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LAWYERS FOR EMPLOYERS

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Employer Considerations for Employees Working from Home

As a result of COVID-19, employers are increasingly offering employees the opportunity to work from home. As many employers have recognized, at-home work is likely a necessity given the realities of COVID-19. Even after the pandemic has passed, it is likely that Canadian workplaces are forever changed as a result. As such, we have outlined some key considerations for employers in respect of employees working from home.

Contractual and Policy Considerations

Every employee should be working under the terms and conditions of a written employment agreement. Most employment contracts contain a provision that allow the parties to mutually agree to modify the terms and conditions of employment (most require that these changes be in writing). To the extent that an employee's hours of work or working conditions are being modified signifantly, it is advisable to obtain written consent from the employee to the new arrangement. In the absence of such agreement, and if such an arrangement were imposed on a worker, an allegation of constructive dismissal could be made.

A separate "work-from-home agreement" is also recommended. A work-from-home agreement is useful to clearly outline the respective obligations and responsibilities of both the employer and employee, including working conditions (home office, safe workplace), required hours of work, limitations on overtime, tracking hours of work, and technological considerations such as logging into the employer's system and IT security concerns. An employee is required to devote their full-time and attention to work even if working from home. It will be important to develop clear reporting and performance management systems.

Finally, an employer should develop and implement work-from-home policies and procedures for all employees. With the prevalence of working from home increasing because

of the pandemic, employers should implement work-from-home policies to ensure the consistent application of practices and procedures for employees who are working from home.

Statutory Considerations

Employment Standards: employees working from home are entitled to minimum statutory entitlements, such as minimum wage, overtime pay, vacation pay and entitlement to various forms of leave, including Infectious Disease Emergency Leave. Under the *Ontario Employment Standards Act, 2000,* a "*homeworker*" defined as an individual performing work from their own homes, is entitled to a higher minimum wage ($15.40 per hour) than the general minimum wage ($14 per hour). The employer is ultimately responsible for implementing procedures to control hours of work and ensure that there are proper reporting procedures in place to ensure compliance with minimum employment standards. This may include regular reporting requirements, logging in and out procedures, and specific written approval as a requirement in advance of any overtime work.

Occupational Health and Safety: Under the Ontario *Occupational Health and Safety Act*, an employer is required to take every precaution reasonable in the circumstances for the protection of a worker. At the same time, the law is unsettled as to the application of the *Occupational Health and Safety Act* to telework. Section 3(1) of the *OHSA* provides that the *Act* does not apply to work performed "*in or about a private residence, or the lands and appurtenances used in connection therewith*." However, the Ontario Labour Relations Board has permitted a reprisal application to proceed in respect of home work (although section 3(1) was not discussed in the decision). Additionally, the Supreme Court of Canada has also recently upheld an adjudicator's ruling that the employer's workplace inspection obligations under the *Canada Labour Code* do not apply to workplaces over which the employer has no control. In that case, the Court held that Canada Post did not have control over letter carrier routes and delivery locations, and therefore, could not be expected to inspect those locations to assess hazards.

Workplace Safety and Insurance: Under the Ontario *Workplace Safety and Insurance Act*, workers who are injured "in the course of employment" even if it is while working at home, may be entitled to benefits under the *Act*. An employer and employee have the same rights and responsibilities whether an employee is working at home or at an employer's workplace. Of course, if an employee is injured while working from home, there will be questions as to whether or not the injury or illness was actually work-related. An employer should take reasonable steps to ensure employees are aware of timely reporting obligations if there is an accident. Employers may also want take the opportunity in a "work from home" agreement to specify *WSIA* reporting obligations and place an onus on the employee to ensure that there is a dedicated, safe work space when the employee is working from home.

Human Rights: The duty of accommodation as required by human rights legislation applies to employees working from home. The most common issue that has arisen due to the pandemic is childcare obligations because of school and daycare closures. Discrimination on the basis of "*family status*" (which includes childcare obligations) is prohibited by human rights legislation throughout Canada. Employers are required to accommodate an employee's child care requirements (not preferences) to the point of undue hardship. This may require offering at-home work to an employee with no options available for childcare. It may require consideration of alternative hours of work. At the same time, an employee has an obligation to cooperate in the accommodation process and has to make reasonable efforts to explore childcare alternatives to ensure that he or she can work. With the opening of schools and daycares in Ontario, there are many options available to parents that must be explored. The pandemic is ever evolving and if there is another shut down, employers may need to consider offering at-home work as an option. In some cases, at-home work is not possible given the nature of the work or position.

Conclusion

The pandemic has likely changed workplaces forever. The line between an employee's home and workplace has been blurred. This causes productivity, privacy and confidentiality concerns for both the employee and employer. Employers lose a measure of control over the working environment and for this reason, it is critical for employers to implement "work from home" policies, procedures and agreements to ensure a clear understanding of responsibilities, obligations and duties when working from home.

New *Canada Labour Code* Changes to Internship Rules

Changes to the *Canada Labour Code,* R.S.C., 1985 took effect on September 1, 2020 and will be passed through the *Standards for Work-Integrated Learning Activities Regulations.* These regulations have been passed in order to offer additional protections for interns and student interns working for federally regulated industries or workplaces.

An intern does not have to be part of a formal education program. An intern may be a recent graduate, an individual pursuing a mid-career change or an individual returning to the workplace following an absence. Interns are entitled to

the full labour standards protections under Part III of the *Canada Labour Code*. An intern is also entitled to be paid at least minimum wage.

Student interns, defined by students who are completing an internship to fulfill the requirements of a formal educational program, are unpaid. However, other labour standards protections have now been extended to student interns as of September 1, 2020. In particular,

- *Standard hours of work and breaks*: Student interns are now covered under the standard hours of work provision in the *Code,* including a variety of rights such as, standard hours of work, general holidays in a week, rest periods, maximum hours of work, scheduling hours of work, notice of schedule, and the right to refuse work that they do not have at least 96 hours of notice for.
- *Breaks for Medical Reasons or Nursing*: Student interns now have the ability to enforce rights to have breaks for medical reasons; they will still be required to provide a medical certificate by a health care practitioner. In addition, they will also be able to take unpaid nursing breaks where necessary in order to nurse or express breast milk.
- *Holidays:* Student interns are eligible for general holidays as prescribed by the *Code*. This allows them to take statutory holidays, and also will allow them to have the following day off where a statutory holiday falls on a weekend. Employers will still be able to substitute statutory holidays for other days off in respect to student interns
- *Protected Leaves of absence and maternity-related reassignment*: If a student intern is pregnant or nursing, a student intern is entitled to request a modification to duties upon delivery of a medical certificate stating that the current duties caused a risk to the student intern or child. An employer must modify the position or provide a written explanation as to why a modification is not reasonably practicable. If modification of the duties is not possible, a student intern may not be entitled to a leave of absence. Other leaves have also been extended to students, including personal leave, bereavement leave and medical leave, along with corresponding prohibitions against any reprisal for exercising rights under Part III of the *Code*.
- *Work-Related Illness and Injury and Sexual Harassment*: Student interns are protected with respect to injuries they experience at work, reassignment to a different position still applies where the student returns and is unable to perform the work they used to perform before their absence. Many of the *Code* provisions are related to reprisals and sexual harassment.
- *Record Keeping Requirements*: There will also be new record keeping requirements for employers after engaging a student intern. Employers will need to keep the information for a period of at least 36 months after the student internship ends. The record keeping requirements are quite comprehensive and should be viewed in advance of hiring.

A summary of the changes can be found at the following link:

https://www.canada.ca/en/services/jobs/workplace/federal-labour-standards/employer-obligations-interns.html

Superior Court says Layoff permissible based on Verbal Agreement, not Constructive Dismissal

There is a line of authority that says an employer cannot lay off an employee without a clear contractual right to do so (express or implied) and that in the absence of that contractual right, the imposition of a layoff (including a temporary layoff as permissible under the Ontario *Employment Standards Act, 2000*) constitutes constructive dismissal.

In *Hefkey v. Blanchfield Roofing Co.,* the Superior Court had to decide whether or not the employee could be laid off based on a verbal agreement. The employee commenced employment with Blanchfield Roofing Co. in 2003, left in April 2009 for a period of time for another job, and then returned four months later. He worked continuously for the company until December 2015, when he was laid off from his position; which was the first time that he had been laid off during the course of his employment. He was recalled to work 3 months later, and was advised that he would have to sign a new employment contract. He did not previously have a written employment agreement as all agreements between the parties were verbal. The employee refused to sign the written contract and claimed that the employer was not entitled to lay him off and claimed constructive dismissal. He also argued that the employer had the onus of proving that there was an express or implied term in the contract that permitted layoffs.

The employer argued that there was an express verbal agreement with the employee that the conditions of his employment had always included the possibility of a layoff during the winter months if there was no work available. Ultimately, the Court accepted the employer's position and concluded that there was an express verbal agreement that permitted layoffs during the winter months. While he had not been laid off during his employment, this was because he was married to the owner's sister and did not diminish from the express verbal agreement that permitted layoffs. As such, there was no constructive dismissal.

In rendering this conclusion, the Court followed the decision in *Jamshidi v. Dependable Mechanical Systems* and determined that the employee had the onus of establishing that the contract prohibited layoffs.

In this case, the employee failed to meet that onus and it was concluded that the employer had the right to lay off the employee. While the Court ruled with the employer on the issue of a permissible layoff, it also concluded that the terms of the written employment agreement being proposed were substantially different than his previous terms, including changes to remuneration, job title, and entitlements upon termination. According to the Court, it was "vastly different" than his existing terms and conditions, which supported a constructive dismissal claim. Notably, the Court found that there was a break in service when the employee left for a few months for another job, and therefore, his length of service was 6 years, rather than 12 years. He was awarded 7 months of reasonable notice.

For employers, the Court reaffirms the validity of a verbal agreement which permitted layoffs. At the same time, the Court placed the onus on the employee to prove that such a layoff was expressly prohibited. A best practice for employers is to include an express right to layoff an employee in a written agreement in certain circumstances, which is consistent with the temporary layoff provisions as outlined in the Ontario *Employment Standards Act, 2000*.

Sweeping Changes to the *Canada Labour Code* Harassment and Violence in the Workplace Regulations

On June 24, 2020, the Minister of Labour announced the new *Workplace Harassment and Violence Prevention Regulations* that will come into force on January 1, 2021. The regulations will amend the *Canada Labour Code*, and will replace Part XX of the *Canada Occupational Health and Safety Regulations*. The following are some highlights of the legislation:

Assessment of Violence and Harassment in the Workplace

- Employers must conduct a workplace assessment, in conjunction with a workplace health and safety committee or representative, to identify risk factors and develop preventative measures in relation to harassment and workplace violence. This includes an evaluation of workplace culture, physical design of the workplace and external factors that could give rise to workplace violence or harassment, and the implementation of preventative measures.

Development of Workplace Harassment and Violence Prevention Policy

- The employer and the joint health and safety committee are required to develop a workplace harassment and violence policy with specific elements such as the respective roles of the employer, employees, and workplace health and safety representatives. They will also need to create a summary of training to be provided to all employees, a comprehensive resolution process and description of support measures that are available to employees.

Resolution Process (Notice of Occurrence)

- In order to file a complaint or to report an "occurrence" (which is defined as any incident of workplace harassment or violence in the workplace), an employee is required to provide a notice of occurrence to the employer or the designated recipient in writing or orally.
- Where a person provides a notice of an occurrence, an employer is required to respond within 7 days. The employer will then be required to inform the responding party and make "*every reasonable effort to resolve an occurrence*", within 45 days. The parties may attempt to resolve the matter through conciliation.

Investigation Process

- If the matter is not resolved, it must be investigated if the "principal party" (person who is object of occurrence) requests it. An investigator must be selected from a pre-developed and jointly approved list, or by agreement of the parties involved. If an investigator is not agreed upon, the employer must select an investigator listed by the Canadian Centre for Occupational Health and Safety, as having training, knowledge and experience relevant to workplace harassment and violence.
- An investigation report must be provided to the principal party, responding party and workplace committee or health and safety representative.

While the legislation is quite extensive, federally regulated employers have **until January 1, 2021** to ensure that they are in compliance with its requirements. We would be pleased to review your current policies and practices to ensure full compliance with these new Regulations. If you have any questions, please do not hesitate to contact us.