

Welcome to COVID-19: Managing a Successful Return to Work (Alberta)

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Speakers



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Telecommuting: During the COVID-19 crisis and beyond

Presented by Alison Walsh

Telecommuting: introduction

- Telecommuting
 - Meaning working from a remote location away from the employer's central workplace, with the aid of computers, internet or other electronic devices and communication.
- Telecommuting is growing
 - During COVID-19 lockdown:
 - February 1, 2020: 20.4% of businesses reported 10% or more of their workforce was telecommuting or working remotely.
 - March 31, 2020: 47.9% of businesses reported 10% or more of their workforce was telecommuting or working remotely.
 - As restrictions ease:
 - Governments are recommending employees continue to work from home to reduce staff in order to maintain physical distancing.
 - Stage 1 of Alberta Relaunch: Government of Alberta is recommending remote working where possible.

Telecommuting: introduction

- Beyond Covid-19 lockdown:
 - Increased employee desire – numerous surveys suggest that many employees favour remote working after restrictions ease.
 - COVID-19 has shown employees can be productive working from home:
 - Twitter: announced its Canadian employees can keep working from home indefinitely.
 - Open Text Corp: announced it would be permanently closing half of its offices and would have staff continuing to work home after lockdown lifts.
 - Shopify: announced that the majority of its employees will permanently work remotely and offices will be closed until 2021.
- Blended arrangement:
 - Bank of Montreal: 30% to 80% of its 45,000 employees may consider a blend of work from home and office once lockdown ends.
- Accommodation
 - Employees with young children at home and do not have childcare options due to school and daycare closures.
 - Employees with underlying health issues.

Telecommuting: benefits and risks

- Generally, employers are not legally required to allow employees to telecommute (absent a contractual term or accommodation obligations)
- Telecommuting can have benefits to both the employer and employee:
 - Reduces employer's operational costs;
 - Improves employee engagement and work-life balance.
- Telecommuting can also create potential risks for the employer:
 - Less control over proprietary and confidential information;
 - Liability for accidents that occur outside of the employer's premises;
 - Liability for excessive hours worked by the employee (e.g., overtime pay);
 - Concerns regarding productivity and time theft.

Telecommuting policy

- One way to reduce the risks associated with telecommuting is to implement a telecommuting policy.
- A telecommuting policy minimizes potential risks by setting out expectations for the employee around issues such as:
 - Eligibility to telecommute
 - Explaining employees responsibilities (e.g., hours of work, preserving confidential information, compliance with company policies, etc.)
 - Protocols for communication with management and co-workers
 - Reserving right to revoke the remote work arrangement and bring employee back into the office at the company's discretion

Telecommuting: eligibility

- Determine up front the criteria an employee must meet to be considered for a telecommuting arrangement:
 - Nature of the position
 - Employee's ability to work independently, manage workload efficiently and complete work on time
 - Past job performance
 - How long the employee has been employed
 - How frequently an employee can telecommute (i.e., full time, once a week, etc.)
- May be instances when a telecommuting arrangement may be part of a form of accommodation, for example:
 - Accommodating child care or elder care obligations
 - Self-isolation, high-risk category if contracts COVID-19
 - While recovering from an injury

Telecommuting: granting requests to telecommute

- Policy should be clear that the permission to telecommute is not guaranteed.
- Consider including a telecommuting trial period.
- Employers should avoid giving impression that once a telecommuting arrangement is approved, it is permanent:
 - Employers should reserve the right to require the employee to return to work at the employer's premise.
- Employers should be clear where the employee will be based.

Telecommuting: hours of work and monitoring

- Hours worked by a telecommuting employee can be difficult to track.
- When working hours are not controlled, this may lead to issues under employment standards legislation, particularly where employees perform off-duty work:
 - **Wages** – Employees are entitled to be paid for time worked. If paid by the hour, may be entitled to wages spent working off-duty hours.
 - **Overtime** – Employees are entitled to overtime pay, when they work beyond a standard number of hours per day or week. Both hourly and salaried employees are entitled to overtime.
 - **Hours of work** – Employee are only permitted to work a certain number of hours in a day or week.
 - **Record keeping** – Employers must keep records of hours worked (including overtime). Failure to keep records may lead to fines/penalties or the inability to defend an employee's claim for unpaid wages.
- Unless an employee is exempt from hours of work and overtime minimums, off-duty work creates liabilities.

Telecommuting: hours of work and monitoring

- Ways to limit liability, include:
 - Defining the employee's hours of work
 - Prohibiting employees from working off-duty hours
 - Limiting employee's access to employer resources during off-duty hours
 - Requiring managerial approval for unscheduled work
 - Tracking employee's hours of work
 - Have employees submit daily/weekly timesheets or track time worked on specific projects throughout the day
 - Track network access to track working hours

Telecommuting: hours of work and monitoring

- Monitoring productivity
 - Employee monitoring software, e.g., ActivTrak, Teramind, Hubstaff, Time Doctor
 - *Personal Information Protect Act* imposes limits on the scope of technological monitoring
 - This requirement applies even if the individual has consented to the collection, use or disclosure of his or her personal information
 - Monitoring software may lead to over-collection of employee information
 - Before implementing monitoring software, an organization should conduct a privacy impact assessment:
 - What is the purpose of the monitoring?
 - Is a monitoring software likely to be effective to address those issues?
 - Is the monitoring conducted in a reasonable manner?
 - Can the organization's objectives be met another, less intrusive way?

Telecommuting: hours of work and monitoring

Best practices:

- Notify employees that the program is in place and what information is being collected when they access the organization's systems.
- Avoid continuous, real-time collection of personal information, such as keystroke logging or screen capturing.
- Avoid collecting more information than necessary.
- Implement training and policies for the employees who will be using tracking tools.
- Log access to the system and periodically review the logs to ensure the system is being properly used.
- Periodically evaluate the effectiveness of the program.

Telecommuting: engaging with your employees

- Despite the difficulties with remote working, monitoring software is not a substitute for personal management.
- Regular contact with employees with employees whether via video conferencing, telephone, instant messaging, etc. is key in managing employee performance.
- Contact can be regular scheduled update meetings, as well as unplanned meetings.

Telecommuting: health and safety

- If an employer permits an employee to work from home, that location during the employee's work hours become a workplace subject to:
 - occupational health and safety legislation; and
 - workers' compensation legislation.
- A home office should offer the same level of safety and security as the employee would receive at the regular work office.
- Occupational health and safety legislation may require the employer to conduct a workplace inspection to identify hazards and take corrective action. Employers should ensure workers have a safe home office or workstation.
- Employees should be informed that they must comply with the employer's health and safety policies when working from home.

Telecommuting: health and safety

- Occupational health and safety legislation also has specific rules for employees working alone. Some precautions include:
 - Keeping in regular contact with employee even if there is no “work” details to discuss.
 - Employers should have the worker’s contact information including exact address they will be working from and an emergency contact.
 - Workers should have a “working alone contact” (e.g., someone the worker connects with regularly, such as a supervisor or co-worker), as well as their employer’s contact information.
 - Protocol for contact with customers (e.g., limiting direct contact or prohibiting employees from meeting with third parties in their home, etc.)
- Telecommuters should understand their obligation to immediately report workplace injuries under the *Workers’ Compensation Act* (just as they would do at the office).

Telecommuting: equipment and technology support

- If the employer is providing a computer and remote network access, consider:
 - Specifying that the equipment belongs to the company and is to be used only for business purposes.
 - Stating that the employee is responsible for any intentional damage to company property.
 - Employee must return company equipment to the company when the telecommuting arrangement ends.
- Specify when employee will be reimbursed for expenses (e.g., long distance charges, internet use for business purposes).

Telecommuting: security

- Telecommuting raises security concerns regarding the protection of:
 - Employee personal information
 - Under PIPA, employers have an obligation to protect against the improper disclosure of personal information.
 - Employer confidential and proprietary information
 - Customer confidential and proprietary information
- Employers should implement mitigation strategies to protect against:
 - Improper disclosure of employee personal information; and
 - The loss of or unauthorized access to its proprietary and confidential information.

Telecommuting: security

- In addition to confidentiality agreements, employers can minimize risks by requiring employees to:
 - Go paperless or at least limit physical records being taken out of the workplace to only what is necessary to perform job.
 - Physical records should be returned to the workplace as soon as they are no longer needed.
 - Provide employees with office-issued laptops or other portable devices that are password-protected.
 - Never allow employees to store confidential/personal information on their personal computers or devices.
 - Do not share passwords for equipment related to employee's work with anyone outside the company's organization.
 - Keep physical records or electronic devices, when not being used, in a locked filing cabinet, drawer or office.
 - If unauthorized disclosure occurs, the employee must immediately inform the company.

COVID-19

Workplace health and safety: Ensuring a safe return to work

Presented by Cristina Wendel

General health and safety duties

- Under Alberta's *Occupational Health and Safety Act*, various workplace parties have general health and safety duties, including:
 - **Employers:** to ensure, as far as it is reasonably practicable, the health and safety and welfare of their workers, other workers at the worksite, and other persons at or in the vicinity of the work site who may be affected by hazards originating from the work site.
 - **Supervisors:** to, as far as it is reasonably practicable, take all precautions necessary to protect the health and safety of every worker under the supervisor's supervision.
 - **Workers:** to take reasonable care to protect the health and safety of the worker and of other persons at or in the vicinity of the work site while the worker is working.

Due diligence

- Due diligence is a defence to a charge that a person has failed to comply with the OHS legislation.
- In order to establish due diligence, the party must show that they did what could reasonably be expected under the circumstances.
- The party must show that they made reasonable efforts to comply with the OHS legislation. This requires consideration of the following:
 - **Control:** Who had control? Did the party charged have the ability to prevent the incident?
 - **Foreseeability:** Was it foreseeable that something would go wrong?
 - **Preventability:** Could the incident have been prevented?

Due diligence program

- Key points in establishing due diligence:
 - Written policies, practices and procedures
 - Training
 - Monitoring and enforcement to ensure compliance with policies, practices and procedures
 - Reporting and investigation process in place for workplace incidents

Risks of failure to comply with OHS legislation

- Compliance orders
- Stop work / stop use orders
- Inspections
- Administrative penalties
 - Up to \$10,000 per incident
- Offences
 - Penalties: fines up to \$500,000 and/or 6 months imprisonment for first offence
 - Doubled for second and subsequent offence
- Criminal negligence

Additional liability risks

- Claims by employees
 - With WCB coverage
 - Without WCB coverage
- Claims by family members of employees
- Claims by third parties
 - Visitors, customers, suppliers
- Public health orders – fines for non-compliance

Hazard assessment

- COVID-19 is considered an OHS hazard:
 - Employers must complete a hazard assessment to identify existing and potential hazards relating to COVID-19.
 - Employers must take measures to eliminate the hazard. If elimination is not reasonably practicable, the hazard must be controlled.
- Workers must be involved in hazard assessments.
- Hierarchy of controls:
 1. Engineering controls
 2. Administrative controls
 3. PPE
 4. Combination 1-3

Hazard assessment: engineering controls

- Engineering controls are intended to isolate the hazard. This includes:
 - Physical barriers (plexiglass)
 - Rearranging workplaces – workspaces and common areas
 - Restricting access
 - Removing communal items
 - Isolation of sick employees
 - Improvements to ventilation systems

Hazard assessment: administrative controls

- Administrative controls are intended to change how workers and others in the workplace interact. This includes:
 - Implementing policies and procedures, such as:
 - Physical distancing policies
 - Working from home
 - Assessments, before allowing entry into the workplace
 - Staggered start and break times
 - Increased cleaning and sanitation

Hazard assessment: personal protective equipment

- Use of PPE is intended as a last resort where physical distancing cannot be maintained through engineering and administrative controls. This includes:
 - Masks
 - Gloves
 - Eye protection
 - Gowns
 - Face shields

Training

- Employers must ensure employees are properly trained in the hazard. This includes providing training in:
 - The policies and procedures designed to control the hazard of COVID-19
 - PPE (proper use, cleaning, disposal, its limitations)
 - Responding to employees or third parties who are exhibiting symptoms or test positive for COVID-19
- Employers should also ensure appropriate signage is set up at the workplace, advising employees and others of the safety measures that have been put in place. For example:
 - Proper hygiene (e.g., washing hands)
 - Physical distancing reminders and guides (e.g., one-way arrows, waiting spots)
 - Respiratory etiquette (e.g., coughing/sneezing into elbow).

Reporting requirements

- In Alberta, there is no express legal obligation on employers to notify the local health authorities when there is an employee who has tested positive for COVID-19.
- However, employers may be required to report a case to WCB in certain cases.
 - If an employee becomes ill at work with COVID-19, the employer would likely not be able to determine whether the worker contracted COVID-19 in the course of his or her employment or in the general community.
- If the reporting requirement to WCB is triggered, the employer must report the illness of the employee to WCB within 72 hours.

WCB reporting requirements

- An employer is required to report a case of COVID-19 to the WCB, if the employee has lost time from work and:
 - the nature of employment involves sufficient exposure to the virus; and
 - either
 - the nature of the employment is shown to be the cause of the virus, or
 - the nature of the employment creates a greater risk of exposure for the worker.
- The WCB has stated that a claim is likely to be accepted if a worker contracts the illness and is performing what the province deems to be an “essential service” that puts them in regular contact with the general public.
 - However, if the employee is not at greater risk than the general public of contracting the infection, the WCB is advising employers not to report a case of COVID-19.

WCB reporting requirements

- The WCB has also stated that a worker will likely also be covered in the event of a widespread outbreak at their place of work.
- The WCB defines an outbreak as “a sudden and/or unexpected rise in the number of cases of a disease”.
- When multiple workers in the workplace have symptoms or have tested positive, other workers at the work site may be at greater risk than the general public of contracting COVID-19.
- Those cases need to be reported, so that WCB can investigate and determine if the cases are work-related and qualify for WCB coverage.

Employees' mental health

- The definition of “health and safety” in Alberta’s OHS Act includes psychological and social well-being in addition to physical well-being.
- Issues relating to and arising from the COVID-19 pandemic may exacerbate or give rise to mental health issues.
- Employees may suffer from or be experiencing a variety of issues such as anxiety, fear, depression, financial stressors, impacts of isolation, all which may give rise to mental health issues.
- Employers should be prepared to consider accommodation requests.
- Employers should also ensure proper supports are in place to assist their employees (e.g., EAP).

Managing return to work refusals

Presented by Roxana Jangi

Types of work refusal

- The steps an employer should take will depend on the type of refusal the employer is dealing with.
- A “Refusal to Attend Work” will generally relate to an employee’s refusal to attend the workplace due to potential or imagined exposure to the COVID-19 or an obligation or restriction related to COVID-19 that prevents the employee from attending work.
- A “Refusal to Perform Work” will relate to an employee’s refusal to perform a particular task, because the employee believes that the task is unsafe .

Refusal to Attend Work

Important to first understand the employee's reason for refusing to attend work, as different reasons require different responses from the employer:

- Occupational health and safety
- Disability-related restrictions / risks
- Family obligations
- General anxiety about exposure

Refusal to attend work

1. Occupational health and safety perspective:

- It is legally allowed to refuse to perform work, if the worker reasonably believes that their work is dangerous, hazardous or unsafe.
- It is illegal for employers to penalize workers for legitimately refusing unsafe work.
- Work refusal triggers an obligation on the employer to investigate the hazard.
- No other worker can complete work unless certain conditions are met.

Refusal to attend work

- For a COVID-19 refusal, the employer should consider:
 - The current scientific understanding of COVID-19 transmission and risk
 - The specific exposure risks presented by the nature of the work
 - The particular workplace
- If a hazard is confirmed, the employer is required to adopt preventative measures to eliminate or reduce the workplace danger.
- OHS Guidelines and Public Health Authority guidelines should be followed.

Refusal to attend work

2. Disability-related restrictions / risks:

- Employee suffers from an anxiety or mental health disorder or has a medical condition that makes them particularly vulnerable to risks associated with COVID-19.
- Triggers the employer's duty to accommodate under human rights law:
 - Alternate work arrangements (working from home, etc.)
 - Modifying duties or workspaces
 - Additional precautions / protective measures in the workplace
 - Medical / disability leave

Refusal to attend work

3. Family obligations:

- Employee has children home from school or is caring for a family member who is ill
- Triggers job-protected leaves (new amendments under *Employment Standards Code (Alberta)*)
- Consult provincial legislation and abide by requirements

Refusal to attend work

4. General anxiety about exposure:

- Provided the anxiety is not related to a disability, there is no specific legal obligation to allow the employee to refuse to attend work.
- Possible solutions:
 - Clear communications regarding the precautions put in place in the workplace to ensure employee safety
 - Providing additional safety precautions to alleviate the employee's fears
 - Allow the employee to take a voluntary unpaid leave of absence / take unused vacation time
 - Disciplinary measures (last resort / be very careful)

Temporary layoff extensions, recalls and terminations - Managing employment relationships in recessionary times

Presented by Adrian Elmslie

Legal Distinction Between Layoffs and Terminations

- Terminations:
 - Permanent in nature
 - End the employment relationship
 - Trigger the employer's obligation to provide notice or pay in lieu of notice (statutory and common law)

Legal Distinction Between Layoffs and Terminations

- Lay offs:
 - Intended to be temporary in nature
 - Employment relationship maintained even though the employee is not required to work
 - Normally requires some advance notice unless such notice is not possible due to “unforeseeable circumstances”

Limitations of Layoffs

- Limited duration:
 - Employment is deemed terminated if the employee is not recalled to work within a certain time period
 - Default position:
 - Original Code provisions - 60 days in a 120 day period
 - Revised due to COVID 19 – 120 consecutive days
 - Exceptions:
 - Employer has continued to pay benefits and the employee has agreed layoff can last until benefits are terminated
 - Collective agreement in place with recall rights

Extending the Layoff Period

- Extending layoffs beyond deemed termination deadline:
 - Recall the employee for a period of time – resets the 120 day clock
 - Some risk of constructive dismissal if repeated
 - Implement a continuation of benefits agreement with the employee to extend the layoff period
 - Must be done prior to the expiration of the default termination deadline
 - Must obtain the employee's agreement
- Cannot continue indefinitely

Recall from Layoff

- Technical requirements under the Code:
 - Must serve notice on the employee
 - Must be in writing
 - Recall date cannot be less than 7 days from the date the notice is served
- If the employee fails to return on the recall date, the employer has the option to terminate without notice

Terminations

- Terminations can result from the expiry of a layoff or a decision by the employer to terminate
- Both trigger notice obligations for the employer
- Once employment is terminated the employer is liable for:
 - Termination pay under the *Employment Standards Code*
 - Pay in lieu of reasonable notice under the common law (unless limited by contract)

Terminations – Considerations under the Code

- The Code sets out the minimum termination obligations only
 - Termination entitlements are based solely on length of service (range from 0 to 8 weeks)
 - If the employee is working at the time of termination, notice can be provided as working notice, payment in lieu, or a combination
 - If the employee is on layoff at the time of termination, employer must provide pay in lieu of notice
- Can trigger group termination obligations under the Code (more than 50 employees in a single location within 4 week period):
 - Notice to the Minister
 - Additional notice to employees
 - Requirement has been modified during the pandemic

Terminations – Considerations under Common Law

- Employee entitlements based on *Bardal* factors:
 - Character of employment
 - Age
 - Length of service
 - Availability of similar employment
- Can be working notice (if the employee is working at the time of termination) or a payment in lieu

Terminations – Considerations under Common Law

- Complicating factors:
 - Economic difficulty for the employer is generally not a source of relief for the employer
 - Employers may not be able to meet common law termination obligations or make reasonable common law notice offers
 - Employees will be scrutinizing offers closely – mitigation prospects will be poor
 - Will likely result in increased litigation
 - No legislative relief to date

Terminations – Strategies and Considerations

- Preservation of capital vs. avoidance of litigation
- Consider working notice if employees are not on layoff
- Plan ahead and make strategic staffing decisions – look to upgrade
- Consider government assistance programs to avoid immediate termination costs
 - EI job share program
 - CEWS
- Understand your liability before you make a decision
- Plan ahead to avoid problems in the future – use employment agreements / offers with termination provisions for all new hires

Questions



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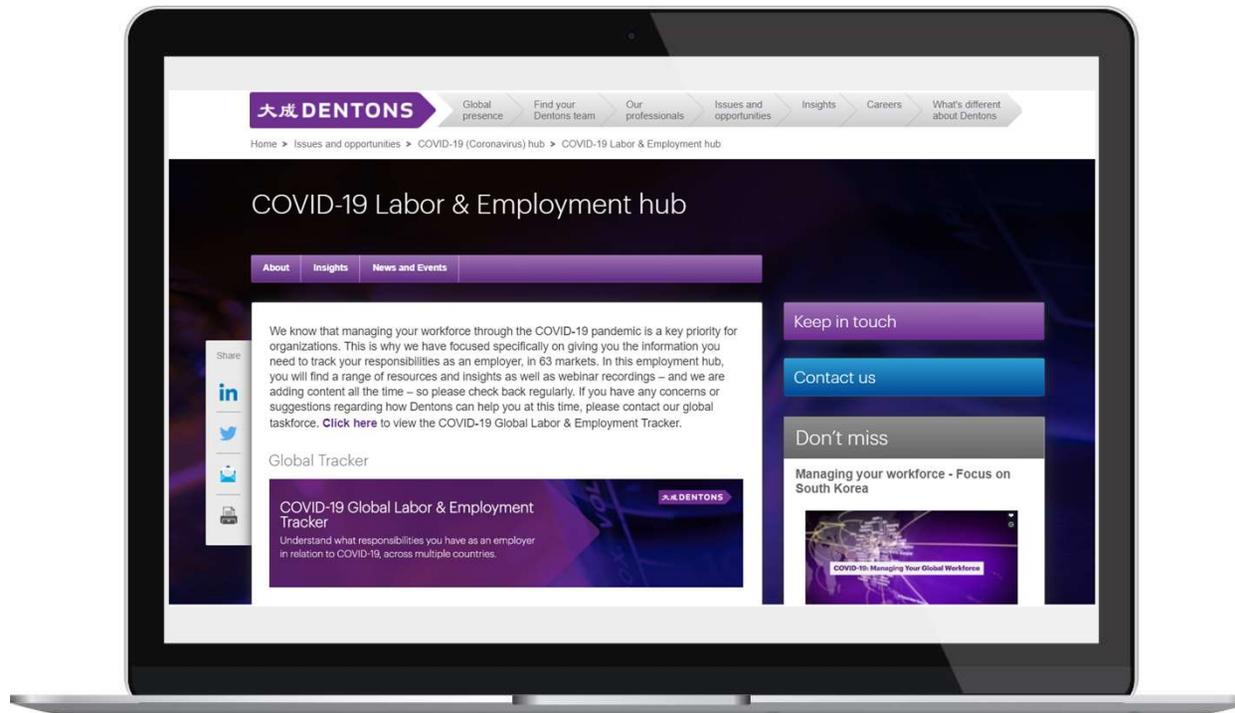
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