



## Deloitte Legal alert

### Back to the future (of work): Employment law and privacy considerations for remote workers

November 3, 2020

As several provinces across the country navigate various stages of economic reopening following the mass closures caused by the COVID-19 pandemic, employers face many uncertainties about whether and how to return

#### **Contacts:**

**Olivier Fournier**  
Partner, National Leader,  
Deloitte Legal Canada LLP  
Tel: 514-393-8362

**Hélène Deschamps Marquis**  
Partner, Data Privacy and  
Cybersecurity  
Tel: 514-393-8300

employees to the physical workplace, especially with an ongoing second wave in certain provinces. In addition, research suggests that the pandemic has been an “accelerator” for remote working arrangements, and up to two thirds of workers have indicated their preference to continue remote working arrangements for the foreseeable future.<sup>1</sup> However, remote working does not alter the fundamental obligations of employers to manage their workers appropriately, including their obligation to monitor occupational health and safety requirements in the workplace (which we wrote about [here](#)), including the remote workplace, as well as additional employment, privacy, and tax law considerations.

## RECRUITMENT AND HUMAN RESOURCES

Although many businesses have experienced economic slowdowns causing workforce reductions, some businesses have seen increases in demand or a gradual return to pre-pandemic business that requires new staffing and training for new or existing employees. Amid the “new normal”, human resources professionals must navigate everything from virtual interviews, to background checks, remote onboarding and training new employees and upskilling existing employees from home.

### Accommodation

In Ontario, employers must ensure that all recruitment procedures, including interviews, are conducted in accordance with the *Accessibility for Ontarians with Disabilities Act, 2005*. However, all employers should be sensitive to disabilities and inform candidates of the availability of potential accommodations if necessary or supports as required. For example, telephone interviews may be ill-suited for a candidate with hearing loss where videoconferencing, allowing for lip-reading, may be more appropriate. Employers must be open to requests for accommodation and work with a candidate with disabilities to implement suitable accommodations.

### Virtual onboarding

In addition, employers must ensure that all pre-hire candidate personal information (as well existing employee information) is handled with care, and in compliance with applicable privacy laws. Employers must remain extra vigilant to safeguard exchanges of personal information, such as pre-hire documents like photocopies of identification, over digital platforms, as the pandemic has presented unique cybersecurity challenges. Employers should also obtain informed consent from candidates, just as in the normal course, to run applicable background or credit checks, and to disclose personal information to third party benefit or payroll providers. Employers remain responsible for ensuring employees can request access to, and update, their personal information. In particular, employers should remind employees to update their address, email and phone number for themselves and emergency contacts to ensure that employees and their emergency contacts can be reached while working remotely.

Employers should be sensitive to the fact that onboarding and training in an entirely virtual environment can be isolating and present a host of technological and social challenges. Employers should work to find ways to boost integration

### Quebec

#### Charif El-Khoury

Partner, Employment and Labour  
Tel: 514-393-5581

#### Philippe Ross

Lawyer, Employment and Labour  
Tel: 514-393-9704

### Ontario

#### Jessica Kearsey

Partner, Employment and Labour  
Tel: 416-775-2302

#### Alexis Lemajic

Lawyer, Employment and Labour  
Tel: 416-874-3436

### British Columbia

#### Jessica Kearsey

Partner, Employment and Labour  
Tel: 416-775-2302

#### Claire Feltrin

Lawyer, Data Privacy and  
Cybersecurity  
Tel: 604-673-8646

### Related links:

[Deloitte Legal Canada LLP](#)

<sup>1</sup> See <https://www2.deloitte.com/us/en/insights/focus/human-capital-trends.html>.

and morale by offering virtual social activities where possible, such as weekly team videoconferencing. Training courses which may have taken place in person have moved to virtual platforms and employees should be provided with applicable IT contact information in the event of technological problems. Employers offering upskilling opportunities to existing employees should clearly communicate available opportunities to all employees, including remote employees, to avoid differential treatment.

## **MANAGING THE EMPLOYMENT RELATIONSHIP**

With an ongoing second wave and infection rates rising nationwide, many employers are forced to adapt, and extend temporary remote working measures into semi-permanent arrangements lasting until the end of 2020, and even possibly into the beginning of next year. This reality presents several challenges. Many traditional management tools do not translate well into the remote working environment, since as managers themselves – particularly executive management – may be the ones who are working remotely while front line staff are present in the physical workplace.

### **Employer policies – the necessities**

One way to clarify roles, responsibilities and expectations to remote workers is to update workplace policies. Employers should take this opportunity to not only create new policies as they become necessary (e.g., teleworking and pandemic planning policies), but also to update existing policies in compliance with local legislation.

Teleworking policies should clearly define eligibility criteria and duration (e.g., is teleworking limited to the COVID-19 crisis or will the arrangement continue on a more permanent basis?), hours of work and availability, performance metrics (including reaffirming work quality standards), requirements for any physical workspace, confidentiality, insurance and other liability issues. The policy should also outline the employer's right to change or cancel the policy at any time and to require the physical return of employees when safe to do so, if applicable.

To clarify and reaffirm existing expectations, it is wise to provide employees with copies of existing policies, such as:

- The Employee handbook and/or Code of conduct, if applicable;
- Attendance, sick and other leave policies;
- Overtime policies (including any amendments for tracking time for remote workers and authorization for overtime hours, if any);
- Expenses and company property policies (including any updates for provision of home office equipment or related expenses, if any);
- Human rights, accessibility and accommodation policies;
- Confidentiality agreements (particularly important where employees will handle sensitive data in a shared home office environment);
- Progressive discipline policy; and
- Health and safety policies (see section below).

In addition to the above, and in an era of increasing misinformation particularly surrounding the COVID-19 pandemic, employers would be wise to develop a social media policy. While off-duty online conduct is typically beyond the

employer's purview (with some limited exceptions, such as reputational damage, disclosure of confidential information, misrepresentations, etc.), employers should clarify expectations about acceptable online activity, particularly where it may be attributed to the employer. For example, an employee's opinion about the employer's pandemic safety precautions (or lack thereof) posted to social media may cause reputational damage and violate the employee's duties of loyalty to the employer.

### **Managing constructive dismissal risks**

Employers should also be careful to consider the impact of unilateral changes in job duties, including changes in core responsibilities, reporting structure and location, as well as prolonged working from home arrangements, or significant changes in compensation, including pay cuts and layoffs. There may also be tax and other significant implications to having workers work from home where "home" is not the jurisdiction where work was intended to be performed at the time of hire. Most employment contracts which predated the pandemic will likely not provide for the possibility that employment may be interrupted or may significantly change as a result of the pandemic, and employers should proceed with caution before implementing such changes "across the board". This is particularly true for employees with senior supervisory or managerial responsibilities, who may not be required to attend the physical workplace, and who may be working from locations not anticipated at the time of hire, due to travel restrictions or for other reasons related to the pandemic.

### **Managing performance**

Beyond defining and adapting existing policies, employers need to revise their performance management practices on a day-to-day basis. One way employers are adapting to remote supervision is through maintaining regular communication with employees in managing performance. Inherent challenges of remote work include the lack of in-person supervision, isolation, boredom, and distractions at home – particularly for employees juggling additional domestic responsibilities, such as childcare, online schooling and eldercare – that can have a negative impact on productivity. Employers should listen to each employee's challenges to review and adapt performance management within their organization in order to respond to those challenges.

Managers should set a fixed, yet evolving, flexible communication plan with employees. Whether it is group meetings in the morning to plan the team daily workload or recap meetings at the end of the day, it is important to establish structured daily or weekly check-ins and find the most suitable approach tailored to the workplace. While group meetings are effective to reach several employees at once, managers should not minimize the importance of regular one-on-one calls.

Employers should enable multiple communication channels, beyond emails and phone calls. Current technology allows multiple alternatives from traditional ways to communicate. Co-workers and managers should be able to communicate effectively, just as if they were sitting in the office, by using videoconferencing, messaging, and visual collaboration software.

Most importantly, communication should be a two-way stream. Managers should be available, just as employees are expected to be available, and

establish *rules of engagement* (i.e. best ways to communicate with a supervisor).

### **Leadership style**

A management style based on results is better adapted to remote working since direct supervision is not possible. Managers should evaluate employees according to SMART (i.e. specific, measurable, achievable, realistic and time-bound results) performance indicators based on positions held. This way, employers should be able to evaluate the performance of remote workers based on the results achieved.

In accordance with result-based management, managers should ensure clarity in terms of expectations and define clear objectives for tasks and work to be performed. With challenges that come with working from home, managers should build a structure to help employees navigate teleworking more easily.

A way to monitor performance in a context of teleworking is for remote workers to file time entries, either manually or through a software. It allows managers to compare data between employees holding similar positions and optimize employee productivity. Employers could also monitor and log all errors and delays observed or to the contrary, note all tasks that were completed in time and/or adequately.

### **Support and motivate**

Managers should also take advantage of one-on-one phone calls and video calls with employees to inquire about what motivates or demotivates them. Concerned and stressed workers are rarely productive workers. Managers should be sensitive to preoccupations experienced by remote workers in the current context where teleworking has been, for many, forced by the COVID-19 pandemic. While employers can offer external professional services addressing mental health issues – such as employee assistance programs – direct supervisors should offer their support for any struggles (e.g., space, technology, expectations, etc.).

Motivation is another element when considering performance. It is important to understand how employees, individually, are motivated in their roles and approach their work. Moreover, virtual or in-person social events should be encouraged since it creates a sense of belonging, keeps the work culture strong, and breaks isolation. Socials are essential to boost performance among employees.

## **WORKPLACE HEALTH AND SAFETY IN THE “NEW NORMAL”**

Employers who are reopening their physical workplaces must be aware of their obligations to adapt workplace health and safety policies in light of the conditions related to the COVID-19 pandemic. We note that these restrictions and obligations may vary by province, industry and region, given the differing impacts of COVID-19 in various places. See, for example, [this bulletin](#) we published earlier this year on guidance for overall health and safety, concerns relating to declining mental health of employees during the pandemic and recommendations for employee communication. In addition, provincial

governments published industry-specific health and safety guidelines, such as in [Ontario](#) and [Quebec](#).

In the era of remote working, we urge employers to continue meeting their obligations under health and safety law to take every precaution reasonable for the protection of the worker, albeit in different ways for remote workers.

## **Ergonomics**

Providing employees with assistance for ergonomic work from home set-ups may be one way to meet occupational health and safety obligations and ease some of the physiological tensions and stressors associated with remote working. Some examples include providing adequate training (via webcast or online modules) on how to operate company equipment and/or technology from home and how to set up an ergonomic workspace. Some employers have provided stipends or reimbursements for office equipment to increase ergonomic safety. While employers cannot be expected to conduct home visits for employees working from home (and even less so where remote employees have relocated to other provinces/countries during the pandemic), employers should continue to communicate or check in with employees at regular intervals regarding workplace safety.

Employers should also be aware of tax benefits and/or consequences of providing home office equipment to employees. For example, employees may be able to deduct certain home office expenses on their 2020 tax returns, and employers may consider employee eligibility for issuance of a T2200 Form – a form required by the Canada Revenue Agency for eligible home office expenses. A more in-depth discussion of these and other tax-related considerations was published by our Tax group [here](#).

## **Workplace violence and harassment**

As discussed above, an employer should continue to take every reasonable precaution for the protection of the worker, even where employees are working remotely. In particular, employers should take care to update workplace violence and harassment policies in compliance with local legislation. While some health and safety concerns are obviated by the removal of workers from the physical workspace, remote workers may face different health and safety risks.

Opportunities for in-person workplace violence and harassment may be reduced by social isolation, but opportunities for online bullying and harassment (including via company networks, chat services, email, etc.) and instances of domestic violence have increased. Employers should reiterate workers' responsibilities to contribute to a discrimination and harassment-free workplace, including the remote workplace, and ensure policies are specifically updated to encompass virtual violations of the policy (e.g., over social media).

In addition, employers may have special obligations under occupational health and safety legislation to take every reasonable precaution to protect workers from domestic violence in the workplace. Employers should be alert to the signs of domestic violence and work with employees to develop precautions, such as updating emergency contacts, keeping in regular contact with employees and contacting authorities to perform wellness checks if necessary.

## **Remote work and workplace injury reporting**

Employers and employees alike must be vigilant and continue to follow applicable reporting procedures when an employee is injured in the course of performing his/her employment duties. Employees should first get medical help, ranging from first aid to emergency treatment, and then immediately document the incident. Employees should take extra care to record details about the incident and treatment, given that many remote working injuries or illnesses will be incurred away from the workplace, management and any witnesses. Employers should ensure that injuries are reported to the governing workplace safety authority as applicable.

Some workplace safety boards have published guidance for workers who believe they have contracted COVID-19 in the workplace. For example, the Ontario Workplace Safety and Insurance Board (WSIB) has posted some guidance on frequently asked questions about COVID-19 claims [here](#) and information about how these claims are considered and decided [here](#). Workers who believe they have contracted COVID-19 in the workplace, whether remotely or on site, should inform their employer immediately, and employers should work with employees to determine applicable accommodations, quarantine, contact tracing and notifications to other employees as well as any applicable WSIB notifications.

## **Work refusals and job abandonment**

As workers make the gradual transition back to the physical workplace, we anticipate an increase in unsafe work refusals. Under applicable occupational health and safety laws, workers have the right to refuse unsafe work and must follow the applicable procedure to do so. Employers notified of alleged unsafe work must engage with employees to determine the cause for health or safety concerns, investigate the claim, and work with applicable health and safety authorities to determine the legitimacy of the claim and/or any appropriate remedies.

Employers are reminded that workers who refuse unsafe work are protected against reprisals for doing so under applicable occupational health and safety legislation. However, there may be cases where workers make a claim, in good faith and out of genuine fear for their own health and safety amid the COVID-19 pandemic, and upon investigation that claim is unfounded. Some examples include employees who have general fears for safety without any specific cause (e.g., "my employer is refusing to provide PPE") or employees who raise concerns about the commute to the workplace via public transit. While these fears may be genuine, they do not necessarily ground an unsafe work refusal.

When an unsafe work refusal investigation determines that employees are in fact safe and healthy at work, the employee who made the claim is expected to return to work, unless the employee still believes the workplace is unsafe. In that case, the refusal must be escalated to an inspector. Once a final decision has been made, an employee is expected to resume work that is deemed healthy and safe.

Employees who are not satisfied with the outcome of their unsafe work refusal may consider approaching employers in a last effort to negotiate either a leave

of absence (depending on local law and company policy) or accommodations, if the employee qualifies under applicable human rights legislation. As a matter of best practice, employers are encouraged to work with employees to the extent possible to alleviate safety concerns during these difficult times.

Where all reasonable opportunities are exhausted, employees who fail to return to work (and in some cases, remote workers who are unresponsive to employer communications) may be considered to have abandoned their jobs. However, to show abandonment, an employer must prove that when viewed objectively, the statements or actions of the employee clearly and unequivocally demonstrate an intention to no longer be bound by the employment contract. Employers should approach job abandonment with caution, as undisclosed medical conditions of the employees or their family members may give rise to job-protected employment standards leaves and/or human rights accommodation. When in doubt, employers should seek further information from the employees about why they refuse to return to work and consult with local counsel before any employment decisions are made.

## **HUMAN RIGHTS AND ACCOMMODATION**

Remote working poses particular challenges for the employer seeking to meet the substantive and procedural components of the duty to accommodate. With the physical separation between workers and managers brought on by the pandemic, it is possible that employees coping with visible and invisible disabilities are not readily identified by management. For example, warning signs that an employee may be impaired by drug(s) or alcohol are apparent in a physical workspace, but may go undetected when employees operate from home. Additionally, employers should be sensitive to the pronounced effect of the pandemic on employees coping with mental health disabilities (whether disclosed or undisclosed). Where an employer suspects that an employee's attendance or performance may be impacted by an undisclosed disability, the employer has a duty to inquire about possible accommodation needs with the employee prior to taking any steps that may adversely affect their employment.

Provincial legislation protects employees from discrimination and harassment on the basis of protected human rights grounds (e.g., sex, disability, family status, etc.). In addition to the duty to accommodate disabilities in the workplace, employers should also consider whether the rearranging of family responsibilities due to the COVID-19 pandemic requires additional accommodation. For example, employees with at-risk school-aged children who cannot attend school in person for health reasons may require accommodation to balance childcare and work. Similar responsibilities may arise for employees who provide care to elderly family members. Where an employee makes an accommodation request, employers should work with employees to determine applicable restrictions and suitable options for accommodation short of undue hardship.

## **PRIVACY, DATA SECURITY, AND CONFIDENTIALITY**

### **Privacy**

#### *1. Collecting employee personal information relating to COVID-19*

Remote work arrangements and the gradual return of employees to the workplace give rise to a number of issues relating to privacy in the workplace, from the screening and verification of employees' medical condition to the disclosure of COVID-19 cases within an organization. As such, it is crucial that employers understand the rules relating to employee consent, and health privacy laws more generally, as they navigate employment relationships during the COVID-19 pandemic.

As a starting point, Canadian privacy statutes do not require employers to obtain consent to collect, use or disclose personal information where it is necessary to manage the employer-employee relationship so long as employees are notified that their personal information may be collected, used or disclosed for those purposes. Further, employers have an obligation to ensure workplace safety, which includes safety relating to the contracting of COVID-19. That said, employers should note that privacy laws also require that they only collect personal information from employees that is *reasonable* in the circumstances. In the context of the pandemic, any employer-imposed requirement that employees disclose symptoms relating to COVID-19 would generally be considered reasonable in the interest of maintaining a safe workplace. However, any personal information requests beyond that purpose should be carefully considered.

In certain workplaces, conducting temperature checks may also be considered a reasonable screening mechanism by employers to ensure workplace safety. However, employers should ensure that they are using the least intrusive method possible, provide employees with advance written notice that temperature checks will be required to enter the workplace, and seek legal advice prior to implementing any further measures relating to testing (e.g., requiring COVID-19 testing on-site).

#### *2. Responding to employees who have been exposed to or tested positive for COVID-19*

What should an employer do if an employee is presenting symptoms of COVID-19 or discloses that he or she has tested positive for, or been exposed to COVID-19? While guidance on this issue continues to evolve, we recommend at this time that employers consider the following guidelines:

- If an employee reports COVID-19-related symptoms while he or she is at work, the employee should be discreetly sent home and advised to seek medical attention from a qualified practitioner.
- If an employee has tested positive for COVID-19, the employee should be advised to self-isolate for 14 days, as prescribed by law. The employee's return to work will then depend on the advice of a qualified medical practitioner.

- If an employee discloses that he or she has been exposed to or tested positive for COVID-19, the employer should not disclose the identity of this individual to his or her co-workers. Rather, the employer should notify any employees who may have been in contact with the individual that a co-worker has tested positive for the virus. To the extent an employer believes there is a need to disclose such an employee's identity for safety purposes, the employer should consult with legal counsel prior to doing so given the sensitive nature of personal health information. Finally, if an employer is concerned that an employee's identity may be *deduced* from any notifications to employees about a case of COVID-19 in the workplace, the employer should consider obtaining consent of the employee in question *prior* to notifying others.

### **Data security and confidentiality**

Canadian privacy laws require organizations to implement reasonable and appropriate safeguards in order to protect personal information in their custody and control. With the onslaught of the COVID-19 pandemic and the heightened information security concerns brought with it as a result of remote work, this obligation is more important than ever. Specifically, employers must revisit cybersecurity and related policies and protocols to ensure that they have physical, technical and administrative controls in place appropriate to the sensitivity of the data they collect to protect their information assets. This may include the implementation of employee training (particularly in respect of information security matters such as phishing and other internet-related attacks), the encryption of portable devices (e.g., laptops and smart phone housing employment-related information), and the securing of remote access to workplace systems (e.g., through the use of Virtual Private Networks or "VPNs").

Employers should also consider revisiting confidentiality agreements, including guidelines on proper data retention and disposal of confidential and/or personal information. For example, employees should be provided with appropriate software and instructions on how to report data breaches when working remotely. Where hard copies are necessary, employees should be instructed on the proper disposal procedures of confidential information – for example, cross-shredding documents or having them couriered to the office for proper disposal. Employers should also consider reviewing company property policies with employees, particularly for onboarding or offboarding employees, to ensure a mechanism for the proper use and return of company property.

To the extent there is any doubt about how to ensure that adequate security safeguards are in place, organizations should seek the assistance of external counsel and/or information security experts.

Deloitte Legal Canada LLP  
Bay Adelaide Centre, East Tower  
8 Adelaide Street West, Suite 200  
Toronto ON M5H 0A9  
Canada

This publication is produced by Deloitte Legal Canada LLP as an information service to clients and friends of the firm, and is not intended to substitute for

competent professional advice. No action should be initiated without consulting your professional advisors. Your use of this document is at your own risk.

Deloitte Legal Canada LLP is an independent national law firm with offices across Canada and is affiliated with Deloitte LLP, a Canadian limited liability partnership that is a member firm of Deloitte Touche Tohmatsu Limited ("DTTL"), a United Kingdom private company limited by guarantee. Deloitte Legal Canada LLP, Deloitte LLP, DTTL and each member firm of DTTL are legally separate and independent entities.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. Please see [www.deloitte.com/about](http://www.deloitte.com/about) to learn more about our global network of member firms.

Please note that Deloitte is prepared to provide accessible formats and communication supports upon request.

© Deloitte Legal Canada LLP.