Telework: Better Safe

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Telework is not a new phenomenon. According to the International Labour Organization, its rise dates back to the 1970s when a major oil crisis prompted many companies to keep their employees at home to reduce their energy consumption[1]. That said, since the Covid pandemic, teleworking has become widespread. Now, nearly a quarter of Canadian companies (22.5%) expect that 10% or more of their workforce will continue to telework after business is back to normal[2]. Needless to say, this mode of work is here to stay.

However, teleworking can be a real headache for employers when it comes to injury prevention and occurrence.

A more permissive caselaw

The *Act Respecting Industrial Accidents and Occupational Diseases*[3](the "AIAOD") may apply to homeworkers[4]. In fact, the courts have long held that a home can be considered a workplace within the meaning of this Act, where there is part of the work that is performed by the employee with the knowledge and consent of the employer[5].

In fact, before the pandemic, there were two opposing lines of caselaw regarding the acceptance of workplace injuries when they occurred in the home of the worker who was duly authorized to work remotely. One accepted them, the other denied them. However, it was all a question of circumstances. If the situation fell within the sphere of professional activities, it was accepted, even if it could be considered as part of the personal sphere. [6]

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However, since the pandemic, in 2020 and 2021, the Administrative Labour Tribunal (the "ALT") has issued several decisions expanding the boundaries of this sphere of professional activities. Several so-called "comfort" activities have been admitted in the context of teleworking, such as falling while walking during a health break[7]or on the stairs at home at the beginning of the lunch hour[8]. Similarly, going to the bathroom[9], going outside to smoke[10], getting a soft drink[11], a coffee[12], or a dish from the microwave[13] could qualify as comfort activities within the sphere of work activities at work, even when teleworking.

Although the restrictive trend could still be applied, it is important to note that each situation must be analyzed individually, taking into account the location of the event, the existence and degree of authority over the worker, the purpose of the exercise and its usefulness with respect to the performance of the work.

In short, given the increased use of telework, employers should expect to see an increase in such claims. This observation should guide them in the organization of this new work method, especially considering the new amendments to the *Act Respecting Occupational Health and Safety* (the "AOHS").

Impact of amendments to the Act Respecting Occupational Health and Safety

In 2021, the AOHS underwent a number of important changes. One of them is that the Act and its prevention obligations apply to both the worker who teleworks and the employer[14]. This means that the worker's home or open workspaces are now the employer's responsibility. For example, the obligation set out in section 51(7) of the AOHS, namely that the employer must provide safe equipment and ensure that it is maintained in good condition, applies in this case to the telework environment where the worker is located. This new reality entails obligations for employers and will undoubtedly have an impact on the courts' interpretation of the acceptance of an employment injury.

Indeed, as shown in the previous section, recent decisions tend to demonstrate that accidents that occur at home in the context of telework are mostly admissible. Moreover, the new obligation set out in the AOHS according to which the telework environment is under the responsibility of the employer in matters of prevention related to occupational health and safety is likely to be interpreted by the courts as being more conducive to the recognition of workplace injuries. The link is certainly not direct, but the trend in caselaw and the amendment to the AOHS lead us to believe that this will be the case.

Recommendations in light of the evolution of caselaw and amendments to the AOHS

In light of the above, it would be advisable to establish or revise a telework policy in order to ensure that the obligations of the employer and those of the worker with respect to the telework workplace are clearly defined. For example, depending on the activities that may be carried out, it will be important to define the notion of workplace in a telework environment. To do so, each employer will have to ask itself many questions, such as:

> Do you want to allow teleworking in a cooperative teleworking location?
> What measures can be put in place to ensure that prevention obligations are met and that occupational injuries are avoided?
> Who will be responsible for ensuring that the employer's obligations regarding prevention are met in a context where the employee works remotely?
> How to manage employees who are outside the country?

In short, all these questions will have to be analyzed in the context of drafting or rewriting a telework policy.

The members of the Labour and Employment Law team remain available to assist you in your reflection and in the revision of your policy, if necessary.

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1. International Labour Organization, *Challenges and Opportunities of Teleworking for Workers and Employers in the ICTS and Financial Services Sectors*, Geneva, 2016.
2. Statistics Canada, *Canadian Survey on Business Conditions: Impact of COVID-19 on businesses in Canada*, May 2020.
3. CQLR, c. A-3.001.
4. *Club des petits déjeuners du Québec* c. *M.C. Frappier*, 2009 QCCLP 7647.
5. *Quebecor Media Inc.* et *Marco Delgadillo*, 2011 QCCLP 4843.
6. *Desrochers* et *Agence de revenu du Canada*, 2011 QCCLP 7562; *Futura manufacturier de portes & fenêtres inc. et Rossignol*, 2020 QCTAT 2562; *Benoît* et *NCH Canada inc*, 2021 QCTAT 856.
7. *Laverdière* et *Ministère des Forêts, de la Faune et des Parcs (Opérations régionales)*, 2021 QCTAT 5644.
8. *Air Canada* et *Gentile-Patti*, 2021 QCTAT 5829.
9. *Lefèbvre (Re*), 2006 CanLII 70745 (QC CLP).
10. *Miljours* et *Ameublement Branchaud*, 2016 QCTAT 809.
11. *Cormier* et *Société des Entreprises Innues d'Ekuanitshit (2009*), 2019 QCTAT 3752, *Robillard* et *DPCP*, 2020 QCTAT 2933.
12. *Giroux* et *Pro Mec Élite inc*, 2014 QCCLP 2853.
13. *Beaudry* et *Ministère de la Sécurité publique (Santé-sécurité)*, 2004 CanLII 92916 (QC CLP).
14. AOHS, sec. 5.1.

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