

# Returning To The Workplace: Employer Obligations And Options

written by Tina Tsonis | April 4, 2022



With news of the ending of Covid-19 restrictions in some regions in Canada and the announcement of the easing of restrictions in the NWT, the real question is whether working from home is here to stay. Can Northern employers ask that their employees to return to the workplace? The answer: it depends.

## **Health and Safety Obligations**

The anticipated lifting of restrictions does not mean that the pandemic itself is over. The potential for future outbreaks and variants remains. Employers are obligated, pursuant to relevant health and safety legislation, to maintain a safe workspace for their employees. This obligation extends to the Covid-19 context, even as restrictions lift. If the employer does not take steps to prevent the spread and infection of Covid-19 in their workplace, such as providing personal protective equipment or installing physical barriers, they may be faced with requests from employees to work from home on the grounds of health and safety concerns surrounding Covid-19. As restrictions ease, it may be prudent for employers to keep such protections in place to assure employees that any health and safety concerns in their workspace continue to be adequately addressed. However, employers' obligations may shift with changing public health guidance, and they should be mindful of these changes and adapt appropriately to new information and direction from official sources.

## **Accommodations**

Employers must be aware of any obligations to accommodate under the relevant human rights legislation. If an employee refuses to return to work and the reason is based on a protected human rights ground, then a duty to accommodate could be triggered. An employer could find themselves in a situation where they must continue to provide the employee with an opportunity to work from home. However, the accommodation must be reasonable and cannot cause the employer undue hardship. When considering if an accommodation is reasonable, employers can request additional information to make this determination.

## **Constructive Dismissal**

For employers who have implemented a robust response to Covid-19, and policies which include working from home, recalling employees may be a natural transition. It may also be an expectation of both the employer and the employee. However, where an employee was hired during the pandemic and has always worked from home, or where

there is no Covid-19 policy or written employment agreement setting out the expectations of returning to work, an employee may claim that working remotely is a fundamental term of their employment. Consequently, unilaterally changing their place of work could be considered a constructive dismissal.

A constructive dismissal occurs when an employer unilaterally changes the fundamental terms of employment. Common examples of unilateral changes to fundamental terms of employment include changes to an employee's hours, remuneration, or duties but could in theory apply in the context of ordering a return to work.

Absent a clearly written employment agreement or a Covid-19 policy that communicates an intention and approach to return in-person to the workplace, an employee may allege that there has been a change to the fundamental terms of their employment.

## **Employee Retention**

Even if an employer is on the right side of the law when asking employees to return to the office, recognizing the benefits of having a continued work-from-home policy may be beneficial.

Recent surveys indicate that employees across Canada would prefer to continue working from home permanently or with a mix of in-office and work from home. Data also suggests that there is a significant number of employees who would resign from their positions if forced to return to work, both for safety and lifestyle reasons.

If employers have not significantly experienced an impact on work productivity and efficacy while their employees have been working from home, it may be advantageous for employers to weigh their options.

Instituting a progressive, flexible approach to working from home could have the effect of boosting employee retention and moral.

Ultimately, an employer could force a return to an in-person working environment but whether they should depends on the unique circumstances of each workplace.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

by [Kathleen O'Brien](#) and [Stefanie Laurella](#)

Lawson Lundell LLP