



# What's New in HR Law

## Hiring Remote Workers in Other Provinces? Legal Considerations for Employers

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### Bottom Line

With the current prevalence of remote work and the likelihood that it will continue in some sectors even after the COVID-19 pandemic has run its course, some employers are actively considering recruiting job candidates in, or allowing existing employees to work remotely from, provinces and territories across Canada in which they may not have regular business operations. This approach may expand an employer's pool of prospective candidates and/or allow for greater flexibility in the construction of the employment relationship. There are, however, some key considerations of which employers should be aware.

### What employment standards legislation governs a remote worker's employment?

Typically, it is the law of the province or territory where the remote worker is physically located and where the work is performed that governs the employment relationship.

In Ontario, the *Employment Standards Act, 2000 (ESA)* applies where:

- the employee’s work is to be performed in Ontario; or
- 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 Ontario *Employment Standards Act, 2000* as their work outside of the province is a continuation of their work performed in Ontario.

In contrast, a remote worker who physically lives and works exclusively in Alberta, but has been hired by an Ontario-based employer would ordinarily be governed by the Alberta *Employment Standards Code*.

When hiring remote workers, consider the location where they will be performing the work, and which employment standards legislation will apply. There can be significant variations in minimum wage, overtime, hours of work, vacation, public holidays, and termination requirements, among others, as between provincial and territorial jurisdictions.

For example, in Ontario, the *ESA* sets out specific rules pertaining to the minimum wage for “homeworkers”. As contemplated under the *ESA*, homeworkers are individuals who do paid work out of their own homes. Employees who fall within this category are entitled to earn a minimum wage that is at least 110% of the general minimum wage rate. The current minimum wage rate applicable to homeworkers is \$15.70 per hour. Effective October 1, 2021, the minimum wage rate applicable to homeworkers will be increased to \$15.80 per hour. The rationale underlying the special minimum wage rate for homeworkers is that they should be compensated for taking on certain overhead costs (e.g. heat, electricity, property taxes, cleaning, etc.) in connection with their employment.

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, which contains each incumbent’s name, address, and wage rate. Information pertaining to a homemaker may only be deleted from the register three years after the homemaker ceases to be employed.

Given the potential implications of the physical location of remote workers, employers are well-advised to include in a remote worker’s employment agreement a provision requiring approval from the employer before the worker may change their designated work location. If a remote worker moves to a new jurisdiction and performs their work from that new location, the employment standards legislation of that new jurisdiction may apply. If this occurs without the knowledge of approval of the employer, ensuring compliance with applicable laws and regulations will be incredibly challenging. For this reason, employers will want to retain control over the provinces and territories in which their employees perform work.

### **What about health and safety issues and to which province would employers owe workers’ compensation premiums?**

Under the Ontario *Occupational Health and Safety Act (OHSA)* employers are generally responsible for the provision of 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 may

preclude the OHSAs' application in some remote work situations, it is not necessarily determinative.

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

Ensuring a healthy and safe workplace can be a challenge when it 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.

To address this inherent difficulty, in working out the details of any remote work program, employers should consider reserving the right to inspect the home office space periodically to ensure that it meets 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 the overall program policy document(s). Employers should also consider outfitting remote workers with proper equipment and furniture to minimize the risk of workplace strain or injury.

In terms of workers' compensation coverage, each province interprets the issue pursuant to its own legislation and policy documents. In some cases, more than one province will require employer registration and remittances to be paid. 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 for employers and workers who work across provinces and territories. The purpose of the agreement is to avoid duplicate payment of employer premiums on workers' earnings and determine from which province(s) a worker can claim benefits.

Under the IJA, employer premiums are payable to the workers' compensation board in the worker's home 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, a worker's earnings are prorated and the employer pays premiums on the prorated earnings based on where the work was performed.

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

Given the changing nature of the workplace, some employers may wish to later return remote workers to a common work space. Constructive dismissal is a central 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 incumbent's employment (*e.g.* remuneration, duties and responsibilities, work location, *etc.*). An employer that **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 may be an especially challenging scenario where the employee has been permitted to work in another province or territory than that in which the employer ordinarily conducts business. In this situation, a return to the physical workplace could require the employee to undertake a significant relocation in order to continue their employment.

To proactively address this risk, it is prudent to ensure that an employer expressly reserves the right to unilaterally terminate any remote work arrangement and recall the employee to the physical workplace in the employment agreement itself. Similar provisions, making clear that any remote work arrangement is at the employer's discretion should also be expressly stated as part of an employer's broader policy document(s).

## Check the Box

Hiring remote workers has many advantages, including drawing from a wider pool of talented candidates, the potential of increased productivity from remote workers 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 incumbent work from any given jurisdiction, including any licensing or business registration requirements. 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* implementing any new working arrangements, or permanent changes to their workplace policies or programs. Having the requisite agreements, policies, and procedures in place at the front end will avoid unforeseen legal issues as well as reduce the cost of any associated litigation.

## Need more information?

For more information about hiring and managing remote workers, returning employees to the workplace, or for support and representation in wrongful or constructive dismissal litigation, contact [Cassandra da Costa](#) at 519-435-6009, or your regular lawyer at the Firm.



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