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Tasks and Responsibilities of an Employer in a Digital Age:

How to Comply with the Applicable Requirements
for Work Conditions

1. Introduction

The general meaning of labour law is intimately tied to the understanding that an employee is a party in a weaker position in the employment relationship and that the employer has to follow all possible rules that have been established by labour law so as to protect the employee.

There are several classes of rule that an employer has to honour:

- 1) specific rules on occupational health and safety
- 2) rules connected with the individual employment contract at issue (addressing working and rest time, annual holiday, night work (along with overtime work etc.), and protection for specific categories of employees – (minors, pregnant workers, etc.)

Using new forms of employment and new technologies renders it impossible for the employer to follow both sets of rules without problematic issues arising. For instances, in cases of ‘online jobs’ (e.g., telework or platform-based employment), it is not possible for the employer to measure the working time unilaterally. Furthermore, the employer is interested more in the result. In cases involving shift work handled online, it is not possible to measure how many hours of work will be done in a shift or know in advance how the work is going to be done.

It is obvious that the principles of labour law developed in the 19th century do not function adequately for today’s environment. Although the protection of the employee must remain at the core of labour law, it is time to rethink the position of the employee in labour relations. One important requirement in this connection is that the employee takes more responsibility in labour relations. This extends to determination of the appropriate limitations on working and rest time and to observing the occupational health and safety rules. The protection of the employee is not only the task of the employer; this responsibility has to be shifted more toward the employee.

Another important question emerges also, one connected with how to assess the quality of the work performed by the employee. Until recently, it was possible to verify the quality of work done by employees rather directly in the workplace, but now, in the era of digitalisation, the term ‘workplace’ does not denote anything definite and concrete. Hence, a vital question for the employer inevitably rears its head: how can such control be performed most efficiently?

This article’s discussion of the attendant issues is divided into four chapters. The first chapter (2) examines the issue of the employment relationship and its legal regulation. The main problem to be solved is

that of determining the existence of a subordination relationship in the context of employment and further define it to the extent necessary.*¹

Then, in the second chapter (3), matters related to working hours and rest time are considered. Providing the employee with work and rest time is both a key obligation for the employer and one of the most important guarantees to be provided for every employee.

In the third chapter (4), the discussion turns to issues connected with the workplace. The workplace is an important connecting point for guaranteeing the necessary protection in the employment relationship and for ensuring compliance with occupational health and safety rules. The current system of occupational health and safety regulations imposes on the employer both employee-specific and general responsibility for compliance with the requirements associated with work and rest time. However, in modern conditions that involve changes in forms of employment, the employer lacks the opportunity to ensure the protection of health and safety at work in every work situation. These circumstances lead us to the question of whether in the field of occupational health and safety some share of the responsibility should be left to be borne by the employee.

After the discussion described above, we are positioned to address the general legal issues connected with work-quality assessment, which are dealt with in last chapter (5).

2. The employer's control over employees' work

2.1. Typical employment or atypical employment

When someone talks about an employment relationship, the reference usually is to a situation in which the employer checks the employee's work. The employer oversees where, when, and how the work is performed by the employee. One assumption underlying the formation of the labour legislation now in force and a precondition for its application still today is that an employer can unilaterally prescribe to the employee the conditions for the performance of work. For this reason, we must consider the relationship of subordination that is involved. What matters here is not the economic subordination but personal subordination (dependence). Subordination to the employer's orders means, among other things, that the employee places some of his or her time at the employer's disposal.*²

An ordinary employment relationship is connected with a certain employer, a given workplace, and fixed working time. These criteria for an employment relationship have been applied in the case law of the European Court of Justice*³. The above-mentioned criteria for an employment relationship are clearly highlighted also in the case law of the Supreme Court of Estonia*⁴.

Inasmuch as subordination is clearly observed in an employment relationship, there is a possibility for the employer to check the assignments performed by the employee and the quality of completion of the above-mentioned tasks. If an employee has performed his or her assignments in the wrong way (i.e., not in accordance with the requirements set), the employee may be legitimately held responsible for this, to an extent up to and including termination of his or her employment contract by the employer for reason of non-compliance with work obligations.

Checking of the assignments performed by the employee is possible mainly on account of the fact that in cases of an ordinary employment relationship the employee has a certain workplace and there is a certain period of time for performing the work. The employer has more proximate contact with the employee. However, the change in structure of employment relationships and expansion to new possibilities for work

¹ See also M. Risak, T. Dullinger. The concept of 'worker' in the EU law: Status quo and potential for change. ETUI, Report 140, 2018. – DOI: <https://doi.org/10.2139/ssrn.3190912>.

² G. Tavits. "Individuaalse tööõiguse põhimõisted" ['Basic concepts of individual employment law']. – *Juridica* 2003/9, pp. 634–642 (in Estonian).

³ In the *Laurie–Blum* case, the European Court of Justice stated: "That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration." C-66/85, *Laurie–Blum v. Land Baden-Württemberg*, [1986] ECR 2121.

⁴ See, for example, the Estonian Supreme Court's case no. 3-4-1-53-14, with materials available at <https://www.riigikohus.ee/et/lahendid?asjaNr=3-4-1-53-14> (in Estonian) (most recently accessed on 28.4.2018).

arrangements have brought a situation in which it is possible to state that control over the work performance on the employer's part has become more indirect. The literature has not articulated unambiguously what has changed in employment relationships or what precisely constitutes or is characteristic of non-typical employment relationships. That said, work organisation that entails flexible working time, the sharing of an employee between employers, and also the fact that an employee need not even have a workplace are often discussed.^{*5}

When one is discussing new forms of employment and the subordination relations possible between an employee and employer, it is obvious that there is need for a new understanding of 'employee'. Some European countries have introduced the concept of 'employee-like workers'.^{*6} In Estonia, no such new, parallel notion exists yet, although a recent study of the new forms of employment present in Estonia has prompted the suggestion that a new category of employees has to be introduced. The main element connecting the categories involves economic dependence. It is not necessary that there exist personal dependence; more important is that the employee or employee-like worker is financially dependent on the employer or employer-like entity. The report on the study itself does not make any further suggestions as to what kinds of right have to be guaranteed for those workers and whether and in what extent such terms as those of the occupational health and safety rules should be applied.^{*7}

2.2. The employer's right to control work performed by the employee

The employer's right to control the work performed by the employee is derived, on the one hand, from the nature of the employment relationship following from the employment contract. For example, according to the Employment Contracts Act of Estonia, the defining feature of an employment relationship is that an employee undertakes to perform some work in subordination to the employer while the employer for his or her part undertakes to pay remuneration for this^{*8}.

Labour law is described as a field of law that is intended mainly for protection of employees' rights. Although the employer too has an important role to play in labour relations, there is not much legal regulation pertaining to employers' position or addressing the rights of an employer. For the most part, we are left to consider the employers' obligations, in relation to the employee.

In light of this gap, one important question, among others, can be found in relation to the position of the employer. We can look to the nation's supreme law for answers. Does the Constitution contain any rules pertaining to employers, does the Constitution limit the freedom of activity of an employer, etc.? Usually the nation's supreme law does not itself refer to the notion of an employer. There is more discussion about entrepreneurs and surrounding freedom of entrepreneurship.

Where, then, can legal sources be found? The employer's right to manage the labour and control the work performed by employees can be connected with freedom of contract; i.e., the employer is free to decide when and with whom an employment contract is to be concluded. According to Section 19 of the Estonian Constitution^{*9}, this is connected to the right of free self-realisation. The Constitution of Estonia states that everyone has the right to free self-realisation. When exercising his or her rights and freedoms and fulfilling his or her duties, everyone must respect and observe the rights and freedoms of others and obey the law.

⁵ Atypical work. European Observatory of Working Life (EurWORK). Available at <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/atypical-work> (most recently accessed on 15.6.2018).

⁶ See, in the example case of Germany, Arbeitnehmerähnliche Person ['Employee-like people']. – *JuraForum*. Available at <https://www.juraforum.de/lexikon/arbeitnehmeraehnliche-person> (most recently accessed on 26.6.2018).

⁷ Analüüs "Tulevikutöö – uued suunad ja lahendused" ['Analysis: The work of the future – new trends and solutions']. Estonia: Technopolis Group / Rake 2017, pp. 154–156 (in Estonian), available at http://www.sm.ee/sites/default/files/content-editors/Ministeerium_kontaktid/Uuringu_ja_analuusid/Toovaldkond/tuleviku_too_-_uued_suunad_ja_lahendused_l6ppuaranne.pdf (most recently accessed on 22.6.2018). With regard to economically dependent workers, see also R. Haljasmäe. "Majanduslikult sõltuva töötajaja õiguslik kaitse" ['Legal protection of the economically dependent worker']. – *Juridica* 2007/4, pp. 274–280 (in Estonian). See also: R. Haljasmäe. "Töötajale ettenähtud tagatiste laiendamine majanduslikult sõltuval töötajajale" ['Extension of guarantees for economically dependent workers']. – *Juridica* 2009/4, pp. 217–223 (in Estonian).

⁸ Section 1 of the Employment Contracts Act (*Töölepingu seadus*). – RT I 2009, 5, 35, English translation available at <https://www.riigiteataja.ee/en/eli/506022018003/consolide> (most recently accessed on 22.6.2018).

⁹ The Constitution of the Republic of Estonia (RT I, 21.5.2015), with English translation available at <https://www.riigiteataja.ee/en/eli/521052015001/consolide> (most recently accessed on 15.6.2018).

Also according to the Estonian Constitution, everyone has the right to be engaged in entrepreneurship.^{*10} Freedom of entrepreneurship encompasses an assumption that the entrepreneur may choose the necessary employees. An employer's freedom to deal with entrepreneurship has been dealt with also in the European Union's Charter of Fundamental Rights, according to which an employer has the right to deal with his or her own entrepreneurship.^{*11} These rights entail the employer having the right to manage the relevant labour (the language refers to the employer's right to manage his or her labour). The principle is simple – the employer must receive the legal opportunities necessary for reaching the goal of being successful and effective in his or her activity. The employer's right to manage the relevant labour and to have control over an employee's performance has its foundations in the terms of the Constitution and is supported by various other legal acts existing at national and international level.

3. Adherence to requirements related to working time

3.1. The importance of working time

Specified working time is an important component of an employment relationship for the employee. What we may refer to as the traditional employment relationship presumes full-time employment. With regard to working time, attention has been directed largely to the interests of the employee in employment relationships, particularly in connection with concerns about excessive work. Accordingly, the International Labour Organization (ILO) has adopted conventions that regulate various aspects of working time.^{*12} In addition, the European Union has adopted directives pertaining to working time^{*13}, and the recent European Pillar of Social Rights draws attention to ensuring the adequate regulation of working time.^{*14}

In the European Union directive dealing with notification of the work conditions by the employer, it is foreseen that one of the mandatory conditions to be communicated to the employee is the time of the work.^{*15} In consequence, at the European Union level, work time has been recognised as a fundamental aspect of employment – it is a fundamental condition of the relationship. In addition to the above-mentioned factors, attention is drawn to equality of treatment between part-time and full-time employees.^{*16}

According to Section 5 (1) of the Estonian Employment Contracts Act (hereinafter also 'ECA'), the employee must be informed about the working time particular to his or her case. Under Section 5 (2) of the ECA, terms of employment must be presented clearly, comprehensively, and in accordance with the principle of good faith. If, for example, the agreement on working time has been formulated unclearly or equivocally, the presumption is imposed via the Employment Contracts Act that the employee's working

¹⁰ Section 31 of the Constitution of the Republic of Estonia (*ibid.*).

¹¹ Article 16 of the Charter of Fundamental Rights of the European Union, 'Freedom to conduct a business'. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN> (most recently accessed on 15.6.2018).

¹² E.g., the Forty-Hour Week Convention, ILO convention no. 47, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C047 (most recently accessed on 15.6.2018), and the Hours of Work Convention, ILO convention no. 30, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:C030:NO (most recently accessed on 15.6.2018).

¹³ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time. *Official Journal* L 299, 18.11.2003, pp. 9–19, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0088> (most recently accessed on 15.6.2018).

¹⁴ The European Pillar of Social Rights in 20 principles. Available via https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en (most recently accessed on 15.6.2018).

¹⁵ Article 2 (2) (i) of Directive 91/533/EEC states that the information given to the employee must include information about the length of employees' normal working day or week. Council Directive of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (91/533/EEC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0533:EN:HTML> (most recently accessed on 17.6.2018).

¹⁶ Some authors mention that there are three EU directives – on part-time work, fixed-term employment contracts, and temporary-agency work – that have been designed to support flexibility of employment relationships. However, there are critics who argue that, more fundamentally, these directives all are grounded in three assumptions that can prove limiting: 1) part-time, fixed-term, and temporary-agency work are beneficial to the worker; 2) these forms of work act as stepping-stones and 3) the main problem in this domain is unequal treatment of non-permanent workers relative to 'standard' workers. See A. Davies. *Regulating atypical work: Beyond equality.* – N. Countouris, M. Freedland (eds). *Resocialising Europe in a Time of Crisis.* Cambridge: Cambridge University Press 2013, pp. 230–246. – DOI: <https://doi.org/10.1017/cbo9781107300736.015>.

time is 40 hours per seven-day period and eight hours a day. According to §43 of the ECA, an arrangement of this nature constitutes full-time work.

The issue of working time is important not only because it represents efforts to establish limits between time at work and one's family life but also because it ties in with occupational health and work-safety problems: in cases wherein the employer and/or employee does not heed the requirements related to amounts of working time or does not respect the necessity of rest time, implications may arise for employees' health situation. Workplace accidents and occupational illness are among the possible consequences.

When new forms of employment are applied, it should be borne in mind that not all fields of economic activity are influenced greatly by the development of information technology, possibilities for flexibility, and opportunities for exercise of new forms of employment. For this reason, the division of employees into categories between so-called white- and blue-collar workers may gain added relevance. Though such dichotomies can be problematic in some cases, the activity of white-collar workers (i.e., workers performing various service tasks, doing office-related work, engaged in public service, etc.) permits us to speak in more general terms about arrangement of flexible working time and, in connection with that, about possible obstacles found in the legal regulation.

3.2. Who ensures compliance related to working and rest time

Considering the balance of responsibility with regard to compliance questions may seem strange since there appear to be quite explicit statements that the employer is obliged to ensure honouring both of the statutory hours of work and of the rest requirements. On the other hand, if one looks more closely at the European Union Working Time Directive^{*17}'s description of arrangements for working time, one finds that the directive does not directly refer to the employer in this regard. Rather, it sets out for the Member States the aspects to be attended to in the organisation of working time. Consequently, it cannot be ruled out that the employee too is at least partly responsible for organising his or her working time and rest periods.

According to the Employment Contracts Act, the organisation of working time falls within the scope of the employer's responsibility. The ECA's §47^{*18} specifies that the employer must keep records of the employee's working time especially with regard to night work and overtime work. It is up to the employer how those records and keeping a record of the working time more generally are managed. The main problem is connected with the fact that it is not possible to define unambiguously what constitutes working time, especially in relation to when and with what time limits the employee must be available to the employer if the employer so desires (e.g., in cases of being 'on call'). In today's environment, organisation of flexible working time leads to a situation in which the employer's options for regulating someone's working time and monitoring the fulfilment of requirements related to working time are becoming limited, both in principle and in practice.

For example, practical arrangements for an employment relationship in Estonia sometimes involve taking into account working-time tables (i.e., timesheets) compiled by the employee, and the case law available in this respect recognises this approach as legitimate. Where it is not possible to give the employer verification of having worked at night or having worked overtime, Estonian court practice takes into account what the employee has stated in this regard.^{*19} Thereby, current case law in Estonia already has brought change related to the employer's commitment to following the time used for work: if the employer has not tracked compliance with the rules on working time or has not duly imposed fixed working hours for an employee, this can be done on the employee's side – the requirements can be met on the employee's side through completion of working-time tables.

Where there is an opportunity to perform work in a location desired by the employee and at times that are suitable for him or her, we find a situation in which what matters is less when the work is performed than what the quality of the work and the final result of the work done are. In general, one can characterise

¹⁷ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (see Note 13).

¹⁸ Section 47 of the Employment Contracts Act (*Töölepingu seadus*). – RT I 2009, 5, 35, with English translation available at <https://www.riigiteataja.ee/en/eli/506022018003/consolide> (most recently accessed on 15.6.2018).

¹⁹ E.g., the Harju County Court judgement of 31.1.2012 in case no. 2-10-2667; Harju County Court case 2-14-56647, 20.11.2015; Pärnu County Court case 2-15-18247, 13.5.2016.

employment relationships in certain spheres as having previously been focused on the process but now, in reality, having become more oriented to the result.

To the extent that the employment relationship is oriented toward the result, there is no need to control the working time and the circumstances wherein the assignments were performed. What matters is whether and how they were completed.^{*20} However, the working-time and occupational safety directives of the European Union do not currently support an option for the employee to control the working time him- or herself and keep records of the volume and time of the work.^{*21} For this reason, the employer retains full responsibility for monitoring the working time and fulfilling related requirements. This very real obligation creates a situation in which flexibility is not always possible even where there is a clear wish on both sides to ensure such flexibility and a good combination of working and family life. Insofar as the arrangements for working time are to a significant extent no longer a unilateral decision of the employer, the employer can no longer assume full responsibility with regard to organising the employee's working time. The legal framework should reflect this. Observing the existence and amount of overtime work in particular is becoming more and more complicated, as is ascertaining whether and when each employee gets his or her scheduled rest.

In a study carried out in Estonia on the forms of future work and the possibility of their implementation, the researchers proposed amendment of the Employment Contracts Act and the introduction of working-time rules that afford substantial flexibility in the time arrangements. Thus, it is foreseen that the employment contract may provide an opportunity to agree on a working-time period (with a specified minimum and maximum working time, a range to the number of hours of work) or to leave no specific agreement as to working time. In line with this recommendation, it was proposed that the Estonian legislator consider to be viable what is, in essence, the establishment of zero-hour contracts.^{*22} On the other hand, there is no clear indication of how and under what conditions other guarantees related to work and rest periods (night work, time for rest between stretches of work, and weekly amounts of rest) should be guaranteed. Furthermore, no answer has been proposed as to whether and to what extent the employer should ensure that restrictions (on night work, overtime work, etc.) are complied with in situations of such a flexible work-time arrangement.

4. The workplace

4.1. The meaning of the workplace

The traditional employment relationship is characterised by the work being performed at a fixed place (referred to as the place of employment). The employee's duties are fulfilled at a fixed location and during the scheduled working hours. Before the contract of employment is signed, the employer must let the employee know where the place of performance of the work is located. This obligation to provide information related to the workplace is explicitly articulated in Directive 91/533/EEC, which addresses terms and conditions of employment.^{*23} This directive has been implemented in Estonia's law: Estonia's Employment Contracts Act, in §5, states that the employee has to be informed of the place of performance of work. In addition to this, the ECA contains language setting forth an assumption in this regard – when agreement pertaining to the workplace is unclear or absent, it is presumed that the workplace lies within / is

²⁰ In the context of changed work relations, customer feedback has increased, as has its consideration in the performance of work duties. In the literature of various professions, it has been noted that such customer feedback may at the same time constitute a potential source of discrimination. See R. Ducato et al. Customer ratings as a vector for discrimination in employment relations? Pathways and pitfalls for legal remedies. Presentation at the Marco Biagi Foundation conference held on 19.3–20.3.2018.

²¹ Article 5 of the EU's directive on work environment specifies the general responsibilities of the employer. See Article 5 of 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, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989L0391&from=EN> (most recently accessed on 15.6.2018). The Working Time Directive does not make any reference to the employer. It does create more obligations for the Member States. See, for example, Article 6 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (see Note 13).

²² Analüüs "Tulevikutöö – uued suunad ja lahendused" (see Note 7).

²³ Article 2 of the Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (see Note 15).

bounded by the jurisdiction of the local government.^{*24} The current understanding of labour relations is closely related to the notion of a concrete workplace, and, accordingly, all the protective measures that are mandated for work/workers should be applied in the workplace.

4.2. The employer's obligations connected with the workplace

The place of work is an essential component of the employment relationship as a whole. We can define the term 'workplace' as denoting a place where the employee performs the work and also constituting a place where the employer must ensure that the occupational health and safety rules are followed. According to the Rome I regulation, the determination of the applicable law is tied to the location where the employee is carrying out the duties.^{*25} Therefore, at the moment, there are diverse clauses providing for safeguards for employees, which vary greatly, connected with the notion of the workplace or with descriptions thereof.

The Estonian Occupational Health and Safety Act contains two definitions in relation to this: of 'working environment' and of 'workplace'. The working environment is described as the setting in which people work. The workplace, in turn, is a place of work and its surroundings on the premises of an enterprise of a sole proprietor or company, a state or local government agency, a not-for-profit association, or a foundation (hereinafter 'enterprise') and, in addition, extends to any other places of work to which an employee has access in the course of his or her employment or where he or she works with the permission of the employer or on the employer's orders. An employer shall design and compose its workplace such that it is possible to avoid occupational accidents and harm to the health and to maintain the employee's work ability and well-being.^{*26}

Although recent academic literature often highlights sharing economy, digitalisation, and aspects of developments that accompany these, the employment regulations that are currently in force, centred as they are on the concept of the workplace, do not make it any easier to address the process of digitalisation and the emergence of new forms of employment in tandem with this. One consequence of this focus is that the employer maintains a duty of carrying out analyses for prevention of occupational risks.^{*27} This analysis is an essential component of designing a secure work environment.

There are several ways to assess whether persons who offer ride-sharing are employees or not. This alone illustrates well that analysis of the subject is far from finished.^{*28} While recognition of what constitutes the status of employee is still causing problems in Estonia, there is not much attention given to relevant consequences arising therefrom and, in particular, to employer status. There is seldom further discussion of how the occupational health and safety rules are to be applied in the new forms of employment relationship or where exactly the employee's working environment is.

The modern forms of employment do not require a fixed workplace to which the employee comes every working day. This situation has been rendered possible by the fact that in many cases the employees do not have to be physically present and that much work can be done by means of dedicated secure platforms, databases, etc. It must be emphasised in connection with this that, as is alluded to above with regard to the blue- and white-collar delineation, for some types of work the place of work remains important (e.g., construction work, railway jobs, and shipping).

One of the changes that can be made to the labour law now in force would involve replacing the notion of workplace with that of work environment. Under this proposal, an employer and employee would no longer be seen as connected to one concrete workplace; instead of that, a much broader notion could be used,

²⁴ See §20 of the ECA.

²⁵ See Article 8 (2) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN> (most recently accessed on 15.6.2018).

²⁶ Sections 4 and 5 of the Estonian Occupational Health and Safety Act (*Töötervishoiu- ja tööohutuse seadus*). RT I 1999, 60, 616, with English translation available at <https://www.riigiteataja.ee/en/eli/505052017007/consolide> (most recently accessed on 15.6.2018).

²⁷ See Article 6 (3) of the Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC) (see Note 21). See also §13 (1) 3) of the Occupational Health and Safety Act (*ibid.*).

²⁸ See the materials on the recent European Court of Justice case *Asociación Profesional Élite Taxi*, C-434/15, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198047&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1085694> (most recently accessed on 15.6.2018).

with the language of ‘work environment’ being applied. This amendment would not fundamentally change the nature of the key problem as a whole. A central issue remains: if the place of employment is not actually verifiable by the employer and the employer is not in a position of technical or physical control over the elements that are needed for completion of the work, the employer cannot be held liable therefor.

For someone wishing to take into account the changes in the workplace, it is obvious that there exists a need to reduce the responsibility of the employer for guaranteeing compliance with the occupational health and safety rules. There should be more responsibility on the employee’s side for guaranteeing a safe and healthy working environment. The above-mentioned study conducted in Estonia on the prevalence of new forms of work echoes this, suggesting as one possible outcome of these developments that the employee’s responsibility with regard to occupational health and safety requirements should be increased.

The authors of that analysis have also arrived at the understanding that the national-level introduction of such a change would contradict the law of the European Union as currently in force.^{*29}

5. Assessment of work quality

The use of new forms of remote work has ushered in a situation wherein the employee’s working time can be unlimited and wherein the work need not be confined to a specific place of work. That forces the employer to face several important questions. In addition to the regulation-related ones above, there is one at the core of the employer’s interests: how to measure the quality of the work.

If quality criteria have not been agreed upon, the employer cannot assess whether the work done by the employee was of high quality or not. New forms and means of carrying out work-related duties have not brought changes in that regard.

Sharing-economy work and platform-based employment are proliferating today.^{*30} At the same time, remote work (telework) is increasingly applied for completing work-related tasks, yet the conditions laid out in the law for control and evaluation of the quality of the employee’s work have remained the same^{*31}: the employer prescribes the expected results that the employer must achieve, and then the parties agree upon the quality criteria that may be applied. If the corresponding quality criteria are met, it is possible to consider the work done to be of high quality. That said, for better ensuring the quality of the work performed, it is being found important to negotiate separately with each employee on the terms related to quality. When it is not possible to negotiate employee-specifically in this manner, agreements may be reached at least at the level of groups composed of employees with, for example, a certain class of duties. The only aspect of the quality assessment that is truly important here is who will make the final decision as to whether the work submitted meets the quality criteria (i.e., whether it is in line with the results expected).

The new forms of employment will restrict the employers’ position to assess the quality of work done by the employee. Therefore, more responsibilities about the quality of work has to be heard by the employees.

6. Conclusions

If we are to reflect fruitfully on the opportunities that digitalisation has brought with it and if we wish to support those opportunities and enhance positive digital developments, we must be as precise as possible in our discussion and with the resulting legal praxis and legislation.

Digitalisation has not wrought rapid changes in all professions and areas of employment, and traditional contractual employment encompassing a subordination relationship will continue to exist. The legal regulations now in place are clearly focused on such work, with a fixed workplace and fixed working time. Under those regulations, the employer has significant responsibility for compliance with the associated requirements. However, the other part of the picture – non-traditional employment relationships – should not be neglected. Although legal regulation at EU level does provide for the possibility of the employee

²⁹ Analüüs “Tulevikutöö – uued suunad ja lahendused” (see Note 7).

³⁰ M. Risak, J. Prassl. Uber, TaskRabbit, & Co: Platforms as employers? Rethinking the legal analysis of crowdwork. – *Oxford Legal Studies Research Paper Series* 2016/8.

³¹ K. Künnapas. Kaugtöö aktuaalseid probleeme [“Topical problems of telework”]. – *Juridica* 2014/4, pp. 279–290 (in Estonian).

having some responsibility for compliance with occupational health and safety rules, this has not entered full application yet: at the end of the day, the employer is still responsible for developing healthy and safe work conditions. Therefore, the workability of the new forms of employment within this framework remains highly questionable.

With regard to the assessment of the quality of the work performed by the employee, digitalisation does not entail any substantive changes. As before, the essential principle is that the work must be done within the prescribed time and to the prescribed quality. The level of quality must be agreed upon with the employee – though sometimes at the level of the individual employee in the new conditions – and it must be ensured that the employer and the employee are able to apply a shared understanding of the agreed level of quality.