Flexible work arrangements: tax, employment & immigration issues

June 02, 2022

At the outset of the COVID-19 pandemic, regional lockdowns forced many employees to work from home indefinitely. As public health measures begin to ease, many employers have permanently adopted flexible working arrangements that involve their employees working from home on a full-time or hybrid basis.

This article summarizes the important legal considerations for employers adopting flexible working arrangements.

Establishing a remote working policy

It is important that employers clearly outline their expectations for employees working from home. Employers should establish a formal remote working policy that addresses the following:

- The class or group of employees that are eligible for remote work;
- The employer's expectations with respect to performance and availability;
- The frequency with which the employee works from home instead of from the employer's premises. If certain employees will have different flexible working arrangements than other employees, set out the criteria and factors that will guide the employer's discretion;
- The health and safety guidelines that employees must observe while working from home, including appropriate ergonomics and other considerations. Coverage under the Workplace Safety and Insurance Board generally extends to employees performing duties "in the course of" employment regardless of where those duties are performed, and employers may not abdicate their duty to ensure that employees are working in a safe environment just because an employee is in their home;
- Whether the employer has the ability to terminate the flexible working arrangement, and if so, the relevant notice period;
- Establish clear hours of work for employees who are eligible for overtime and track those hours, as working from home may mean that employees often work longer hours than they did in the office;
- Whether employers will supply, or reimburse the employees for, the necessary technology and equipment to work from home;

- Whether employees are permitted to work out-of-province or out-of-country (as this may have tax consequences for the employer as discussed below); and
- Establish the times when an employee is required to be in the office or workplace, such as for important meetings, social events, retreats or any other occasion.

In addition to establishing a separate remote working policy, employers should amend existing policies in order to address risks specific to a flexible working arrangement. For example:

- Confidentiality policy – Establish clear rules on maintaining the confidentiality of the employer's information while the employee is at home. Consider requiring the employee to maintain a private workspace in their home and to lock all confidential information away at the end of each day;
- Technology policy – There may be an increased risk of employees accessing the employer's servers through their personal, rather than employer-issued, devices. Since personal devices often have inferior security protocols, this may pose cybersecurity risks for the employer; and
- Harassment Policy – Ensure that it addresses cyberbullying.

Issuing Form T2200/T2200S for employees working from home

Employees working from home on a full-time or hybrid basis may be able to claim certain home office expenses when computing their employment income. An employee may only deduct a home office expense that is otherwise permitted by the *Income Tax Act*[1] (the ITA) if either of the following requirements (each referred to as a "Deduction Requirement") are met:

- The home office is where the employee principally performs (*i.e.,* more than 50 per cent of the time) employment duties;[2] or
- The home office is used exclusively for employment purposes **and** is used on a regular and continuous basis for meeting customers or other persons in the ordinary course of performing employment duties.

In respect of an employee's 2022 taxation year, there are two methods that employees may choose from for computing the deductible amount of home office expenses: the "Detailed Method"[3] and the "Temporary Flat Rate Method."[4] In order for an employee to claim a deduction under the Detailed Method (but not the Temporary Flat Rate Method), the employee is required to have their employer sign Form T2200 *Declaration of Conditions of Employment* (Form T2200) or Form T2200S *Declaration of Conditions of Employment for Working at Home Due to COVID-19* (Form T2200S).[5] Accordingly, employers may be asked to issue a Form T2200 or Form T2200S by employees computing their deduction under the Detailed Method.

Form T2200 or Form T2200S requires the employer to certify certain conditions of employment that are relevant to the determination of whether the employee is entitled to deduct home office expenses. While there is no legal obligation under the ITA for the employer to provide the form, the Canada Revenue Agency (CRA) expects employers to provide it in situations where employees have reasonable grounds to claim home

office expenses.[6] Aside from the ITA, an employer may be legally obligated to provide the form pursuant to their obligations under the employment contract or collective agreement. Even if there is no legal obligation to provide the form, it is generally recommended that employers provide it to their eligible employees upon request, since the failure to do so may hinder the employees' ability to deduct their legitimate home office expenses.

Province of employment

a) Payroll tax implications

The amount of payroll taxes that an employer is required to withhold from an employee's remuneration depends in part on the employee's province or territory of employment. This is generally determined based on the location of the employer's establishment that the employee reports to for work.

Employees that only work from home do not report for work at an establishment of the employer. However, the withholding rules deem such employees to report for work at the establishment from which the remuneration is paid. The CRA's administrative position is that this is typically the location of the employer's payroll department or payroll records.[7]

The CRA has issued an administrative policy for employees that work from both the home office and the employer's establishment pursuant to a hybrid remote working arrangement. An employee that is subject to a hybrid remote working policy is likely regarded as working entirely from the employer's office if the employee has a "recurring" physical presence at the employer's place of business (generally considered to be a *weekly* presence of a duration equivalent to at least one workday).[8] On the other hand, employees with non-recurring physical presences at the employer's establishment will likely be viewed as working entirely from their home office such that the deeming rule applies.

b) Labour and employment considerations

Employees who always work out of province or outside of Canada will be subject to different employment standards and other laws than employees employed in the home province of the employer. Employers need to consider whether they have the knowledge and human resources support to permit such arrangements.

Cross-border employment arrangements

Flexible working arrangements are also beneficial for employers, as it allows them to hire individuals without being restricted to the geographic area where the employer maintains a physical presence. However, these arrangements may result in cross-border employment situations discussed below.

a) Foreign employees working in Canada

The following are some of the pertinent considerations where a non-resident employee works in Canada for a non-resident employer.

Employee's Canadian tax residency status

It is important to consider whether the conditions of the flexible working arrangement causes an otherwise non-resident employee to be a resident of Canada. A resident of Canada is liable for Canadian taxes on their **worldwide income** (in addition to potentially being liable for taxes on the same income in their home country, subject to the availability of foreign tax credits in the home country). On the other hand, a non-resident of Canada is only potentially liable for Canadian taxes on **certain Canadian-sourced income**, including employment income earned for work performed in Canada.[9]

An employee will be considered resident in Canada for tax purposes if they (i) spend 183 days or more in Canada or (ii) have sufficient social and economic ties to Canada (the Canadian Residency Test). However, if the employee meets the Canadian Residency Test **and** is resident in a country that has a tax treaty with Canada, as long as the employee maintains a home and social and economic ties in their original country of residence (and does not establish such a home and ties in Canada), the employee is generally deemed to be resident only in their original country of residence and not Canada.[10]

Regardless of the employee's tax residency status, the employee is required to file a Canadian tax return if they have Canadian taxes payable.

Employer's Canadian payroll withholding obligation

Canadian employee source deductions apply to an employee of an employer (resident or non-resident) who performs any services in Canada. The employer is required to withhold and remit such deductions irrespective of any withholding requirements imposed by another country.

However, if a non-resident employee is a resident of a jurisdiction that has a tax treaty with Canada, the tax treaty may exempt the non-resident employee from Canadian taxes on their Canadian-sourced employment income. Where the non-resident employee qualifies for treaty relief, the non-resident employer is relieved of their payroll-withholding obligation only if the appropriate waiver is submitted to the CRA.

Employer's Canadian payroll reporting obligation

The ITA requires payroll reporting by any employer (resident or non-resident) with respect to any employee who performed services in Canada in the year. The employer must file the T4 information return on or before the last day of February following the calendar year that the return relates to.

The non-resident employer is subject to this reporting obligation regardless of whether it is subject to, or exempted from, the payroll-withholding obligations discussed above.[11]

Canadian business immigration considerations

A non-resident employer that allows a non-resident employee to work in Canada must also consider the rules under the *Immigration and Refugee Protection Act*[12] (the IRPA) and *the Immigration and Refugee Protection Regulations*[13] (the IRPR).

The IRPA provides that a foreign national may not work in Canada unless he or she is authorized to do so under the IRPA. "Work" is defined by the IRPR to be "an activity for which wages are paid or commission is earned, or that competes directly with activities of Canadian citizens or permanent residents in the Canadian labour market."

In general, any activity that does not "take away" from opportunities for Canadians or permanent residents to gain employment or experience in the workplace would not be considered "work" for the purposes of the IRPR. Provided that the foreign national's primary source of remuneration remains outside of Canada and the principal place of business and place of accrual of profits from the activity remain predominately outside of Canada, they will generally be considered to be engaging in international business activities in Canada and exempted from the requirement to obtain a work permit. As such, remote work being performed for the benefit of a non-resident employer, with no productive work being performed for an entity or individual in Canada, would typically be permitted so long as the foreign national can demonstrate that he or she is otherwise admissible to Canada. In practice, however, it can be difficult to demonstrate non-immigrant intent if one simply arrives in Canada in order to "set up shop" to work remotely for an extended period of time without something more.

b) Canadian employees working abroad

The following are some of the pertinent considerations when a Canadian resident employee works abroad for a Canadian resident employer.

Employee's tax residency status

An employee that is a tax resident of Canada is subject to Canadian income tax on their worldwide income. At the same time, the employee may also be considered a resident of the foreign jurisdiction under their laws.

As long as the foreign jurisdiction has a tax treaty with Canada, the tiebreaker rules will result in the employee being considered resident in only one of the two countries on the same basis described above. If the foreign jurisdiction does not have a tax treaty with Canada, then the employee should seek advice to confirm they will not be subject to double tax.

Compliance with foreign laws

Canadian employers with employees working abroad must consider how the foreign jurisdiction's laws apply to the employment arrangement. Employers should engage the assistance of counsel in the relevant jurisdiction for this purpose.

Some relevant considerations include the following:

- Does the Canadian employer have tax withholding or reporting obligations in the foreign jurisdiction?
- What are the employment and labour standards in the foreign jurisdiction?

- How do the foreign jurisdiction's business immigration rules apply to the cross-border employee?

BLG can help

As employers establish permanent flexible working arrangements in the post-COVID era, it is important that they understand how Canada's tax, employment, immigration and other laws apply to such arrangements.

As a full service law firm, BLG can help employers navigate the complex legal landscape that applies to flexible working arrangements. If you have any questions, please contact the authors of this article.

Footnotes

[1] RSC 1985, c 1 (5th Supp).

[2] In respect of the first Deduction Requirement, the ITA is ambiguous as to the relevant time period applicable under the "principally performs" test. Accordingly, CRA has issued a COVID-19 administrative position in respect of the first Deduction Requirement stating that the requirement is met for an employee that worked at home over 50 per cent of the time for **at least four consecutive weeks** due to COVID-19.

[3] The employee is able to claim the actual amounts incurred for home office expenses that are permissible deductions under the ITA. This method requires the employee to complete a detailed accounting of all the permissible deductions they are claiming. Employees are also required to retain receipts or other supporting documentation in respect of the expenses being claimed.

[4] The employee may deduct $2 for each day they worked from home in 2022, up to a maximum of $500 for the year. The amount of this deduction does **not** depend on the actual amount of eligible expenses incurred by the employee. Accordingly, there is no requirement to keep receipts and supporting documents in respect of the expenses.

[5] Note that it is not required that the employment contract include a written requirement that the employee works from home.

[6] CRA Views #2004-0082191E5, "Requirement to Issue T2200" (2004 November 10); CRA Views #2013-0507001E5, "Obligation de remplir un T2200 pour un employé" (2014 October 27).

[7] Canada Revenue Agency, "T4001 Employers' Guide – Payroll Deductions and Remittances" (January 4, 2022) at p. 10.

[8] CRA Views #2015-0620821I7, "Withholding of Income Tax at Source" (February 4, 2016).

[9] Employment income earned by a non-resident employee who performs services in Canada is generally subject to Canadian employee source deductions unless the employer obtains a waiver from tax under a relevant tax treaty between Canada and the employer's country of residence.

[10] The rules can be very complex and should be reviewed with an advisor if there is any uncertainty.

[11] There is one exemption to this rule in the case of a U.S. resident employee who performs services in Canada where **both** an RC473 employer certification is obtained and the employee earns less than C$10,000 for the time spent in Canada.

[12] SC 2001, c 27.

[13] SOR/2002-227.

By

Natasha Miklaucic, Robert Weir, Brian Dingle, Tony Zhang

Expertise

Tax, Labour & Employment, Business Immigration

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.