
The Future of Remote Work: Practical Considerations for Employers

The webinar will begin at 9:00 a.m. EST – June 7, 2023



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Agenda

- Cross-Canada or International Relocation
 - Legal risks if a remote worker relocates
 - How to prevent or manage employee relocation issues
- Performance Management
 - Use of electronic monitoring to manage employee performance
 - Discipline and termination for time theft and other remote work performance issues

Agenda

■ Health and Safety

- When will occupational health and safety and workers' compensation legislation apply to a remote worker?

- Bullying and harassment in an online workplace

■ Employment Standards and Human Rights

- How to ensure a remote worker complies with employment standards requirements

- Remote or hybrid work as a form of human rights accommodation

Cross-Canada or International Relocation



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Cross-Canada or International Relocation

- Since the outset of the pandemic, 1 in 10 workers have relocated because of option to work from home
- Relocation brings with it additional risks and obligations for an employer
- Do not assume the laws of your home jurisdiction will continue to apply if employee is elsewhere

Cross-Canada or International Relocation

- If employee relocation is permanent, expect local labour and employment legislation to apply to the work relationship
 - May result in different overtime rules, statutory holidays, termination entitlement, *etc.*
- Relocation may also impact existing employment agreement and its enforceability

Cross-Canada or International Relocation

Shu Zhang v IBM Canada Limited, 2019 CanLII 79641 (Ont LRB)

- Employee hired and worked in Ontario
- Relocated to British Columbia with employer's consent
- After two years employer required employee to return to Ontario, and employee refused

Cross-Canada or International Relocation

Shu Zhang v IBM Canada Limited, 2019 CanLII 79641 (Ont LRB)

- Employer took position employee resigned
- Employee claimed he was dismissed and sought severance pay under Ontario *Employment Standards Act, 2000 (ESA)*
- Ontario Labour Relations Board (OLRB) held *ESA* did not apply

Cross-Canada or International Relocation

Shu Zhang v IBM Canada Limited, 2019 CanLII 79641 (Ont LRB)

- *ESA* only applies to an employee if
 - Work is performed in Ontario
 - Worked is performed both inside and outside Ontario, but work outside Ontario is the continuation of work performed inside Ontario
- *ESA* does not apply once employee relocates to BC

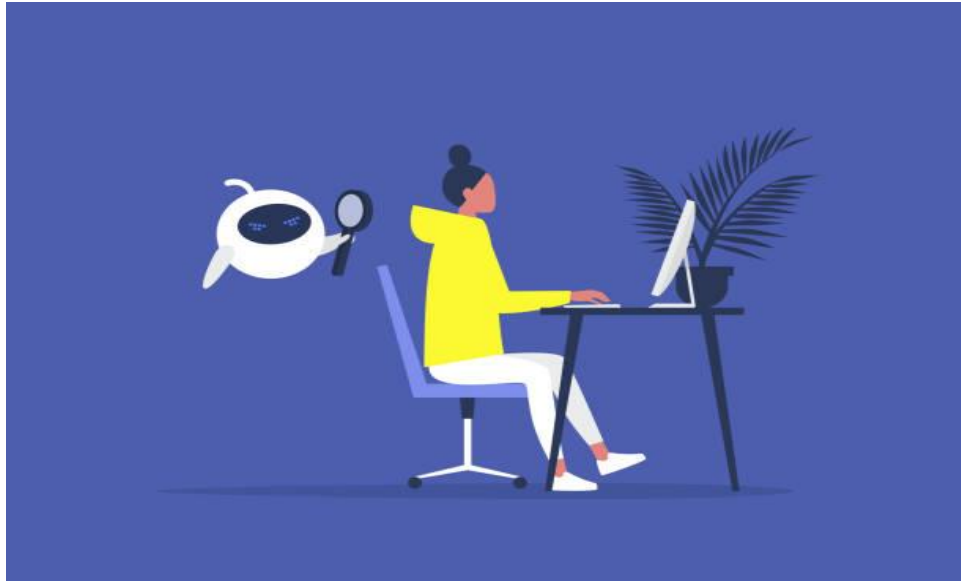
Cross-Canada or International Relocation

- To reduce potential relocation risk
 - Make remote work arrangement conditional on employee continuing to reside in home province
 - Require employees who may have relocated without employer knowledge or consent to return to home jurisdiction
 - If relocation permitted, ensure workplace policies and agreements are drafted flexibly to apply to all jurisdictions

Cross-Canada or International Relocation

- Risk and potential liability may be different depending on individual circumstance (*e.g.*, relocation to Alberta vs. relocation to Paris, France)
- Reach out to the SK team to help:
 - Assess risk
 - Prepare appropriate documentation
 - Coordinate with provincial and international employment counsel, as needed

Performance Management



Performance Management

Electronic Monitoring

- Electric monitoring has increased since outset of pandemic
 - Key stroke
 - Internet site tracking
 - Computer cameras
- Can be effective tool to manage productivity, but not without legal risk

Performance Management

Electronic Monitoring

- In Ontario, employers must comply with recent amendments to *ESA* regarding employee monitoring
- In other jurisdictions, may have privacy legislation that impacts surveillance
- In a unionized workplace, any surveillance must be ‘reasonable’

Performance Management

Electronic Monitoring

IUOE, Local 793 & LiUNA, Local 183 v. Earth Boring Company Limited, 2021 CanLII 42419 (ON LA)

- Union challenged use of phone app through which employees clock in and out with a ‘selfie’
 - Concern that employer could also use app to track employee location at site

Performance Management

Electronic Monitoring

IUOE, Local 793 & LiUNA, Local 183 v. Earth Boring Company Limited, 2021 CanLII 42419 (ON LA)

- Arbitrator ruled app was an unjustified intrusion on employee privacy
 - ❑ Location tracking could be engaged outside of workplace
 - ❑ Data collected would be provided to third party app which had right to hold, use and distribute data

Performance Management

Time Theft

- Concerns about employee ‘time theft’ a key factor driving employers to consider electronic monitoring
- Recent decisions support the employer-argument that ‘time theft’ in a remote work environment may constitute just cause for dismissal

Performance Management

Time Theft

Besse v. Reach CPA Inc., 2023 BCCRT 27

- Employer installed time-track software on remote employee's computer in response to concerns with productivity
- Also scheduled weekly meetings with employee to assess what work was being completed

Performance Management

Time Theft

Besse v. Reach CPA Inc., 2023 BCCRT 27

- Adjudicator found cause to terminate

“Given that trust and honesty are essential to an employment relationship, particularly in a remote-work environment where direct supervision is absent, I find Miss Besse’s misconduct led to an irreparable breakdown in her employment relationship...” (emphasis added)

Performance Management

Time Theft

Enbridge Gas Inc. v Unifor, Local 975, 2023 CanLII 2937 (ON LA)

- Grievor worked on his own at work sites with minimal supervision
- Employer used GPS and computer tracking software to monitor activities
- Grievor's employment terminated for time theft and union grieved

Performance Management

Time Theft

Enbridge Gas Inc. v Unifor, Local 975, 2023 CanLII 2937 (ON LA)

- Termination upheld – grievor repeatedly failed to go to work sites and claimed payment for unattended time
- Deliberate pattern demonstrated serious misconduct, not mistake
- Stressed the importance of honesty and trust in remote work

Performance Management

Electronic Monitoring – Tips

- Before implementing electronic monitoring, discuss risks and best practices with legal counsel
 - What are the legal risks?
 - How can risks be mitigated?
 - How should a policy be communicated to employees?

Health and Safety



Health and Safety

Occupational Health and Safety Legislation

- In Ontario, *Occupational Health and Safety Act (OHSA)* does not apply to work performed in a private residence
 - Exempts most remote work arrangements from *OHSA* application
 - Exemption does not apply in any other Canadian jurisdiction

Health and Safety

Workers' Compensation

- In Ontario, *Workplace Safety and Insurance Act (WSIA)* applies to a workplace injury sustained at home
- Claims adjudicated in the same manner
- Question is whether injury arose ‘in the course of employment’

Health and Safety

Workers' Compensation

- Considerations:
 - ❑ When did the injury occur?
 - ❑ Where did the injury occur?
 - ❑ What happened?

Health and Safety

Workers' Compensation

Air Canada and Gentile-Patti, 2021 QCTAT 5829

- Employee injured when she fell down stairs on lunch break while working at home
- Filed claim with Quebec's workers safety board (CNESST)
- Claim successful and employer appealed to Administrative Labour Tribunal (ALT)

Health and Safety

Workers' Compensation

Air Canada and Gentile-Patti, 2021 QCTAT 5829

- ALT held injury met definition of ‘work accident’
 - Unforeseen and sudden event
 - Occurred in the course of work
- ALT held those who work at home are entitled to same protection as those at employer’s premises

Health and Safety

Workers' Compensation

Air Canada and Gentile-Patti, 2021 QCTAT 5829

- While employee fell on break, she was required to follow a precise schedule that allowed a break at the time she fell
 - Concept of a 'break' would not make sense if the period was not connected to employee's work
- Fall also occurred just after employee had disconnected from work and while she was on her way to have lunch

Health and Safety

Workers' Compensation

Allard and Promutuel Horizon Ouest, 2023 QCTAT 1027

- Employee injured in the middle of lunch break
 - Worked in basement, logged off, and went to have lunch in her yard
 - After she was done lunch, dropped personal cell phone and was injured picking it up

Health and Safety

Workers' Compensation

Allard and Promutuel Horizon Ouest, 2023 QCTAT 1027

- ALT held injury did not meet the definition of ‘work accident’
 - Did not occur in the course of work, occurred outside of residence (in yard) and in middle of unpaid meal period after employee had finished eating and while not required to connect to work

Health and Safety

Workers' Compensation

Allard and Promutuel Horizon Oust, 2023 QCTAT 1027

- Distinguished *Air Canada* on the basis the employee in that case had just logged off work and was on the way to lunch
- Bottom line: Whether an injury is “in the course of work” depends on all the circumstances!

Health and Safety

Workers' Compensation

- How to reduce risk?
 - Clear, written policies and protocols re remote work
 - Generally, such as workplace set up and accident reporting protocols (including training)
 - Specific to employee, such as duties while at home, hours of work, break times, productivity (as applicable)
- **Remember** employer reporting obligations still apply

Health and Safety

Bullying and Harassment

- According to 2022 study:
 - 38% of employees experience harassment in remote work
 - 24% believe harassment/abuse worse in remote work model
- Email communication and digital meetings often to blame
- Makes policies incorporate or reflect virtual work

Employment Standards and Human Rights



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Employment Standards

Hours of Work

- Employment standards legislation across Canada contain requirements re hours of work and record keeping
- Under the *ESA*, employer must record
 - Dates and times worked
 - Number of hours worked each day and week
 - If employee has two or more rates of pay, dates and time worked beyond overtime threshold at each rate of pay

Employment Standards

Hours of Work

- No obligation to maintain record of dates and times or number of hours worked each day and week for salaried employee if
 - Employee exempt from hours of work and overtime provisions or
 - Record maintained of hours worked in excess of
 - employee's regular work week and
 - eight hours a day (or regular workday, if greater)

Employment Standards

Hours of Work

- Employee is entitled to unpaid eating period of at least 30 minutes at intervals such that employee does not work more than five consecutive hours
- Parties can agree, whether or not in writing, that employee will have two eating periods that total at least 30 minutes in each period of five consecutive hours of work

Employment Standards

Hours of Work Compliance Tips

- Establish policy to record weekly hours of work and eating breaks
 - Consider how to accurately capture flexible hours
- Even if not required by the *ESA*, may want employee written confirmation they did not work in excess of scheduled hours
 - Assist to refute later claims for overtime pay

Employment Standards

“Homeworker” Requirements

- ‘Homeworker’ = employee who does paid work out of their own home for an employer
- Entitled to a higher minimum wage
 - \$17.05 per hour (as of October 2022) vs. general minimum wage of \$15.50 per hour – increases to **\$18.20** in October
- All other *ESA*-related entitlements are the same

Employment Standards

“Homeworker” Requirements

- Employer must advise homeworker in writing of
 - Type of work they are employed to do
 - Amount to be paid for an hour of work in a regular work week if the homeworker is being paid by the number of hours worked

Employment Standards

“Homeworker” Requirements

- If the homeworker is paid based on the amount of work they complete (not hours)
 - the amount paid for each thing done in a regular work week
 - the number of things to be completed by a certain time, if the employer requires a certain number to be completed by a certain time

Employment Standards

“Homeworker” Compliance Tips

- Ensure salary for all hours worked compensates employee at elevated minimum wage
 - Example: If 37.5 hours per week, minimum wage salary is \$33,247.50 (increases to \$35,490.00 in October 2023)
- Verify the necessary written information provided
 - Can be included in written employment agreement

Human Rights

Remote Work Accommodation

- In “post-COVID” environment, some employers have received a greater number of ‘work from home’ accommodation requests
 - ❑ Medical: cannot commute/stress/anxiety
 - ❑ Family status: no or limited childcare arrangements
- Traditional accommodation rules continue to apply

Human Rights

Remote Work Accommodation

- Employer may request information and documentation to confirm employee entitled to accommodation
 - Disability: focus on (1) existence of disability, and (2) restrictions and limitations
 - Family status: determine if (1) request is a ‘want’ or a ‘need’, and (2) are there ‘other supports’ available

Human Rights

Remote Work Accommodation

- Even if employee establishes need for accommodation, this does not mean they are entitled to work remotely
 - ❑ Entitled to ‘reasonable’ not ‘perfect’ accommodation
 - ❑ Can the restrictions be accommodated with in-person work?

Human Rights

Remote Work Accommodation

- Don't be afraid to question the need for accommodation
 - Critically evaluate physician's notes that appear to dictate how employee should be accommodated
- Be creative with accommodation options
 - Consider if schedule change or work modification at the physical work site may meet restrictions and limitations

Questions?



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