

# Legal implications of the hybrid work model

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A hybrid work model has become the reality for many workplaces, but with this shifting landscape of work comes a series of legal considerations. After [the COVID-19 pandemic changed the shape of many workplaces](#), flexible work arrangements have become the new normal, bringing with them [many issues to consider](#). How should changes to terms of employment be handled? What can be done to ensure equitable treatment of employees with protected needs? These key questions and more were addressed on May 18, 2022 through a virtual conversation, Legal implications for your Hybrid Workplace.

[Maddie Axelrod](#), a partner in BLG's Labour & Employment group, and [Melissa Eldridge](#), counsel in the Labour & Employment group, led the event. Part of the L&E breakfast club series, they discussed key legal considerations of the hybrid and remote work models before answering questions from the virtual attendees.

Workplaces look different now than they have in years past, but taking these legal implications into account will ensure that new hybrid and remote work models operate effectively for everyone. Reach out to Maddie Axelrod, Melissa Eldridge or the [BLG Labour & Employment group](#) if you have further questions about the legal considerations for hybrid workplaces.

## Read the full conversation [here](#).

**Rob Weir**

Good morning everybody. Welcome to the L&E breakfast club, Legal Implications for your Hybrid Workplace. My name is Rob Weir and I'm a partner in the group. It gives me great pleasure to welcome you, wherever you are today - in your office, at your home, or on the park bench. We decided that we would model a hybrid workplace today for everybody. I'm at home, Maddie's in the office and Melissa is in the office.

It gives me great pleasure to welcome Maddie and Melissa, who are going to be your presenters today. Many of you know Maddie, Maddie became a partner in the L&E group earlier this year. We're super proud of Maddie and happy to have her with us.

We're happy to introduce Melissa Eldridge, who is our newest lawyer. Melissa has been practicing as a labour and employment lawyer for over 11 years. She worked at the beginning of her career for another national law firm and then for the last seven years worked in house at one of our major clients. Melissa practices, like Maddie, in all areas of labour, employment and educational law. It's great to welcome Melissa to our group and to BLG and to introduce all of you to Melissa. And so without further ado I'm going to turn it over to Melissa and Maddie. And Melissa, go ahead.

### **Melissa Eldridge**

Thank you very much Rob and good morning everyone. Maddie and I are pleased to be here this morning. We have just about an hour together and our goal is to leave some time at the end of our presentation to answer any questions you may have. The agenda is packed today but we will be as efficient as possible.

We see, and we have heard from Rob, that the hybrid workplace is our new reality and so as part of the agenda today, I will be tackling the first three topics: handling changes to terms of employment; overseeing employee attendance, working hours and overtime; and understanding employee mental health and wellbeing strategies. Maddie will then share her expertise on the last three topics: ensuring equitable treatment of employees with protected needs; complying with confidentiality, health and safety, and other workplace obligations, both in the office and remotely; and then finally additional considerations.

So handling changes to terms of employment. This seems to be a very popular topic right now and one that provides opportunity but also challenges for employers. The headlines seem every day to offer new ideas or options, from a completely remote workplace option with companies giving up office space, to certain employers asking their staff to return in-person to resume working conditions that resemble pre-pandemic working norms.

What we do see is that there are many individuals who would prefer not to take a pay cut in order to have that flexibility in their workplace. And what we're seeing more often than not is that employees are becoming very selective about their working conditions and about what is important to them in maintaining potentially a hybrid workplace.

The advice our law firm offers clients, and some of the best practices we have observed in the industry, is to treat employees as you normally would in terms of your workplace culture - **engaging in dialogue, being transparent and providing advance notice about expectations for return to the office.**

If you've already returned to the office in part or in a more fulsome way, what we're sharing with you probably resonates in terms of offering staff a reasonable period of time -**ideally at least a month - in order to prepare and make the necessary changes to return to the office in part or in full in the coming months.**

We are seeing that employees are asking for flexibility and this flexibility is not rising to the level of protected code accommodation, but just practical flexibility, such as my train service isn't fully up and running so I'm looking for a delayed start time in order to catch the later train at my local GO station. We see employees who are looking when they get to the office to feel more comfortable. **It's difficult to compete with kitchens and homes**

and pets and so we're not proposing any of that, but there are perks that employers are considering like enhanced coffee machines, treats, lunches, breakfasts, events that bring people together and create a positive association with going to the office. We are seeing, and have seen for some time now, a shift in workplace culture.

Employers are best served to turn their minds to the type of workplace they are offering their employees. A lot of the workplace culture initiatives do include being more mindful of that elusive work-life balance. And so we see with recent legislation a disconnecting from work policy. Any employer with more than 25 employees is required to have this policy in effect by June 2, 2022, so just a few short weeks away. This is a good opportunity for employers to review what the expectations are in terms of being connected or disconnected from the workplace in the form of a written policy.

In terms of the more formal or legal observations on this topic, recalling employees back to the office may have some employees triggering concerns or exercising their rights in terms of whether or not this is a fundamental change in their condition of employment. One of the things we are recommending is that you are again very transparent and proactive with your employees

We're also recommending that employers get written consent from their employees prior to reducing any hours, work wages or changes in responsibility. That's a best practice that existed pre-pandemic, but we are certainly seeing more and more employees who are looking for alternate arrangements. Our recommendation is that if any of these alternate arrangements result in a change in the terms of employment, for you to be proactive and have that secured in writing in a very transparent fashion.

Overseeing employee attendance, working hours and overtime. We are seeing employees indicating and demonstrating that they are productive working from home. As employers you may see the benefits of this arrangement and you may see the benefits of a continued hybrid work arrangement. To respond to this increasingly remote and hybrid work environment we saw [Bill 88, the Working for Workers Act](#), passed into law in Ontario recently, April 11, 2022.

Through these amendments to the Employment Standards Act, any employer who employs 25 or more workers must have a written policy in place on the electronic monitoring of employees. This can be a brand new policy or it could be a change to an existing policy if you already have one in your workplace. The key piece is that the policy must identify and disclose whether the employer is electronically monitoring employees. If so, this policy should capture a description of how, and in what circumstances, the employer may electronically monitor employees, and the purposes for which this information is obtained through electronic monitoring and how that's being used by the employer.

There is no limitation imposed on electronic monitoring by this new law. It is permissible in Ontario, absent an express contractual or collected agreement restriction. So, regardless, you're going to need the policy, but whether or not you're engaging in electronic monitoring may require a review by your legal team, your HR professionals and a quick sweep of policies that exist to determine whether any contracts, collective agreements or policies that currently exist at your workplace touch on this point about electronic monitoring.

I think it's fair to assume that you should anticipate questions and it's recommended that you don't need to have the most detailed policy. The requirements for the policy are widely available online through the Government of Ontario but you should anticipate questions from your employees and the recommendation is to be transparent. If electronic surveillance is happening, for example, to keep track of vehicles that are used in the workplace for mileage or locations that are visited in any given day, there's a justifiable use. That could be a pre-existing arrangement and the rationale for the monitoring is often a very important point and goes a long way in terms of your efforts to be transparent with your employees.

At this point in time, it may also be prudent to update your acceptable use policy, not only because of Bill 88, but because of the hybrid workplace and all the new considerations that are introduced between work and office lifestyles and office culture. We recommend a standalone policy that supplements an existing acceptable use policy, but we do recommend that you turn your mind to that of course before the deadline.

We also know that the Supreme Court of Canada has recognized a limited employee expectation of privacy in a case called *R. v. Cole*. So again, we recommend that all employers stipulate all purposes for which they may require access to network data including information in user accounts, i.e., to maintain the network, but also potentially to investigate misconduct. The more prevalent theme that we're seeing, and the focus of this presentation, of course is to support the continuity of work.

Understanding employee mental health and wellbeing strategies. We have seen the reference to employee wellbeing as a theme throughout this presentation. It's important to dedicate a section of this presentation to this topic because we are have seen now with the reintroduction of this more hybrid more of a focus on one day, multiple days back at the office. We are seeing employees who are not the same employees that we knew prior to the pandemic. We are seeing employees who can feel drained or bored because their work life has been infiltrated, has been infused with their homelife. We are seeing employees who are very keen in some cases, but may be anxious to interact with their colleagues at the office.

It's important to monitor and be cognizant that while you have positive intentions and are trying to rebuild your sense of team, we must be mindful about those employees who may feel uncomfortable after many months of being isolated or may feel anxious about what socializing may look like with their colleagues. We have employees who feel exhausted from being on video calls. You can make use of having people from different cities, different offices, different countries join, but where possible, we encourage you to be mindful of the employees that may be in the office. They may want a place or work space where they can meet in person again if the comfort levels are there, so that they can interact with their colleagues and have less screen time.

The WSIB considerations have been numerous over the past few years and key questions have arisen about what does it mean to be in the course of employment? If you're in your home, if you're working in the evening or on the weekend, if you're checking emails or, you know, carrying a box of paper to your printer. It's important for an employers to be aware of the new and evolving WSIB considerations that exist in your workplace. Being aware of mindful means ensuring that your employees are well trained on workplace policies and understanding the necessity of reporting workplace injuries when they occur. Another recommended best practice is creating a risk

assessment checklist that offers employees a step-by-step review of their working environment, be that at home or in the office. This promotes a culture of safety among each and every employee to review their surroundings, to review the way that they work, and to ensure that their workplace is safe and comfortable in order for them to carry out their tasks.

We urge you to take steps to combat digital exhaustion. Some ideas include offering in-person arrangements where it is appealing or acceptable to do so, investing in improved benefit plans or allowances, creative ideas including food-delivery services, a focus on responding to the interests of the employees in your office. Focusing on active engagement and support, building connections or rebuilding connections, and encouraging not only speaking up, but speaking with each other.

Introducing changes to traditional working hours in support of flexibility and balance. Of course, the needs of the organization must be prioritized, but where it's possible this is a very important tool that can be used to your advantage as an employer. We've covered the disconnecting from work policy and being thoughtful in your approach. And then, of course, being open to change as the organization settles into the new normal. We hear a lot that we're still defining the new normal. It's still a work in progress, but we offer this part of the presentation to hopefully guide or inform some of the initiatives that you may consider in the coming months. At this point, I'll turn it over to Maddie to continue the presentation.

### **Maddie Axelrod**

Thanks very much Melissa. The next topic that we wanted to cover is on ensuring equitable treatment of employees and specifically with protected needs, but others as well. One of the questions that we are seeing is around ensuring internal equity among the team. You know, how we deal with managing our workforce when everyone's kind of **all over the place - some people are at home, some people are in the office and some** people are across the country. In thinking about that, we remember that some employees may prefer remote work or may have different types of hybrid working arrangements for a variety of reasons, including protected grounds under human rights legislation.

We're going to come back to the human rights accommodations piece in just a moment, a little later on in the presentation. But just to plant the seeds, the bottom line there is that there will be employees who, for a variety of valid legal reasons, are required or permitted to work from home or to work with a certain hybrid schedule that might look different than that of other employees.

Even outside of those employees, there will also be others who are perhaps working remotely more than others or there are types of roles that work remotely in different circumstances than other roles or in different situations. Not everyone is doing exactly the same thing all the time. This is one of the by-products of having a hybrid workplace. In your HR capacities you may be getting questions like how come this employee gets to work remotely five days a week and I need to come in, or I'm new to the company and I don't know anybody here because I'm the only one who's opting into the remote arrangement you offered me. Different people are doing different things and it can be hard to manage the team that way.

Beyond the human rights piece, ensuring that there is equitable treatment of employees on that team is important for many reasons. The obvious ones are for morale and team cohesion and that all leads to better performing teams. We also know there's a challenge in recruitment and retention in a lot of industries right now. People may not want to return to or to join an office where they feel that they're not part of a cohesive team. Making sure that the team is managed appropriately and people are feeling good about the way that different roles are different positions are being treated within the team within the context of the hybrid workplace, that's going to be important for a lot of those recruitment efforts as well.

**Now I'll share a few points or practical tips you can consider for how to manage this to ensure equity in your teams.** First is listening to employee input on what will work. You may have certain ideas that everybody wants to work from home five days a week that may or may not be the case in your workplace. Some people feel that they would like to come in and some people want to be in all the time, so perhaps a survey is a good way to get the lay of the land and see what actually is going to resonate with your employees.

Second would be developing policies and practices in your workplace. We're going to come back to that idea of policies and communicating expectations, but whatever the content of the policy is, it should account for those various types of work and it should be applicable throughout the scope of employment.

When you're hiring, think about is this role going to be remote, hybrid, or in the office. What does it look like on a day-to-day basis and building in the nature of your hybrid workplace to promotion decisions as well. If you have more traditional metrics of success or commitment and you're shifting into a hybrid workplace, give some thought to whether you need to adjust those metrics to match. Have you traditionally been rewarding people who've spent the most time in the office and are you no longer going to be doing that because of the hybrid setup? If so, some changes may need to be implemented. For those employees who may need additional supports to succeed in the hybrid workplace, whether it's because of protected human rights grounds or other reasons, if you'd like your hybrid workplace to be successful it may require giving some thought to and implementing those additional supports so that everyone can succeed.

And that's at the base level, but also from the leadership as well. It's one thing to say this is now a hybrid workplace and you're free to work from home as much as you want or up to three days a week, but the president is still going to be in five days a week or all the managers are still coming in because we think it's important. It's a bit of talking the talk as well as modeling through your policies. This is a good opportunity to review your general culture and practices and ensure that you have an inclusive environment, whether it's because people are working hybrid, remotely, or when they're in the office, building a cohesive team and an equitable team with proper treatment across the board for people in different situations is going to be important. If you are shifting your type of workplace, it's a good opportunity to take stock.

**Now I'll go over some more compliance pieces. The first one I'll cover is hours of work and overtime.** In a remote environment, we are seeing that some workers may end up working longer hours, whether that's by choice, by mistake because they've lost track of time, or maybe trying to be more productive and saying I'm at home anyway and I've saved my commute time so I'll put it in an extra half hour.

At the same time, we sometimes see productivity challenges come up. Most employees and most types of roles are good about this environment, but sometimes we do see people who are not being quite as productive when they're working from home and sometimes that creates challenges for their managers or the company. That's especially true given that it's a little bit harder to track what people are doing when they're at home and we rely a little bit more on trusting people to get their work done. In some cases there may not be as focused work happening, but if work is happening over a longer stretch of time, it can result in more time being worked within the meaning of employment standard legislation.

Depending on the employee's role, the terms of their contract and the way they are paid, they may be entitled to more pay for that time, whether it's excess hours at straight time or maybe they cross the threshold into entitlement to overtime. On the employer's side, there's an obligation to record hours of time that are worked and to pay employees accordingly.

When people work remotely it's going to be important for employers to develop policies to ensure that everybody is clear around the parameters about working hours and overtime and the obligation to track and record those hours. Whether that means you log into your laptop at 9 a.m. and you log out at 5 p.m. with a lunch, or saying we have flexible hours and I don't really care when you do your work but it's approximately 40 hours per week. If it looks like you're coming up on that boundary or you can't get your **work done within that timeframe**, then it's important to have a procedure for dealing with that.

As Melissa mentioned, in Ontario there's now this upcoming obligation for employers with 25 or more employees to have a disconnecting from work policy. I won't repeat what she said but interestingly it doesn't actually give employees a right to disconnect, it just says employers have to have a policy on it. But many employers are taking the opportunity to think about that principle of disconnecting from work, which is really important and it can be harder to do when people are working remotely. They are taking this opportunity to give some thought to what their hybrid workplace is going to look like **and how to support employees disconnecting from work when it's not as clear the distinction between what is work and what is not**. It also helps provide clarity on hours of work.

The next compliance topic is around health and safety. Generally the occupational health and safety legislation in each province has an obligation to the effect that employers have to take every reasonable precaution for the protection of a worker. There may be exceptions in some provinces for work done in private establishments. It's not entirely clear whether that is going to apply in the context of people working from home, but our best advice is to assume that it does and that this obligation to protect your workers is still going to apply even when they're working remotely.

Even beyond the occupational health and safety legislation, there are decisions from the **workers' compensation side that their coverage generally extends to employees who are performing their duties in the course of employment**, even if that is done at home or on the road or somewhere else remote or, of course, in the office. Because of that, best practice is to ensure that employees are working in a safe environment when working remotely. What does that look like? It doesn't necessarily mean you need to send your health and safety committee to everybody's house to have a look, but some due

diligence by the employer is probably a good idea. You might want to implement that risk checklist that Melissa mentioned, encouraging employees to have a look at their **home office setups. They should look around and see if there are any hazards - tying up** loose cables and having a safe chair and desk, but also perhaps ergonomic equipment, making sure that they're not going to get back issues because they don't have a proper chair. Then have employees sign back to certify that they have checked for those hazards and potential risks and to ensure they've got a safe workplace at home.

Coming back to this topic of accommodations, many of you are likely familiar with this topic. Under the Human Rights Code and human rights legislation across the country, employers have a duty to accommodate protected grounds to the point of undue hardship. Undue hardship generally means considering the cost and health and safety considerations. That is still true when employees are working remotely or in a hybrid arrangement. During the pandemic we saw many employees who had an increased burden because of the circumstances that relate to protected grounds. For some it might be family status or child care needs, whether its daycares being closed or schools doing remote learning such that parents are essentially stuck at home with additional responsibilities and can't come into the office as they normally would have.

Other forms of protective grounds that come into play here might be disability. We might see higher-risk employees requesting accommodation to continue working remotely or have slightly different hybrid arrangements than you might otherwise have expected. We deal with these in the same way that we would consider other accommodation requests. The employee has a legitimate substantiating documentation that says that for human rights related reasons, they can't fit into the hybrid work model the way that you thought, and you need to go through the accommodation process.

Examples might be if someone has an underlying condition and coming into the office and dealing with other people in-person is too risky given that condition, then that might be a valid medical reason that they can't fit into or need some adjustments to the hybrid workplace arrangement. Maybe it's the scheduling issue like Melissa mentioned, the GO train is not up and running, or maybe it's because the bus is too crowded and it's too risky for their underlying condition and they can't take public transit at that time of day. Or maybe in a particular location you've indicated that you want them to come back to the office because they're working too closely with other people or maybe they're working with people who are for one reason or another risky for them. Perhaps they're unvaccinated, near young children or the elderly or what have you. Or maybe it's because of school closures and so for a period of a few weeks they need to be at home.

For all of these you should go through that same accommodation process, both procedural and substantive. You have an obligation as an employer to both look for and hopefully find a solution to accommodate those needs. It's really going to be case-by-case, it's going to be really fact specific. A lot of those examples around the underlying high-risk conditions, that's going to change over time as well from a COVID perspective. Those kinds of considerations look a lot different right now than they did in, let's say, September 2020, especially with vaccination, PPE and how case numbers are looking at any point in time. But it's still possible and there may be various other non-COVID reasons under the human rights category that mean people can't fit into the hybrid workplace as planned. Flexibility and creativity are going to be key here again, taking things on a case-by-case basis, trying to bear in mind those principles of fairness,

reasonableness and trying to work with your employees to find an accommodation that will work.

Whether it's allowing employees to work remotely for a specified period, whether it's full-time or part-time, it's going to depend on what their legitimate human rights needs require. It may mean modifying their job duties or bundling their duties or giving them assignments that look a little bit different for a period of time so that they can avoid whatever it is they're restricted from doing because of their protected needs.

If they can do part of their work from home, maybe it's giving them that part of their work on a part-time basis for now, and then maybe reassigning for now the part they cannot do in person. If they're unable to come to the office and their role is completely in-person role for legitimate reasons, it might look like a leave from work until things are resolved one way or another.

It might be allowing a flexible work schedule, if there are other maybe mental health issues contributing to an inability to come to the office on a full-time or hybrid basis. If it's an issue around public transit, that may mean the employer helps them get to work in another way. **It's going to be very fact-specific and depend on what the employee needs at that time.**

We've got this potpourri category here of additional consideration to run through quickly as you're thinking about your hybrid workplace. Number one would be office equipment **at home, is there an obligation for an employer to provide or pay for employees' office** equipment at their home offices if you are telling them to work from home? Employers may not have a freestanding obligation to do that, but there may be an interest on the employer's part to ensure that employees have strong, secure, reliable and fast internet to get their work done.

**Given those occupational health and workers' compensation considerations we** mentioned, the employer may also have an interest in preventing injuries that might arise from improper, unergonomic, unsafe working spaces. The duty to accommodate still applies at home, so if employees need special equipment that would likely still need to be provided at home. Many employers are providing allowances or certain equipment to employees to facilitate working from home. Coming back to that challenge in recruiting, that may be a perk that employers should consider providing to their employees, even if it's not strictly required by statute or otherwise.

The next one is jurisdictional considerations. Especially at the beginning of the pandemic, a lot of employees said, hang on if I'm going to be working remotely, I'm out of here. **I'm going to leave the city, I'm going to live at the cottage or I'm going into the** back country or what have you. Now as you're working on your hybrid workplace or calling people back to the office, we're now looking at this from another perspective.

Are we okay with employees having done that or continuing to do that? If they're in the province and you're okay with the employee not being regularly available to come to the office, to a certain extent that's okay. If it's a completely remote role great, maybe you need to set some parameters that the employee has to make their way into the office for monthly team meetings or what have you. But once they cross the border, even if it's a provincial border, there are some new considerations that arise that you'll want to think about.

If your employee is regularly working from a new location, you might want to ask **questions like does the company now need to register for workers' compensation in that jurisdiction?** Are we carrying on business in this jurisdiction now because we have an employee there? Do we need to do anything from a corporate perspective, whether it's corporate filings or paying taxes? If the employee is sitting in that jurisdiction and teleworking, do they need an immigration permit to do that or a visa and will the local employment laws apply?

If somebody is doing work in a certain jurisdiction, most likely the employment laws of that jurisdiction are going to apply and the company's going to have to think about how they're going to comply with those. We may not be able to answer these questions that easily because they do differ depending on the laws in each jurisdiction. The visa requirements to the U. S. are going to look different than to the U.K. for example. That's a question that you all need to think about and get an answer to before you approve all your employees completely going remote and leaving the country. There may also be impacts to the company in Canada for essentially having foreign workers and you'll want to get tax and immigration advice on those points as well.

Now, onto privacy and confidentiality. Number one is considering security of the **employees' information and access for IT.** If employees are working from their own home networks, whether or not they're using a VPN to login to the company network or system, you'll want to think about the security of the company information that they're going to be accessing remotely. You want to get your IT team to set you up so **everything is sufficiently protected.** You'll also want to make sure that IT actually can remote in to help with any issues that arise while they're working remotely. Whether that means tweaking your current system or setting something else up to make sure everything is smooth and runs safely, that's what you'll need to think about.

The question around expectation of privacy in a home office, Melissa touched on that earlier around Bill 88 and electronic monitoring. It's a big question. Home offices are still in their home, but at the same time work is being conducted there. There is a limited expectation of privacy in even a work computer. Maybe it changes depending on what that computer is used for, whether personal use is permitted. Beyond that, if an employee is working in their home office, it doesn't mean that the employer suddenly has a right to access everything that's in their home because now they work there.

I had a question from someone recently about a headline about U.S. employers installing cameras to watch their employees while they were working from home. We have to think about Bill 88, about electronic monitoring of employees. In a more general sense, it's an important question to consider. Can we achieve whatever the objective is with that type of arrangement, can we achieve that in another way that might be perceived as less intrusive by our employees? Whatever conclusions you reach on these fronts, think about doing training on those key considerations and best practices.

Communicating expectations to employees for your policies, correspondence, regular updates to employees through email or otherwise, updating contracts where applicable, that's all going to be key. Our recommendation is to consider developing a hybrid or remote working policy and a code of conduct that sets out those clear expectations. That's going to help in saying what the employer wants so that employees can do what is expected of them and hopefully you avoid any issues this way. It also helps create a

record that employees were told what is expected of them and if an issue does arise in the future, then you can act and course correct accordingly.

In our view, an effective hybrid or remote working policy should include all of these things: number one is setting clear expectations and defining the rules. Think about what types of roles or employees can work remotely, whether it's if you've been there for less than the first six months, maybe you must be in the office and then after that you're **eligible for the remote policy**. **How often and what time of year - maybe if you're a tax firm** you want to say at tax season, a busy season, you've got to be in the office to work **with the team**. **Where can they work - are they allowed to leave the city or the province** for those tax and immigration considerations, but also accessibility to the office? Think about how your hybrid arrangement might end. Is this a pilot project that you're going to reassess in six months? Even if not, you may want to build in some parameters about when the employer can change the arrangement. Whether you can completely remove it or change it in minor ways, build that into the policy so it's contemplated right from the outset.

You should also remind employees of their more general and already existing obligations to the employer. So performing well, attending at work or being available for work, the duty of loyalty to the employer to act in the employer's best interest, maintaining confidentiality of employer information, all of these still apply despite the fact that there is remote or hybrid work. Similarly, examples of behavior that would be **contrary to the code of conduct all still applies - workplace harassment or violence, other important policies**. Just because people are working remotely doesn't mean that workplace harassment can't occur. You want to remind people and provide extra reminders because of this different context that this still is the expected type of conduct you have as an employer, and that they need to comply with it.

On hours of work and overtime it will be important to include clear procedures around that. Again, we talked about this - what are their hours of work, what are they supposed to be doing outside of those hours, do they have a right to disconnect, and even if those hours are flexible setting up those general expectations about total amount of work and procedures to address any issues.

**Safe workplaces - consider doing that risk assessment checklist, having employees** check around for a safe workplace in their home offices and then sign back to say that they've done that or to say, actually I need some cable ties or I need an ergonomic chair, and then think about whether you're going to reimburse for those things. You also might want to set out what's going to be expected from an internet or equipment perspective. Your policy might say you are expected to have internet of at least a certain speed, you're expected to use an ethernet cable if you can rather than Wi-Fi, it should be a private network and not working on the Starbucks Wi-Fi, for instance, setting all of those kinds of considerations.

In terms of leadership high-level buy-in, employers should set out responsibilities for managers and organizational leaders as well. There can be flexibility, but you want to have everyone in the organization on board for the hybrid workplace you're trying to implement. Setting out expectations for everyone at every level will be important.

You also want to make sure that you build in room to vary the application of your policy where needed for human rights accommodation purposes. That's the whole point of

accommodations, it's an adjustment to the norm where required under human rights legislation and so you need to have that flexibility to make individual arrangements where needed. Policies aren't going to anticipate every single possible situation that's going to arise, especially as we venture into this still kind of new area of hybrid working. But, if you set out guidelines and general principles and the expected conduct you have of your employees, it'll put you in a good position to have a strong, effective, cohesive hybrid workplace.

Any questions?

I see a question here: should employment contracts reference hybrid models or be silent? There's some questions around introducing new employment contracts for existing employees, whether it's going to be a change to terms of employment and you have to think about do we want to be presenting employees with a new contract or do we want to approach this more as an informal, not that significant kind of change? It's a bit of a strategic consideration around the constructive dismissal analysis. But if you're hiring a new employee and you have the opportunity to present them with a fresh clear employment contract and they are going to be subject to a hybrid workplace, I do think it's a good idea to reference in the contract what your expectations are of that employee. Traditionally you would say congratulations, this is an offer to join the company, you'll be working as a position title reporting to whomever at the XYZ office. And so, instead of at the office, you can say this is a remote role, or this is a hybrid role, and you can set out those terms of employment right in the contract if that's your opportunity to do it.

### **Melissa Eldridge**

The only thing I would add to Maddie's review is that for now hybrid workplaces are our realities, you may want to include a sentence or two indicating that the employer may choose to change the arrangement away from a hybrid workplace if that's something that your workplace is contemplating in the future. If you know the position will be remote or hybrid indefinitely then making that clear and attracting and retaining people **makes perfect sense**. **If you're unsure whether or not this will be the way forward for the next several years, then building in an escape clause as an organization is also an idea you can consider.**

### **Maddie Axelrod**

Definitely agree. Escape clause is going to be important. This has come up in a number of contexts recently where, when you're introducing a new policy, we are learning that it's going to be important to consider at the beginning the exit strategy. Is the policy going to be in place forever or what's going to trigger us to review this and change the policy?

A few other questions have come in. There is here around the disconnecting from work policy coming in June. I think in the last webinar, what we probably said was we'll see if the government issues regulations that provide further detail around what needs to be in this disconnecting from work policy. We don't think there's going to be further detail at this point. First of all, given the passage of time we still haven't seen it. Second of all there was a publication on the Ministry of Labour's website that basically said there's no guaranteed right to disconnect under this new part of the ESA, all it says is that you have to have the policy and it doesn't provide any further detail beyond what the original

legislation included. Given that the Ministry of Labour has published this guidance on this policy, it's pretty unlikely that they would then have to go amend it because some new regulation is forthcoming shortly. So at the moment we think this is pretty well all we're going to get.

**Melissa Eldridge**

**Here's another question: if we allow employees to work from anywhere in the world for four weeks a year, are there tax implications and visa implications? Is there anything else to consider? We have a list of countries employees cannot work from.**

I'll provide a classic legal answer, which is it depends, but Maddie's presentation touched on a case-by-case analysis and I think that is the prudent response here. Depending on the jurisdiction where the work is being carried out, four weeks does seem like an incredibly low period of time and may qualify more like a working vacation than anything else. But in terms of visa implications and tax implications, that's something that it would be prudent to get advice on depending on the type of work being carried out. So is it plugging in your computer and responding to emails or is it going and actively engaging in a trade fair or sales, marketing, or working at a plant. These are all considerations that would factor into the correct answer. Maddie do you have anything to add to that?

**Maddie Axelrod**

Yeah I think that's absolutely right. It's going to really depend on where they've gone and what the issues or what the consequences of an employee going to a particular jurisdiction are going to be. And to your point, even if there are maybe some risks of consequences coming from an employee going to work in another jurisdiction, if it's a very short period of time you may as an employer decide that it's okay to take that risk, that you're comfortable taking that risk for a short period of time. Again, at the end of the day, it's going to come down to communicating with your employees. If you say in a policy you can work for up to two or four weeks a year from anywhere, that may be okay. But maybe you set out, as you've mentioned in your question here, certain places that, because you've done the analysis and it is higher risk from that compliance perspective, that employees cannot work from those jurisdictions. So yeah, I think that's all that I would add on that front.

**Here's a question around obligations for accommodating an employee who says they have to work from home because of a higher-risk individual at home. Again, the classic lawyer answer is it's going to depend. I think what you would do in that situation is ask for supporting documentation. It's a little bit trickier when it's not the employee themselves but someone they live with, but you can still get certain information without getting sensitive medical diagnosis, for example.**

You can get certain information, enough information that you as the employer can understand what's required and put in accommodations as necessary. Generally, I would say that the duty to accommodate probably still does apply here. I think that probably falls under, whether it's family status or if it's association, so if somebody else has a disability and they're associated with somebody who has a disability, that's still probably protected. And then, you know, what steps you're going to take in response to that is going to be very fact specific. Whether that means they work from home the

whole time, at certain times only or take additional protective steps, it's going to have to be individualized based on the employee's personal situation.

### **Melissa Eldridge**

The only thing that I would say is that I've seen some employers take the position that workplace accommodations start with the start of the work day and how you get to and from work is the employee's responsibility. I've seen that approach and I understand that approach when clients share that. However, I do think it's prudent to take Maddie's points into consideration in terms of engaging in dialogue and understanding their concerns. Often when individuals are talking about crowded buses or crowded trains, there could be other issues at play and the focus on getting into the workplace or getting out of the workplace may be the opener to a larger conversation. Those issues typically don't disappear once the individual is in the workplace.

### **Maddie Axelrod**

**The last question we have here is around fire wardens, it's very interesting. The** question is, how are employers handling the role of a fire warden in the hybrid world where we can't guarantee that the fire warden is on site on a specific day. So what are the best practices and how are we held accountable?

I will say I'm not 100 per cent up to speed on obligations in terms of fire codes and having somebody on site. I think there were amendments to various building obligations at the beginning of the pandemic and we can check on the current status of those. I think if the conclusion is that there must be a fire warden on site or that it's best practices to have someone on site, see if you can implement a rotation. If you've only got the one fire warden, it might be a bit of a stretch to say if not for your role as a fire warden, which is probably a volunteer position, you would be permitted to work remotely but now you need to work in the office five days a week. That may not go over well. So see if you can get some other volunteers and then they can rotate. If it turns out that under the building code you do have to have someone on site, then see if you can rotate it. But if at the end of the day that's part of the person's job, and I sort of assumed it was a volunteer role, but if it is their job and it needs to be in person then it needs to be in person.

### **Melissa Eldridge**

Maddie we are seeing downtown but also at offices across the province that workplaces are not being fully utilized in terms of every floor or every corner of an office. We are seeing a shift to more of a hoteling approach in workplaces. I raise this not only because it adds to that innovative adapting approach that employers are taking, but it also can get around the fire warden issue.

If you have some direction or registration required for individuals who are coming into the office, if certain floors are empty, then you may not need the fire wardens where there are no employees. And so you may want to strategically space out or group employees to promote a collegial workplace in an otherwise more empty office space. That's a consideration as well, moving away from the traditional desk or cubicle approach into a more collaborative work environment where monitoring employees, insuring health and safety, and promoting the team, becomes a lot easier.

## **Maddie Axelrod**

Our last question that's come up here is should we be providing work from home agreements for hybrid work?

It comes back to that first question that we talked about, whether employment agreements should reference hybrid work and I think it's the same response -there are some considerations around introducing new agreements for existing employees and a bit strategic around the constructive dismissal analysis, so something to think about. You also want to think about the specific circumstances of your employees. Are they freshly hired or are they very long service? How do you think they're going to react to the idea of hybrid work?

As a general point, you do want to communicate expectations, so if you have an opportunity with a new hire or if you think it's appropriate in your workplace to issue a more formal communication like a work-from-home agreement, then I do think that's a good practice. It sets up clear expectations and gets employees to sign off on them. An agreement is really a two-party contract and if the employee's signing off and saying I acknowledge that this is what's expected of me as an employee, this is my role and my responsibility in participating in the hybrid workplace, that's generally a good idea.

## **Melissa Eldridge**

Very much agreed. Well I'll say thank you very much for starting your morning with us and joining us for this breakfast club. It was my pleasure to meet you virtually as part of this hybrid environment and I do look forward to future presentations in person. I thank Maddie for co-presenting with me. Maddie, over to you.

## **Maddie Axelrod**

Thanks everybody, we're looking forward to seeing you again soon. If anyone's in B.C., there is a Vancouver breakfast club happening on June 15. Otherwise we'll see you in Toronto in the fall.

By

[Maddie Axelrod, Melissa L. Eldridge](#)

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