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THE EMPLOYER GUIDE TO RETURNING TO THE WORKPLACE POST COVID-19

Returning to the Workplace Post COVID-19

Since the beginning of the COVID-19 pandemic in March 2020, employers have had to face a constantly evolving and exhausting landscape of lockdowns, re-openings, and health and safety requirements.

With much of the Province returning to normalcy in the fall of 2022, employers are grappling with how to operate a business in the post COVID-19 Era. It is not merely a case of welcoming back employees who were working remotely and resuming business as usual. Rather, employers will need to consider how to return employees to the workplace, what new workplace policies apply and working from home, the workplace, or elsewhere.

This Guide has been put together to help employers return their employees to the workplace post COVID-19.

I. CAN YOU REQUIRE AN EMPLOYEE WHO HAS BEEN WORKING REMOTELY SINCE THE START OF THE PANDEMIC TO RETURN TO THE WORKPLACE?

Yes, an employer can require their employees, who have been working remotely to return to the workplace. The following are recommended steps to ensure a successful return to the workplace:

1. **Reasonable notice of return.** There are currently no legal requirements or rules setting out the reasonable notice an employer is required to give to employees returning from remote work. The employer practically should provide reasonable notice – ideally in writing – to the employee. The appropriate length of notice depends on the circumstances, and could be only a few days' notice or longer.

   If an employer had made representations or promises (in writing or orally) to an employee that they would be working from home *indefinitely*, there may be a potential claim against the employer for constructive dismissal. Requiring an employee to return to the workplace in the above circumstances may constitute a fundamental change of location and may lead to a constructive dismissal claim. Of course, providing reasonable notice of the change and or obtaining the employee's agreement to the change may negate any potential claim for constructive dismissal.

2. **Implement a Return to Work Policy.** An employer should immediately put a policy in place requiring their employees to return to work at any time in the discretion of the employer. The policy should also include the following topics:

   a. Working arrangements such as work from home or a hybrid work from home / work from workplace model.

   b. A plan for a staggered return to the workplace. For example, does everyone return to the workplace at the same time? Or will a schedule be implemented where employees return to the workplace on a staggered or alternating basis?

   c. A plan for use of workspace - does everyone use their same workspace that they used pre-COVID-19? If not, how are workspaces assigned/determined/allocated? Can a workspace be signed up to use? Can an office be replaced with a workstation or vice versa?

   d. Health and safety requirements as applicable in accordance with the government's health and safety regulations, such as social distancing, use of disinfectants, cleaning, etc.

3. **Offer Accommodation if Employees Raise Family Care Obligations.** Keep in mind that employees who have been working remotely may require a period of time to arrange for child or family care before returning to the workplace. Under the *Human Rights Code ("Code")*, if an

employee requests accommodation due to a protected ground, such as family status, an employer must accommodate the employee up to undue hardship, subject to the employee's duty to cooperate as discussed further below.

Undue hardship is the point where any further accommodation would interfere excessively with the employers' operation. Such things as financial costs that are so substantial that they would alter the essential nature of the enterprise or so significant that the financial costs would substantially affect the business' viability are considered when assessing whether there is undue hardship.

When providing accommodation for family care obligations, the employer's efforts need to be *reasonable enough* to allow employees to still carry out their work duties despite the family care obligations. It *does not mean* that accommodation has to be *perfect or ideal*. In fact, the employee has a *corresponding* duty to cooperate with reasonable accommodation. For example, if an employee is requesting accommodation for a period of time to arrange for child or family care before returning to the workplace, the employee would be required to first seek assistance from other family members.

If the accommodation offered is reasonable but the employee refuses it, then the employer may not have any further duty to make additional efforts to accommodate the employee, and the employee may be considered to have resigned or abandoned their employment.

If the employee is *still* unable to perform their essential work duties *even after* reasonable accommodation has been made short of undue hardship, the employer may not be restricted from terminating the employee, but they still *must* provide reasonable notice of termination to the employee.

If accommodation for family care obligations was not required by the employee prior to working remotely, it may be difficult for an employee to establish that accommodation is now required for any more than a brief period of time.

4. **Job Protected Leaves Available under the *ESA***. Some employees may not be able to immediately return due to COVID-19 related reasons, such as caring for family members due to COVID-19 related issues.

   Under the *Employment Standards Act, 2000 (the "ESA")* an employee that has contracted COVID-19, is required to isolate due to a direction from a public health officer, or is caring for a family member due to COVID-19 related issues (i.e. the family member is under quarantine or isolation due to a direction from a public health official), may be eligible to take up to three (3) days of paid infectious disease emergency leave. This paid infectious disease emergency leave entitlement is set to end on Mach 31, 2023.

   Moreover, under the Emergency Leave provisions of the *ESA – Emergency Leave: Declared Emergencies and Infectious Disease Emergencies*, employees that are providing

care or support to an individual because of a matter related to COVID-19 that concerns that individual, including, but not limited to, school or day care closures, are entitled to an unpaid leave of absence. This leave can last until the employee no longer needs the leave to care for their children or family members due to COVID-19-related reasons. At the time of writing, there is no end date for the entitlement to this unpaid leave.

5. **Establish a Safety Plan.** Even though most COVID-19 public health restrictions, such as a requirement to wear a mask indoors or to undergo rapid testing, have been lifted it is still important to have a comprehensive Infectious Disease Safety Plan in place. Employees should be made aware of what will happen if there is a COVID-19 outbreak in the workplace, what PPE is available and what measures are put into place to ensure social distancing and workplace cleaning and hygiene. The following are a list of questions an employer should consider when developing a COVID-19 / Infectious Disease Safety Plan:

   Q1 – How will the employer take reasonable precautions so that that all workers know how to keep themselves safe from exposure to an infectious disease?

   Q2 – How will the employer screen for infectious diseases?

   Q3 – How will the employer take reasonable precautions to control the risk of transmission in the workplace?

   Q4 – What will the employer do if there is a potential case of, or exposure to an infectious disease at the workplace?

   Step 1 – Exclude symptomatic person from workplace

   Step 2 – Contact public health

   Step 3 – Follow public health direction

   Step 4 – Inform workers who may have been exposed

   Step 5 – Report to Ministry of Labour and WSIB

   Q5 – How will the employer manage new risks in how they operate their business?

   Q6 – How will the employer make sure the plan is working?

6. **Update Employment Agreement.** As the return to the workplace and new legislation and case law raises the issue of new liabilities for employers, Employment Agreements should be reviewed and updated to reflect the new workplace and new protections for employers.

II. WHAT IF AN EMPLOYEE REFUSES TO RETURN TO THE WORKPLACE?

Under the *Occupational Health & Safety Act, (the "OHSA")*, most employees have the right to refuse work in a workplace they have reason to believe is likely to endanger them. This will trigger the employer's duty to investigate the employee's safety concern. Pursuant to section 43 of the *OHSA,*

(3) A worker may refuse to work or do particular work where he or she has reason to believe that,

(a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;

(b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself;

(b.1) workplace violence is likely to endanger himself or herself; or

(c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker. R.S.O. 1990, c. O.1, s. 43 (3); 2009, c. 23, s. 4 (2).

The work refusal must be reasonable, and the employee must provide a reason for the refusal to the employer.

Generally, work refusals under the *OHSA* deal with the **physical condition** of the workplace – not the employee's personal preference to not work. Determination of whether the workplace is 'likely to endanger' an employee based on COVID-19 will depend on a lot of factors and requires a careful case-by-case analysis. Employers should consider:

- The type of workplace (is it a primary health care provider? A grocery store? An IT company?);
- The specific employee (their age, health, family obligations);
- The most current information from objective sources on the COVID-19 virus (transmission, recommendations for the appropriate amount of time to quarantine following travel, etc.); and
- Government recommendations and orders (requirements to mask and socially distance).

The right to refuse work does not apply to all employees. For example, it does not apply to 'essential workers' such as first responders, firefighters, police officers, or health care workers, when 1) the likely endangerment is inherent in the worker's work or is a normal condition of the worker's employment; or 2) when the worker's refusal to work would directly endanger the life, health or safety of another person.

If a protected employee reasonably believes the workplace is likely to endanger them or another worker and refuses the work, the employee must:

1. report the circumstances of the refusal to their (or the worker's) employer or supervisor;
2. explain the reasons for the refusal; and

3. remain available for the purposes of the investigation.

The employer may then have an obligation to inform other parties of the refusal, such as, for example, a health and safety representative, a union representative and/or a health and safety committee. The employer must then investigate the work refusal report pursuant to their obligations under the *OHSA*. At this stage, the employer has an opportunity to remedy the health and safety concern. If following an investigation and steps taken to deal with the circumstances that caused the worker to refuse work, the employee still has reasonable grounds to believe they are likely to be endangered, the employee can continue to refuse work and the employer must notify a Ministry of Labour inspector. The inspector will decide whether there are circumstances likely to endanger the worker or another worker.

In the event an employee says they feel 'unsafe' returning to the workplace, the employer should ask the employee why they feel this way. If the employee's concern relates to "the physical condition of the workplace", the Work Refusal process under section 43 of the *OHSA* may be required.

What if an employee simply does not want to return to the workplace?

If an employee simply refuses to return to the workplace, and the reason behind the refusal is a personal preference, as opposed to a safety concern, the refusal to return to the workplace could be considered to be abandonment of their employment. In the event that an employee abandons their employment, the employee would not be entitled to further pay, termination or severance pay, or common law notice.

III. WHAT TO EXPECT FROM EMPLOYEES WORKING FROM HOME

Some employees are still working from home and may wish to continue to do so after employers have recalled them back to the workplace. Given that some employees working from home may consider this to be the "new normal", employers may want to reconsider their definition of the "workplace" in their policies to include an employee's residence, or elsewhere.

For employees who are permitted to continue working from home, their home is now their new "workplace". As such, there are a number of things employers can expect their employees to continue to do, even though they have not returned to the prior workplace. For example, an employer can expect an employee to continue to follow all workplace policies, maintain confidentiality, maintain professionalism (i.e., video conference calls are to be treated the same as in person client meetings, cameras always being on, stable internet, etc.), maintain the dress code, and maintain the same start and end times for working.

However, an employer should not expect an employee to work at all hours of the day. An employee should only be expected to work the same number of business hours as they did when they were in their prior workplace. This will

minimize the likelihood that an employer receives a claim for overtime pay, or a claim for short term disability leave if their employees are burnt out

from the overtime hours they are working. Moreover, this will minimize the likelihood of an employee alleging constructive dismissal, due to a change in their hours of work. If it is constructive dismissal, an employer would be liable for wrongful dismissal damages, which could be up to 24 months' notice or possibly greater.

What workplace policies still apply?

If an employee is working from home, an employer can expect an employee to abide by all current and future workplace policies. There are three policies that employers are *required* to have, pursuant to statute: a Workplace Health and Safety policy, a Workplace Violence and Harassment policy and an Accessibility policy. As the *Occupational Health and Safety Act* may apply to an employee's residence while they are working from home, an employer should ensure to update their Workplace Health and Safety policy, Workplace Violence and Harassment policy and their Accessibility policy to reflect this. This is important given the increased number of employees now working from home.

For example, with respect to the Workplace Health and Safety policy, an employer may wish to include a clause that provides for the use of ergonomic equipment to prevent an employee from experiencing a workplace injury which could also apply at home. With respect to the Workplace Violence and Harassment policy, an employer may wish to include a clause that defines "workplace violence" to include domestic violence and cyberbullying at home. For safety and mental health reasons, it would be important to include a clause requiring the employee's camera to be on while videoconferencing.

In addition to the above three required policies, there are a number of policies that employers are *recommended* to have in place. For example, an employer may wish to have the following policies:

1. Pay equity plan (if the employer has more than 10 employees, they are required to have a Pay Equity Plan);
2. Drug and Alcohol policy;
3. Social media policy (to prohibit employees from browsing social media during core business hours);
4. Human rights policy;
5. Accommodation policy;
6. Absenteeism policy;
7. Privacy policy;
8. Workplace injury policy;
9. Confidentiality policy;
10. Videoconference protocol policy (what is the dress code and background for Zoom?);
11. Sick leave policy;
12. Vacation policy; and
13. Overtime policy.

What if an employee wishes to work from another Province / Territory or Country?

Employers should not permit an employee to work from another Province / Territory or Country. There are a number of considerations that an employer must take into consideration if they permit their employees to "work from anywhere".

There are tax considerations to take into account, depending on which Province/Territory/Country the employee wishes to work in, particularly, how much income tax, CPP and EI that needs to be remitted on each payroll.

In Canada, employment standards legislation varies between each province. For example, while termination and severance pay are required to be given to an employee who is terminated without cause in Ontario, an employee is only entitled to termination pay in British Columbia and not severance pay.

Occupational health and safety legislation also varies between each province, and an employer's duties may differ if some of their employees live in Ontario and others live in another province such as Saskatchewan.

Human rights legislation also differs from province to province and country to country, with some provinces or countries having greater or lesser protection than Ontario, requiring an employer to comply with these extra laws.

An employee who lives in another Province / Territory will be subject to a different time zone and an employer will need to consider whether the employee will still be subject to the core business hours of the head office in Ontario.

Moreover, for any employee who works out of Ontario, whom an employer wishes to continue employing, an employer should revisit the Employment Agreement with the employee and include new terms and conditions as applicable to the Province/Territory/Country's law that apply. Of course, if an employer still wishes to continue to employ the employee on the basis that the employee returns to Ontario, that should be included in the agreement and the employer should give the employee written notice to return. The length of notice is dependent on many factors and must be reasonable under the circumstances. If the employer does not wish to continue employing the employee, the employer must still provide reasonable notice of termination to the employee.

WE ARE HERE TO HELP!

Returning employees to the workplace and the COVID-19 pandemic will be an ongoing process and discussion. New policies and Employment Agreements are required to protect employers from liability. Learn more by contacting Minken Employment Lawyers for assistance with returning employees to work and any COVID-19 related questions. Contact us today at contact@minken.com or call us at 905 477-7011.Go to our website and sign up for our newsletter to receive up-to-date information, including new legislation and Court decisions impacting your workplace.