

## Member's Quarterly

Summer 2020 Edition

### Feature

# How to Manage a Remote Workforce

As COVID-19 has made many employees and employers used to working from home, we can expect this will continue for many workplaces after the crisis is over. There are benefits to both employers and employees from telecommuting. There are also issues that should be considered with such arrangements.



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### Eligibility

Employers should establish clear criteria about who qualifies to work remotely, including the type of work that qualifies, the employee's ability to work at home, set up an office, maintain confidentiality and the level of productivity required.

Employers should be mindful of human rights obligations and take a flexible and reasonable approach to telecommuting-related accommodation requests, which should be examined on a case-by-case basis. A case where the employer failed to reasonably consider an employee's request to work remotely is *Devaney v. ZRV Holdings Limited*, where Ontario's Human Rights Tribunal found the employer discriminated against an architect for denying his accommodation request to work remotely for care of his ailing mother.

### Work Expectations

Clear expectations should be set regarding the type and quality of work the employee is expected to perform remotely and how work performance will be managed. It should be made clear that regular work hours are to be maintained, that attendance at virtual work meetings may be required and that even though employees will be working from home, the employer has the right to and will supervise them.

### Work Equipment

Employers should ensure their remote workers have the proper work equipment and be clear whether employees who use their personal device for work-related purposes will be compensated for any related costs. Employers should maintain a list of equipment provided for telecommuting purposes.

### Work Space

A telecommuting policy should outline any physical work space requirements and ensure employees will work in a proper work environment. Telecommuted work must be safe and free from hazards.

### Location

The telecommuting policy should state the location where employees are to work; whether they are only permitted to work in their homes or may work elsewhere. Without clarification on this point, an employee may take the position s/he may work from various locations outside of the home as was the case in *Ernst v. Destiny Software Productions Inc.* In this case, a Vancouver software company hired Ernst to market its software allowing him to work remotely in Calgary. The agreement did not specify the location where Ernst was to work. While working, Ernst moved to Mexico, taking the position he could work remotely from there. This led to his termination and an unsuccessful wrongful dismissal lawsuit. BC's Supreme Court found the employee's unilateral move to Mexico and refusal to return to Canada were unacceptable and constituted just cause for termination. To avoid ambiguity, employers should reserve the right to determine an employee's remote workplace location.

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#### Confidentiality and Insurance

To ensure employees protect sensitive and confidential information while working remotely, employers should consider security issues regarding the employee's location, use of confidential information, computer access and technology. Employers may need to implement additional cyber-security measures.

A telecommuting policy should address insurance requirements such as home insurance coverage and potential damage or loss.

#### Working Remotely and Constructive Dismissal

A telecommuting policy should address how and when telecommuting may end and examine whether working remotely constitutes a fundamental employment term. If it is a fundamental employment term, an employer cannot unilaterally change this term significantly without running a risk of constructive dismissal. A reminder of this principle is found in Ontario case of *Hagholm v. Coreio Inc.*, where the employee successfully sued her employer after it cancelled her previous ability to work from home 3 days per week.

To address this issue, the telecommuting policy should clearly state that the ability to telecommute is a privilege, that employer has the discretion to modify, end or revoke a telecommuting arrangement with an employee, and that working remotely is not a fundamental term of employment.

#### Documentation

Employers should ensure they clearly communicate expectations in a telecommuting policy or written document, including work expectations, hours of work, supervision, use of confidential information, ownership of work equipment and termination or amendments to the arrangement.

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