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Legal considerations related to "workation"

The "workation[1]" trend, although not entirely new, has gained significant traction since the pandemic and is expected to continue growing in popularity. This hybrid working model can be appealing to many employees and serve as a recruitment and talent retention tool for employers who embrace it. However, allowing employees to temporarily work from another city or country gives rise to various legal issues that employers should address beforehand. Indeed, changes in work location can impact several obligations imposed on employers.

Firstly, according to the *Act respecting occupational health and safety*[2], employers have a duty to implement necessary measures for protecting the health and safety of their employees, including ensuring safe and ergonomic working conditions. This obligation remains in effect even when work is performed outside Québec. However,

[1] "Workation" (a word that is formed by the contraction of the words "work" and "vacation" also sometimes spelt "workcation" or "worcation") refers to people continuing to do their regular work, but from a destination where they would normally take vacation.

[2] RLRQ c. S-2.1.

complying with this obligation can be challenging in the context of workation, particularly if the chosen destination is deemed riskier. Employers may have grounds to reject an employee's request for working in an unsafe location. To obtain a comprehensive list of travel destinations and their associated risk levels, we recommend referring to the Canadian government website.

Workation can also give rise to concerns and issues related to data protection and confidentiality. When assessing a workation request, it is important for companies to ensure that their confidential, privileged, sensitive and personal information remains protected in the same manner as when the employee works in Québec. In this regard, it is relevant for the employer to focus on the type of data to which the employee has access while performing their duties. If the employee's responsibilities involve handling confidential or sensitive data, or personal information, this could be a justifiable reason, depending on the circumstances, to deny the workation request.

According to Québec tax laws, employers are obligated to make and remit source deductions from employee salaries and pay certain social security contributions. Working outside Québec may trigger the application of foreign tax rules. This means that, in some cases, employees residing in Québec and temporarily working abroad may be subject to taxation in the country where they conduct their professional activities. Additionally, their employer may have withholding or social security obligations towards foreign tax authorities. It is important, therefore, to be aware of the risks and potential tax liabilities that may arise before approving a workation request. In this regard, Canada and Québec have entered numerous international conventions governing the collection of taxes between specific countries.

Regarding logistical considerations, employers have the right to expect employees to perform their work as if they were in the office. However, certain factors, such as time zone differences or the quality of Internet connectivity, can pose challenges. Moreover, other factors must be considered, including cybersecurity issues and coverage of property and casualty or liability insurance policies in the event of a change in the work location.

Given the aforementioned considerations, we strongly recommend that employers intending to allow workation develop and implement a comprehensive telecommuting policy that specifically addresses this issue, and assess requests on a case-by-case basis.

Practical advice

Considerations in developing a policy on workation:

- Circumstances surrounding the workation request (reason for travel, e.g., ill family member);
- Nature of the work performed by the employee;
- Duration of the remote work request;
- Remote work location (remote area in the province, outside the province or outside of the country);
- Occupational health and safety;
- Protection of data confidentiality;
- Cybersecurity;
- Tax issues; and
- Damage and civil liability insurance.

Labour disputes: Replacement workers and telework

The Superior Court recently rendered two decisions regarding anti-scab provisions in the context of telework.

In the first decision, the case involved Groupe CRH, which operates a cement plant in Joliette. During a lockout in the summer of 2021, the union filed an application for an order with the Administrative Labour Tribunal (the ALT), alleging that Groupe CRH was unlawfully using non-unionized employees who were teleworking to perform the work of the locked-out employees. The union argued that this violated the provision of the *Labour Code*[3] (the Code) that prohibits an employer from "utilizing, in an establishment where a strike or lockout has been declared, the services of an employee he employs in the establishment to discharge the duties of an employee who is a member of the bargaining unit on strike or locked out." On November 25, 2021, the ALT ruled in favour of the union[4]. In his decision, the Administrative Judge stated that the "establishment" affected by the lockout extended to the teleworking employees' homes. According to the ALT, this interpretation is more adapted to the new reality of the workplace since the pandemic. Therefore, the tribunal found that the employer had violated the provisions regarding replacement workers.
The ALT ordered Groupe CRH to cease using the services of the teleworking employees to perform the tasks of the locked-out employees. However, on April 21, 2023, the Superior Court overturned the ALT's decision and set aside its orders[5]. The Superior Court states that the ALT's interpretation was inconsistent other provisions of the Code that refer to the concept of "establishment."

In the meantime, the ALT revisited the interpretation of the concept of establishment and the possibility for employers to use teleworking employees to perform the duties of employees on strike or locked out during labour disputes. In a similar case involving Coop Novago, an agricultural cooperative, the union alleged that non-unionized or other employees were performing the work of striking employees from their homes.

On March 23, 2022, the ALT granted the union's application[6], basing its decision on the precedent set by the CRH Group case, which recognized that the "establishment" affected by the lockout extends to the home of teleworking employees. The ALT therefore ordered Coop Novago to cease using the services of non-unionized employees or employees from another establishment to perform the work of striking employees, even if done through telecommuting. On May 10, 2023, the Superior Court upheld the ALT's decision[7], stating that the ALT was justified to rely on the CRH Group decision to conclude that telework cannot be used to circumvent the purpose of the anti-scab provisions of the Code.

Given the conflicting decisions from the Superior Court, the legal status regarding replacement workers in a telework context remains uncertain. The union representing the employees of the CHR Group has appealed the Superior Court's decision, and the Court of Appeal will have the opportunity to provide clarity on the matter in the coming months. We will closely monitor the case to observe how the Court of Appeal will rule on this issue.

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[3] RLRQ c. C-27.

[4] *Unifor, Local 177 v. Groupe CRH Canada inc.*, 2021 QCTAT 5639.

[5] *Groupe CRH Canada inc. v. Tribunal administratif du travail*, 2023 QCCS 1259.

[6] *Syndicat des travailleuses et travailleurs de la Coop Lanaudière CSN v. Coop Novago*, 2022 QCTAT 1324.

[7] *Coop Novago v. Syndicat des travailleuses et travailleurs de la Coop Lanaudière – CSN*, 2023 QCCS 1539.

Decision briefs

Drake v. Trans Continental Equipment Ltd. (T.A.T., 2023-3-16), 2023 QCTAT 1218

The Administrative Labour Tribunal (the ALT) has ruled that an employee's refusal to return to work at the employer's establishment, following a directive to end telework, does not constitute a serious enough offence to justify dismissal.

In that case, the employer terminated the complainant, who held the position of purchasing and inventory clerk, due to his refusal to return to work on-site. The ALT determined that the company did not have a permanent telework policy in place and that the employer's management rights allowed them to require employees to resume on-site work. However, while acknowledging the employee's refusal to comply with the employer's directive was insubordinate, the ALT concluded that this misconduct was not serious enough to warrant dismissal, particularly given that the complainant had been open to further discussion on the issue, had 10 years of seniority and had no prior disciplinary record. Therefore, the ALT found that the employer had failed to demonstrate just and sufficient cause for the dismissal.

Bellemare v. Hydro-Québec (T.A.T., 2023-3-20), 2023 QCTAT 1322

In this case, a lineman who was involved in union activities filed a complaint for a practice prohibited under Section 14 of the Labour Code[8] (the Code). The complainant argued that the employer put him in a situation that limited his right to challenge his disciplinary suspension. The employer proposed a four-month suspension instead of a one-year suspension, on the condition that the complainant waive his right to file a grievance.

While the Administrative Labour Tribunal (ALT) noted that the Code does not prohibit an employee from waiving the right to file a grievance when such a decision is part of a genuine process to resolve a dispute or avoid arbitration, this exception does not apply when bargaining down an excessively severe penalty, as was the case here. The judge found that the employer could not have been unaware that their actions would interfere with the complainant's free choice by pressuring him to waive his right to file a grievance in exchange for a reduced penalty. As a result, the court ordered the employer to pay CA$15,000 in punitive damages under the *Charter of Human Rights and Freedoms*[9].

Canadian Union of Public Employees, Local 1299 FTQ, v. Ville de Châteauguay (T.A.T., 2023-5-04), 2023 QCTAT 2002

The remarks made by a foreman to an employee who promptly contacted their union representative after an industrial accident may constitute interference with union activities under Section 12 of the *Labour Code*[10].

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[8] RLRQ c C-27.

[9] RLRQ c C-12.

[10] RLRQ c C-27.

Varia

Bill 19, *An Act respecting the regulation of child labour*

The *Act respecting the regulation of child labour* was passed on June 1, 2023, and, with a few exceptions, has been in effect since that date. As a result, individuals under the age of 14 can only work in specific types of jobs (artistic production, newspaper delivery, childcare, homework help and tutoring, certain jobs supervised by an adult) **with parental authorization.** Furthermore, starting September 1, 2023, children subject to mandatory school attendance can work a maximum of 17 hours per week, including 10 hours from Monday to Friday (during the school period).

Bill C-13, *An Act for the Substantive Equality of Canada's Official Languages*

On June 20, the *An Act for the Substantive Equality of Canada's Official Languages* received royal assent. The second part of this Act, enacting the *Act respecting the use of French in Federally Regulated Private Businesses,* will provide a framework for the use of French as a language of service and work within private enterprises under federal jurisdiction in Québec and in regions with a significant Francophone presence. The Act will come into force in Québec at a later date to be set by order in council and, two years later, in regions with a strong Francophone presence.

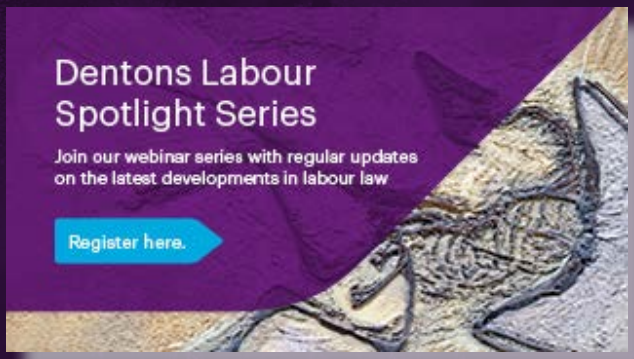
Through a compromise between the federal government and the Government of Québec, this new law incorporates several elements of the *Charter of the French Language*[11] (the **Charter**), particularly regarding the language of work. Additionally, it is important to note that this law also allows private enterprises under federal jurisdiction to voluntarily comply with the Charter, which would then apply to them instead of the federal legislation, specifically in relation to their workplaces in Québec.

[11] RLRQ c C-11.

Stay tuned!

Labour Spotlight Series:

A series of webinars hosted by Dentons' Employment and Labour group.



Canadian Occupational Health & Safety Law

Stay updated on legal and regulatory issues concerning occupational health and safety through Dentons' blog.

Congratulations

We extend our congratulations to **Nicolas Séguin**, who will be joining our Employment and Labour group as a lawyer following his articling term. We warmly welcome him to our team!

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