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# Special Rights of Employees Caring for a Child or Other Family Member with Disabilities with Regard to the Organization of Working Time and Remote Working Under the Polish Labor Code

## Abstract

This paper deals with the special rights of employees caring for children or other family members with disabilities to request to work remotely or to be covered by a flexible working arrangement. As of 2018, the Polish legislator is introducing special entitlements for this category of employees aimed at reconciling work and caring for a child or family member. The paper presents a catalog of these special rights and the application procedure.

**KEYWORDS:** persons with disabilities, access to work, remote work, flexible working time, employees caring for a child or family member

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# 1 | Introductory remarks

The Labor Code includes provisions aimed at reconciling work and non-work life for employees in a challenging family situation due to caring for a child or other family member or household member with disabilities. By the Law of May 10, 2018, amending the Law on Vocational and Social Rehabilitation and Employment of Persons with Disabilities and specific other laws<sup>[1]</sup>, Article 142<sup>1</sup> was added to the Labor Code. The regulation became effective on June 6, 2018. This provision was the first particular solution for this category of employees in the Labor Code.

The Polish legislator has recognized the difficult situation of caregivers and is expanding the catalogue of rights to facilitate this care. In addition, Article 676<sup>6</sup> of the Labor Code which dealt with telework, provides that an employer shall grant an employee's request to work in the form of telework if the employee is caring for a disabled child or a child with special educational needs. The new provisions on remote work, which replaced telework, referred to Article 67<sup>19</sup> § 6 of the Labor Code, the employer is obliged to grant the request of an employee caring for a disabled child or a child with special educational needs, as well as a pregnant employee, an employee raising a child up to the age of four, and an employee caring for another member of the immediate family or another person in a typical household with a certificate of disability or a certificate with a significant degree of disability, to perform work at a distance, unless this is not possible due to the organization of work or the type of work performed by the employee.

As a result of the implementation of Directive 2019/1158 of the European Parliament and of the Council of June 20, 2019, on the work-life balance of parents and caregivers and repealing Council Directive 2010/18/EU<sup>[2]</sup>, the Polish legislator intends to introduce further solutions regarding the rights of employees with caregiving responsibilities. The legislator has expanded the scope of flexible work arrangements that employees caring for a child or other person may request<sup>[3]</sup>. The amendment added Article 188<sup>1</sup> to the Labor Code.

<sup>1</sup> OJ 2018, item 1076.

<sup>2</sup> OJ L 188, 12.7.2019, p. 79–93.

<sup>3</sup> Draft law implementing Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working

It is worth noting that the issue under discussion concerns the regulation of the right to access for persons with disabilities. On July 19, 2019, the Law on Ensuring Accessibility for Persons with Special Needs, was adopted with the aim of bringing Polish law compliant with the Convention on the Rights of Persons with Disabilities<sup>[4]</sup>. It follows from Article 9 of the Convention that appropriate measures should be taken to ensure that persons with disabilities, on an equal basis with others, have access to the physical environment, means of transportation, information, and communication, including information and communication technologies and systems, and other facilities and services, generally available or universally provided, in both urban and rural areas. These measures, which include the identification and elimination of obstacles and barriers to accessibility, apply to, among other things: (a) buildings, roads, transportation, and other indoor and outdoor facilities, including schools, housing, medical care institutions, and workplaces, (b) information, communication and other services, including electronic services and emergency services. States, therefore, should ensure the right of persons with disabilities to access and create institutional, procedural, and infrastructural solutions in this regard<sup>[5]</sup>.

## 2 | Employees caring for a child or other family member or household member are entitled to special entitlements

Special rights regarding the organization of working time and remote work have been granted to a certain category of employees. The legislator aims to support: 1) parents in the case of a complicated pregnancy; 2) parents

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conditions in the European Union (Official Journal of the EU L 186, 11.07.2019, p. 105) and Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and caregivers and repealing Council Directive 2010/18/EU (Official Journal of the EU L 188, 12.07.2019, p. 79). [www.legislacja.gov.pl](http://www.legislacja.gov.pl) (No. UC118).

<sup>4</sup> OJ, No. 1169 with effect from 25 October 2012.

<sup>5</sup> Katarzyna Roszewska, „Komentarz do art. 2”, [in:] *Ustawa o zapewnianiu dostępności osobom ze szczególnymi potrzebami. Komentarz*, ed. Katarzyna Roszewska (Lex/el. 2021).

of a child with a certificate of severe and irreversible disability or an incurable life-threatening disease, which arose during the prenatal period of the child's development or childbirth; 3) families with a child with disabilities or special educational needs.

Referring specifically to the content of Article 142<sup>1</sup> of the Labor Code, the employer is bound by the application if it is submitted by:

1. employee-parents of a child with a certificate referred to in Article 4, § 3 of the Law on Support for Pregnant Women and Families „For Life” (Journal of Laws of 2020, item 1329), that is, a certificate of severe and irreversible disability or incurable life-threatening disease, which arose during the prenatal period of the child's development or childbirth;
2. employee-parents of a child with a certificate of disability or a certificate of moderate or severe disability as defined in the regulations on vocational and social rehabilitation and employment of disabled persons;
3. employee-parents of a child with, respectively, an opinion on the need for early childhood development support, an evaluation on the need for special education, or an evaluation on the need for remedial classes, as referred to in the provisions of the Law of December 14, 2016. – Education Law (Journal of Laws of 2021, item 1082, and 2022, items 655, 1079 and 1116).

In the case of the persons mentioned in item 1, it should be noted that three persons may exercise this right: the mother of the child, the father of the child, and the spouse of the mother, even if he is not the father of the child<sup>[6]</sup>. Unclear is the question of the admissibility of binding requests by employees who have adopted a child who has the characteristics mentioned in the above provision. It seems that the legislator has not granted this right to adoptive parents or to employees who have adopted a child from a non-professional foster family<sup>[7]</sup>.

An employee's request to perform remote work will, in principle, not be binding on the employer, with the exception of requests from pregnant

<sup>6</sup> Krzysztof Stefański in: *Kodeks pracy. Komentarz. Tom II. Art. 94-304(5)*, 4th ed., ed. Krzysztof W. Baran (Warszawa, 2022, Lex/el.), art. 142(1).

<sup>7</sup> Katarzyna Serafin in: *Zatrudnienie w epoce postindustrialnej*, ed. Barbara Godlewska-Bujok, Krzysztof Walczak (Warszawa, 2021, Lex/el).

employees, employees bringing up a child up to the age of four, and employees listed in Article 142<sup>1</sup> paras. 1(2) and (3) of the Labor Code. The legislator has limited the circle of persons entitled to make requests in the case of remote work by referring only to items 2 and 3 of Article 142<sup>1</sup> § 1 of the Labor Code, excluding the employee's spouse and the employee's parent of a child in the prenatal stage in the case of a complicated pregnancy.

In addition, a binding request to work remotely will also apply to employees caring for another member of their immediate family or another person in the typical household with a disability certificate or a certificate of significant disability. In practice, therefore, the provision will apply to persons caring for minors with a certificate of disability (since a certificate of disability is issued to a person who has not reached the age of 16) and those with a certificate of significant disability (a certificate of disability is issued to a person who has reached the age of 16). Consequently, persons caring for a person with a certificate of mild or moderate disability are not covered by this provision. Such persons could apply for teleworking in accordance with the general rules.

The right to work in the specified forms of working time organization and remote work will also be available to employees who are caring for adult children, i.e. over 18 years of age.

## 3 | Remote work

Remote work found its way into the Labor Code as a result of the Covid-19 pandemic<sup>[8]</sup>. Previously, the Labor Code contained a regulation on telework<sup>[9]</sup>. It should be noted that the code regulation on telework was an implementation of the European framework agreement on telework

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<sup>8</sup> Act of 2 March 2020 on special solutions related to the prevention, prevention and control of COVID-19, other infectious diseases and emergencies caused by them, OJ 2021, item 2095.

<sup>9</sup> The Act of 24 August 2007 amending the Act - the Labor Code and certain other acts, Journal of Laws 2007.181.1288 of 2007.10.01, By means of the Act of 24 August 2007 amending the Act - the Labor Code and certain other acts (Journal of Laws No. 181, item 1288), Chapter I Ib was added to the second section. As of 16 October 2007.

concluded by the social partners at the EU level<sup>[10]</sup>. However, teleworking was not a popular form of work organization in Poland. When the COVID-19 pandemic started, the legislator did not take advantage of the current telework regulation but decided to introduce a new legal regulation on remote work.

Article 3 of the Anti-Covid Law provided that in order to counteract COVID-19, an employer may instruct an employee to perform the work specified in the employment contract outside the place of its regular performance for a specified period of time (remote work). At the same time, the provision of the Labor Code on telework was in force. Subsequently, the provisions of Article 3 of the Anti-Covid Law were expanded. In several paragraphs, the legislator clarified the rules for performing remote work<sup>[11]</sup>. However, it should be emphasized that the regulation in the Anti-Covid Law was ad hoc and can only be applied during an epidemic.

According to Article 67<sup>18</sup> of the Labor Code, work may be performed in whole or in part at a place specified by the employee and agreed with the employer on a case-by-case basis, including the employee's home address, mainly through direct communication at a distance (remote work). This provision, which refers to total or partial remote work, is supplemented by Article 67<sup>33</sup> § 1, which adds that remote work may be performed occasionally, at the request of the employee submitted in paper or electronic form, for a period not exceeding 24 days per calendar year. Thus, the Labor Code provides for three types of remote work: total, partial and occasional. The dimension of occasional remote work is clearly defined by the number of days per calendar year that an employee may use for remote work. Occasional work is distinguished from other types of work by the fact that specific provisions on remote work (i.e., Articles 67<sup>19</sup>-67<sup>24</sup> and Article 67<sup>31</sup> § 3 of the Labor Code) do not apply. The legislator assumes that the employee will perform occasional remote work infrequently, so it is not necessary to apply all the provisions on remote work (including the provisions on the costs of remote work).

Remote work may be performed by means of direct remote communication, or it may concern the performance of production parts or material services. The place where the remote work is to be performed is always determined by the employee and agreed with the employer (i.e. accepted

<sup>10</sup> <https://www.etuc.org/en/framework-agreement-telework>.

<sup>11</sup> Article 3 (3) added by Article 77 (1) of the Law of June 19, 2020. (OJ 2020, item 1086) amending the present Law as of June 24, 2020.

by the employer). Remote work is to be performed at the employee's place of residence or at another location chosen by the employee and agreed to by the employer. This part of the definition is crucial in distinguishing remote work from traditional work. It also does not exclude a situation where the parties agree that remote work will be performed at different locations, which the employee will inform the employer of each time. On the other hand, the provision does not allow the employee complete freedom to choose the remote work location (i.e., without agreeing with the employer's location).

The scope of application of remote work will be broader than that of existing telework, mainly due to the absence of the requirement of regularity of work and the need to communicate the results of work to the employer, mainly by electronic means. The premise of the regularity of telework has raised many questions of interpretation due to its vagueness.

Not all types of work can be performed remotely. The Labor Code specifically excludes certain types of work from the scope of remote work. Article 67<sup>31</sup> § 4 of the Labor Code provides that remote work does not include work: 1) particularly hazardous; 2) resulting in exceeding the permissible standards of physical factors set for living quarters; 3) with hazardous chemical agents as referred to in the regulations on health and safety at work related to the presence of chemical agents in the workplace; 4) related to the use or release of harmful biological agents, radioactive substances and other substances or mixtures emitting offensive odors; 5) causing intense dirtiness.

Remote work may be introduced by agreement of the parties to the employment relationship or by the employer's order. Remote work introduced by the employer's order is intended to be an exceptional situation (Article 67<sup>19</sup> § 3 of the Labor Code). Remote work may be performed at the employer's instruction: 1) during a state of emergency, a state of epidemic emergency, or a state of epidemic emergency, and for three months after their revocation, or 2) during a period in which it is temporarily impossible for the employer to provide safe and hygienic working conditions at the employee's current workplace due to force majeure - if the employee submits a paper or electronic statement immediately before the order that he has the premises and technical conditions to perform remote work.

In addition, an employer must first obtain information from the employee he has the premises and technical conditions to perform remote work. In practice, this means the employer's obligation to get information on whether the employee has the skills mentioned above and capabilities

before issuing a remote work order. If a change in the premises and technical conditions make it impossible to perform remote work, the employee shall immediately inform the employer. In such a case, the employer shall immediately revoke the order to perform remote work (§ 5).

The employer may revoke the remote work order at any time with at least one day's notice (§ 4). The revocation of a remote work order implies, as is the case under the current regulations, that the employee performing remote work must return to work under the previous rules and at the last place of work. The employer should agree with the employee, considering the employee's prior place of remote work (e.g., remoteness from the workplace) and a date for the employee to return to their traditional work.

In principle, however, remote work must to be introduced by agreement between the parties to the employment relationship. Article 67<sup>19</sup> § 1 provides that an agreement between the parties to the employment contract regarding the employee's remote work performance may occur (1) after the employment contract or (2) during the employment. The agreement may be made on the employer's initiative or at the employee's request made on paper or electronically. The provision of Article 29 § 4, which provides that an amendment to the terms and conditions of the employment contract must be made in writing, does not apply to remote work.

Consent means that both parties must agree to the introduction of remote working. However, the legislator has provided that certain categories of employees can make a request that obliges the employer to allow remote work. If the employer refuse to grant remote work, he or she must justify this. It should also be mentioned that the employer cannot make a binding request to stop remote work and to restore the employee's previous working conditions unless the continuation of remote work is not possible due to the organisation of work or the type of work performed by the employee (Article 67<sup>22</sup> § 2 of the Labor Code). On the other hand, the request of the employee's superior to perform remote work cannot constitute a reason justifying the employer's termination of the employment agreement. However, the employer may withdraw its consent to the performance of remote work if, during an inspection of the remote work, the employer finds deficiencies in compliance with labor protection regulations and rules or in compliance with information security and protection requirements, including procedures for the protection of personal data. If the consent to perform remote work is withdrawn, the employee shall start working at the existing workplace on the date determined by the employer (Article 67<sup>28</sup> § 3 of the Labor Code).

## 4 | Work under flexible working time arrangements

Employees who are caring for a child or other family or household member, as defined in Article 142<sup>1</sup> of the Labor Code may request to work in the interrupted working time system (Article 139 of the Labor Code), mobile working hours (Article 140<sup>1</sup> of the Labor Code) or individual working schedule (Article 142 of the Labor Code). However, this catalogue will be extended by the new Article 188<sup>1</sup> § 1 of the Labor Code, according to which an employee may also request to work in the system of shortened workweek (Article 143 of the Labor Code) and the weekend working system (Article 144 of the Labor Code), as well as to reduce the working time.

Pursuant to Article 142 of the Labor Code, an employer may draw up an individual working time schedule upon an employee's written request. In the individual work schedule, it is possible, in particular, to determine different days and hours of work beginning and ending than for the general employees, which allows to take into account the specific needs of certain employees and facilitates the reconciliation of work with personal and family obligations. When requesting the application of an individual work schedule, the employee is not required to justify his or her request. However, in the case of the employees referred to in Article 142<sup>1</sup> of the Labor Code, they must prove their situation.

The Labor Code allows requesting mobile working hours (Article 140<sup>1</sup> § 1 of the Labor Code). This means that the work schedule may provide for different starting times on days that, according to the schedule, are working days for employees. According to Section 2, the work schedule may provide for an interval in which the employee decides the time of starting work on a day which, according to the schedule, is a working day for the employee. However, the performance of work according to this work schedule shall not violate the employee's right to rest. In such work schedules, the performance of work on the same day does not constitute overtime.

The interrupted working time system is a particular type of system. Under Article 139 § 1 of the Labor Code, if justified by the nature of the work or its organization, the interrupted working time system may be applied according to a predetermined schedule that provides for no more than one break from work per day of no more than 5 hours. The break shall not be counted as working time; however, for the duration of the break, the employee shall be entitled to remuneration equal to half of the remuneration due for the break. This system divides the daily working time into

two stages by introducing one break. This system represents a departure from the principle of continuous counting of working time. Thanks to the introduction of this system, employers have greater flexibility in adjusting working time to changing needs during the day<sup>[12]</sup>. The fact that the legislator has included intermittent working time among the solutions facilitating the reconciliation of work and caring for a child with a disability may give rise to certain reservations<sup>[13]</sup>.

The Polish legislator has also recently recognized the need to introduce solutions to facilitate part-time work for employees caring for children, family members, etc. Therefore, their next step will be to introduce the possibility of applying for the weekend work system or the shortened working week system or to reduce the working hours<sup>[14]</sup>. Both of these working time systems are characterized by part-time work.

At the written request of the employee, the system of shortened working week may be applied to that person. Under this system, an employee may work less than five days a week, with a daily working time not exceeding 12 hours, within a payroll period not exceeding one month (Art. 143 of the Labor Code). In addition, at the written request of the employee, a working time system may be applied to him/her, according to which work is performed only on Fridays, Saturdays, Sundays, and holidays. Under this system, the daily working time may be extended by no more than 12 hours for a reference period not exceeding one month (Art. 144 of the Labor Code).

## 5 | Consequences of a request to work remotely or to work in flexible hours

The employer will be able to refuse a request for remote work only if the organization of work or the nature of the work performed by the employee makes it impossible to grant the request, and the employer will be obliged to inform the employee of the reason for the refusal in paper or electronic form within seven working days of the employee's request. Thus, in the case

<sup>12</sup> Stefański in: *Kodeks pracy. Komentarz. Tom II. Art. 94-304(5)*, art. 139.

<sup>13</sup> Serafin in: *Zatrudnienie w epoce postindustrialnej*.

<sup>14</sup> See proposed Article 188<sup>1</sup> of the Labor Code, Parliamentary print 2932.

of the specified employees, the employer's obligation to grant the request to work remotely will not be absolute. Rather, the legislator has treated this category of employees separately, as the employer must demonstrate the reasons why it cannot agree to remote work.

The explanatory memorandum to the bill introducing Article 142<sup>1</sup> of the Labor Code states that the request is binding on the employer<sup>[15]</sup>. It should be noted that the employer's refusal is permissible only if the organization or nature of the work makes it impossible to grant the request. Thus, the refusal cannot be arbitrary. This means that mere obstruction of the workplace is not sufficient for a lawful refusal. Its condition is to demonstrate in an appropriate form (in writing or electronically) that one of the two conditions indicated in § 2 („organization of work” or „type of work performed by the employee”) has occurred, which objectively makes it impossible to carry out the request (unreasonableness of the flexible formula for performing work in a given position)<sup>[16]</sup>.

However, as for the review of the employer's decision, the provisions of the Labor Code do not provide for an appeal procedure against the employer's decision or a review of the legitimacy of the rejection of the employee's request by the State Labor Inspectorate. There are various contradictory statements in labor law doctrine. On the one hand, it is pointed out that the possibility of judicial enforcement of the application is therefore purely theoretical, even illusory. It is difficult to imagine that the court will decide for the employer on the organization of work or specific solutions for the organization of working time<sup>[17]</sup>. On the other hand, it is assumed that the most natural legal qualification for the above actions is to treat them as an administrative act or even an administrative decision, as indicated by their character and the obligation to justify them. The above would imply the possibility of an administrative appeal against the refusal<sup>[18]</sup>. In conclusion, it should be noted that the legislator has not explicitly regulated this issue.

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<sup>15</sup> Parliamentary paper, Explanatory Memorandum VIII. 2215.

<sup>16</sup> Maciej Nałęcz in: *Kodeks pracy. Komentarz*, 13th ed., ed. Wojciech Muszałski, Krzysztof Walczak (Warszawa, 2021, Legalis) komentarz do art. 142<sup>1</sup> k.p.

<sup>17</sup> Grzegorz Orłowski, „Pracodawca jest obowiązany, chyba że nie może” *Monitor Prawa Pracy*, nr 8 (2018), Legalis.

<sup>18</sup> Arkadiusz Sobczyk in: *Kodeks pracy. Komentarz*. 5th ed., ed. Arkadiusz Sobczyk (Warszawa, 2020, Lex).

## 6 | Summary

The Polish legislator recognizes the need to take into account the difficult family situation of employees caring for a child or other family or household member who is disabled. Although the first regulations in this area appeared in Polish law only recently, the legislator introduced further solutions in 2018.

The proposed solution is positive. However, it should be noted that Polish legislation is very chaotic. The solutions are incomplete. They are not based on a well-thought-out and comprehensive concept of regulating the status of care workers. A significant shortcoming of the regulation is that it does not provide for any means of control in the event of an employer's refusal to accept a request for remote work or flexible working hours. In practice, workers caring for a child or other family member may not differ much from other workers. Nevertheless, the legislator intended to introduce special rights for the former. An analysis of the legislation shows that this has not been fully achieved and that employees may face some obstacles in this respect.

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