sector focus

The pandemic has changed employment agreements and workplace policies

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FIFTY-SIX PERCENT of Canadians currently working remotely say they would look for another job if required to return to the workplace full-time, while 23 percent say they would quit on the spot.* Add to that ongoing health and safety considerations, new and evolving employment standards, and the business risks associated with talent attrition, and Canadian employers are being rocked from all sides.

Thankfully, there are steps an employer can take to maximize its ability to manage its business, and minimize risks associated with a post-pandemic workplace. Most important is having a written employment agreement with every employee and workplace policies that contain key employer protections.

> "Contrary to popular belief, in many provinces, an employer does not have an inherent right to temporarily lay off an employee without triggering termination entitlements"

There are two types of clauses an employer should revisit or consider, including in its employment agreements and/or workplace policies: clauses that apply during employment, and clauses related to termination.

BRIAN WASYLIW,
SHERRARD KUZZ

Clauses that apply during employment

The pandemic has caused employers to consider employment clauses and policies often overlooked in the past.

Layoff clause

“Contrary to popular belief, in many provinces, an employer does not have an inherent right to temporarily lay off an employee without triggering termination entitlements,” says Brian Wasyliw of Sherrard Kuzz LLP in Toronto.

In Ontario and British Columbia, there must be an express or implied right to lay off an employee temporarily, failing which an employer has no automatic right to do so. Without this right, a layoff may amount to a without-cause termination, entitling the employee to notice or pay in lieu of notice, and possibly severance pay. Because the maximum length of layoff permitted by legislation fluctuated during the pandemic, a temporary layoff clause should expressly permit layoff for whatever maximum period applies.

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Sherrard Kuzz LLP is one of Canada’s leading employment and labour law firms exclusively representing the interests of employers. Recognized nationally and internationally, the firm is consistently named among Canada’s Top Employment and Labour Firms by Canadian Lawyer®, Chambers Global®, Lexpert®, Best Lawyers®, Who’s Who Legal® and Legal 500®, and as a 5-Star Safety Law Firm for excellence in occupational health and safety by Canadian Occupational Safety®. Firm clients are public and private, domestic and foreign, unionized and non-unionized, subject to provincial or federal regulation, and range in size and complexity of operations from small, single-location, single-business enterprises to large, multi-site, multinational organizations.

Find out more

By contrast, says Olivia Girouard of Loranger Marcoux (Quebec) in Montreal, “In Quebec, although an employer may include a layoff clause in the employment contract, it is not necessary, as the Quebec Act respecting labour standards explicitly provides for the employer’s right to proceed to such layoffs.”

It may also be advisable to include a general clause addressing unforeseen events, by which an employer may institute temporary amendments to the employment agreement without those amounting to constructive dismissal.

Health and safety clauses

Many employers have begun to include in their employment agreements an express requirement to comply with health and safety policies, including an infectious disease policy and vaccination policy (mandatory or otherwise). In Ontario and British Columbia, an employer can require an employee to be vaccinated against COVID-19 as a condition of employment, subject to any accommodation required under human rights legislation. By contrast, employers in Quebec may not require an employee to be vaccinated against COVID-19 as a condition of employment.

To minimize the risk of a successful claim of constructive dismissal, many employers now also include an express right to suspend an employee without pay in the event of a breach of these policies (subject to human rights accommodation).

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Roper Greyell LLP is one of the most well-respected and recognized workplace law practices in Western Canada. We combine ingenuity with insight to deliver practical and cost-effective solutions for our clients’ workplace issues.

Roper Greyell LLP was founded in 2006 by lawyers from two leading employment and labour law practices in British Columbia. Today, we are one of the largest employment and labour law firms in Western Canada, with 48 workplace lawyers serving clients in virtually every sector of the economy, including some of the largest and most sophisticated private and public sector employers in British Columbia and across Canada.

Find out more

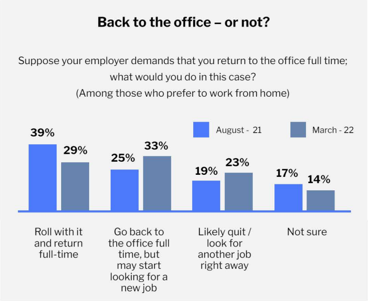
Remote work clauses

Legal standards differ across the various Canadian jurisdictions (and outside of Canada), exposing an employer to unexpected risks should an employee relocate outside the "home" jurisdiction. These risks involve employment standards, occupational health and safety standards, and tax law, to name just a few.

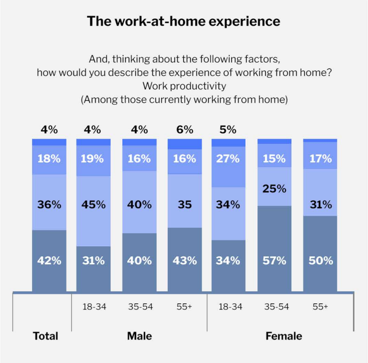
To protect a business, employers should consider clauses to address the following:

- permitted work jurisdictions
- the right of the employer to unilaterally change an employee's jurisdiction of work (including any remote work arrangement)
- the type and frequency of work that can be done off-site
- standards and protocols that must be met while off-site

In Quebec, British Columbia, and Ontario, the respective workers compensation regimes apply even if an employee is working from home.



Angus Reid Institute/CBC News survey from March 23, 2022



Angus Reid Institute/CBC News survey from March 23, 2022

Productivity clauses
If an employer wishes to monitor productivity off-site, this may require express employee consent. In British Columbia and Quebec, privacy legislation restricts the collection of an employee's personal information, and monitoring employees through surveillance is limited to what is reasonably necessary in the context. Employers should develop a clear policy that defines all rights, expectations, and limitations of a monitoring plan.

In Ontario, recent amendments to employment standards legislation will, effective October 11, 2022, require an employer with more than 25 employees to have a written policy regarding electronic monitoring of employees, including how and in what circumstances employees may be electronically monitored and the purposes for which information obtained through electronic monitoring may be used.

Finally, the implementation or review of work-from-home policies provides an opportunity to ensure compliance with each province's hours-of-work provisions. In Ontario, this includes the recently passed requirement to have a "disconnecting from work" policy. An employer with 25 or more employees (including those working from home) must have a written policy on disconnecting from work (meaning not engaging in work-related communications such as emails, telephone calls, video calls, or the sending or reviewing of other messages). Significantly, the legislation does not create any new entitlements or "rights" for employees. Referring to it as a "right to disconnect policy" would therefore be inaccurate and should be avoided.

Clauses related to termination
The termination clause
In Ontario and British Columbia, a properly drafted termination clause can limit an employee's entitlements upon termination to employment standards minimums rather than reasonable notice under the common law. "In British Columbia, a termination clause need not specifically reference an employee's entitlement to benefits and severance pay to be enforceable, as in Ontario, but should carefully limit entitlement to the minimum under employment standards legislation," says Gregory Heywood at Roper Greyell LLP in Vancouver.

By contrast, in Quebec a termination clause cannot limit an employee's entitlements upon termination because the Civil Code of Quebec explicitly states an employee cannot renounce the right to reasonable notice of termination.

> "In Quebec, although an employer may include a layoff clause in the employment contract, it is not necessary, as the Quebec Act respecting labour standards explicitly provides for the employer's right to proceed to such layoffs"

OLIVIA GIROUARD,
LORANGER MARCOUX

A restrictive covenant
When an employee departs, the former employer will often want to restrict the employee's ability to use

the knowledge, know-how, and insight gained in the course of employment to the benefit of a competitor. Historically, a non-competition agreement might have achieved this end.

LORANGER MARCOUX
lawyers LLP

Founded in 1991, **Loranger Marcoux** is one of the best-known and most recognized boutique law firms in Quebec, offering specialized services to employers exclusively, in the fields of employment law, labour relations and occupational health and safety.

Since January 2018, we have also offered consulting services in human resources management, including staffing, training and development, compensation, pay equity, and occupational health and safety.

Our clients especially appreciate our great availability, the depth of our team, and our ability to intervene in delicate situations and to find effective and imaginative solutions.

Find out more

Effective December 2, 2021, Ontario's Employment Standards Act was amended to expressly prohibit an employer and employee from entering into a non-competition agreement. The prohibition applies retroactively to October 25, 2021 (when the amendment was introduced), but does not apply to a non-competition agreement entered into prior to October 25, 2021. A non-competition agreement entered into in violation of this law is void.

The prohibition does not apply if the agreement is entered into with an "executive" (defined in the act), or as part of a sale of a business (including a lease) or part of a business if the purchaser and seller agree the seller is prohibited from engaging in competitive activity after the sale and, immediately after the sale, the seller becomes an employee of the purchaser.

As a result of this new prohibition, Ontario employers should evaluate whether a less-restrictive agreement (such as a non-solicitation and/or confidentiality agreement) could achieve the objective.

> "In British Columbia, a termination clause need not specifically reference an employee's entitlement to benefits and severance pay to be enforceable, as in Ontario, but should carefully limit entitlement to the minimum under employment standards legislation"
>
> GREGORY HEYWOOD, ROPER GREYELL

In British Columbia and Quebec there is no such legislative prohibition on the use of a non-competition clause. However, each clause will be stringently assessed under the common or civil law, respectively. That said, a reasonable and carefully worded non-solicitation clause is more likely to be upheld.

Best practices for employers

Whether your business operates in a single Canadian jurisdiction or across several, the COVID-19 pandemic has fundamentally changed the workplace.

Now is the time to review existing and new employment agreements and workplace policies to ensure they provide maximum flexibility to manage and protect your business.

Loranger Marcoux (Quebec), Roper Greyell LLP (British Columbia), and Sherrard Kuzz LLP (Ontario) are three of Canada's leading employment and labour law firms and members of the Employment Law Alliance (ela.law). For assistance anywhere in Canada, contact us.

Gregory J. Heywood

Roper Greyell LLP

Greg is a founding partner at Roper Greyell LLP where he provides strategic and practical advice to employers on labour and employment issues in the workplace.

Greg has over 30 years of experience as a labour litigator with a respected reputation as a formidable opponent. Known for his resilient advocacy for his clients and aggressive cross-examination skills, clients can rely on Greg to fight for them.

Greg represents management and employees in wrongful dismissal lawsuits, labour arbitrations, labour board hearings, human rights tribunal hearings, and wrongful dismissal proceedings. Greg has also represented unionized employers in grievance arbitrations and workplace discrimination cases.

Brian Wasyliw

Sherrard Kuzz LLP

Brian is an experienced and accomplished employment and labour lawyer with a background in commercial litigation. He has extensive courtroom experience, having appeared at all levels of court in Ontario and before many administrative tribunals. Brian's expertise includes the full range of employment and labour law, with particular focus on human rights and accommodation, employment contracts, wrongful and constructive dismissal, harassment and investigations, grievance arbitration, as well as employment and labour issues in corporate restructuring and transactions. He has published on a variety of labour and employment issues.

Olivia Girouard

Loranger Marcoux

Olivia Girouard joined Loranger Marcoux LLP in 2016. A perfectly bilingual lawyer, her practice relates to all aspects of employment law, labour relations, and occupational health and safety. She works with clients to provide general advisory support, as well as working on contentious matters, providing advice on all sorts of labour, employment, and worker compensation disputes.

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