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Borden Ladner Gervais

Working Remotely or "Remotely Working"? What Every Employer Should Know (and Do)

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It can be called many things: working from home, working remotely, telework, telecommuting, etc. But the result is the same — an employee performs their duties outside of the workplace including, in many cases, from their home.

There may be sound business reasons for allowing employees to work remotely, but what are some of the legal considerations? This article covers some essential legal issues every employer should know about and policies that should be adopted on remote working arrangements.

Do employees have a right to work remotely?

No. An employee does not have an inherent right to work from home or other location.

Employees may, however, become entitled to work from home by the terms of their contract, a workplace policy, or if management has agreed to or tolerated the practice. A right to telecommute may also arise if it is part of an accommodation under human rights law (*e.g.* the employee has a disability arising from a physical injury limiting mobility, or must be home to help look after an elderly relative[1]), subject to undue hardship on the employer.

Employers should use clear, objective criteria to decide who can work from home. If arbitrarily applied, the policy may lead to claims for discrimination (*e.g.* disability, gender, race, ethnic origin, etc.) and possible legal action.

Can employees work from anywhere they want?

An entitlement to work remotely does not give employees freedom to work wherever they want. Absent a workplace policy or agreement to the contrary, the employer still has the authority over where work is to be performed.

This may be an issue if an employee wants to use multiple locations (*e.g.* home and cottage), or moves to a location not suitable to the employer (*e.g.* different time zone, limited access to technology).

If a policy or agreement is silent on location, it can open the door for an employee to work from different locations than originally contemplated — within reason.

In *Ernst v. Destiny Software Productions Inc.* (2012 BCSC 542), the employer, based in B.C., entered into an agreement with an employee, who lived in Calgary, allowing him to work remotely. The agreement did not specify location for working remotely. The employee interpreted this to mean 'anywhere' and relocated to Cabo San Lucas, Mexico. He was terminated when he refused to return to Canada and sued the employer. Appropriately, the court held that this was far beyond the employer's expectation and dismissed his claim for wrongful dismissal.

Do employment standards and occupational health and safety laws apply outside the office?

A key feature of employment standards legislation is that you cannot "contract out" of its provisions. The result is that these laws — covering hours of work, overtime, statutory

leaves, etc. — apply equally to work performed by employees at the office, at home, or other remote location.

When it comes to occupational health and safety legislation the case is not as straightforward. There are few court and tribunal decisions on this issue. Further, some decisions have been contradictory.[2] As a best practice, employers should develop a clear policy to ensure that the home worksite is suitable from an occupational health and safety perspective.

What about insurance and other liability issues?

Working remotely can also raise insurance coverage issues about the safety of the employee (or others) at the remote "worksite", the security of information and data, and potential damage or lost company property.

In most cases, general liability insurance policies will cover employees working remotely. However, employers should review these policies and consult insurers to be certain. Additionally, employees should be required to confirm their home insurance policy and coverage, particularly in the event of injury or property damage.

How will information be kept private and confidential?

Maintaining privacy and confidentiality are challenges in any location. Employees working in locations and on networks the employer has little to no control over (*e.g.* home offices, coffee shops, libraries, hotels, airports, etc.) can increase those risks.

To protect sensitive and confidential information, employers should consider the following questions:

- What information will the employee be accessing?
- Will the employee be using his/her own equipment, or company equipment?
- How will information be transported (USB, email, hard drive, etc.)?
- What locations will the employee be working at? Are there special security concerns?
- What technology is available to improve the security of data out of the office?

Answering these questions will help an employer to take appropriate measures to safeguard information.

What are the pitfalls of cancelling an employee's remote working arrangement?

If telecommuting is a fundamental term of employment (*i.e.,* created by written contract, workplace policy, or an employer condoning the practice for a long period of time), then the employer must provide reasonable notice before cancelling the arrangement and recalling the employee. In other words, if a worker has the right to work from home, an employer cannot simply demand they immediately return to the office since it would be a unilateral modification of the terms of their employment.

Consider the recent case of *Hagholm v. Coreio Inc.* (2018 ONCA 633), where an employee was permitted to work from home three days a week. When the company was sold, the new owners informed her she had to return to the office. She refused and sued the employer. The courts found that this constituted constructive dismissal since the employer unilaterally changed the terms of her employment, and awarded her damages.

We Can Help

To address the above concerns (and others), employers should have a policy covering all remote working arrangements. Contact BLG's Labour & Employment experts to guide you through these legal issues and help you prepare a clear, effective workplace policy.

[1] *Devaney v. ZRV Holdings Limited*, 2012 HRTO 1590.

[2] For example, see Ontario decisions of the Workplace Safety and Insurance Appeals Tribunal Decision No 2249/16 (2016 ONWSIAT 2410) and *Watkins v. The Health and Safety Association for Government Services* (2013 CanLII 57037).

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