

## Member's Quarterly

## Winter 2024 Edition

### Feature

# Hiring a Remote Worker Living Outside Ontario?

*Employers beware of these pitfalls*

**R**emote work continues to be a commonplace work arrangement in the post-COVID-19 world. During the COVID-19 pandemic, many individuals living in Ontario left urban centres for rural parts of Ontario and some left the province altogether. To that end, employers may be considering allowing employees to continue working remotely from other provinces or recruiting employees located outside of Ontario. However, there are important considerations that employers must be aware of before continuing or entering into such an employment relationship in order to avoid serious pitfalls.

### Governing Employment Standards Legislation and Taxes

Employers should be aware of which employment legislation governs the employment relationships with their employees. In Canada, the law of the province or territory where an employee lives and performs work governs the employment relationship. For example, in Ontario, the Employment Standards Act, 2000 ("ESA") applies to work performed in Ontario, or where the work is performed inside and outside Ontario, but the work performed outside Ontario is a continuation of the work performed inside Ontario.

Understanding which legislation is applicable is important because there may be fundamental differences in an employee's minimum wage, termination entitlements, overtime, hours of work, vacation and public holiday entitlements. For example, in *Shu Zhang v. IBM Canada Limited*, 2019 CanLII 79641, the Ontario Labour Relations Board held that an employee working for an Ontario-based company but who lived and worked from British Columbia was not entitled to statutory severance pay. The Board found that the ESA governed the employment relationship when it commenced, as the employee was resident and working in Toronto at the time. However, the ESA ceased to apply when he relocated to British Columbia where he worked remotely.

Employers must also be sensitive to tax and withholding issues, which are location-specific. As each province determines its own tax rates on employments, employers' withholding tax obligations could change based on where their employees are working.

### Workers' Compensation Premiums

Employers should be aware that all workers' compensation boards in Canada are signatories to the Interjurisdictional Agreement on Workers' Compensation ("IJA"), which aims to regulate the payment of premiums and workers' compensation benefits, to avoid any duplication of employer premiums on workers' earnings, and to determine from which jurisdiction a worker may claim benefits.

### Health and Safety Considerations

Employers have a duty to ensure a healthy and safe remote working environment for their employees. Under the Ontario Occupational Health and Safety Act, 1993 ("OHSA"), workplace is defined as any premise or place where a person performs work in their course of their employment for the employer. Employees working remotely also have obligations under OHSA to take reasonable care of their health and safety, cooperate with the employer's health and safety practices and procedures, and inform



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the employee if they cannot fulfill any said practices or procedures. There is an obvious challenge for employers in meeting their obligation where an employee is working remotely from another province or territory.

#### **Constructive Dismissal Claims**

Many employers mistakenly believe that they can unilaterally recall remote workers working from another province/territory to the employer's office without issue. However, doing so may lead to claims of constructive dismissal. Constructive dismissal occurs where an employer unilaterally changes a fundamental condition of the employment relationship, which effectively terminates the employee's employment. In the context of recalling a remote worker to the employer's office, it is possible that an employee could claim constructive dismissal on the basis that the employer had condoned their working from another province or territory.

#### **Steps Employers Should Take Before Hiring Remote Workers**

Employers can take steps before hiring remote workers in other provinces to safeguard against these aforementioned pitfalls.

A well-drafted employment agreement may help mitigate the risk of possible legal issues and unnecessary litigation. In order to ensure legal compliance with employment standards legislation, employers should ensure that all employment agreements with remote workers have a provision requiring the employer to approve any changes to the worker's geographical location. That way, if the worker is considering making such a change, they are obligated to disclose it to the employer first.

To reduce the possibility of a constructive dismissal claim, an employer should include an express provision in a remote worker's employment agreement giving the employer the right to unilaterally terminate the remote work arrangement at any time and recall the employee to the employer's workplace. As best practice, employers should institute a workplace policy on remote work that clearly states that remote working arrangements are at the discretion of the employer.

Employers should also consider whether home inspections, including virtual inspections, to assess workplace health and safety are practicable or appropriate. Given that remote working arrangements have less employer supervision, it is important for employers to maintain regular communication with employees working remotely to ensure their health and safety and compliance with employer guidelines.

Proactively instituting these provisions and policies also benefits remote workers by reducing ambiguity and clearly outlining both employer and employee obligations in the remote working arrangement.

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