

GLOBAL REMOTE WORKING - WHAT EMPLOYERS NEED TO KNOW

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There is no doubt that the COVID-19 pandemic has changed the way we work and engage with each other. While we anticipate a return to the office for many workers after the pandemic, it is also apparent that remote working is here to stay.

We have been receiving an increasing number of queries about remote working in Canada and how remote working impacts the employment relationship between the employer and the employee. This article provides a high-level overview of some of the more pertinent issues to consider. This article is not exhaustive of all of the legal issues an employer will need to consider – legal advice should be obtained if your organization is considering the feasibility of remote working in Canada.

What law governs a remote worker's employment?

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

For example, if a worker is working remotely from a location in British Columbia (i.e. the worker is physically present in British Columbia from where the work is performed), but performs work in connection with business operations in Ontario, the law of British Columbia will govern the employment relationship. In this example, the worker's employment will be governed by the *British Columbia Employment Standards Act* (if applicable) and other relevant laws, even though the worker performs work in connection with business activities in Ontario.

What law governs a remote worker's employment if the worker moves between Canadian provinces/territories?

Employment standards legislation differs from province to province. As noted above, generally speaking, the law that governs is the law of the province or territory in which the employee resides. However, employment standards legislation in some provinces provide that the legislation will apply to workers who are performing work in the province and outside of it. For instance, in Ontario, the *Employment Standards Act* provides that the Act applies to workers who perform work in Ontario, or to workers who work **both** inside and outside of the province, where the work outside of the province is a continuation of the work performed in Ontario.

If a worker moves to a different province or territory and then performs work from that province or territory, then there is a potential that the law of that new province or territory will govern the employment relationship. The precise answer will depend on the legislation of the worker's home province, as well as the particular circumstances of the worker's employment.

Can an employer use a choice of law clause in an employment contract to agree in advance what law will govern the employment relationship?

No. An employer cannot use a choice of law clause to oust the law of the jurisdiction where the worker is physically located and performing the work.

Where will a remote worker's income be taxed?

A worker's province or territory for income tax and payroll deduction purposes is determined by reference to where the worker physically reports to work at an employer's establishment or "place of business".

An "establishment of the employer" is any place or premises in Canada that is:

- owned, leased or rented by the employer; and
- where one or more workers report to work or from which one or more workers are paid.

If a worker reports to an employer's establishment in person in their home province or territory, then the worker's province or territory of employment for income tax and payroll deduction purposes is the one in which the establishment is located and where the worker reports to work.

If the worker is not required to report to an employer's establishment in person (i.e. remote workers), the worker's province or territory of employment for income tax and payroll deduction purposes is the one from where the worker's wages are paid. This will normally be the location of the employer's payroll department or payroll records.

Where will workers' compensation premiums be payable?

It is the province or territory where the work is performed that determines the province or territory where workers' compensation premiums are payable.

All workers' compensation boards in Canada have signed an *Interjurisdictional Agreement on Workers' Compensation* (IJA) that regulates the payment of premiums and workers compensation in respect of employers and workers who work across Canadian provinces and territories. The purpose of the IJA is to avoid duplicate payments in respect of workers' compensation premiums and compensation in these circumstances.

Under the IJA, employer premiums are payable to the workers' compensation board in the jurisdiction where the worker is located and performs the work, irrespective of whether the employer has a physical office in that location. If a worker performs work in more than one Canadian province or territory, an employer can prorate a worker's earnings and pay premiums on the prorated earnings based on where the work was performed.

Does a remote worker have to be paid in Canadian currency?

While the law differs between provinces and territories, the answer to this question is generally yes. For example, in British Columbia, s. 20(a) of the Employment Standards Act provides that wages must be paid in Canadian currency.

Are there any specific provisions to include in remote working employment contracts?

For **new hires** who will be employed or working remotely, we recommend that the following provisions be included in remote working employment contracts:

- The worker will be permitted to work from a remote location in a particular province or territory. The employment contract should also expressly provide that the worker will not be permitted to work remotely from a different province or territory, without the employer's express written approval.
- The employment contract should also specify whether the remote working arrangement will be permanent or temporary, or whether the worker will have a hybrid working arrangement whereby the worker will work in both an office and remote location.
- The remote location must at all times comply with applicable health and safety laws, and must be approved by the employer.
- The ability to work from home is not a condition of the worker's employment, and may be terminated by the employer at any time and for any reason, including if the worker fails to maintain the remote location in accordance with health and safety laws (and any other legal requirements and employer policies and procedures).
- The employment contract should also include general provisions dealing with the following specific issues:
 - Hours of work and overtime.
 - The employment relationship and employment contract is conditional on the worker's ability to legally work in Canada.
 - Productivity and measurement of work performance.
 - Data privacy and security.
 - Confidentiality.
 - Equipment and supplies for the remote location.

- Insurance coverage.

For **existing workers** who already have employment contracts in place, and for workers who are permitted remote working generally, we recommend that employers implement a Remote Working Policy which deals with the above issues. If such a policy is implemented, employers should ensure that workers are made aware of the policy and the policy should be available and accessible to workers.

Are there any other general considerations applicable to remote working?

Under both provincial and federal occupational health and safety regimes employers have general and specific duties to maintain a safe workplace. In many jurisdictions “workplace” is defined broadly so that it will continue to apply when a worker is working from home. These duties include obligations in relation to ergonomics, meaning the fact a worker is working from home does not relieve an employer of their obligation to ensure the worker’s home work station is assessed for ergonomic risks and that those risks are eliminated or minimized. Health and safety obligations differ between provinces and territories and we recommend that advice be sought about an employer’s legal obligations in a particular province or territory.

Employers should also consider immigration requirements, and should ensure that the necessary work permits are in place (if applicable).

by [Dianne Rideout](#) and [Michelle McKinnon](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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