The Future of Working from Home. You Asked, We Answered.

April 2023

Aird & Berlis LLP's Workplace Law Group recently presented a webinar entitled *Work From Home: The New Normal?* which focused on the continuation of work-from-home ("**WFH**") arrangements beyond the COVID-19 pandemic, remote work policies and key considerations for employers when administering such arrangements.

We thank our many supporters and attendees for their continued interest in our webinar series, and this topic in particular. During the webinar, we received many questions. In this bulletin, we address some of the major themes set out in the questions.

What are the essential elements of a good WFH policy?

Although the specific content of a WFH policy will vary depending on an employer's operational needs and the nature of its workforce, a strong WFH policy should serve two primary purposes. First, it should provide employees with key information with respect to the terms of their WFH arrangement, such as where employees are permitted to work from, what their hours of work will be and, generally, what is expected of them with respect to their performance and responsibilities. Secondly, it should contain protective language that will provide support and/or security for employers in the event of a dispute in the course of administering such a relationship.

The following list sets out the *essential elements* of a WFH policy:

- A statement confirming that working remotely means working within the province in which the employee currently resides and not from another province and/or country, absent the prior written consent of the employer;
- A statement confirming that all duties, responsibilities and performance expectations remain the same whether the employee performs their work remotely or in the workplace, including the obligation to attend meetings and appear on camera where necessary and/or required by the employer;
- A statement confirming that employees agree to have a designated workspace at their residence, agree to maintain the safety of their remote work location, and have adequate homeowners/tenant insurance in place. Specifically, this statement must confirm that the employer is not responsible for the health, safety and/or maintenance of such location;
- A statement confirming the employee's understanding that reliable and consistent internet is a critical component of a successful remote work arrangement;
- A statement confirming that obligations with respect to confidentiality and proprietary information continue in a remote work setting. Employees must, therefore, take all necessary steps to allow for the security and protection of confidential information and/or company documentation/records; and
- A statement confirming that such policy and/or any applicable WFH arrangement is subject to change, suspension and/or discontinuance at the sole discretion of the employer.

With respect to electronic monitoring, what are some of the privacy issues related to employee appearance on camera or an employer review of an employee's workspace?

Appearing on camera

Even though staff may be working from home, an employer can require its employees to appear on camera during work-related meetings and/or calls. As noted above, employees' duties, responsibilities and/or job performance expectations continue to apply in the context of remote work and in the same manner as if work was being performed on-site.

Simply stated, if an employee would be required to attend and actively participate at a meeting in-person as part of their duties, an employer can continue to expect this, even though the employee is working remotely. If an employee objects to appearing on video on the basis that they do not have a private/designated work area within their home, consideration should be given as to whether a WFH arrangement is appropriate for such an employee and if physical attendance at work is required.

Employers should make the expectations of being "on camera" clear to employees, preferably in writing as part of a policy.

Reviewing remote workplaces

Employers have a duty to provide a safe working environment to employees and take reasonable precautions to protect the health and safety of their workers. In Canada, this duty is interpreted very broadly and purposefully, tending to favour the protection of the worker above all else. Currently, there is very minimal case law on what constitutes "reasonable precautions" in the context of a WFH arrangement. Given the continued prevalence of WFH arrangements, either on a full-time or partial basis, it is very likely that issues like this will be subject to interpretation by courts, administrative tribunals and arbitrators.

It remains prudent for employers to display some level of control, oversight and/or review of an employee's workspace. At the very least, employees should be required to (a) confirm they have adequate homeowners and/or tenant insurance in place; (b) confirm specifically where such workspace is located; and (c) individually attest that their workspace is safe and conducive to their health and performance of work.

Employers can also require that any employee who chooses or is required to participate in a remote work arrangement will allow for the employer to review their workspace, either via video call or photos. To minimize any allegation of breach of an employee's reasonable expectation of privacy, such steps should always be taken in a reasonable manner and in the least intrusive way possible. For example, an employer can request that photos of a workspace be sent to a secure and confidential email address to be reviewed by one individual. Further, any and all steps taken by an employer in this respect should be diligently recorded.

Do employees who have become accustomed to working at home have the right to refuse to attend in person?

Employers have a right to determine how and where work is performed. Although it depends on the specific circumstances of each matter, employees who previously physically attended at work prior to the COVID-19 pandemic have not obtained a new right to categorically refuse to attend in person.

However, managing an employee's return to the workplace, either on a full-time and/or partial basis, can be difficult. There are strategies that employers can adopt to make the transition back to the office easier for employees and/or reduce the likelihood of conflict, blanket refusals or allegations of constructive dismissal:

- Advise employees in the remote work policy that the arrangement is at all times subject to change and/or discontinuance at the employer's sole discretion.
- Continue to update employees regarding any expected return-to-work date or change in work arrangements (i.e., additional days expected in the office). The earlier employees are put on notice of a future return, the more time they have to manage their affairs accordingly, and the more likely they are to perceive the gradual return-to-office process as reasonable.

In certain cases, managing an employee's return to the office is complicated if a refusal to attend at work is due to family and/or child-care concerns. In such instances, employees often make a request for accommodation on the basis of "family status" under the *Ontario Human Rights Code*.

When considering whether such an accommodation is legally required, an employer must review the employee's request. Remember – there is a difference between an employee's *personal choice or preference* and a *legitimate need*. To appropriately distinguish between the two, employers are entitled to probe the reasons presented by the employee as to why an accommodation is warranted. For example, employers can ask to understand previous child-care arrangements that were in place prior to the COVID-19 pandemic and whether the employee has considered reasonable alternatives, such as different daycares, caretakers, etc.

Regardless of what the employer's final decision is, it is important for employers to show that they reviewed the employee's request and thoroughly considered it. As in all things related to the employer/employee relationship, common sense and a measured approach tend to be the best approach when dealing with workplace change issues.

Disclaimer: This article offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal advice. Readers should seek professional legal advice on the particular issues that concern them.

Contacts

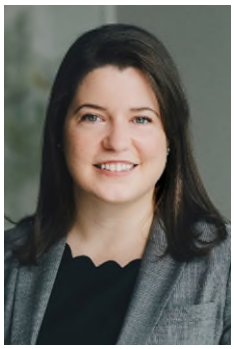


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Fiona has extensive experience advising international businesses entering the Canadian market. To date, she has advised over 100 companies expanding into Canada. Fiona advises clients in this space all day, every day. She has been practising for over a decade, and is a regular speaker and writer on market expansion matters. Fiona is proud to be recognized by *The Best Lawyers in Canada* and *The Canadian Legal Lexpert Directory.*

A proactive and comprehensive approach is required to succeed in a new market. Fiona manages teams of other lawyers and patent agents to provide her clients with a full range of legal services to help their businesses grow. She acts as project manager to ensure her clients receive seamless legal services in all relevant areas.

Fiona takes great care to understand her clients' businesses and deliver advice that is tailored to meeting their specific needs. Her responsiveness, dedication to clear communication and hands-on approach show that she is personally invested in the success of her clients.

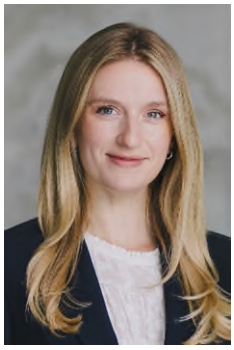


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Meghan assists clients with their litigation issues by thoroughly examining all aspects of a case and delivering practical solutions. Meghan is a critical thinker and a strong advocate. She frequently writes and speaks on a variety of labour, employment and privacy topics.

Meghan has appeared before several tribunals and courts, including the Ontario Superior Court of Justice, the Ontario Divisional Court, the Ontario Court of Appeal, the Human Rights Tribunal of Ontario, the Ontario Labour Relations Board and the Ontario Employment Standards Branch.



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