

Member's Quarterly

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Ask the Expert

The Great Resignation Era Begins

How do you deal with employees who refuse to return to their workplace?

HR pundits as well as economists refer to the summer and fall of 2021 as “The Great Resignation” with employees refusing to return to their offices and previous workplaces. With the advent of widespread remote work, a broader variety of potential employment is available with employers no longer restricted to aspiring applicants by geographic restraints.

As well, many employees who were working from home are loathe to return full-time to the office and are looking for jobs which permit continued remote work. In fact, virtually every study has shown that employees, provided the opportunity of remote work, wish to continue doing it, at least part of the time.

The outcome of the Great Resignation is the difficulty employers have retaining employees. So why should they make it more difficult for themselves by requiring reluctant employees to return to the offices?

In general, employees are more productive at their offices. Previous experiences with working from home have almost always ended in failure. When Patrick Pichette (former CFO at Google) was asked “How many people telecommute at Google?”, he said he liked to answer “As few as possible” after its mid-decade unsuccessful experience with working from home.

The Aternity Productivity Study of the Canadian workforce found that employees working from home, although working 10% longer hours, were 22% less productive for each hour worked, which adds up to a considerable productivity drag even over a month. It is uncontestable that training, mentoring, teambuilding and exchanges of ideas cannot easily be accomplished as well through a screen. There is also the aspect that employees who are not in the office get passed over when something suddenly arises as well as losing promotional opportunities. Like the old “satellite office”, working from home once businesses return to near normal might seem like a banishment for those who are ambitious.

This is the conundrum employers will face- the risk of losing employees or, at least their spirits, if forced back to the office as opposed to the productivity loss from their continuing to work remotely. The Aternity study showed another danger. The longer an employee works remotely, the greater the productivity gap grows. That only makes sense. When there are no consequences from taking a 20-minute walk, watching a podcast or playing with their children during the workday, it becomes deceptively simple for those 20 minutes to become 30, 40 or simply more frequent.

The real question is whether employers have the right to require employees to return to the offices. The answer is simple - they do. Refusal to return is cause for discharge without severance.

However, this will change. If an employer permits employees to work remotely for very much longer, past the time that they are restricted by public health guidelines from having employees return to work, then remote working will become a term of their employment. If employees are allowed to remote work for another six months, an employee could then credibly argue that working from home has become a term of their employment and it is simply too late to order them back to the office. In this case, forcing them back is a constructive dismissal just like (in pre-COVID times) ordering someone whose job consisted of remote work to work from the office instead, was then viewed as a constructive dismissal.

What can employers do to require employees to work from the office?

1. Order them back now, as waiting much longer may make remote work a term of their employment;
2. Provide them advance written notice now of the date that they are required to return;



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3. Have them sign contracts now permitting you to order them back to the office on, say, one month's notice. If they refuse to sign, order them back to the office now.

If you do not do any of these three things, you are seriously risking having remote work become a term of employment for those employees. At that point, you will be unable to force them to return and doing so would be a constructive dismissal. The only way to order them back then, without risking liability, is to provide them with full reasonable notice at common law of their return date. That can be as much, depending upon the employee, as 24 months. This is the problem with adopting any new material practice. It has the tendency of ossifying into a "legal right".

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