disasters, industrial accidents, fires, floods, earthquakes, epidemics or epizootics and any other exceptional cases that endanger the life or normal living conditions of the entire population or a part thereof.

labor law only knows switches in terms of transfers to another work, to another employer and to another territory location, but not the 'transfers' to remote work. The regulations of Art. 72.1 LC RF concerning relocation to another workplace, another structural unit located in the same territorial location as the employer (перемещение) which does not require the consent of the employer also do not apply, because no other workplace is created by the employer in the case of remote work. Chapter 49.1 LC RF does not use the term "employee workplace" at all, but operates with the term "remote fulfilment of the labour function." The most suitable regulation seems to be Art. 74 LC RF, which regulates the amendment of significant conditions of the employment contract for reasons connected to the change of organizational or technological aspects of work. In the case of remote work, the amendments cover not only the workplace, but usually also the working time regime and rest time, and the way of interaction with the employer; these are significant conditions of the employment contract. However, Art. 74 LC RF requires that the employee must be informed about such changes no less than two months in advance, which is not possible to comply with in exceptional circumstances.

#### CONCLUSION

As a conclusion, the following outcomes of the new regulation of remote work in Russia shall be stressed:

The legislator has reacted to the challenges of the coronavirus pandemic and imposed the policy "we stay home, we are working from home." Furthermore, it has cancelled the possibility to provide in an employment contract additional reasons (in relation to the LC RF) for the termination of the employment contract. The revised LC RF covers all types of remote work, including mobile work, and gives the parties to the employment relationship a lot of options of how to organize remote work and working time. Electronic workflow allows for quick and paperless interaction between the employer and the employee. From this point of view, the law is fit for the digital age. However, this flexible regulation is mostly beneficial for employers since they are not obliged to approve a request of the employee for remote work, and they are freed from numerous labor protection requirements. Furthermore, the employer can determine the working time of the remote worker and (constantly) monitor their activity remotely and invisibly. Therefore, it is necessary to re-establish the balance of interests between employees and employers and fill the abovementioned regulative gaps.

One of the important reasons for the reform of remote work was to address the legislative gaps concerning the transfer to remote work. Since the legislator did not—also in the revised LC RF—clarify the question concerning the legal nature of remote work (i.e., what kind of amendment

to the employment contract is made in this case), the question concerning the legal consequences of the employee's refusal to switch to remote work when this does not require the consent of the employee remains open.

There are no exemptions in the LC RF concerning the freedom of association and conclusion of collective agreements in relation to remote workers. However, there have been practical problems regarding the realisation of collective labor rights, since employees who are permanently on remote work, are never on the employer's premises and are separated from other employees.<sup>26</sup> The permission to alternate remote work and the introduction of mandated remote work without the employee's consent can strengthen collective bargaining with employees on remote work and the regulation of their working conditions in collective agreements since every employee can potentially become a remote employee.

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26. See Gerasimova et al., *supra* note 4, at 126.