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Thinking About a Permanent Move to Working at Home? What Employers Need to Know

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In March and April of 2020, employers made rapid adjustments to where and how their employees worked, with many employers moving most (if not all) of their employees to work at home arrangements. Now that we are over a year into the pandemic in Canada with vaccination rates on the rise and COVID-19 cases dropping in most regions, most employers are considering what a return to normal looks like for them. We have heard from clients that some are considering a permanent transition to an entirely or primarily virtual workplace environment. What do employers need to consider before implementing such a change on a permanent basis?

Policy Impacts

Most workplace policies are focused on an in-person work environment. We recommend reviewing and updating existing policies and, if necessary, developing new policies that address your expectations regarding such things as:

- the protection of confidential information and company property;
- employee availability during business hours and after-hours (including overtime);
- responsiveness;
- connectivity;
- what you consider to be an appropriate workspace within the home;
- reimbursement for expenses related to setting up and maintaining a home office;
- securing the return of company property at the end of the employment relationship; and
- requirements regarding occasional attendance at the office or at meetings with clients and suppliers.

Employment Agreements

We also recommend reviewing your existing template employment agreements and determining if you need to make adjustments to account for the fact that your employees will now be expected to be working at home some or all of the time. Some areas that you will want to consider revising or updating are references to prerequisites such as car allowances and paid parking (which may no longer be necessary), specific requirements regarding home office readiness and associated expenses such as technology allowances. You may also want to reserve the right to recall the employee to an office-based position to ensure that the Company has flexibility if it decides to revisit its commitment to a work at home environment.

Tax Issues

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Generally speaking, employees have a limited ability to deduct expenses related to doing their jobs. As a rule, it is only permitted when the employee is required by the employer to work from home more than 50% of the time. If they meet that criteria, then they can treat certain expenses like heating, electricity and WIFI as deductible. Employers will need to issue T2200s to employees who are seeking these types of deductions. Another issue for employers to consider is how to respond when an employee relocates out of province while they are working from home. Employers usually remit based on the province in which the employee performs their work but if your employee relocates to another province during the work at home period and no longer reports to a physical workplace, you may be able to remit on the basis of the province in which your company's payroll is located. A particular issue may arise for companies that are located in the US and hire Canadian citizens to cross the border to work in the United States. The fact that that individual is now performing services at their home in Canada could give rise to Canadian tax obligations for the American corporate entity. It could be required to file a Canadian tax return or, depending on the nature of the employee's activities and role within the organization, it could even be deemed to have created a permanent establishment in Canada, which could result in obligations to remit Canadian corporate taxes. We recommend getting tax advice specific to your situation where you have employees working from home in a province or country other than the one in which your business operates.

Data Security

Employees working at home access their employer's confidential and proprietary information in an uncontrolled environment. It can be a challenge for employers to ensure that their systems and information are being used properly. We recommend providing updated training and policies addressing certain issues that are specific to a work at home environment such as:

- Use of company devices by others in the home
- Password protection for company owned devices
- Printing, retention and destruction of confidential information
- Creating a secure environment for phone calls and virtual meetings
- Tips for creating a secure home WIFI network.

Workplace Safety

It may surprise people to learn that the definition of "workplace" in most occupational health and safety laws is broad enough to include a home office. This creates a particular challenge for employers in terms of balancing their obligations to ensure that employees are working in a safe environment vs the desire to protect employee privacy in their homes. However, given that employers are obligated to assess the safety of their workers' home offices, we recommend the following steps:

- Ensure that your workplace safety policies address home offices
- Update your basic health and safety awareness training to address home office issues
- Provide employees with guidance on how to make their home offices safe for work and ask them to specifically verify that their home office meets your standards
- Provide assistance if the employee or worker identifies any of the following issues:
 - Domestic violence – It is important to remember that many provinces specifically charge employers with addressing the workplace safety issues posed by domestic violence. If you have a worker who says he or she cannot work safely at home due to concerns with domestic violence, you need to offer support by way of a potential leave of absence and referral to employee assistance program or local resources regarding domestic violence. We also recommend specifically discussing emergency protocols if the employee feels threatened or is experiencing violence at home.
 - Lack of ergonomic work furniture – Although employers in most provinces are not statutorily obligated to provide all tools to be used at work, employers still have an obligation to ensure their employees can work safely and without risk of injury. We recommend that employers consider offering virtual ergonomic assessments and allowances for the purchase of appropriate office furniture.
 - Isolation – Where employers know that employees are working in isolated environments, they are obligated to take steps to ensure that they are working safely. We recommend regular check-ins with such individuals and discussions regarding the appropriate emergency protocol if you cannot reach them.

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Performance and Attendance

Although there may be a perception that remote workers are less engaged with the workplace, in fact, we have seen during COVID-19 that the opposite problem has manifested. Instead of a lack of engagement, employees are reporting feeling burned out and overcommitted to their jobs. The lack of a commute has erased certain boundaries between home and work that many found helpful to maintain balance. Employers who want to move to a permanent work at home arrangement will need to find ways to address the morale and legal risks that this type of working environment can create. We recommend ensuring that your managers are cautioned to balance performance management and a commitment to productivity with empathy and a respect for reasonable boundaries. Workplace harassment claims can still arise in a remote environment, especially where employees feel that they are being micromanaged or bombarded with excessive emails, texts, and calls. We suggest that employers take the following steps:

- Track hours of work and monitor potential overtime
- Set clear expectations regarding availability and responsiveness during working hours
- Schedule routine (but not excessive) check-ins with managers
- Offer coaching and technological support where appropriate
- Adhere to the usual procedures regarding discipline and performance management
- Strive for a balance between creating accountability and micromanaging
- Educate managers on the risk of potential burnout and overtime claims and train them to escalate matters when an employee appears to be working outside of their regular hours.

In summary, although the transition to working at home has provided employers and employees with a break from some of the inconveniences associated with a physical workplace – the commute, workplace distractions, certain expenses associated with maintaining an office environment – there are no breaks for employers in terms of managing and responding to key employee issues like safety, security, efficiency and the need for accommodation. Any employer considering a permanent transition to a work at home structure should carefully consider how best to manage any organizational or legal risks that may be associated with such a transition.

As always, the Cassels Employment & Labour Group is available to provide advice and assistance to employers navigating these tricky workplace issues.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.