

The new face of the workplace

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There is little doubt that COVID-19 has transformed the way we work and how the traditional workplace is viewed. In very short order, a large portion of the Canadian workforce was pulled out of office towers and commercial spaces and mobilized to work in remote settings.

As we emerge from the peak of the pandemic and discussions begin about reopening the economy, plans will need to be made for returning employees back to the workplace. However, bringing employees back to the workplace will not be as simple as unlocking the doors and letting everyone back in. There are many long-term changes that employers will also need to consider in terms of how and where work is performed, many of which will be shaped by guidance provided by provincial and public health authorities.

We have compiled a list of items for employers to consider as they begin planning for a return to the workplace. These include the introduction of employment agreements and policies that address a virtual or remote work environment, health & safety provisions, furloughing employees from layoff, potential work refusals, the ongoing duty to accommodate family status claims and communication & employee well-being.

Employment agreements & policies for a virtual workforce

A common theme that has arisen for many organizations is the need for flexibility in the employment relationship and the importance of including the ability to make adjustments quickly. Developing employment agreements that go beyond the traditional terms of employment and implementing remote work policies can assist employers in reacting to exigent circumstances that require a redefinition of the manner of work. These agreements should include:

- Redefining the location of work, including a consideration for cross-border services;
- Consideration for relocating from the office to home, including health and safety requirements;
- Defining hours of work and the possible introduction of timekeeper systems to track time;
- Detailed obligations to protect confidentiality and ensure cybersecurity policies are implemented;
- Obligations to ensure that technology and equipment is available to support a virtual work environment;
- Redefining production standards, expectations and managing virtual workers;
- Provisions for temporary layoff in line with minimum employment standards legislation; and
- Consideration for re-deployment of workforces to adapt to changes in business needs/client demands.

Health and safety

The health and safety of all employees or anyone attending the employer's premises should be paramount. Employers should maintain health and safety standards and practices that are in compliance with recommendations and guidelines provided by public health authorities. For example, on April 30, 2020, the Ontario government provided more than 60 guidelines that are applicable to a variety of sectors including retail, construction, health care, food and transit.

Some of the guidelines set out by the Ontario government which are applicable to the office setting include:

- Maintaining physical distancing (being 2 metres/6 feet) between persons;
- Discouraging the sharing of telephones, keyboards, desks or workstations;
- Considering the total number of workers in the workplace and having staff work remotely where possible;
- Developing systems to conduct work away from the office whether by email, telephone or video conferencing;
- Postponing non-essential face to face appointments or converting to virtual/video appointments;
- If direct client contact is essential and cannot be avoided, then staff should consider using personal protective equipment;
- Staggering start times, breaks and lunches;
- Suspending group activities/gatherings; and
- Increasing the sanitization of the workplace by providing easy access to soap and water, encouraging staff to frequently wash their hands, and increasing the cleaning and sanitization of commonly touched surfaces.

In many other jurisdictions that have begun the return to work process, employee testing measures, such as regular temperature gauging and virus immunity testing have been adopted and/or are being considered. In Canada, such measures, as well as the implementation of health and safety measures, including the guidelines set out by government authorities may invoke significant legal, privacy and human rights considerations. Employers should seek legal advice before implementing any such measures.

Recalling employees from layoff

In recalling employees from layoff, employers should be aware of any procedural requirements set out in the applicable employment standards legislation that may dictate when and how employees are to be recalled to work. Some provinces, such as Alberta, provide employees with a seven day window in which to return from layoff when recalled by their employer. In other provinces where no timeframe exists, a reasonableness standard is generally used. In those cases, an employee's personal circumstances may inhibit their ability to return to work by the deadline noted in the recall notice. Employers should be mindful of the duration of any current layoff periods and any upcoming deadlines by which the employment relationship will be deemed terminated.

When issuing a recall notice, employers should include the date by which the employee is expected to return to work. In an attempt to address any outstanding safety concerns that employees may have about returning to the workplace, employers may choose to include in the recall notice a brief outline of the steps that have been taken to ensure the workplace is safe.

Work refusals

There may be some employees who refuse to return to work when recalled. The reasons for the refusal may vary from a concern that the workplace is unsafe to the perception that they are not required to return to work until any emergency order is lifted. Determining whether a work refusal is reasonable will be assessed on a case by case basis. Employers should follow the steps outlined in the applicable health and safety legislation when addressing the refusal and consult with legal counsel where necessary. Where the refusal is unreasonable, employers may find themselves in a situation where the employee has been deemed to have abandoned the employment relationship.

Accommodation and family status claims

With school closures extended and the school year cancelled in various provinces, many employees will have ongoing childcare responsibilities which could inhibit their ability to return to the office. Many provinces have implemented legislation that provides for unpaid job protection leaves of absences for those who are unable to return to work or attend work because they are caring for children or other family members during the duration of the emergency order.

The inability to return to work because of family responsibilities may also invoke family status considerations pursuant to applicable human rights legislation which may increase requests for accommodation.

Communication & employee well-being

Employers should provide employees with as much information as possible about any return to work protocols that are developed. Ongoing and frequent communication from leaders and management may serve to allay many concerns that employees have. As the return to the workplace is likely to cause many employees to feel anxious and uncertain, employees should be reminded of the assistance programs that remain accessible to them.

Conclusion

Returning employees to the workplace is a complex and fluid endeavor which cannot be done in a vacuum. This crisis will undoubtedly redefine the way that we work and all aspects of the employment relationship. While adjustments will need to be made to return employees back to the physical workplace, there will also be a need to contemplate a new way of working as for many companies the way work is done and where it is done will never be the same. Inevitably, the new face of the workplace will have legal implications and we are here to help with this transition as we plan for the future.

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