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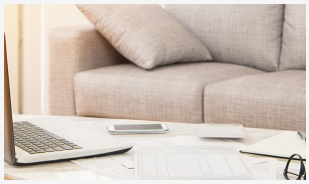
# Navigating the future of remote work



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Authors: Steven Dickie, Kelly O'Ferrall, Sneha Ajai

Remote work continues to evolve, as digital nomads and a variety of hybrid work arrangements become permanent features of many workplaces. These arrangements create new operational and legal compliance challenges for employers. It has become critical for employers to be able to mitigate risks associated with remote work and hybrid work environments, while at the same time achieving the flexible workplace objectives that have become table-stakes for employees in many settings.

Employee preferences may not be the only driver of remote work today, as organizations have also recognized that it has certain benefits, especially since the pandemic. Even as adjudicators grapple with novel issues that continue to arise from remote work arrangements, organizations must aim to balance their business decisions against important legal considerations.

## The rise of dual-employment and moonlighting in the age of remote work

For many employees, remote work seems to offer more flexibility to take on other outside employment (i.e., "moonlighting"). However, there are important legal limits on employee rights to engage in additional work, even in a remote workplace. Some written employment agreements will require the employee's attention to be devoted exclusively to work for the employer. Even where an employment agreement does not contain such a restriction, employees tempted to add outside work that interferes with their existing responsibilities to their employer should take warning from a recent decision of the British Columbia Supreme Court. The Court upheld the termination of the employee's employment "for cause" on the grounds that she was neglecting her work by working her second job during business hours.

Notwithstanding that decision, moonlighting will not always justify the employee's termination for cause. As such, for employers – at least those who wish to prevent employees from working second jobs during hours that should be devoted to work for them – it is crucial to make it a term or condition of employment that the employee not work elsewhere during business hours. Alternatively, an employer may wish to restrict outside employment only where such other work could result in an actual or perceived conflict of interest.

Either objective can be achieved through valid and enforceable employment agreements with clear terms. It is also essential to implement clear and consistently enforced workplace policies addressing outside business activities and conflicts of interest.

## Importance of strong performance management policies and practices

Performance management and evaluation policies and practices are important tools for employers to set expectations and document performance issues, provided they are fair, transparent and consistently enforced. Given that remote workers may have less frequent day-to-day contact with members of management, formal processes take on increased importance. Performance management policies, properly implemented, can also help surface productivity concerns and employee commitment issues arising from moonlighting.

Having well-drafted performance management policies offers many benefits, including the ability to regulate employee efficiency and performance consistency, especially in remote work situations where regular check-ins can be logistically challenging. These policies may also provide data to measure individual improvement or, conversely, failure to achieve improvement goals. Finally, these policies and related procedures assist in ensuring that discipline or termination decisions are not linked to discrimination, thereby potentially supporting termination for "just cause."

Employers must balance defending their interests through performance management policies with their obligations under human rights legislation to ensure that any policies and performance management tools are not applied in a discriminatory fashion. In some situations, this may include a duty to inquire as to whether any performance issues may be rooted in a need for accommodation.

## Working remotely in other jurisdictions

In workplaces with limited or no in-person requirements, employees are increasingly requesting to work remotely in other jurisdictions. This could include a province or country other than the one in which they were hired to work. Typically, the laws of the jurisdiction in which the employee is working will apply. Accordingly, employers should consult local legal counsel to ensure they understand and can properly assess the risks associated with permitting an employee with limited or no workplace to work remotely from that jurisdiction. At a high level, employers may want to consider risks relating to employment contract enforceability and other operational issues before permitting remote work in other jurisdictions.

Employment contracts are typically drafted in a jurisdiction-specific manner and may not be enforceable in a jurisdiction other than the jurisdiction for which they were drafted. As such, when employees move from one jurisdiction to another, the ability of the employer to rely on the terms of the employment contract can be affected. This can result in increased exposure to liability for the employer. For example, a termination provision that is drafted to be enforceable in the employer's jurisdiction (e.g., Ontario) could be found to be unenforceable under the law of the employee's jurisdiction (e.g., Québec). As a practical matter, this may entitle the employee to additional sums upon termination of employment than were originally bargained for.

Human rights, workers' compensation and occupational health and safety legislation are a few examples of employment-related statutes that vary from jurisdiction to jurisdiction. Although they are generally similar across Canada, there are nuances to consider when ensuring compliance with applicable obligations when the employee works outside of the employer's jurisdiction. Employers need to familiarize themselves with all legislation that could potentially apply and not just legislation that applies in the province in which they operate to ensure they are able to comply.

In addition to local employment laws, other potential considerations include the tax consequences for both the employee and the employer, privacy and data protection, immigration issues, protection of trade secrets, benefits coverage and insurance.

Due to all of these risks, employers should seek legal advice in the jurisdiction where the employee will be working. Employers should review their employment contracts and policies to ensure that such contracts and policies will be enforceable. Employers should also have clear remote work policies and/or agreements that are communicated to employees in advance of the commencement of any remote work arrangement. Such policies should appropriately limit employees' ability to work remotely.

## Managing the 'return-to-office' mandate

Many employers continue to experience push-back from employees against return-to-office (RTO) mandates. This leads to the inevitable question as to whether and how employers can force employees to return to working at the employer's premises.

Generally, employers have the flexibility to impose RTO mandates, absent a contractual right which entitles the employee to work remotely. In the labour union context, an arbitrator recently confirmed that determining the "best form of work arrangement" is a fundamental responsibility and right of the employer. The decision highlights that management, by virtue of its role, has the ability to exercise business judgment and can make choices related to the structure of work and employee health and safety. If an employer determines that the best form of work arrangement is not fully remote work, it is up to management to decide what represents the optimal work arrangement for the benefit of the organization.

Nevertheless, refusals to return to the employer's physical workplace must be addressed carefully on a case-by-case basis. To mitigate the risk of wrongful dismissal claims, employers will need to consult with legal counsel before determining the best strategy to address any refusals. The best strategies for easing resistance to RTO policies continue to be employee relations-based strategies, such as providing incentives to return to office, including free meals, social activities and financial incentives. However, having a properly drafted and well-implemented RTO policy will help employees understand the terms and expectations about returning to the office. For new employees, location of work can be clearly established through an employment contract that sets out the expectations regarding the possibility of remote work, if any.

For hybrid workplaces, employees' commitment to an RTO plan, or in-person attendance, can be a legitimate criterion to take into account, among others, in performance evaluations. In some cases, however, an employee's inability to attend work in-person due to a *bona fide* protected ground under human rights legislation would need to be accommodated.

## 'Trending' accommodation requests

In recent months, we have seen a sharp increase in the number of human rights-related accommodation requests demanding a full or partial work-from-home arrangement. These requests for accommodation are mainly asserted to be in connection with disabilities or family status.

Employee requests to work remotely all or part of the time as an accommodation based on a protected ground under human rights legislation must be handled cautiously and separately from requests to work remotely for other non-human rights-related reasons. When

employees make such accommodation requests, each one must be considered by the employer in good faith on a case-by-case basis. It should be documented through the employer's established accommodation process.

It is worth remembering, however, that employees are not necessarily entitled to their requested form of accommodation. Employers are only required to reasonably accommodate documented needs that are based on a protected ground under human rights legislation. Employers are not required to accommodate employee preferences. In other words, an employee does not have to be granted the right to work remotely simply because they request it.

Moreover, other accommodations may be appropriate in the particular circumstances. For example, an employee who requests a remote work arrangement on the basis of a documented need based on family status could be offered reduced hours of work, if that appropriately accommodates their documented need.

## Commuting as the new frontier of accommodation requests

As part of the remote work era, many employees view commuting as an additional responsibility that is imposed under RTO mandates. Despite this pushback, commuting remains solely an employee responsibility.

To this end, employers do not have to reimburse or pay employees to commute even if they mandate RTO. For example, the Ontario Relations Labour Board recently relied on the Ontario Ministry of Labour's policy guidance to confirm that commuting to and from the workplace is not considered work unless certain exceptions apply, such as employer imposed requirements regarding carpooling, use of company vehicles and pick-ups/deliveries en route to or from the workplace.

## Looking ahead

Since the COVID-19 pandemic, expectations and norms regarding remote work have been evolving rapidly. As they navigate the new and evolving landscape, employers should limit their risk exposure by consulting with trusted and experienced employment counsel. It is also important to audit and update internal policies, including regarding remote work. Finally, employers should ensure that they consistently and frequently update their employment agreement templates for enforceability in light of ongoing legal developments.