

# Recalling prodigal workers – and avoiding constructive dismissals

**Employers should bring remote workers back in 'bite-sized pieces... rather than a drastic change': lawyer**

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More than four years after the start of the COVID-19 pandemic, things are more normal than they have been, but the workplace remains changed with many more workers working remotely or in a hybrid model than prior to 2020.

If an employer wants to change that, it might not be easy, according to Daniel Hassell, an employment lawyer at Zubas Flett Law in Toronto.

One potential liability for ordering employees who have been working remotely to come back into the physical workplace is constructive dismissal, says Hassell.

“If there's no employment contract in place that deals with the employer's right to have the employee working at the office, then it could be that there's an implied right to work from home,” he says. “[A directive to work in the office] could breach an essential term or condition of employment and the employee could resign involuntarily and trigger a constructive dismissal claim.”

If that happens, the employer could potentially add a layer of protection, or at least reduce potential damages, by making a new offer of employment, adds Hassell.

“A court might assess whether the employee had a duty to mitigate by accepting a new offer of employment,” he says. “The timing of that offer could be important because it wouldn't really carry any weight unless it was after the employee resigned as a result of the [constructive dismissal](#).”

## **Accommodation requests**

Another liability could come about if the employee has been working remotely for some time and their circumstances at home evolved into something with potential human rights elements involving requests for accommodation based on disability or family status from childcare or eldercare obligations, adds Hassell.

If an employer wants to get its workforce mostly [back in the physical workplace](#) after a period of time working remotely, Hassell suggests taking a gradual approach rather than shocking people with a sudden announcement.

“If possible, introducing a hybrid relationship and increasing the time at the physical work location could be helpful in increments - do it in bite-sized pieces to make it more palatable, rather than a big drastic change,” he says. “An abrupt change, where they're calling employees back to the physical workplace without any advance notice and without regard to the employees' circumstances to where some of them may have moved or had other changes to their personal life that could affect their ability to get back to the workplace, could be problematic.”

“Sometimes there's not necessarily a tangible reason to return to the workplace, so if the employer can really justify it in a clear way, that would be helpful, and set out clearly why the return to the workplace is important, considering that things have been remote for a certain period of time,” adds Hassell.

A gradual approach could also help mitigate the constructive dismissal risk if the employer provides reasonable notice of the change.

“Courts have allowed some flexibility for employers and I think the employer would have some latitude if they gave reasonable notice of a change and tried to work co-operatively with the employee,” says Hassell.

### **Orientation, health and safety**

There are also practical issues with bringing a number of employees back to the workplace after being away for a while.

“The usual training requirements that would be involved in having employees at the workplace, like health and safety, that's really important, and also just introducing them to the office,” says Hassell.

Once employees are back in the physical workplace for the most part, it's incumbent for employers to [keep informed of developments](#) related to new waves of COVID-19, influenza, RSV, or other diseases that could spread in the public and an office environment.

“Hopefully, these new variants [of COVID-19] aren't so serious and things don't deteriorate, but if there's COVID or other infectious diseases, it's really important for the employer to put in place any health and safety measures that would be required in the circumstances, take every precaution reasonable in the circumstances for the protection of the worker, and make sure they're safe with training on any other measures to protect from COVID or other hazards,” says Hassell.

While most employment contracts didn't address the circumstances of remote work during the pandemic and afterwards, employers can take more control over it now with [remote work policies](#) and clauses in future agreements and updating existing agreements, says Hassell.

“It's important for employers to indicate in employment contracts that it's up to the employer to decide what the working relationship will be like, where the work is going to take place, and how much the ratio of working remotely versus working at the physical

workplace will be at the employer's discretion," he says. "And in addition to the usual work-from-home policy requirements that the remote office has to be appropriate for performing the job, include things like confidentiality will be respected and the employer's proprietary information isn't going to be vulnerable."

A good approach is to work with any employees who may be resistant to returning to the physical workplace full-time to find a solution that works before resorting to extreme measures that could increase liability, according to Hassell.

"Hopefully, a lot of employees are eager to get back to the workplace and it goes smoothly for the majority," he says. "If there's an objection or pushback, get legal advice because everyone's circumstances are a little bit different."