The New Post-COVID Workplace
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AGENDA

- Reluctance to Return
- Accommodation
- Health and Safety
- Mandatory Vaccination
- Working in Hybrid Setting – what does the future hold?

RETURNING FROM REMOTE WORK

- Employers should anticipate not all employees will want to return to the office
- If return is required, may see an increase in constructive dismissal claims and/or requests for a permanent remote work arrangement for disability or child care related reasons
- If employee refuses to return, even after being required to do so, what do you do?

CONSTRUCTIVE DISMISSAL

- Employee may not want to return and claim requirement to return is a constructive dismissal
- If work-from-home is a temporary arrangement, requirement to return not likely a constructive dismissal, as there is no change to the employee's 'normal working conditions'
- However, restricting ability to work from home may constitute constructive dismissal if it was a pre-COVID term or condition of employment
  (*Hagholm* v. *Coreio Inc.* 2017 ONSC 7713)

RELUCTANCE TO RETURN

- In some cases, may be entitled to an unpaid leave of absence under employment standards legislation if want to remain home for a reason related to COVID-19
  - *e.g.*, condition that puts employee at increased risk, need to stay home because children have been kept out of/can't attend school or daycare
- Entitlement on an unpaid leave does not translate into an entitlement to work from home
- Work from home request can be denied, subject to duty to accommodate under human rights legislation

ACCOMMODATION - DISABILITY

- Employee may claim a medical condition prevents them from attending work (*e.g.* anxiety)

- Employer entitled to medical documentation to verify if duty to accommodate triggered
  - Does employee have a disability?
  - What are the restrictions and limitations?
  - What is prognosis for improvement?

ACCOMMODATION - CHILD CARE

- Employee may want to continue to work-from-home in order to continue to keep children out of school or daycare
- No free standing entitlement to a work from home arrangement because of employee choice to keep a child out of school or daycare
- Entitled to seek information to evaluate need for accommodation, including documentation (such as medical) to support request

ACCOMMODATION - CHILD CARE

- Want to determine whether the request is due to a preference vs. a need
  - *e.g.,* child with a medical condition may not be able to attend school due to doctor's advice
- Entitled to information on "other supports" available to the employee
- Employee is not obligated to exhaust all other options before seeking accommodation from employer

ACCOMMODATION GENERALLY

- In either case (family status or disability-related request), if employee has established need for accommodation, duty to accommodate to the point of undue hardship
  - High standard; must be more than a mere inconvenience or some cost
- However, employee entitled to reasonable, not preferred, accommodation
  - Not entitled to work from home by default
  - Can restrictions and limitations be met by making a modification to schedule or work conditions so employee can still come to work?

RELUCTANCE TO RETURN

- Even if there is no basis for accommodation, may still have employee refusing to attend work and taking position they will continue to work remotely

  - Fear of COVID-19 in the workplace
  - General fear of COVID-19 in public
  - Belief they should be entitled to accommodation that has been denied

RELUCTANCE TO RETURN

- If fear of COVID-19 at the workplace:
  - Educate employee on precautions taken in workplace
  - If continues to refuse, treat as a work refusal under occupational health and safety legislation

- If employee is not entitled to a leave or accommodation and does not have a legitimate basis to refuse to return to work, continued absence may be treated as a resignation or cause for termination

HEALTH AND SAFETY ON RETURN TO THE WORKPLACE

- While some employees may be reluctant to return, others may be eager for the social contact
- Need to ensure continued adherence to public health and safety requirements at work, regardless of vaccinated status
- Anecdotal evidence is that workplace transmission often occurs between employees during social time (breaks, eating, shared commute) when adherence may be more lax

HEALTH AND SAFETY ON RETURN TO THE WORKPLACE

- If employees have been working remotely ensure educated on health and safety protocols prior to returning to office
  - Screening
  - Physical distancing
  - Masks
  - Disinfecting requirements
  - Changes to work location or shared spaces
  - Hygiene
  - Requirements if employee feels ill at work or prior to attending work

HEALTH AND SAFETY ON RETURN TO THE WORKPLACE

- Consider where employees congregate and what safety measures should be implemented to reduce potential workplace transmission
- Remove excess chairs from break rooms, eating areas, *etc*.
- Educate employees on the importance of adherence to safety protocols even outside of 'working' time at the office (e.g. smoke break, lunch off-site)
- Proactively address non-compliance at work (e.g. employees congregating, improper mask usage)

ALL OF THAT SAID…

- For many workplaces, employees are the most valuable resource
  - Consider what you *may* do vs. what you *should* to in order to retain talent
  - If you are going to permit WFH arrangements, establish objective criteria to avoid claims of favourtism
    - Role, last performance evaluation, objective productivity measurements, *etc.*
    - How to monitor/communicate when it's not working; ensure clear arrangements are at employer's discretion

MANDATORY VACCINATION

- At this time, mandatory vaccination for unionized staff is not likely enforceable
  - Subject to specific provisions of collective agreements, not likely to be found to be a reasonable exercise of management rights
- For non-union staff, consider the ‘or what?’
  - Can mandate for non-union staff (subject to the duty to accommodate), but failure to vaccinate will not constitute just cause for discharge so

MANDATORY VACCINATION

- For non-union staff:
  - termination will be on without cause basis, meaning termination costs
  - If holding out of active employment, may trigger constructive dismissal
- Key points are (a) no government mandate, (b) no change to how Public Health treats those vaccinated vs. not, (c) vaccination doesn't prevent transmission of virus and (d) PPE precautions in place already considered sufficient to reduce transmission
- Consider incentives (extra vacation days, restaurant vouchers, *etc.*)

POLICIES AND PROCEDURES FOR A HYBRID SETTING

- Look to amend existing employment agreements or policies to address remote work considerations, or adopt a remote work policy to deal with specific issues that arise
- Location of Work
  - Where must work be performed?
    - May want to limit to home province
    - Otherwise, permanent relocation may risk employer being subject to labour and employment legislation of the employee's province (or country) of residence
      - May also create tax or 'corporate residency' issues

POLICIES AND PROCEDURES FOR A HYBRID SETTING

- What expectation is there of attendance in the office, even if working remotely?
- If hybrid schedule, consider setting out schedule
- Include employer right to revoke remote work arrangement if deemed necessary; consider notice provision to allow to arrange person affairs
- How will you track ‘down time’ while employee works from home?
- How will you ensure employment standards compliance?

POLICIES AND PROCEDURES FOR A HYBRID SETTING

- Expenses
  - Consider who will pay for the tools of the position when remote
    - Technology
    - Office furniture
    - Paper, pens, etc.
  - If a hybrid role, may want to address what resources employees can take/retain from the office for use when working remotely

POLICIES AND PROCEDURES FOR A HYBRID SETTING

- Hours of Work
  - Especially important if employees are working an unconventional schedule when remote
  - Establish policy for recording, submitting and reviewing hours of work and eating breaks to ensure compliance with employment standards requirements
  - Also remember some jurisdictions may have a different minimum wage applicable to employees who work from home
    - Ontario - homeworker minimum wage currently $15.70 per hour

POLICIES AND PROCEDURES FOR A HYBRID SETTING

- Information Technology
  - Ensure IT policies address use of employer technology outside of the physical office
  - Where may information be stored (Employer laptop? Central system? Employee's personal computer?)
  - Who can use the employer's computer while employee is at home?

POLICIES AND PROCEDURES FOR A HYBRID SETTING

- Information Technology
  - What are the expectations around personal use?
  - Are employees aware of any monitoring or tracking programs installed?
  - May also want to address where IT may be used and how it is to be secured
  - How will you retrieve equipment if necessary?
    - Consider making unaltered return of equipment part of any termination package offer

POLICIES AND PROCEDURES FOR A HYBRID SETTING

- Confidentiality
  - Is there an expectation of confidentiality over business discussions that occur in the home?
  - How are confidential documents to be stored and destroyed?
    - Secure desk?
    - Shredder in the home?
    - Prohibition on printing?
    - Bring into the office for destruction?

TAKEAWAYS

- Develop a plan on how to reintegrate employees
  - Consider how performance of work may need to change based on the current 'state' of the pandemic
  - Determine if a hybrid or remote model will continue
- Consider what criteria you will use to determine who may work from home and how it will be explained to employees
- Communicate (early and often) plans with employees in advance so they can make necessary arrangements now (*e.g.* child care in the fall)

TAKEAWAYS

- Develop any policies and procedures required to reopen or facilitate ongoing work from home arrangements
  - IT
  - Expenses
  - Confidentiality
  - Timekeeping/reporting
- Make sure employees are educated on health and safety obligations prior to return

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