

SCOPE OF THE TELEWORK OBLIGATION IN QUEBEC

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The whole world has been trying to fight COVID-19 for more than one year now. To limit the spread of COVID-19, the government of Québec signed several decrees and ministerial orders, most of which had an impact on an employer's right to require that his employees physically report to work. In June 2020, the government specified in Ministerial Order No. 689-2020 that teleworking should be given preference. However, in December 2020, pursuant to Ministerial Order No. 2020-105, teleworking became mandatory for employees in businesses, organizations or in the public service who perform administrative or office work, except for employees whose physical presence is essential to maintaining their employer's business. Since then, office employees of only 2nd tier (yellow) regions can return to their offices, although teleworking remains recommended. [1] The other office employees in the 3rd and 4th tier regions (orange and red) must perform mandatory telework until advised otherwise.

In such a context, we believe that it is important to give an overview and a reminder of obligations and recommendations for employers whose employees perform their work from home.

Obligation to Perform Telework

Physical Presence Essential to Maintaining the Business of an Enterprise

The term "essential to maintaining the business of an enterprise" has not been defined by the government, nor by the Quebec courts for that matter up to now. It is accordingly up to an employer to determine what tasks cannot be performed through teleworking.

In our opinion, some office or administrative duties cannot be performed through remote working and a physical presence is essential to maintaining the business of an enterprise. For instance, the person who picks up the mail, who processes inventory or who receives deliveries.

On the other hand, it is not always so easy to determine if an employee's physical presence is essential. Let's take the example of an employee who can only perform 80% of his tasks by working remotely. In such a situation, we suggest that the employer, when it's possible, ask the employee to report to work only one day a week to perform the tasks for which he/she must be physically present and to continue teleworking on the other days.

Lastly, what about a situation in which for example, an employee may perform remote work, but who has reduced his productivity since teleworking or does not produce proper work any longer? On this point, we consider that this is not necessarily an employee whose physical presence is essential, but rather a productivity problem which could be limited by the implementation of a good telework policy (see the section below for more information) or by giving the employee a disciplinary notice.

Consequences for Non-Compliance

An employer who requires that his employees physically report to work, although their presence is not essential, will have to justify this before the Commission des normes, de l'équité, de la santé et de la sécurité du travail ("**CNESST**") whose inspectors are tasked with applying the *Act respecting occupational health and safety* ("**AROH**S"). In the performance of their duties, these inspectors determine if the employer took the necessary measures to protect the health and ensure the safety and physical well-being of his employees.^[2] In the current context, this involves determining if the employer took the measures required to allow his employees whose physical presence is not essential to perform their work remotely.

If an inspector receives a complaint, the employer must show that he has previously taken the measures required to assess the possibility of having remote work performed, that following this analysis, it was impossible to do so and that if those tasks were not performed at the workplace, the employer would sustain a break in service.

If an inspector is not satisfied with this analysis, he could issue a remedial order.^[3] If the situation is not remedied following this notice, the enterprise is liable to a fine of \$1,500 to \$60,000 for a first offence and up to \$300,000 for a subsequent offence.^[4] Lastly, an inspector has the power to order the shut-down of a workplace if he considers a worker's health, safety or physical well-being to be endangered.^[5]

An Employer's Rights and Obligations

Because remote working is only one way of performing work, the rights and obligations of employers under the various labour laws,^[6] employment contracts or collective agreements continue to apply.

Accordingly, an employer must namely ensure that the location where an employee performs his work, even telework, is safe. In fact, it is possible that an injury which occurs during telework may be considered by the CNESST as an industrial accident.

In addition, an employer may be required to pay certain expenses in connection with telework, namely for the purchase, use or maintenance of an employee's equipment, if by supplying it himself, the employee would be paid less than the minimum wage.^[7] An employer must also bear the expenses related to the operations of his enterprise.^[8]

One must not lose sight of the fact that an employee is governed by the employment standards of the province where he performs his work. Accordingly, an employee who works from his residence located in another province or country may be subject to different standards than when he would physically report to work at the office. In such a case, we suggest that you contact one of our team members to better assess your obligations.

Implementing Policies

To properly delimit the obligations and responsibilities of employers and their employees, it is strongly suggested if this has not already been done, to have a telework policy specifically dealing with the following points:

- Work schedules and overtime
- Conditions for management and supervision (e.g. frequency of contacts, type of supervision, etc.)
- Expectations regarding productivity and the method of evaluation
- Compliance with the employment contract or the collective agreement, as well as with policies which are already in force
- Details for communication with the employer (e.g. an obligation to immediately notify the employer in case of a breakage, a breakdown or the inability to use computer equipment)
- Expenses to be borne by the employee and those borne by the employer (e.g. Internet, telecommunications, etc.)
- Work tools and equipment (e.g. who supplies the equipment, who owns it, the obligation to maintain it in good condition and ensure its protection, return of the equipment, etc.)
- Use of the computer equipment and protection of confidential data (e.g. acceptable use, protection software to be maintained up to date, safe storage, destruction procedure, etc.)
- Workstation organisation (e.g. ensure health and safety, allow inspection by the employer, conditions for inspections and investigations, etc.)
- Industrial accident or occupational disease (e.g. promptly notify the employer, same obligations as if the employee was at the employer's workplace, etc.)
- Parameters for protection of privacy compliance and its limits
- An employee's obligation to notify the employer of his telework location.

These are only a few examples of points which may be applicable to your business and would appropriately be dealt with in a telework policy. We would be pleased to give you more specific advice, adapted to your business, and to revise or prepare a policy for you.

[1] [Level 2–Early Warning \(yellow\)](#) [ps2id id='1' target='']

[2] Sect. 51 AROHS [ps2id id='2' target='']

[3] Sect. 182 AROHS [ps2id id='3' target='']

[4] Sect. 236-237 AROHS [ps2id id='4' target='']

[5] Sect. 186 AROHS [ps2id id='5' target='']

[6] More specifically: *Civil Code of Québec*; *Labour Code*; *Act respecting labour standards (“ARLS”)*; *Act respecting occupational health and safety*; *Act respecting the protection of personal information in the private sector*; *Act respecting industrial accidents and occupational diseases*; *Charter of Human Rights and Freedoms*. [ps2id id='6' target='']

[7] Sect. 85.1 ARLS [ps2id id='7' target='']

[8] *Id.* [ps2id id='8' target='']

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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