

## ISSUES IN CANADIAN EMPLOYMENT & LABOUR LAW

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PageTurner is an occasional publication from Turner, A Human Resources Law Firm™ that provides a general overview on topics of interest to our clients. The information contained in PageTurner usually addresses workplace issues or strategies that arise as a result of new legislation, legal developments or case law. At Turner, A Human Resources Law Firm™ our ongoing objective is to provide insightful and practical advice and representation to our clients. Our goal is to help our clients excel.

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### KEY CONSIDERATIONS FOR RETURNING EMPLOYEES TO IN-PERSON WORK

Many employers have already established and implemented a return to in-person work protocol. The “New Normal” looks different for every workplace, ranging from full-time in-office work, to hybrid work models, to full-time remote work. In most cases, transitions to new or returned work models have occurred without incident; yet some workplaces are still navigating how to return employees to in-person work and may be facing employee dissatisfaction or outright opposition in light of once “temporary” changes that were established at the beginning of the Pandemic, but which may have persisted longer than any of us could have imagined.

Some key considerations when returning employees who have been operating remotely to in-person work include: revisiting the employment agreement; assessing and providing appropriate notice; and building in (as appropriate) accommodations and flexibility. The driving consideration will be what works best for the business; however, this can involve a complex assessment.

The starting point for any contentious or unilateral workplace decision is to review the agreement between the parties. What does the employment contract say about work arrangements? At the time of hiring, what were the expectations with regard to work hours, location, and flexible work arrangements (if any), were these expectations reduced to writing and signed off on, and how has that changed during the Pandemic? Employers should carefully review all communications regarding any changes in work hours, location, wages, etc. during the Pandemic to determine what the original agreement was, and whether any subsequent changes were communicated as temporary in nature with an anticipated end date (e.g. as outlined in an email, letter, or cover note to employees), and whether any policies were established to help support the changes (e.g. a “work from home,” “remote work,” or “hybrid work model” policy). If so, employers may be able to rely on either written or oral communications as a form of contractual language to help guide their return-to-work procedure. As a practical matter however, when the Pandemic started nobody knew how long it would go on for and therefore the likelihood of having an ideal paper trail is unlikely.

In many cases, there will not have been a clear verbal or written communication regarding the duration and nature and duration of remote work, and employers may now need to turn their minds to consultation with human resources and employees, as well as written notice of the return to office plan and related expectations.

With all of this in mind, employers should be clear in their communications, including the exact expectation (e.g. clear work hours, location, date of expected return, etc.), and provide appropriate written notice to employees to enable them to meet these expectation. Employers should also anticipate the potential for pushback from some employees who have, rightly or wrongly, proceeded on the assumption that their Pandemic-based remote work arrangements are now permanent. Depending on the situation, employers may also need to outline the consequences of the employee not following the company policy and related directives. As appropriate, employers should be prepared to be flexible and take into account unique circumstances.

If employees have been working remotely without issue and without a clear communication regarding a return to the physical workplace for the last two years, the requirement to return to the office it may be viewed as a change in circumstances that was agreed upon between the parties and which has fundamentally altered the new work relationship, and therefore, may be construed by the employee as a constructive dismissal. The key question will therefore be: *what was agreed upon?* In most cases, the answer will be that nothing finite was in fact agreed upon due to the uncertainty surrounding the nature and duration of the Pandemic. We believe that, although absent a clear and binding agreement that the remote or hybrid work arrangement was intended to be permanent, an employee would face an uphill battle alleging constructive dismissal. Nevertheless, employers should be aware of the potential for such claims in their planning and communications.

Many employees (in the absence of employer approval) may also have made corollary decisions as a result of changing workplace models during the Pandemic, such as moving to another location, making alternative childcare arrangements (e.g. cancelling daycare for live-in home options or trading off duties with other caregivers), or making themselves available as caregivers for other family members. In such circumstances, it is important for employers to consider accommodations to enable employees to plan and make arrangements, such as allowing a gradual return to work or hybrid/flex model that still permits some remote work as may be appropriate.

Employers should also be prepared to consider whether the entire workforce truly needs to return to the physical workplace. If there have been few issues with remote work (e.g. work product quality and synergies, efficiencies, responsiveness, productivity, attendance issues, etc.) employees may view the change as unnecessary. Employers would be wise to consider addressing issues such as increased commutes and related expenses, flexibility of office days and hours, and potential advantages of new workplace technologies and communication forums.

Expectations regarding remote work, returning to the office, hybrid work arrangements, productivity, work hours and use of confidential information are all important communication opportunities for both employers and employees alike.

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**February 2, 2023**

We are only now coming to grips with the multi-year impact of a global pandemic, and anticipate that employers will face many ongoing workplace challenges in 2023. Nevertheless, these challenges, if properly managed and communicated, present many opportunities. As always, we are here to assist.

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Please note that material contained in this update is meant to provide a general discussion or overview with respect to certain areas of employment and labour law. PageTurner is not a substitute for legal advice or other professional advice. While we believe that the information provided in PageTurner is helpful and provides a solid foundation, many issues in the workplace turn on a specific set of facts for which customized advice should be obtained. Additionally, although PageTurner sets out the law as it stands at the time of publication, the law and statutes change and it is important to remain current.