

Employment and Labour Fall seminar

Remote work in the post-COVID context



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Current Status of Remote Work Conditions

- As COVID-19 becomes less of a concern in the workplace, more employers are looking to make changes including:
 - Moving to a hybrid structure
 - More days in office
- Important considerations when changing remote work structures and handling refusals to return to work

Important Considerations before Changing Remote Work Structures

- Terms and conditions of employment contracts
- Employer communications during COVID-19
- Remote work policies
- In unionized workplaces, consider:
 - Collective Agreement restrictions
 - Past practice/Estoppel arguments
- Duty to accommodate

Employment Contracts and Communications

- Terms and conditions of employment contracts
 - Provision on work location? Hired employees on the basis that the work is remote or hybrid?
 - Does the contract reserve the employers right to modify?
- Communications during COVID-19?
 - In moving to remote work, did the company state the change would be temporary in nature?
Only in response to COVID-19? Subject to change?

Remote Work Policies

- Does your company have a remote work policy in place?
 - Does the policy limit your ability to modify remote work?
- Clear policies are essential and can allow you to address:
 - Employer's right to arrangements at any time
 - Requirement to live within commuting distance and live within the province
 - Impact of performance concerns on the ability to work remotely
 - Requirements for child care during remote working hours

Unique Considerations for Unionized Workplaces

- Collective Agreement provisions
 - If you've negotiated a new collective agreement during the pandemic, did you bargain to include language around remote work arrangements?
 - Did you agree to a letter of understanding outlining on remote work?
 - Scope of management rights

Unique Considerations for Unionized Workplaces

- Even if your collective agreement is silent on remote work, your ability to change arrangements may be limited by “past practice” and estoppel arguments
 - *Alcan Smelters & Chemicals Ltd. v. CAW-Canada, Local 2301*
 - Pre-covid arbitration decision out of British Columbia dealing with shift scheduling
 - Employer was estopped from changing the shift until the Union had the ability to bargain the issue at collective bargaining

Handling Requests for Accommodation

- *Devaney v. ZRV Holdings Limited, 2012 HRTO 1590*
 - Employee terminated for just cause for failure to attend office regularly despite repeated warnings.
 - Employee lived with elderly mother who required considerable care.
 - The employer did not engage in dialogue with the employee about his caregiving responsibility and instead imposed a blanket prohibition on absences from the office.
 - Employee awarded \$15,000.00 in general damages.

Handling Requests for Accommodation

- *Hydro Ottawa Limited and IBEW, Local 636*
 - In response to COVID-19, employer established alternating schedule where employees were in office one week and worked remotely the next week.
 - Employees without childcare arrangements during their week in office were required to either use vacation credits or take unpaid leave.
 - Arbitrator rules that policy amounted to prima facie discrimination and violated the collective agreement by failing to consider duty to accommodate

Handling Requests for Accommodation

- Best practices for responding to requests for accommodation:
 - Engage in dialogue with the employee
 - Ask for information to understand need (not necessarily legal requirements) versus personal preference
 - Work with the employee to search for reasonable accommodation
 - Inquire as to availability of other family members
 - Various child care options
 - Could the accommodation needs be met with different hours of work as opposed to entirely remote work?

Key Takeaways

- Have you communicated anything or put anything in writing that restricts your ability to modify remote work?
- If you're employees are unionized, it will be more difficult to modify remote work, even if you did not promise it was permanent
- Requiring employees to come back to work is likely to be met with some resistance
 - Give employees ample notice if possible
 - Implement a remote work/hybrid work policy
 - Address accommodation requests