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Employment Law Issues in the Post-Pandemic Workplace

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ACC Ontario Chapter

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Agenda

- Return to the Office
- Work from Home
- Hybrid Model
- Vaccination Policies

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Return to Office

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Health and Safety Considerations

- All employers have a duty to take precautions to protect their workers.
- In the context of returning employees to work, these precautions should include:
 - Conducting a COVID-19 risk assessment
 - Developing a return to work plan
 - Implementing COVID-19 policies and procedures
 - Vaccination policy
 - Screening prior to attendance
 - Requiring masks and other PPE
 - Maintaining social distancing and installation of physical barriers
 - Performing enhanced cleaning and sanitation
- Regular review of COVID-19 policies and procedures

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Contingency Planning

- How can employers prepare for the worst?
- COVID-19 policies and how to address outbreaks
- Returning to remote work (temporarily or permanently)

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Work from Home

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Work from Home

- Making work from home a permanent arrangement will constitute a change to working conditions
 - May be given advance notice
 - Consider accommodating employees who object to the arrangement
- Viewed as beneficial or detrimental change
- Ensure remote work is addressed in employment agreements on a go-forward basis

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Policies

- Set expectations through written policies
 - Hours of work and responsiveness
 - Performance management, supervision and discipline
 - Overtime
 - Communication (email, video conferencing, etc.)
 - Company property
 - Security of information
- Communicate policies to employees

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Home Office Set-Up

- Ensure employees have an appropriate home office set-up
 - Regularly canvas employees about any issues and brainstorm solutions
 - Provide necessary equipment and supplies
 - Set clear expectations about ownership and return of property

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Privacy and Employee Monitoring

- Balancing employer / employee rights
- Consider:
 - Is monitoring necessary to meet a specific need or address a specific issue?
 - Is the method of monitoring effective to meet the need or issue?
 - Is the employer collecting the minimum amount of personal information necessary to achieve the identified purpose?
 - Is there a less invasive measure that could achieve the same result?
- Policy
 - Notify employees that monitoring will take place and address expectation of privacy
 - Identify the purpose for monitoring
 - Confirm that monitoring will be done in a reasonable manner

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Occupational Health & Safety and Workers' Compensation

- Application of occupational health and safety legislation to work from home arrangements
- Demonstrating due diligence for the protection of workers
- Application of workers' compensation insurance

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Hybrid Model

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Our New Normal?

- Hybrid model
 - Change in working conditions for most employees
 - Flexible vs. fixed structure
 - Accommodation obligations
 - Employee morale/work life balance

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Alternative Work Arrangements

- Benefits
 - Attractive to many employees
 - Retention tool?
 - Effect on productivity and attendance
 - Reduction in costs
 - Supports employee morale and work/life balance

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Alternative Work Arrangements

- Disadvantages
 - Not suitable for all positions
 - Loss of productivity
 - Loss of team spirit/sense of belonging
 - Greater risk of disclosure of confidential information
 - Requires different management methods
 - Increased risk of systemic discrimination

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Human Rights

- Discrimination in employment is prohibited when it is based on specified individual characteristics, beliefs and relationships
- Protected Grounds:
 - Creed/religion
 - Disability
 - Sex (including pregnancy), sexual orientation, gender identity, gender expression
 - Race, ancestry, place of origin, colour, ethnic origin, citizenship
 - Age
 - Family status, marital status
 - Record of offences

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Accommodation Obligations

- Employers have an obligation to accommodate employees on the basis of protected grounds to the point of undue hardship
- Trigger: an employer becomes aware, or ought reasonably to have known, that an employee is in need of accommodation e.g., an employee...
 - asks for assistance or accommodation
 - brings in a doctor's note
 - experiences a sudden decline in previously strong performance
 - comes in late frequently with alcohol on their breath
- Express request for accommodation not always required
- Requires difficult discussions

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Accommodation Obligations

Employee

- Participate in process:
 - Provide information to substantiate the request for accommodation
- Work with the employer to evaluate accommodation options
- An employee does not get to unilaterally choose the accommodation measure
- Accept appropriate accommodation measure presented by employer

Employer

- Act in good faith
- Procedural duty:
 - Investigate / consider all reasonable accommodation options
 - Involve the employee
 - Obtain information required
- Substantive duty:
 - Implement appropriate accommodation

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Undue Hardship

- Test is not whether it is “impossible” to accommodate, but whether it would be an “undue hardship”
- Difficult test to meet
- Consideration cost and health and safety
- Failure to accommodate to the point of undue hardship will constitute a breach of the human rights legislation

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Accommodation Trends

- Family Status
- Disability
- Mental Health / Alcohol and Drug Addictions

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Vaccination Policies

- Vaccination in the workplace is a novel and evolving issue
- There is limited government or public health guidance on what is and is not allowed in the workplace in Canada

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Key Considerations

- **Occupational Health and Safety**
 - Duty to take every precaution reasonable for the protection of a worker in a workplace
- **Human Rights**
 - Prohibits discrimination on the basis of protected grounds, including disability, sex (pregnancy), religion/creed
 - Duty to accommodate to the point of undue hardship
- **Privacy**
 - Comprehensive legislation in Alberta, British Columbia and Quebec
 - Key Principles: consent, identifying purposes, reasonableness, limiting collection, use and disclosure, accuracy, limited retention, safeguards
 - No comprehensive privacy legislation in the other provinces, but same best practices

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Questions

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