

# COVID-19 and the Workplace: Remote Working Legal Considerations and Recommendations

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Thank you to everyone who attended our webinar on “The Legal Implications of Managing a Remote Workplace.” In case you missed it, the archive can be accessed [here](#). Below is a summary of key takeaways, with some additional considerations coming out of the last few weeks of managing the “new normal” during the COVID-19 pandemic.

COVID-19 continues to disrupt workplaces across the country and a return to “normal” could be months away. As employees remain sequestered, many businesses (particularly those designated as “non-essential” businesses during the emergency) will have to maintain remote working conditions for a much longer time, and to a much larger group of employees, than they may be accustomed.

Consequently, it is important for employers to understand the legal strategies available to manage the risks associated with remote working by their employees.

## Hours of Work and Overtime

The *Employment Standards Act, 2000* (Ontario) (the “ESA”) sets out limitations for hours of work for many positions and industries. These ESA limitations continue to apply to remote workers. Employers should be mindful that remote workers may end up working longer hours, either by choice, mistake or simply in a good faith effort to be more productive. It can be easier for remote workers to allege, maliciously or innocently, that they are owed additional compensation or overtime of which the employer was unaware and had not expected. In a remote setting, the employer will often be without the usual level of control, paper records or tracking to refute what has been alleged.

In order to avoid contravening the ESA and minimize liabilities from claims for overtime pay, we recommend that employers draft a work-from-home (“WFH”) policy, which will help establish clear expectations for your employees. Such a policy should do the following:

- Set out expectations and limitations regarding hours of work per day or week, and also set out specific working hours during the day;
- Require employees working flexible hours to track the hours they work each day to limit the amount of work performed and to ensure they are generally not exceeding the daily or weekly maximums;
- Require that any overtime be preapproved in writing, with an explanation as to the nature of the work that is being performed (and even an explanation as to why such work could not be completed within “regular” hours); and
- Require that employees submit a written report regarding the overtime that has been performed (and description of the work that was performed).

Employers could also consider setting “dark hours,” depending on the nature of their business, when no employees should be logging on or responding to emails or calls.

## Employee Productivity and Accountability

Another concern with remote working is maintaining and tracking employee productivity and accountability that would normally be expected and demanded in a regular working environment. It is understandable

that employee productivity may drop when working from home because of technical reasons, distractions, lack of office resources, communication difficulties and the inability to complete certain tasks remotely.

To ameliorate these concerns, we recommend that employers institute or consider the following:

- Team meetings and check-ins held no less than bi-weekly;
- Using time tracking software, login software or requiring employees to self-monitor and self-report (a journal) their time during the workday;
- Using an instant messaging service such as Microsoft Teams or Google Hangouts, etc.
- Setting out working hours per day or week, noting, however, that flexible hours may also lead to higher productivity if the employee has other commitments during the day;
- Offering support to employees and making sure they have the right tools;
- Finding ways to encourage and recognize your employees, even if virtually or remotely;
- Implementing a clear process for dealing with unproductive employees, which can include setting out clear short-term and long-term goals with the employee, and establishing regular check-ins with an unproductive employee to see if they are meeting their goals.

If you are considering disciplining an employee working from home, the usual best practices should apply. These include documentation, progressive discipline (e.g. verbal warning, written warning, suspension, termination) and performance improvement plans as appropriate.

Always remember that flexibility in respect of remote work will place greater strain on supervision. Supervising managers can be assisted by delegating some of their work to others so that they can focus on supervising and confirming outputs.

### **Accommodation**

Employers also have to consider the struggles and hardships that some employees may face as a result of the pandemic and the shutting down of various services, such as schools and daycares. For employees who are parents, guardians or have any dependents, including seniors, quarantine presents additional burdens and responsibilities. The employer has a duty to accommodate such employees to the point of undue hardship.

In the present circumstances, accommodating based on family status may include allowing employees to work flexible or alternate hours or even reduced hours on an unpaid basis.

We recommend that the employer's WFH policy establish employer expectations for working flexible hours, and set out the duration of the option to work flexible hours. If the ability for employees to work flexible hours is intended to be limited for the duration of the COVID-19 crisis, this should be made clear. As with any policy, it's important to make clear that the company reserves the right to alter or terminate the policy at any time as circumstances warrant.

It is key that the WFH policy be consistently applied to reduce risk of claims that the employer is providing WFH arrangements on a discriminatory basis. It is also important to note that regardless of the specific WFH policy in place, an employee's request for accommodation should be considered and responded to on a case-by-case basis.

### **Security and Confidentiality**

In recent weeks, there have been reports of increased cyberattacks as a result of the growing pains associated with adopting remote working technologies. As a result, the threat posed by cyber attackers and resulting losses for businesses is high. In addition, remote working creates new challenges for maintaining a company's confidential information, as conference calls may be overheard or emails may be read by unintended persons.

In order to maintain the security and confidentiality of business operations, we recommend that employers take the following actions:

- Implement training sessions for employees who are new to remote working for cyber security and confidentiality best practices;
- Educate employees on best practices when dealing with communications from unknown third parties;
- Refresh employees on the company's security and confidentiality policies;
- Restrict the use of public or unsecure networks;
- Use VPN or two-authentication software;
- Ensure that the WFH policy addresses the importance of maintaining the confidentiality of the company's information and that it is not inadvertently disclosed to individuals as a result of the home environment.
  - Consider having employees submit their proposed methods for ensuring the confidentiality of company information.

Employers are encouraged to reach out directly to Fiona Brown, Michael Horvat, Daria Peregoudova or any member of the Aird & Berlis Workplace Law Group for specific legal advice.

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