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COVID-19 and the Workplace in Québec: What Employers Need to Know and Do

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UPDATED: Employers need to respond quickly to COVID-19 measures decreed by governments. Acting fast with the right response will help employers mitigate the impact of COVID-19 on their workforce, their clients and, ultimately, their businesses. In addition to what might be ordered by the government or provided in collective agreements or written contracts of employment, here is what you need to know and do in relation to your employees in Québec.

What should employers do first?

Employers must take the necessary measures to protect the health of their employees and ensure their safety and physical well-being.[1] To do so, employers should prioritize the following actions:

- Regularly send internal notices to employees to keep them informed about actions undertaken by the organization. Keeping employees informed and showing that their health and safety is a priority will help prevent panic and ensure ongoing collaboration.
- One of the first notices to be sent to employees should be to inform them of the measures put in place by the organization to prevent the propagation of the virus; the parameters for mandatory disclosure and isolation; and other sanitary measures that may be informed by public health guidelines.[2]
- Adopt a COVID-19 or infectious diseases policy (see below for more information) and business continuity plan, and start their implementation.

Can employers force employees to stay home or work from home?

Yes, in certain circumstances. Employers can force employees to stay home or work from home. Consistent with the obligation to protect the health of their employees and ensure their safety and physical well-being, we believe that it is reasonable for an employer to require employees to stay at or work from home if they have recently travelled, present symptoms of COVID-19, or were exposed to third parties diagnosed with COVID-19.

Do employees who are forced to stay home or in quarantine have the right to be paid?

No. Unless a collective agreement or written contract of employment provides otherwise, there is no obligation for employers to pay employees while they are unable to attend work due to contracting COVID-19 or because they are in quarantine.

If it is possible for an employee to telework, this option should be encouraged to avoid loss of salary for the employee. If teleworking is not possible, the employee may use the paid illness days, holidays or the short-term insurance coverage that the employer may offer in order to alleviate the loss of salary.

Under the *Act respecting labour standards* (LSA), only the first two days taken annually by an employee to fulfil obligations relating to the care, health or education of a relative are remunerated. Employees who take days off to care for a relative should therefore be made aware that after the first two days, there is no entitlement to be paid. This can be important where an employee who is taking care of a

relative who has COVID-19 is required to go into quarantine for two weeks before returning to work, in compliance with public health recommendations.

Employees who are unable to work as a result of being affected by COVID-19 or in quarantine may be eligible to receive up to a maximum of 15 weeks of employment insurance benefits under the federal Employment Insurance program. In this regard, the Government of Canada has announced that it will waive the one-week waiting period for people who are in quarantine or have been directed to self-isolate and are claiming Employment Insurance sickness benefits.

An employee who is infected with COVID-19 in the course of work that is directly related to the risks peculiar to that work – for example, as a nurse, physiotherapist, occupational therapist or paramedic exposed to someone diagnosed with COVID-19 – is entitled to file a claim to the Commission des normes, de l'équité, de la santé et de la sécurité au travail for income replacement indemnity. An employee so afflicted will be covered for as long as is needed to recover from COVID-19 and be able to continue being employed.

Can employers request that an employee be tested for COVID-19 or be vaccinated (assuming vaccination becomes available)?

No. As of the date of this article, employers cannot force their employees to be vaccinated or undergo testing for COVID-19. In principle, no one may be made to undergo care of any nature, including examination or vaccination, without that person's consent. However, Québec's *Public Health Act* (PHA) provides that the Québec government may require otherwise in two cases:

- **Contagious diseases.** The Minister of Health and Social Services may, by regulation, require mandatory medical treatment to prevent the spread of contagious diseases. To fall in this category, COVID-19 would need to be medically recognized as capable of constituting a serious threat to the health of the population and an effective treatment would need to be available to end the contagion. If COVID-19 becomes listed as a "contagious disease," the required medical treatment may include mandatory vaccination and, potentially, mandatory preventive testing.
- **Public health emergency.** The Québec government declared a "public health emergency" on March 13, 2020, due to the serious threat to the health of the population caused by COVID-19. While the public health emergency is in force, the Minister of Health and Social Services may, without delay and without further formality, order the compulsory vaccination of the entire population or any part of it, and "order any other measure necessary to protect the health of the population" (PHA, art. 123).

An employer can require that its employees comply with public health requirements such as the ones that could be ordered under the PHA. Employees who refuse to comply could be subject to sanctions.

What type of disclosure can employers ask from employees? Can employers require that employees disclose that they have been diagnosed with COVID-19?

Yes. In order to take adequate measures to reduce the risk of transmission and protect the health and safety of other employees, an employer may require that employees answer questions related to and/or proactively disclose the following:

- a diagnosis or any symptoms of COVID-19;
- exposure that might have occurred to someone (such as a relative) diagnosed with COVID-19; and
- recent travel or expected travel in any country, since the World Health Organization has declared that the COVID-19 outbreak is a worldwide pandemic.

If an employee discloses a case of COVID-19 to the employer, it may be necessary for the employer to advise other employees that a case of COVID-19 has been confirmed in the workplace. In doing so, the employer should avoid disclosing confidential information, such as identifying the concerned employee, and limit the information provided about the employee's case to what is necessary to take adequate precautionary measures to ensure the health and safety of the other employees.

Can employers prohibit employees from travelling?

No. Employers cannot prohibit their employees from travelling. Employers can nonetheless require that employees disclose their foreign travel plans in advance, and employers can advise employees that if they decide to travel, they will be required to stay home, in quarantine, for the relevant incubation period of COVID-19 (14 days) from the date of their return to Canada before returning to work. Employers can also require a medical certificate from employees before their return to work if they become ill within that period.

Can employers require that an employee travel for work-related purposes despite the COVID-19 outbreak?

No. The Public Health Agency of Canada recommends that travellers avoid all non-essential travel outside Canada. Employers are encouraged to reassess the necessity of any business travel and to search for solutions to avoid such travel. An employee may consider that there are "reasonable grounds to believe" that travelling at this time could represent a "danger to his [or her] health, safety or physical well-being" and therefore refuse to undertake such travel.

What should be done with an employee diagnosed with COVID-19?

Employers should require that the employee stay home for his or her period of illness. The employer may also require a medical certificate from the employee before reintegration into the workplace in order to avoid the spread of the disease to other employees.

If the employee comes to the workplace while being sick, the employer should require that he or she leaves the workplace immediately; the employer should then contact public health authorities to find out the recommended decontamination measures to deal with the situation.

Under the LSA, an employee may be absent from work for a period of not more than 26 weeks over a period of 12 months owing to sickness.

No dismissal, suspension or transfer of the employee, or discrimination (notably based on the individual's nationality) or reprisal may take place or imposed on the employee for having contracted COVID-19 or for having exercised any rights due to COVID-19.

Can an employee refuse to work?

Yes, in certain circumstances an employee can refuse to work if he or she has "reasonable grounds to believe" that in performing the work he or she would, because of COVID-19, be exposed to "danger to his [or her] health, safety or physical well-being, or would expose another person to a similar danger."

The notion of "danger" is objective. In relation to COVID-19, it may be assessed in relation to the employees' health, age and past medical history. Risk factors for COVID-19 include being older than 70 years, suffering from chronic diseases, particularly respiratory diseases, being pregnant or immuno-compromised. Employers should encourage employees who present such risk factors to work remotely if possible.

An employee may also reasonably consider that working with a colleague represents a danger to his or her health if this colleague presents a risk of infection according to public authorities – for example, if the colleague is diagnosed with COVID-19 and comes to work or has just returned from travelling and did not go into quarantine.

However, no employee may exercise his or her right to refuse to work if the refusal puts the life, health, safety or physical well-being of another person in immediate danger or if the conditions under which the work is to be performed are ordinary conditions in his or her kind of work. This includes, among other types of employment, police officers, firefighters, hospital staff, long-term care or group home employees.

An employee who exercises the right to refuse to work is deemed to be at work for the duration of the work stoppage and is therefore entitled to wages.

Can an employee stay home to help a relative diagnosed with COVID-19?

Yes. An employee may be absent from work for 10 days per year (the first two days being remunerated) to fulfil obligations relating to the care, health or education of a child or a spouse's child or because of the state of health of a relative or a person for whom the employee acts as a caregiver. The absence from work may be extended up to no more than 27 weeks over a period of 12 months if the illness of the relative becomes serious and potentially mortal, as attested by a medical certificate.

The employee must advise the employer as soon as possible of a period of absence from work, giving the reasons for it, and take reasonable steps within his or her power to limit the leave and its duration.

Employees taking leave to help a relative diagnosed by COVID-19 should be advised that their exposure to the disease will require that they be placed in quarantine.

If it is warranted by the duration of the absence, the employer may request that the employee furnish a document attesting to the reasons for the absence.

What should employers include in their COVID-19 or infectious diseases policy?

The ROHS does not mandate employers to adopt a COVID-19 or infectious diseases policy. However, employers should strongly consider setting out and communicating to employees clearly articulated internal policies related to COVID-19. In addition, communications should emphasize that internal reporting is encouraged and will not be subject to reprisal.

A COVID-19 or infectious diseases policy should be tailored to the specifics of every workplace environment and to the extent of travelling and meetings required from employees.

An internal policy may include one or more of the following or other elements recommended by public authorities' health guidelines:[3]

- the hygiene recommendations from public authorities that employees must follow;
- the additional hygiene measures, disinfection requirements and recommendations set up by the employer, such as to distribute and use antiseptic products, disinfect common spaces more often and avoid shaking hands;
- how to self-monitor and detect symptoms of COVID-19, and what to do when sick;
- what and how to communicate with the employer, colleagues and third-party contractors during the outbreak;
- the immediate disclosure by employees to human resources regarding foreign travel plans, diagnosis or any symptoms of COVID-19 or exposure that might have occurred with a person diagnosed with COVID-19;
- the parameters of quarantine – in which circumstances (for example, after being exposed to someone affected by COVID-19 or after returning from travelling), for how many days and how to keep the employer informed of developments;
- the parameters for return to work after a period of quarantine or recovery from COVID-19, requirement that a medical certificate be provided (and if the employer will pay for it) and the reintegration process;
- business continuity plan, which would include, if possible, the identification of critical operations, urgent hygiene measures, resources to alleviate staff-shortage consequences, means to encourage teleworking, and the expectations in the context of many employees working remotely;
- the prohibition or reduction of non-essential internal meetings, meetings with clients or providers, outside visitors to the employer's offices, business travel or professional gatherings and events, and a definition of what "non-essential" covers for your organization;
- encouragement to replace in-person meetings with teleconference or conference calls, when possible;

- log for outside visitors to your offices may be considered, as well as pre-screening questions to ensure the health and safety of your employees.

What are the rules regulating layoffs or collective dismissal in the context of COVID-19?

Employers must comply with the provisions of collective agreements and of the LSA relating to layoffs, permanent layoffs and collective dismissals. Before proceeding with such measures, employers could explore other alternatives, such as encouraging employees to take voluntary unpaid leave, reducing their working hours and/or stopping recruitment.

Temporary and Permanent Layoff

Financial difficulties due to a decline in revenues caused by COVID-19 may cause an employer to temporarily or permanently lay off employees.

The LSA requires that employers provide written notice (or indemnity in lieu of such notice) to employees before terminating their contracts of employment or laying them off for six months or more. Such notice period must comply with the requirements and time periods provided in the LSA.

Best practice would nevertheless mandate that an employer intending to lay off employees for a period of less than six months advise them of the temporary layoff in writing. At the expiry of the six-month period, depending on the circumstances or the cause of the layoff, indemnity may have to be paid to employees in lieu of notice.

The LSA also provides that employees' right to receive a written notice (or indemnity in lieu of notice) does not apply when it is the result of a "superior force" (LSA, art. 82.1). The COVID-19 outbreak would need to be shown, on a balance of probabilities, to have been the direct cause of the end of the contract of employment or the layoff, and to have been a superior force. Due to current uncertainty surrounding COVID-19, it cannot be confirmed whether COVID-19 would be considered a superior force by the courts in the specific context of each employer.

Employers that do not give the prescribed notice or that give insufficient notice, when required, must pay employees a compensatory indemnity equal to their regular wage, excluding overtime, for a period equal to the period or remaining period of notice to which they were entitled.

During a temporary layoff, employees may be eligible to receive employment insurance and other health benefits under their contract of employment or collective agreement.

Collective Dismissal

A collective dismissal occurs when

- an employer terminates the employment of 10 employees or more of the same establishment over a period of two consecutive months, or
- an employer lays off at least 10 employees of the same establishment for a period of more than six months.

Every employer must, before making a collective dismissal for economic reasons, give notice to the Minister of Employment and Social Solidarity in a specified format and within a specified time, and post the notice in the establishment where the dismissed employees work.

Once again, the LSA provides for an exception to the collective dismissal notice requirement in a case of a "superior force" or where an "unforeseeable event" prevents an employer from respecting the required time periods to give notice. In such a case, the employer shall give the Minister the notice of collective dismissal as soon as it is in a position to do so (LSA, art. 84.0.5).

As mentioned above, COVID-19 may be considered a case of a "superior force" or an "unforeseeable event." Employers should seek legal advice to confirm whether this would be the case in their specific circumstances.

During the notice period, the employer may not change the wages of the relevant employees. An employer that does not give the prescribed notice or gives insufficient notice must pay to each dismissed employee an indemnity equal to the employee's regular wages, excluding overtime, for a period equal to the time period or remainder of the time period within which the employer was required to give notice.

The Ministère du Travail, de l'Emploi et de la Solidarité sociale may require that the employer participate in setting up a reclassification assistance committee.

Whether the dismissal is individual or collective, a notice of termination must be given to the relevant employees. The notice should be reasonable in the circumstances of each employee.

If you have additional questions or require assistance in preparing your workplace, please contact us.

[1] *Act respecting occupational health and safety* (ROHS), art. 51; CCQ, art. 2087.

[2] For examples of health guidelines from public authorities, see Government of Québec: https://www.quebec.ca/en/health/health-issues/a-z/2019-coronavirus/; https://msss.gouv.qc.ca/professionnels/maladies-infectieuses/coronavirus-2019-ncov/#situation-au-quebec (available in French only); Government of Canada: https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks.html; World Health Organization: https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports.

[3] Idem.

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