
Blurred Lines: When Personal Interests Become an Employer's Business

The webinar will begin at 9:00am EST



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Agenda

- Productivity, Privacy and Work-From-Home
- Employee Refusal to Wear Personal Protective Equipment (PPE)
- Freedom of Expression, Off-Duty Conduct and COVID-19

Productivity, Privacy and Work-From-Home



Productivity and Discipline

- Workforce productivity continues to be a significant concern for employers with remote work employees.
- An employee can be disciplined or terminated for low productivity while working from home.
- There are challenges with remote work, including tracking productivity and potential COVID-related reasons for change in performance

Productivity and Discipline

- In a unionized workplace, performance issues should be managed through progressive discipline before an employer can assert cause for termination.
- In a non-unionized workplace, an employer can forego progressive discipline or performance management and terminate without cause.
 - Employee then owed termination pay and severance pay (if applicable) entitlements under statute, contract and/or common law

Productivity and Discipline

- If discipline or termination **for cause** is performance-related, employer must be able to establish:
 - ❑ Expectations, concerns and consequences were clearly communicated to employee
 - ❑ Employee was provided sufficient time and resources to improve
 - ❑ Final warning states that the next violation will result in termination of employment

Productivity and Discipline

- Documentation is essential to support a **just cause** decision (particularly in a unionized environment).
- More difficult to terminate for cause if low productivity was condoned when employee worked on-site.
- Adjudicator may also look at whether employee treated consistently with other employees, or other reasons for temporary decline in performance (*e.g.*, children at home).

Employee Monitoring

- Generally, an employer has a right to implement a policy to monitor productivity through technology:
 - ❑ Computer cameras and audio functions
 - ❑ Keystroke, internet browsing and other programs to virtually monitor what an employee does on a computer
 - ❑ GPS tracking

Employee Monitoring – Privacy Considerations

- While an employer has a right to implement a policy to monitor productivity through technology, also consider if there is a privacy right or interest engaged.
- In any jurisdiction with private sector privacy legislation, collection of employee personal information must be “reasonable” and, in some cases, may require employee consent.

Employee Monitoring – Privacy Considerations

- Absent legislation, still consider if the manner of monitoring may constitute an “intrusion upon seclusion.”
- Court of Appeal for Ontario has recognized this “...tort includes physical intrusions into private places as well as listening or looking, with or without mechanical aids, into the plaintiff's private affairs.”

Employee Monitoring – Constructive Dismissal

- Monitoring a remote work employee through technology may give rise to a constructive dismissal claim.
- Constructive dismissal is established if the employer makes a unilateral and substantial change to an essential term of employment.
- Limited case law.

Colwell v Cornerstone Properties Inc.

[2008] OJ No. 5092 (SCJ)

- Employee quit and alleged constructive dismissal after finding a secret video camera had been installed in her office (and hers alone).

- Boss claimed camera installed due to concern about theft by maintenance staff. However:
 - Employee had no money in her office
 - Employee not advised of concern, despite being responsible for maintenance staff

Colwell v Cornerstone Properties Inc.

[2008] OJ No. 5092 (SCJ)

■ Court held:

- ❑ Camera not in and of itself unacceptable employer conduct.
- ❑ Implausible explanation rendered conduct unacceptable.
- ❑ Employee privacy was violated and the workplace poisoned as a result; “All trust had evaporated.”
- ❑ Amounted to constructive dismissal.
- ❑ Employee entitled to seven months of pay in *lieu* of notice.

Employee Monitoring – Unionized Workplace

- In an unionized workplace, employee monitoring may be the subject of a policy grievance.
- Labour arbitrators have recognized a privacy “interest” even in the absence of legislation.
- Need to demonstrate monitoring is reasonably necessary to accomplish a work-related purpose, and lesser means of monitoring would not be adequate.

Remote Work Policy

- Consider a Remote Work Policy

- Address privacy and monitoring issues:
 - Reiterate that an employee should have no reasonable expectation of privacy and set parameters on personal use of work technology

 - Provide express notice if any monitoring technology will be (or may be) used, and to what extent (*e.g.*, program will run during regular business hours)

Remote Work Policy

- Remote Work Policy should also address:
 - ❑ Criteria for working from home
 - ❑ Right of employer to recall employee to workplace
 - ❑ Restriction on where employee may perform work (in home, in the province of employment, *etc.*)
 - ❑ Technology and expenses incurred in performance of remote work
 - ❑ Confidentiality and security protocols
 - ❑ Expectation regarding tracking hours of work

Refusal to Wear PPE



Refusal to Wear PPE

- An employee does not have the right to refuse to wear PPE required by the employer unless there is a valid human rights related reason.
- The Human Rights Tribunal of Ontario recently confirmed that an applicant's objection to wearing a mask on the basis of "creed" had no merit because it was mere political opinion (*Sharma v. Toronto (City)*, 2020 HRTO 949).

Refusal to Wear PPE

- Some government regulations require an **individual** (*e.g.*, customer, employee, *etc.*) to wear a mask or face covering in indoor spaces, subject to prescribed exemptions (*e.g.*, Ontario).
- A key exemption is if individual “has a medical condition that inhibits their ability to wear a mask or face covering.”
- The Ontario regulation (for example) does not require the individual to provide evidence to support entitlement to exemption

Refusal to Wear PPE

- However, if an **employee** seeks an exemption from the requirement to wear PPE (*i.e.*, medical accommodation), an employer is entitled to request documentation to support the request.
- Employer should request medical documentation sufficient to:
 - Confirm existence of disability
 - Establish what restrictions and limitations related to the disability impede employee's ability to wear the PPE
 - Determine if employee can still wear PPE with an accommodation

Refusal to Wear PPE

- If the employee has a legitimate medical condition that prevents them from wearing a mask (or other PPE), the employer must determine if it can accommodate to the point of “undue hardship.”
- Health and safety of other employees and/or members of the public is a key consideration in the undue hardship analysis.

Refusal to Wear PPE

- Potential accommodations:
 - ❑ Relocate employee such that can maintain a distance from others of at least two meters
 - ❑ Temporarily assign employee to new position
 - ❑ Work-from-home arrangement
 - ❑ If none of the above are feasible, a leave of absence may be appropriate until the employee's medical restrictions or public health requirements change

Freedom of Expression, Off-Duty Conduct and COVID-19



Freedom of Expression and COVID-19

- General rule: The employer is not the custodian of an employee's personal character or conduct.
- There are circumstances where “off-duty conduct” or personal comments at work may be subject to discipline or termination.
- Conduct must negatively impact the employer's legitimate business interests.
- There must be a nexus between the employee's actions and the employment relationship.

Freedom of Expression and COVID-19

- Discipline may be appropriate if:
 - ❑ Views expressed or actions taken are fundamentally at odds with duties or responsibilities of the position
 - ❑ Off-duty conduct or comments cause other workers to feel unsafe or poses an unacceptable risk
 - ❑ Comments or conduct harms the employer's general reputation, products, or workforce

“Incompatible With Position”

- Need to consider if personal views or actions interfere with the individual’s performance of their duties or are inconsistent with the nature of their position.
- *Example:* health care worker discouraging residents/patients from wearing a mask or being vaccinated

Co-Worker Health and Safety

- Employer has duty to take every precaution reasonable in the circumstances to protect the health and safety of a worker.

- Employer should investigate personal comments or conduct by an employee if:
 - Co-worker reports feeling unsafe – e.g., because of another worker’s disregard for COVID-19 rules and requirements

 - Co-worker claims they are being harassed due to their COVID-19 related views or adherence to policy

Co-Worker Safety & Off-Duty Conduct

- Even if a complaint has not been made, employer may be justified in investigating off-duty conduct if it becomes aware the employee is engaging in high-risk behaviour (which may pose a health and safety risk) such as:
 - Acting contrary to public health guidelines
 - Making “Anti-mask” or “anti-vaccine” posts and commentary
 - Refusing to be tested for COVID-19 even if symptomatic

Harm to Business or Reputation

- Off-duty conduct or comments may be grounds for termination if damages the reputation of the employer or its business:
 - Public controversy?
 - Negative press?
 - Damage to client base?
- Employer need only show potential (not actual) harm.

Freedom of Expression and COVID-19

- Before making any disciplinary decision, investigation is key:
 - What actually happened?
 - Are there mitigating factors or circumstances?
 - Is there a medical or other human-rights related justification for the conduct?

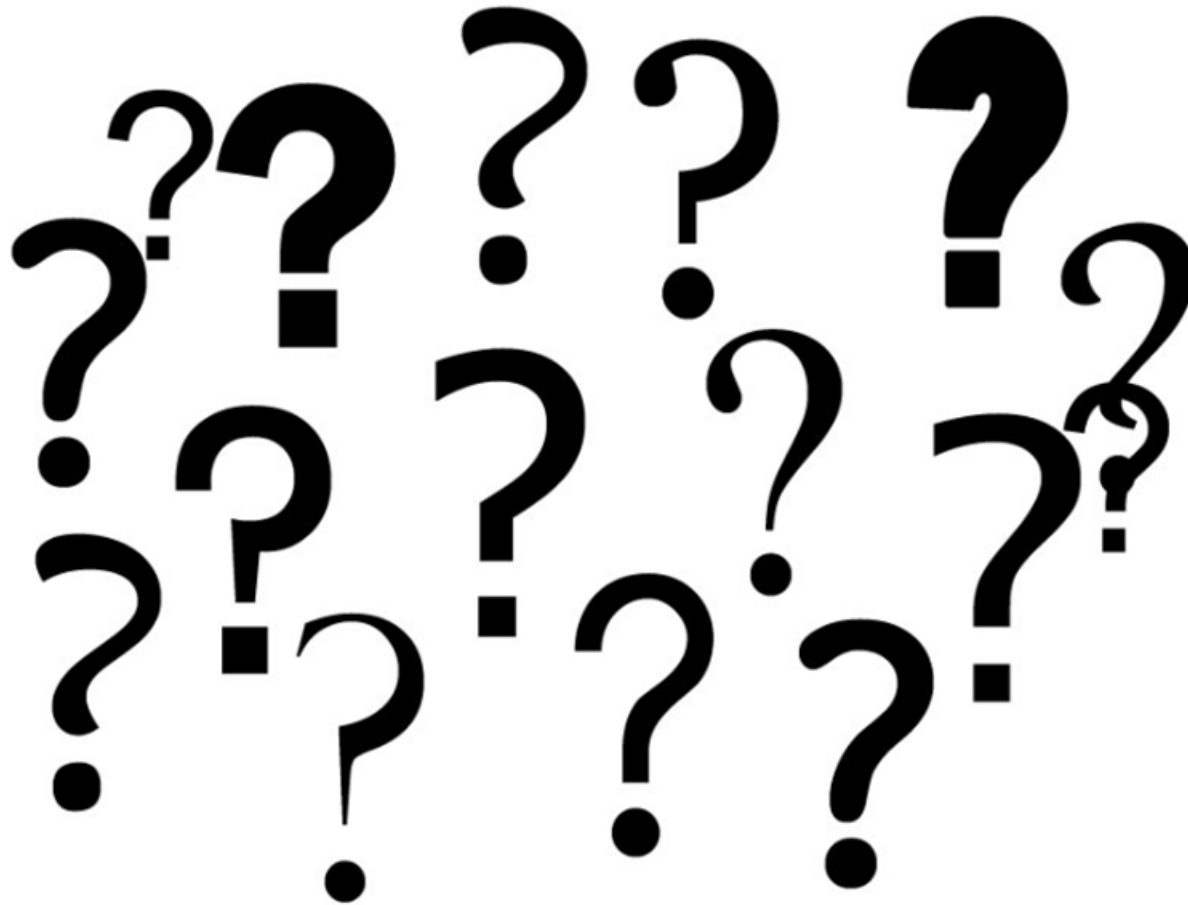
Freedom of Expression and COVID-19

- Consider and assess:
 - ❑ Actual risk to customers/public or other employees
 - ❑ Co-workers' fear of working with that individual
 - ❑ Extent of reputational harm (are they identified as your employee on social media?)
 - ❑ Do others in the workplace engage in similar conduct?
 - ❑ Do you have a social media policy or COVID-19 (infectious diseases) policy that addresses this type of behaviour?

Freedom of Expression and COVID-19

- Discipline or discharge for failure to follow public health guidelines may be difficult if guidelines are not entirely clear:
 - Stay-at-home.... *unless you need to go out*
- Ensure the “punishment fits the crime.”
- Seek legal advice if you’re unsure about imposing discipline or terminating an employee for their views or conduct related to COVID-19.

Questions?





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