

# Workplace Solutions

By Jack Graham and Lana Rafuse of McInnes Cooper



## Deconstructing the workplace

### Five steps to develop a 'flexible' workplace

**D**riven by technological advancements combined with growing aspirations for better work-life balance, more employees are seeking flexible work arrangements. Whether and how to offer flexible arrangements is a business decision, but it's one best made with full appreciation of the legal issues. Here are five steps to help employers assess those issues:

**1. Grasp statutory obligations** All employees, including those in flexible arrangements (such as telecommuting), are governed by employment-related statutes, including:

- **OHS** Employers are responsible for a safe working environment for employees even when they work offsite. Attempt to limit safety issues, such as delineating telecommuting employees' work environment.

- **Employment standards** All benefits apply equally to employees in flexible arrangements, but particularly challenging is the typical requirement that employers keep accurate information about hours worked and overtime pay. If there's a complaint, the employer must have the required records and prove the hours worked and paid, and the overtime required, approved or condoned. Establish a reliable mechanism to accurately track those hours without direct supervisory monitoring.

- **Workers' compensation** Employees who sustain an injury on property over which the employer has no control (or possibly even knowledge) could assert a workers' compensation claim. Issues could also arise when it's unclear whether an employee is "at work" for this purpose.

- **Human rights** Distinguish between flexible arrangements as a human rights accommodation and optional ones. Ensure flexible programs don't inadvertently adversely impact employees with a protected characteristic (typically gender or family status) and administer them in a non-discriminatory manner. Determine upfront whether you'll offer flexible arrangements to all employees with appropriate jobs and if dealing with flexible arrangements on an *ad hoc* or project basis ensure the policy details objective criteria for participation. Otherwise, refusal can create friction — and a discrimination claim.

**2. Anticipate likely risks** Plan according to the legal and operational risks in your circumstances. One of

the most common is technical glitches and data leaks. Before allowing employees to work offsite, carefully assess the tasks and tools they use day to day, including hardware and software, how often they use them and any associated operational, privacy or data security risks involved in allowing data access or storage offsite.

**3. Consider other risks** Some aren't as obvious, but they're just as significant.

- **Contract** A flexible arrangement will become a term of employment when employees have been participating for many years, it's no longer temporary or it's otherwise guaranteed, requiring the employer to provide reasonable notice of intention to change the arrangement or risk a constructive dismissal claim.

- **Negligence liability** This is an underestimated flexible arrangement legal issue. For example, in a traditional office, the employer bears liability for injuries to a third party or property damage caused by employee negligence; injury to a third person or damage to a telecommuter's home office during the course of work is a complicated liability situation. Consider extending liability insurance coverage to appropriate premises and require employees to maintain coverage or limits.

- **Cross-border** If an employee's usual workplace is in a province or country different from the employer's premises, it could be complex to determine the applicable legal regime and/or the employer's legal obligations respecting cross-border transmission of confidential, proprietary or sensitive personal information.

**4. Put it in writing** Written policies, with corresponding written agreements and employee authorizations, clarify areas including: responsibilities; performance expectations; employee consent to monitor remote work or access the employee's workspace for IT setup and OHS inspection; retrieval of employer property; responsibility to recover, maintain and replace employer-issued equipment; permitted use of employer-owned equipment or "bring-your-own-device" guidelines; responsibility for protecting proprietary and confidential employer information; and applicability of workplace rules offsite. And always retain discretion to limit or cancel any part of a flexible arrangement — in writing.

**5. Prepare managers** Use training to prepare managers and supervisors for this new way of working. ■

---

*Jack Graham is a partner and Lana Rafuse a labour law analyst with McInnes Cooper.*