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Do Employees Have the Right to Work from Home?

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Overview

At the onset of the COVID-19 pandemic in 2020, global workforces experienced a sudden and forced shift into remote work. That experience dramatically shifted expectations and realities for office jobs around the world. Over the last few years, workers have often expressed a preference for working remotely, and in many cases successfully continued to negotiate work from home arrangements as labour market shortages gave employees negotiating power. However, more recent shifts in the economy have resulted in less labour shortages in certain industries, and employers are now increasingly requesting that workers return into the office, at least on part-time basis. This shift was recently highlighted in August 2023 when numerous media outlets reported that even Zoom Videoconferencing requested some of its workers attend the office at least two times per week.¹ This article will explore the rights of both employers and employees when it comes to remote work.

Key Considerations

Employers must consider several factors when assessing work location, which includes some of the following:

- **Productivity:** Which work arrangements are most productive for employees: in-office work, hybrid model or fully remote?
- **Finances:** Can the employer save on expensive office rent by having a fully remote workforce? What is the cost to set up an employee to work from home? Can the employer attract qualified and desirable candidates at lower compensation by allowing employees to live wherever they want, which may include more affordable locations?
- **Employee Morale:** Does working in-office (at least part-time) help with team building and community? Does working from home result in happier workers and increase morale?

¹ Goldberg, Emma. "Even Zoom is Making People Return to the Office." The New York Times. August 7, 2023. Retrieved online: <https://www.nytimes.com/2023/08/07/business/zoom-return-to-office.html>

- **Labour Market & Attrition:** Will work location impact the quality of workers that an employer can attract or retain? Will mandating employees to work in-office result in staffing shortages? Has the economy shifted, providing employers with more bargaining power to mandate some in-office work than was experienced over the last few years?
- **Legalities:** Are there any legal implications that impact the employer's right to determine where work is performed? For instance, in a unionized workplace does the collective agreement impose any rights or restrictions on work location? In non-unionized workplaces, are there impacts from an employment contract and/or potential constructive dismissal argument?
- **Workplace Accommodations:** What workplace accommodations may be required for certain employees. For instance, there may be human rights considerations for medical needs or family status (i.e., childcare/elder care) that require workplace accommodations. It is generally easier for an employee to prove the need for a temporary accommodation rather than a permanent one. In all cases, an employer will have the right to request appropriate information to confirm the need for such accommodations. Family status accommodations are often far more difficult for an employee to prove than medical accommodations, as employees must canvass childcare options and not simply expect to work from home without seeking same. It is far more likely that a temporary accommodation would be legally required for family status, rather than any permanent work from home arrangement.

Each employer should consider the cost benefit analysis of all relevant factors applicable to its workplace when determining work location requirements for its staff. Employees will have to balance their ideal work environment with current market conditions when evaluating what type of arrangement they are willing to work in. There is no "one size fits all solution", but instead various individualized considerations for employers and employees alike, which may change based on market conditions, life circumstances, and many other factors.

Can Employers Require Employees to Attend the Office?

In general, employers have the right to dictate where employees work, including requiring remote employees to return to work in-person, unless there are direct or implied contractual terms otherwise, or there are reasons why a work from home accommodation is required. In unionized workplaces, employers must ensure compliance with the applicable collective agreement. Many collective agreements currently coming up for negotiations are silent on the issue of remote work, often having been negotiated prior to the COVID-19 pandemic. Unsurprisingly over the past year, Canadians have seen unions attempting to negotiate terms around remote work during collective bargaining. For instance, remote work was one of the key issues canvassed during the recent strike of Canada Revenue Agency (“CRA”) workers. The union representing the federal public service workers wanted to incorporate remote work rules into terms of the collective agreement. This was one of the key issues on the table during the recent strike, along with a request for significant pay increases. Ultimately, the parties came to an agreement without any collective agreement terms on remote work, but instead a commitment from the Canadian government to review remote work policies.²

In non-unionized workforces, employers hiring new staff can easily place desired conditions on work location in the employment agreement. Ideally, conditions around work location should be clear. Employers expecting an employee to attend at an office full-time or on a hybrid model should explicitly spell out such conditions in the employment agreement. Employees should similarly ensure their expected work location is clearly stipulated in the employment agreement, rather than relying on verbal discussions that are not consistent with terms in their employment agreement. Some employment agreements may allow for work from home currently, with a provision that indicates workers can be recalled for business reasons at any time.

The legalities around a non-unionized employer changing the status quo of the work location sometimes may be a bit more complicated. If an employee had worked from an office pre-pandemic, the work from home arrangements during the pandemic will likely be seen as temporary and an employer can recall employees to work in-office. However, if an

² Ramzy, Mark. “Government keeps remote work rules out of public service collective agreement.” National Post. May 1, 2023. Retrieved online: <https://nationalpost.com/news/politics/government-keeps-remote-work-rules-out-of-collective-agreement>

employer hired new workers during the pandemic and those workers have always worked remotely, those workers may have some argument that a recall to the office could be considered a “constructive dismissal.” A constructive dismissal occurs when changes made or requested by an employer are not possible, or would result in a fundamental change to the employment terms.

In considering whether or not a constructive dismissal has occurred, it is important to review the applicable employment agreement and policies, as well as the overall circumstances. For example, did the employer hire a worker who always lived 400KM away, and gave no indication in a contract or otherwise of any requirement to attend at the office until the recall? This fact scenario may support a finding of “constructive dismissal.” To the contrary, if the employment contract clearly stated that remote work was temporary, making it clear workers may be required to work from the office at some point, then workers will have less leeway to try to argue a constructive dismissal has occurred.

In most cases, an employer can offset legal liabilities surrounding a constructive dismissal argument by providing employees with appropriate notice on the change of work location. The exact amount of notice required will depend on each employee’s employment agreement and their length of service; however, as a general rule, the lengthier notice the better. In the event that an employee cannot reasonably attend the office (for instance due to living significantly far away), the employer can consider if they wish to allow that employee to continue working remote or to terminate their employment. Ultimately, employers should be seeking a productive and smooth transition. To this end, in the event of recalling employees back to in-office work employers should have a plan in place that provides sufficient notice of the transition and a plan to help integrate workers back to the office. For hybrid work, it should be clear which days the employer requires its staff to attend the office (or if it is a choice). For full-time in-office work, the employer may consider a transition period (i.e., from remote, to hybrid, to full-time). In all cases, clear and effective communication will serve all parties well.

Productivity Measures & WFH

When considering work location, employers often focus on worker productivity. There have been several studies on the productivity of remote workers, and the findings are mixed. For instance, two studies in 2022 found that remote and hybrid employees stayed in their jobs

longer and were 22% happier than workers required on-site. Further, remote workers were less stressed, more focused, and more productive than when they had attended at the office.³ Another study found a 5% increase in productivity during the pandemic work from home period, noting that the data showed if an employee was highly productive in office, they will be productive at home, whereas if an employee “slacked off” in the office, they will do the same at home.⁴ However, one more recent study suggests remote working may be less productive as previously thought. A recent study from the National Bureau of Economic Research found that workers randomly assigned to work from home full-time were 18% less productive than in-office staff, by completing less tasks or taking longer to complete tasks.⁵ It may be too soon to truly assess whether or not remote work is more or less productive than in-office work; however, productivity will vary from worker to worker and industry to industry and there are many other considerations to look at when canvassing the issue such as the cost of maintaining office space and morale, among other factors.

Some employers may consider productivity measuring or monitoring in attempts to create more accountability for workers at home. Some measures employers could consider, include:

- **Implementing Clear Deadlines:** As a basic measure, having clear deadlines requires accountability to ensure work is being completed in a timely manner.
- **Outlining Key Performance Indicators (“KPI’s”):** KPI’s are quantifiable measures of performance over time for a specific objective, by providing clear targets and measures for employees and teams. By instilling clear KPI’s an employer is making expectations clear and measuring productivity over a time period rather than on a day-to-day basis. This type of measure is a good way for an employer to show that it trusts its employees, while also providing a clear understanding on overall expectations over time.

³ Robinson, Bryan. “3 New Studies End Debate Over Effectiveness of Hybrid and remote Work. Forbes. February 4, 2022. Retrieved online: <https://www.forbes.com/sites/bryanrobinson/2022/02/04/3-new-studies-end-debate-over-effectiveness-of-hybrid-and-remote-work/?sh=695fb59b2e3e>

⁴ Ibid.

⁵ Robinson, Bryan. “Remote Work Might Not Be As Productive As Once Thought, New Studies Show.” Forbes. August 12, 2023. Retrieved online: <https://www.forbes.com/sites/bryanrobinson/2023/08/12/remote-work-might-not-be-as-productive-as-once-thought-new-studies-show/?sh=67e551b23e7a>

- **Requiring Self-Reported Time Tracking:** Time tracking is historically part of some professions. For instance, lawyers historically use the ‘billable hour’ and input their time worked on each file, allowing for clear accountability of work completed. Other organizations can similarly use time tracking software. This typically is done via self-reporting and can be a good way to instill some accountability. Allowing employees to self-report their time is a less invasive way than electronic monitoring to create accountability and allow an employer to understand an employee’s productivity and workload.
- **Using Employee Monitoring Software:** Employers commonly use various technologies to monitor workplace information technology systems, which may be for security purposes or even productivity. There are technologies that can be used to monitor employees in various ways including: tracking emails sent from the company account, websites visited and even keystrokes to determine when employees are on and offline. However, as noted below, if implementing these more invasive measures, Canadian employers must make sure they comply with applicable privacy laws and/or electronic monitoring requirements.

Ideally, an employer can trust its employees to work productively; however, if productivity becomes an issue, an employer may be required to consider other measures or a recall to in-office work. More invasive monitoring can be controversial or impact morale. If implementing such measures, employers must ensure legal compliance in relevant collective agreements and employment contracts, as well as applicable laws. For instance, in 2022, the Ontario Government enacted changes to the *Employment Standards Act, 2000* requiring that employers with 25 or more employees have a written policy on electronic monitoring.⁶ The policy must specifically include:

- (1) a description of how and in what circumstances the employer may electronically monitor employees, and
- (2) the purposes for which information obtained through electronic monitoring may be used by the employer.

⁶ *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 41.1.1

Ontario employers engaging in electronic monitoring of remote workers must ensure compliance of this provision. At this time, provinces outside of Ontario do not specifically require employers to adopt an electronic monitoring policy; however, some provinces (such as British Columbia, Alberta and Québec, as well as federally regulated workplaces) are subject to privacy laws that may impact how an employer can monitor employees including the implementation of employee monitoring software. Such obligations may include notification requirements to employees, among other things. Beyond legal compliance, it is generally best practice for employers to not surreptitiously monitor employees, but rather make it clear when such monitoring will occur. This also would generally be important for unionized workers considering relevant arbitral jurisprudence.

Conclusion

For most employees, working from home is a privilege not a right. However, remote work has benefits for both employers and employees alike. A fully remote workforce can result in significant cost savings on commercial rent and allow employers to attract a broader range of talent for its teams. Employees often find remote work to be desirable as it helps increase work-life balance. With the COVID-19 pandemic hopefully behind us, it appears that remote work and hybrid work is here to stay in some capacity. It is clear that the post-pandemic workplace may never fully return to the status quo prior to the pandemic. It might be that the pandemic just fast-tracked workplaces into the 21st century, where we have more connectivity and technology than ever before. In any case, considering working from home options will remain at the forefront of many employers and employees going forward, it is important to understand all practical and legal considerations.

About the Author



Deborah Hudson is a founding partner of Hudson Sinclair LLP, where she represents both employers and employees in all aspects of labour and employment law. She was called to the Ontario Bar in 2008, and has practiced exclusively in the areas of labour and employment for her entire career. She spent the first eight years of her career at a prominent management-side firm, and then spent several years at a boutique workplace law firm

where she broadened her practice experience to include acting as employee-side counsel and workplace investigator.

Deborah provides her clients with practical, timely and highly specialized legal advice. She regularly advises both employers and employees in relation to matters occurring at all stages of the employment relationship. She values the importance of early and productive resolution discussions when beneficial and appropriate. In circumstances where resolution is not achievable or advantageous, Deborah advocates on behalf of her clients in all legal forums. Deborah also conducts workplace investigations as an external, independent investigator relating to various workplace circumstances and allegations including: harassment/bullying, human rights matters, privacy breaches and fraud.

Deborah has authored and contributed to a number of publications concerning workplace issues. Most recently, Deborah was a contributing author of: [Startup Law 101: A Practical Guide](#) (2017)⁷; [Ontario Human Rights Code: Quick Reference](#) (2015)⁸; and [Accommodation Issues in the Workplace](#) (2014).⁹ Deborah has also published numerous articles for Queen's University IRC and is a speaker for the [Mastering Fact-Finding and Investigation](#) program.

⁷ Lovrics, Catherine et al, *Startup Law 101: A Practical Guide* (Toronto: LexisNexis Canada, 2017)

⁸ Jamie Knight et al, *Ontario Human Rights Code: Quick Reference*, 2015 ed. (Toronto: Thomson Reuters Canada, 2014).

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