

Second wave of COVID -19: Telework is the rule

In a Q&A posted on its website and updated on November 17, 2020, the French Ministry of Labor provides details on teleworking in the context of the “second wave” of the COVID 19 pandemic.

The implementation of telework becomes imperative

While in the previous versions of the health protocol^[1] telework was “*recommended*”, it must, since October 29, 2020, be generalized for all activities that allow it.

In practice, there are three scenarios:

Scenario #1: Employees can perform all of their tasks remotely.

In this case the employer must place these employees on telework on a full-time basis.

Scenario #2: Employees cannot perform all of their tasks remotely.

In this case, the employer must take all necessary concrete measures to reduce social interactions.

These measures include

- a work organization that reduces commuting to and from work;
- an adjustment of the time spent in the company to perform tasks that cannot be carried out remotely.

Scenario #3: There is no technical solution enabling employees to carry out their activity remotely.

In this case, employees may continue performing their activity in the workplace in accordance with the recommendations set forth by the national protocol to ensure the health and safety of employees updated as of November 13, 2020.

From now on, employers **may be required** to grant **one or more telework days** to employees. The French Ministry of Labor considers that whenever activities are eligible to telework, the implementation of telework by the employer is a measure that not only ensures compliance with the general principles of prevention but

also meets its obligation to protect the health and safety of its employees.

This is a noticeable new development since employers previously had the possibility of refusing telework to an employee. From now on, everything depends on the activity and tasks carried out by the employee.

Concretely speaking, the employer must demonstrate that **the employee's presence in the workplace** is indispensable to the exercise of his/her activity.

As such, employees whose jobs do not seem a priori "*teleworkable*" can nevertheless work remotely to carry out part of their activities.

In order to distinguish between "*teleworkable*" and "*non-teleworkable*" activities, the French Ministry of Labor suggests implementing a three-step method:

1. Listing the main activities for each function or job. Do not hesitate to identify activities that are not usually considered as priority, but which could have added value in preparing for the end of the crisis: updating procedures and work supports, monitoring, etc.
2. Assessing the potential obstacles or difficulties to teleworking for each of these activities for the company, the client and the teleworker (examples: remote access to the server, quality of the Internet network, data confidentiality, preservation of the relationship with the client, digital literacy of the relevant employees, etc.).
3. Identifying whether means and conditions can be put in place to overcome these difficulties (work equipment, installation of secure connection, opening of videoconference rooms, definition of terms and periods of availability for clients, colleagues and managers, distance learning in the use of new digital tools, etc.).

The employee, for his/her part, may not refuse to telework. Indeed, the French Ministry of Labor specified that in the epidemic context, the implementation of telework constitutes a mere adaptation of the employee's position, which can, therefore, be imposed on him/her.^[2]

Role of the *Comité Social et Economique* (Social and Economic Committee ("*SEC*")) in the implementation of telework as a result of the Covid-19 epidemic

In principle, in **companies with at least 50 employees**, the employer must inform and consult with the SEC when deciding that employees should be placed on telework.^[3] However, in view of the urgency of the health crisis and in order to respond quickly to the new lockdown measures decided by the French Government, the employer may simply first inform the SEC without delay of its decision to implement telework.

The SEC should then be consulted as soon as possible after the implementation of the employer's decision to implement telework.

Sanctions for companies that refuse to implement telework^[4]

An employer that, although its business is suited for telework, refuses to implement it could, in view of the working conditions and the preventive measures put in place in the company, be held liable under its **obligation to protect the health** and **ensure the safety** of its employees.

Indeed, employers are required under French law to take and implement all necessary measures to ensure the safety and protect the health of their employees. Failing this, employers could be held liable, without it being necessary to actually demonstrate that an employee has been ill with Covid-19.

Employers can exceptionally authorize employees to return to their place of work

Telework can indisputably lead to situations of suffering, particularly for isolated employees, whenever the link with the work community is weakened.

As part of its safety obligation vis-à-vis teleworking employees, employers must be attentive to these risks and take appropriate preventive measures (for example, maintaining the link between team members as much as possible, facilitating the use of videoconferencing and telephone exchanges, both formally (meetings, etc.) and informally).

If these measures are not sufficient to protect the employee's health in view of the employee's particular situation, the employer may, if necessary in conjunction with the occupational physician, authorize the relevant employee to go to his/her workplace, only on certain days, as the case may be. The employer will then have to ensure the implementation of the measures set forth in the national protocol to ensure the safety and protect the health of its employees.

There are limitations to the control of the tasks performed by teleworking employees

In addition to its recommendations on the work tools that can be used by teleworking employees the *Commission Nationale de l'Informatique et des Libertés* (French Data Protection Authority, hereinafter the "CNIL") published a "Q&A" on its website on November 12, 2020.

The CNIL recalled that insofar as telework is only a way of organizing work, the employer retains full power to supervise and control the performance of the tasks entrusted to its employees.

While the employer's power is a normal and inherent counterpart to the employment contract, this right, far from being absolute, can only be validly exercised with **full respect** for several fundamental individual rights of employees, such as the right to privacy or secrecy of correspondence^[5].

Employers must therefore always be in a position to justify that the measures implemented are strictly proportionate to the aim pursued and do not excessively undermine respect for employees' rights and freedoms, in particular the right to privacy.

As such, the means that employers may use to monitor the remote work of their employees (surveillance

software on work computers, webcams, regular calls, etc.) are subject to limitations and employers' rights in terms of employee surveillance are the same, regardless of whether the employees are working within the company's premises or teleworking.

Pursuant to the obligation of loyalty and good faith that must govern any employment relationship, the **employee** must be informed **in advance** of the methods and techniques put in place by the employer - which methods and techniques must be relevant to the aim pursued - as well as any information concerning him/her personally.

The **SEC** must also be **informed and consulted** on the introduction of new technologies and any significant changes in health, safety or working conditions^[6].

The French Ministry of Labor specified that, in general, no system should lead to a **constant and permanent monitoring** of the employee's activity. As such, the CNIL considers that "**keyloggers**", which enable all actions performed on a computer to be recorded remotely, are considered illegal, except in exceptional circumstances related to a strong security imperative.

In addition, the CNIL recommends that employers should not impose the activation of the camera on teleworking employees who take part in videoconferences.

Indeed, although the broadcasting of the image can contribute to conviviality during a period when one is away from his/her colleagues, telework, especially when it is implemented as a result of the health crisis, can infringe on the right to privacy, especially for any other people present at home. Consequently, an employee must in principle be able to refuse the broadcasting of his/her image during a videoconference by putting forward the reasons relating to his/her particular situation. Only very special circumstances - that ought to be justified by the employer - could make it necessary for employees to show their face during a videoconference.

The granting of meal vouchers to teleworkers

The French Ministry of Labor recalled that the meal voucher is a benefit granted by the employer that does not result from any legal obligation. On the other hand, the granting of a meal voucher is possible if - and only if - the employee's meal is included in his/her daily work schedule.^[7]

However, in accordance with the general principle of equal treatment between employees, teleworkers benefit from the same legal and contractual rights and benefits as those applicable to employees in comparable situation working within the company's premises.^[8]

Coverage of transport costs of employees who "*telework on a rotating basis*"

It should be reminded that under French law employers must pay 50% of the price of the travel pass purchased by their employees for travels between their usual place of residence and their place of work^[9]. However, this does not apply to employees who do not use public transportation.

On the other hand, the obligation to cover part of the transport costs does apply when telework is done on a rotating basis, for example, one or two days a week or every other week.

In this case, the employer must cover, under the usual conditions, the cost of the travel pass that has been used at least once for travels between the employee's usual residence and his/her place of work, without any deduction for teleworking days, provided that the cost of the travel pass is not modified.

Consistent with this approach, the French Ministry of Labor considers that when the employee is placed in a situation of teleworking at home "continuously" over the month or week, the employer is not bound by this coverage obligation as long as the employee did not have to make any travel between his/her home and his/her place of work using his/her travel pass during the period in question.

Yet, the French Ministry of Labor recommends that employers maintain the partial coverage of the travel costs of employees having an annual travel pass and who were unable to suspend their pass contract for the unused month and who, therefore, paid the cost of it.

Interns may continue performing their internship remotely

Until now, the issue of interns/trainees in companies had not been addressed by the French Ministry of Labor. This has now been corrected since the "Q&A" of November 17, 2020 specifies that even if the interns/trainees are not salaried workers within the meaning of the French Labor Code and the host company is not assimilated to an employer, the recommendations set forth in the health protocol can be extended to them. They are then subject to the same rules as employees.

Enhanced inspections

As telework is no longer simply an option but the rule, the French Ministry of Labor announced the mobilization of the Labor Inspectorate to ensure the proper implementation of the health protocol within companies.

As such, the agents of the Labor Inspectorate are not only responsible for supporting companies in the implementation of the new provisions of the health protocol but also for checking that they have duly integrated the risk of contamination with Covid-19 in their assessment of the occupational risks and duly taken the necessary preventive measures accordingly.

[1] [National protocol to ensure the health and safety of workers in the context of the COVID-19 epidemic](#) as of November 13, 2020 (in French only)

[2] Article L. 1222-1 of the French Labor Code

[3] Article L. 2312-8 of the French Labor Code

SOULIER BUNCH

[4] This issue has been addressed in the “Q&A” dated December 10, 2020

[5] These rights are protected respectively under Article 9 of the French Civil Code, Article 226-15 of the French Criminal Code and Articles L 1121-1 and L 1321-3 of the French Labor Code

[6] Article L 2312-8 of the French Labor Code

[7] Article R. 3262-7 of the French Labor Code

[8] Article L. 1222-9 of the French Labor Code

[9] Articles L. 3261-2 and R. 3261-2 of the French Labor Code

Soulier Bunch is an independent full-service law firm that offers key players in the economic, industrial and financial world comprehensive legal services.

We advise and defend our French and foreign clients on any and all legal and tax issues that may arise in connection with their day-to-day operations, specific transactions and strategic decisions.

Our clients, whatever their size, nationality and business sector, benefit from customized services that are tailored to their specific needs.

For more information, please visit us at soulierbunch.com.

This material has been prepared for informational purposes only and is not intended to be, and should not be construed as, legal advice. The addressee is solely liable for any use of the information contained herein.