

Hiring Remote Workers In Other Provinces? Legal Considerations For Employers



Bottom Line

Remote work is continuing its prevalence and, in some sectors, has become a key feature and employee expectation. With this ongoing development, some employers are actively considering recruiting job candidates in, or allowing existing employees to work remotely from, provinces and territories across Canada where they may not have regular business operations. This approach may expand an employer's pool of prospective candidates and allow for greater flexibility in the development of employment relationships.

There are, however, some key considerations relating to remote work of which employers should be aware. This article summarizes some of these considerations.

Which employment standards legislation governs a remote worker's employment?

When hiring remote workers, consider the location where they will be performing the work and which employment standards legislation will apply as a result of that location.

Typically, in Canada, the employment relationship is governed by the law of the province or territory where the remote worker is physically located and where the work is performed. In Ontario, the *Employment Standards Act, 2000* ("ESA") applies where:

- a. the employee's work is to be performed in Ontario; or
- b. the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

If an employee has a home base in Ontario but travels outside of Ontario in the course of their employment, the employee is likely still subject to the *ESA* as their work outside of the province is a continuation of their work performed in Ontario. In contrast, the Alberta *Employment Standards Code* would ordinarily govern the employment of a remote worker who physically lives and works exclusively in Alberta, but has been hired by an Ontario-based employer.

It is critical for employers to understand which legislation their remote workers

fall under. There can be significant variations in minimum wage, overtime, hours of work, vacation, public holidays, termination-related entitlements, and other requirements as between provincial and territorial jurisdictions.

For example, in Ontario, the *ESA* sets out specific rules pertaining to individuals who perform paid work out of their own homes (known as “homeworkers”). Employees who fall within this category are entitled to earn a minimum wage that is at least 110% of the general minimum wage rate; this special minimum wage rate intends to compensate homeworkers for the employment-related overhead costs (e.g., heat, electricity, property taxes, cleaning, etc.) that they take on. As of October 1, 2022, the minimum wage rate applicable to homeworkers is \$17.05 per hour.

Any business that employs remote workers in the province of Ontario should be aware that the *ESA* also requires employers to maintain a register of any homeworkers it employs. This register must contain each homeworker’s name, address, and wage rate. Information pertaining to a homeworker may only be deleted from the register three years after the homeworker ceases to be employed by the employer.

Given the potential legal and tax implications of a remote worker’s physical location, employers are well-advised to include a provision in the remote worker’s employment agreement that requires the employer to approve any change in the remote worker’s designated work location. Taking this step will allow employers to retain control over the provinces and territories in which their employees perform work. Otherwise, if a remote worker relocates and performs their work from a new location without notifying their employer, the employer may unwittingly find itself subject to the laws and regulations of that new jurisdiction. Such a scenario will make it incredibly challenging for the employer to ensure that it is legally compliant.

What about health and safety issues arising from remote work?

Ensuring a healthy and safe workplace can be a challenge when that workplace is located in a remote worker’s home and is largely out of the employer’s control. However, statutory obligations may nevertheless be deemed to apply.

Under the Ontario *Occupational Health and Safety Act* (“*OHSA*”), employers have a general duty to provide a safe work environment. However, section 3(1) of the *OHSA* provides that the Act does not apply to work performed in a private residence.

While this provision may preclude the *OHSA*’s application in some remote work situations, it is not necessarily determinative.

Other provinces and territories have similar health and safety provisions to Ontario’s legislation, while others have enacted legislative regimes that impose positive obligations on employer that are specific to remote work arrangements.

To address the inherent difficulty of *OHSA* compliance in respect of sites beyond the employer’s control, employers should consider reserving the right to periodically inspect their workers’ home office spaces to ensure that they meet all required health and safety standards. The reservation of this inspection right should be clearly spelled out in any written agreement with the remote worker, as well as in any policy document(s) governing the employer’s overall remote work program. Employers should also consider outfitting remote workers with proper equipment and furniture to minimize the risk of ergonomic strain or injury in the performance of work.

To which jurisdiction would employers owe workers' compensation premiums?

Each Canadian province and territory interprets the issue of jurisdiction over workers' compensation coverage pursuant to its own legislation and policy documents. In some cases, employers will be required to register and pay remittances to more than one province/territory.

However, all workers' compensation boards in Canada have signed an Interjurisdictional Agreement on Workers' Compensation ("IJA"), which regulates the payment of premiums and workers' compensation benefits for employers and workers who work across provincial and territorial boundaries. The IJA aims to avoid duplicate payment of employer premiums on workers' earnings and determine the jurisdiction(s) from which a worker can claim benefits.

Under the IJA, employer premiums are payable to the workers' compensation board in the jurisdiction where the worker performs the work, regardless of whether the employer has a physical workplace in that province or territory. If a worker performs work in more than one province or territory, the worker's insurable earnings are prorated and each applicable workers' compensation board receives premiums for only the portion of work performed in that board's jurisdiction.

When can employers unilaterally end a remote working arrangement and require the remote worker to work from the workplace?

Given the fluctuating nature of the physical workplace, some employers may wish to return remote workers to a common shared work space as wider circumstances change. Constructive dismissal is a critical area of concern when considering a change of this nature.

Constructive dismissal arises where an employer, by virtue of its actions, effectively terminates a worker's employment. This most commonly occurs where an employer unilaterally alters one or more fundamental terms or conditions of an employee's employment (e.g., remuneration, duties and responsibilities, work location, etc.).

An employer who **requires** remote workers to return to the physical workplace – absent a contractual right to do so – may inadvertently prompt claims or allegations of constructive dismissal. This risk is especially high where an employee has been permitted to work in another province or territory other than where the employer ordinarily conducts business. In this situation, a return to the physical workplace could require the employee to undertake a significant, and costly, relocation in order to continue their employment.

To proactively address this risk, in the remote worker's employment agreement, employers should expressly reserve the right to unilaterally terminate any remote work arrangement and recall the employee to the physical workplace. Similarly, the employer's broader remote work policy document(s) should make clear that any remote work arrangement is at the employer's discretion.

Check the Box

Hiring remote workers has many advantages for employers, including the ability to draw from a wider pool of talented candidates, the potential of increased productivity from individuals who excel in a home-based environment, and a reduction in overhead costs.

However, before rubber-stamping any remote work arrangement, employers should keep in mind the potential pitfalls of hiring, or permitting work to be done, in new and potentially unfamiliar jurisdictions. Employers should carefully review the legal requirements associated with having an employee work from any given jurisdiction, including any licensing or business registration requirements that may apply. Employers should also consult with financial professionals regarding the tax and payroll implications of hiring remote workers in a new jurisdiction.

Ideally, thought and planning will be given to these potential jurisdictional issues **before** new working arrangements are implemented or workplace policies are changed. By having the requisite agreements, policies, and procedures in place at the front end, prudent employers will avoid unforeseen legal issues and reduce – if not eliminate – the cost of any associated litigation.

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