

 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The Ottawa Region 2021 <i>Charity &amp; Not-for-Profit Law</i> Webinar February 11, 2021</p>
<p><b>Do's and Don'ts: Managing Employees Working Remotely</b></p> <p>By Barry W. Kwasniewski, B.B.A., LL.B.</p> <p>bwk@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p>	
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<p><b>A. INTRODUCTION</b></p> <p><b>1. Overview</b></p> <ul style="list-style-type: none"><li>• COVID-19 Pandemic has caused significant changes in workplaces, including for charities and not-for-profits</li><li>• We are not certain if this is a temporary interruption or if the changes are creating a new permanent “normal”</li><li>• Note the “Do’s” and some “Don’ts” of managing employees who are working remotely, either part-time or full-time, and tips for dealing with challenges discussed throughout this presentation</li><li>• The employment laws discussed in this presentation relate to Ontario, so it’s important to consult with employment lawyers in other provinces as necessary</li></ul> <p>www.charitylaw.ca <span style="float: right;">www.carters.ca</span></p>	

## 2. Current Situation

- Organizations have had to reduce their operating hours or close their doors because of government, emergency orders, regulations and public health directives
- Ontario government declared an emergency on January 12, 2021 and, after a 14-day extension, the order expired on February 9, 2021
- Depending on where you are located and the number of COVID-19 cases in your area, the situation may be more or less severe for workplace restrictions

## 3. Key Legal Issues: Do's and Don'ts

### First:

- compliance issues regarding the Ontario *Employment Standards Act, 2000*, focusing on overtime pay and working from home

### Second:

- developing a "Work from Home" policy: a management tool that sets expectations of employees working remotely

### Third:

- human rights law and issues employers may face with accommodation requests for staff working from home, focusing on the Ontario Human Rights Code "family status" provisions

## A. EMPLOYMENT STANDARDS COMPLIANCE

### 1. Do: Follow the Law in Ontario

- Overtime pay claims are a potential liability for employers with staff working from home
- Ontario's employment standards in the *ESA*, Section 22, require overtime pay at a rate of 1½ times the regular rate for each hour in excess of 44 hours per week: <https://www.ontario.ca/document/your-guide-employment-standards-act-0/overtime-pay>
  - Managers and supervisors are exempt from overtime hours obligations in Ontario
    - What exactly a “manager” or “supervisor” is has been frequently litigated

### 2. Managing Overtime

- Workers may be putting in OT hours while working from home either by mistake or to be more productive for the employer
- Employees must be paid overtime for work in excess of 44 hours per week; this can be expensive
- How to mitigate this risk? Do:
  - Give workers a set of written expectations and limitations for their hours per day and per week
  - Require employees to track and submit their hours regularly
  - Instruct employees that all overtime must be pre-approved in writing

- “Dark hours”: Do inform employees that during certain times they are not permitted to log onto their work computers or respond to emails or calls (e.g. before 8 a.m. or after 5 p.m.)
- Managers: Do not expect employees eligible for overtime to respond to calls or emails during their off hours, or you may be required to pay compensation

### 3. Vacation “Do’s”

- Section 33 of the ESA: minimum two weeks per year for employees with less than 5 years, and three weeks per year for employees with more than 5 years
- <https://www.ontario.ca/document/your-guide-employment-standards-act-0/vacation>
- Unused vacation time can accrue for employees working from home into a significant liability
- Employers must set clear policies with employees, and may require them to take vacation time (even if they are unwilling)
- Employees working from home have the same legal rights as those who are physically at work

## B. DO: CONSIDER WORK-FROM-HOME POLICIES

### 1. New and Uncharted Territory?

- Even prior to the pandemic, it was already common for some industries, such as IT to have employees working remotely
- But many organizations in the charitable and NFP sectors are not used to remote work, so it's necessary for management to adjust
- Organizations may want to consider written policies for employees to set clear guidelines
  - There is no legal requirement for these policies but they should be helpful and proactive

### 2. Typical Issues in Work-From-Home Policies

- Permitted duration and days of the week for work from home and work in the office
- Discretionary right of employer to oversee and alter or revoke the agreement to work from home depending on the employer's needs
- Exclusivity: an employer's right to require that employees at home work only for the employer and not operate a side business without consent
- Regular working hours and overtime authorization to exceed regular working hours, or "core hours" for an employee who is working on a flexible schedule

- Equipment requirements, such as computers and software, to be approved by the employer, for staff working remotely to complete assigned tasks
- Security requirements: maintaining passwords, restricting access to other members of the household, protecting confidentiality of saved information
  - May need to have policies to restrict the use of personal devices, if they lack security, for work purposes
- When to allow the employer access to the employee's home to assess the security of equipment in the working area, or to conduct maintenance or repairs and retrieve equipment

- Responsibility for ordering and paying for home office supplies for employee to complete their work
- Employee responsibility to maintain personal property, including liability insurance coverage, in a case of damage to property, and any injury claims by third parties for incidents on the employee's premises
- Employee's income tax responsibilities, such as determining the tax implications for maintaining a home office area on their property, and encouraging them to seek advice from a qualified tax professional
- These issues should all be part of a work-from-home policy to give clear instructions about rights and obligations; work-from-home may be time limited

### 3. Don't: Risk Constructive Dismissal Claims

- Employers should be clear in their policies that working from home is not an “essential condition” of the employment contract and may be a temporary situation
- Otherwise, if required to return to an office, staff who have been working from home may claim a “constructive dismissal”: a legal argument that the employer breached the employment contract
- “Constructive dismissal” is a common law concept that states an employer cannot change an “essential condition” of an employment contract without consent
- Such claims are brought to court as wrongful dismissal lawsuits and can lead to expensive monetary payouts depending on the circumstances

## C. HUMAN RIGHTS CODE COMPLIANCE

### 1. Human Rights “Do’s”

- The pandemic is upsetting the regular routine of our family lives with closures of daycares and schools, increasing the burden on parents and caregivers
  - Employees are struggling to fulfill their obligations to their families along with work requirements
- Ontario Human Rights Code ss. 5(1) and 5(2) prohibits discrimination and harassment in employment on the grounds of “family status”

**Do:**

- be aware of your human rights obligations as an employer to your employees

## Employment

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, **family status** or disability. [Emphasis added.]

## Harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, **family status** or disability. [Emphasis added.]

- Employers will need to be flexible with employees' family needs if they are seeking accommodations, especially in light of the ongoing pandemic
- Employers must consider an employees' request for accommodation along with possible alternate work arrangements
  - Alternate arrangements can include modified work hours, reduced hours or leave of absence for family care obligations
- Ontario Human Rights Commission's COVID-19 policy statement includes a discussion of family status discrimination in the context of employment: [http://www.ohrc.on.ca/en/news\\_centre/ohrc-policy-statement-covid-19-pandemic](http://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-pandemic)



## E. KEY TAKEAWAYS

- ✓ Working remotely is a new reality that has developed very rapidly because of the COVID-19 pandemic
- ✓ Managing employees working from home is a significant operational and legal challenge for many organizations in the charity and NFP sectors
- ✓ Charities and NFPs need to rethink how work can be done, as many employees will expect a more flexible work-from-home policy, even after the pandemic ends

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