



WORKERS' HEALTH AND SAFETY PROTECTIONS AND WORKING FROM HOME

September 2020



The National Union of Public and General Employees (NUPGE) is a family of 11 Component and 3 affiliate unions. Taken together, we are one of the largest unions in Canada. Most of our 390,000 members work to deliver public services of every kind to the citizens of their home provinces. We also have a large and growing number of members who work for private businesses.

Larry Brown, President

Bert Blundon, Secretary-Treasurer

While the COVID-19 pandemic continues, working from home (WFH) arrangements are becoming the new normal for many workers. The increase in long-term teleworking will likely expose gaps in workers' legal protections and WFH policies, including protection of workers' health and safety in the workplace. The intersection of WFH and health and safety protection is an unexplored topic that will likely present new legal challenges for workers and unions. Even prior to the pandemic, telework was growing, with little discussion of the potential health and safety concerns with WFH.¹ Anticipating health and safety legal issues will help ensure teleworkers are protected and understand their workplace rights, even when the workplace is their home.

Jason Foster and Bob Barnetson state in their book on health and safety in the Canadian workplace that “in Canada, employers continue to be responsible for the safety of their workers regardless of the location of work.”² While this proposition is a laudable goal, and teleworkers should not have a lower standard of health and safety protections, uncertainty and ambiguity remain regarding the extent to which employers are responsible for their workers' health and safety in WFH arrangements. The Canadian Centre for Occupational Health and Safety (CCOHS) has noted that it is not clear how occupational health and safety (OHS) laws cover WFH arrangements.³ To address the uncertainty, this paper considers how OHS and Workers' Compensation (WC) laws apply to WFH and identifies potential legal gaps. By surveying Canadian legislation, case law, government guidelines, and analogous examples, this paper seeks to help workers and unions identify potential areas of concern for workers' health and safety protection in WFH arrangements.

WFH arrangements present similar physical health and safety concerns as in any office space. For example, workers may not have the proper ergonomic set up at home.⁴ As one CBC article noted, at the beginning of the pandemic, “the priority wasn't packing up sit-stand desks or office chairs with lumbar support.”⁵ Furthermore, WFH can exacerbate existing, and present new, health and safety concerns. For example, WFH can increase the risk of overworking because of the challenge of distinguishing work life from personal life.⁶ Separating work life and personal life can be a new source of stress for workers who are WFH.⁷ WFH can also increase risks of domestic violence for workers living in unsafe homes.⁸ Finally, working alone can isolate workers, especially in the context of the pandemic, which can lead to mental health problems.⁹ A European report found that isolation and the lack of informal information sharing is one of the most problematic aspects of WFH arrangements.¹⁰

WFH can also be an important accommodation for workers, and thus a safer and healthier option for some. Disability rights advocates have long been asking for increased access to WFH arrangements because WFH can make work more accessible.¹¹ Furthermore, WFH can also reduce stress and increase work-life balance for some.¹² Identifying gaps and potential legal issues regarding health and safety and WFH, as this paper aims to do, can help workers and unions advocate for safer and healthier WFH arrangements, while not negating the potential health and safety benefits of WFH.

OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

The following section considers how provincial OHS legislation may or may not protect the health and safety of workers WFH. WFH creates challenges to the general application of OHS legislative frameworks. For example, in terms of physical space, inspections must be conducted differently in WFH situations because the workplace is also a private residence.¹³ Furthermore, control over the physical space may be an issue. If the worker is working on their own property, or on a third party's property, the employer may not have authority to inspect hazards and then implement controls. Identifying the appropriate level of oversight, supervision, and protection is more difficult than in a traditional workspace and may not be contemplated by legislation.¹⁴ In general, workers are less likely able to access their rights or entitlements when WFH, and even if specific rights and protections exist, enforcement is more likely to be an issue.¹⁵

While it is important to understand further how OHS legislation applies to WFH, the limited case law on the application of OHS to WFH makes this task more difficult and suggests that OHS legislative frameworks have not been, and may not be, the best method to protect workers. Workers' advocates and unions may find that focusing on other strategies to protect the health and safety of workers who are WFH could be more successful than trying to fit WFH conditions into current OHS frameworks.

For example, ensuring that every workplace with workers WFH has policies outlining health and safety responsibilities and practices, as well as other measures such as access to ergonomic assessments and detailed communication plans, may be more useful than expecting the worker to enforce their rights under OHS legislation. This is not to say that OHS has little import for WFH, especially when gaps currently exist. As an example, discussed further below, application of the violence and harassment provisions in Ontario's OHS legislation should apply equally to workers WFH as they do to workers in a traditional office space. However, next steps should likely involve developing regulations and policies specific to WFH.

In addition, as will become clear throughout this paper, identifying the silences in OHS legislation and how the legislative gaps could impact the health and safety of workers is necessary for a comprehensive analysis. When legislation is silent about specific situations, such as WFH, it is harder to anticipate how the legislation will apply. Furthermore, WFH situations may not be covered by the legislation and may not be considered workplace issues, which could be problematic for some workers.

For example, for workers experiencing domestic violence, WFH may make the "workplace" unsafe by exacerbating unsafe living conditions. Yet, the impact of WFH on these workers is not contemplated in legislation. Future policy development must consider how factors that are not normally workplace issues, and thus not considered by the regulatory framework, may become workplace issues in WFH arrangements.

Little information exists on the application of OHS in at-home offices. Most employers in Canada address challenges of WFH and OHS through their own administrative policies that direct the employee on how to act or how to implement specific protocols. Yet, even with these policies in place, employer follow-up is often limited.¹⁶ Additionally, jurisdictions across the country use different legislative language to describe WFH and OHS. This, along with the fact that governments are unlikely to inspect home offices even if they can,¹⁷ means there are many unknowns about applying OHS in home workspaces.

When surveying the legislation, Ontario's *Occupational Health and Safety Act* (OHSA) is the most concerning in terms of protecting teleworkers because section 3(1) of the act likely excludes telework from the act's application. Section 3(1) states, "this act does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection therewith."¹⁸ A plain reading of the exclusion in section 3(1) suggests that teleworkers are not covered by the OHSA.

While the case law is limited, recent decisions of the Ontario Workplace Safety and Insurance Appeals Tribunal (ONWSIAT) support the interpretation that the OHSA does not apply to WFH.¹⁹ In a 2018 ONWSIAT decision, the tribunal considered whether work done at home could be considered "safe" for the purposes of an alternative work arrangement, even though the worksite (home) was not covered by the OHSA.²⁰ While the tribunal found that whether or not the workplace was covered by the OHSA was not determinative of whether a workplace is safe, the reasoning still suggests that the proposed alternative work arrangement at home was not covered by the OHSA.

Contrary to the ONWSIAT decisions, the reasoning in *Watkins v The Health and Safety Association for Government Services*, an Ontario Labour Relations Board (OLRB) decision, suggests section 3(1) may not bar teleworkers from bringing claims under the OHSA. The Board had to decide whether to hear a telecommuter's case on the merits. The case was brought pursuant to a section of the OHSA. The OLRB allowed the claim to go forward to be heard on the merits, suggesting that even though the claimant was a telecommuter, section 3(1) did not exclude him from bringing a claim. However, the Board never explicitly addressed the implications of section 3(1) on the OHSA's application.²¹ The provision is thus still concerning because it could be used by an employer to challenge a worker who tries to enforce their rights under the OHSA. Following a review of the contradictory case law referenced, Hilary Page, a Toronto employment lawyer, states that while the OHSA likely does not apply to WFH, with "the unprecedented number of employees now working from home, and the lack of clear jurisprudence, this could change."²²

Application of the violence and harassment protections in the OHSA illustrates an area of concern for workers if the OHSA does not apply to telework. For example, section 32.0.7 of the act places a positive duty on the employer to investigate workplace harassment.²³ If the act as a whole does not apply to WFH, provisions protecting workers from violence and harassment would be unenforceable. As Page suggests,

excluding teleworkers from the OHSA is concerning because teleworkers still must interact with colleagues, clients, or other stakeholders, thus the risk of workers being bullied or harassed virtually or over the phone still exists. Page aptly states, workplace harassment “can happen just as easily around the watercooler as on the company Slack channel.”²⁴

Jurisprudence interpreting the OHSA, while not specifically dealing with WFH, can also help us better understand how the regulatory framework will apply to WFH. For example, the Ontario Court of Appeal has found that under section 51(1) of the OHSA, a death or critical injury only needs to be reported to the Ministry of Labour when there is a “reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at a workplace.”²⁵ In *Blue Mountain Resorts Limited v Ontario (Labour)* a guest at the resort died in an unattended swimming pool and the court had to determine whether Blue Mountain had to report the death to the Ministry of Labour under section 51(1) of the OHSA as a critical injury incurred by a person at a workplace. The board had reasoned that Blue Mountain needed to report the death because the swimming pool was a workplace to some employees, and it did not stop being a workplace just because the workers moved from place to place, or were not there at the time of the accident. However, the Court of Appeal found the board’s reasoning unreasonable. The Court stated that while public welfare legislation is meant to be interpreted liberally, that does not mean the provisions are limitless.²⁶ The Court took issue with the board’s focus on the pool as a workplace because of its location. The Court stated, “one can envision endless examples that would be caught by the board’s interpretation, all without any causal relationship with a workplace safety issue. Would parents have to report to the ministry if their child were injured at home because they had hired a nanny?”²⁷ Thus, the Court confirmed that a nexus is needed between the hazard that caused the injury and worker safety to engage the OHSA.²⁸

The Court of Appeal’s reasoning helps us further understand how health and safety regulations may apply to teleworkers. It also further highlights some of the potential borderline situations between work and personal life, as will be discussed further in the section on Workers’ Compensation. Workplace hazards in the home may be hard to identify because the distinction between a private residence and the workplace can be blurred. The case suggests that a nexus between the hazard and workers job and tasks is likely needed to engage the OHSA. Thus, if the person works primarily at a desk, the workspace’s physical condition and the surrounding area would likely need to meet certain safety standards, but physical hazards in the kitchen or bedroom are less likely to be hazards connected to worker safety.

In comparison, British Columbia’s legislation does not have an exclusion clause like section 3(1) of the OHSA, and WorkSafeBC has stated explicitly that many health and safety rights are just as applicable to teleworkers as they are to workers in a traditional office space.²⁹ In BC, the OHS regulations apply to anyone covered under the *Workers Compensation Act (WCA)*. A workplace under the WCA is defined as “any place where a worker is or is likely to be engaged in any work and include[s] any vessel, vehicle or mobile equipment used by a worker in work.”³⁰ Without an exclusion, teleworkers are

likely covered under the act because of the broad definition of a workplace. In addition, the issue of WFH is addressed in specific sections of the act. Section 181(1) of the WCA limits the process for inspections of a workplace when the space is also a private residence.³¹ Similarly, section 28.8 of the OHS regulations excludes private residences from specific air quality specifications, and section 28.9 excludes workers who WFH from the regulations on tobacco and e-cigarette use in the workplace.³² The specific accounting for WFH in these provisions suggests the other provisions apply equally to those WFH as they do to workers on the employer's premises.

BC's approach of only excluding or addressing private residences in specific sections of the legislation is commonly found in other jurisdictions' legislation. In Alberta's *Occupational Health and Safety Act*, occupational health and safety officers are excluded from inspecting private dwellings unless the occupant consents or a judge authorizes the inspection.³³ Similar provisions exist in Manitoba's *Workplace Safety and Health Act*,³⁴ and Prince Edward Island's *Occupational Health and Safety Act*.³⁵

The *Saskatchewan Employment Act* (SEA) has similar wording with regard to inspections of private residences, stating that "an occupational health officer shall not enter a private dwelling without a warrant issued pursuant to section 3-68 unless the occupant of the dwelling consents."³⁶ However, section 3-1(2) of the SEA states that with regard to Occupational Health and Safety provisions,

- (a) if a provision refers to any matter or thing that an employer is required to do in relation to workers, the provision applies to workers who are in the service of that employer, unless the context requires otherwise; and
- (b) if a provision refers to any matter or thing that an employer is required to do in relation to a place of employment, the provision applies to every place of employment of that employer, unless the context requires otherwise.³⁷

Of particular importance in these provisions is the language "unless the context requires otherwise." The extent to which WFH as a context changes the requirements on the employer may cause disputes over applicability of OHS protections for teleworkers. Workers may disagree with the employer over whether the context of WFH limits responsibilities under the act. That said, WorkSafeSask's publication on WFH in response to the pandemic states that many health and safety roles, rights, and responsibilities are just as applicable to WFH as they would be in a traditional office space. Duties that remain the same include reporting workplace injuries, training requirements, safe work procedures, and other check-in procedures if the worker is working alone.³⁸ WorkSafeSask further states that the role of the supervisor may need to be outlined differently, ergonomic assessments may be needed, and follow-up on incidents may need to be administered in a different way for workers WFH.³⁹

Nova Scotia and Newfoundland's legislation is silent about work done at private residences. However, both have broad definitions of what counts as a workplace. In Newfoundland's *Occupational Health and Safety Act*, a workplace is defined as "a place

where a worker or self-employed person is engaged in an occupation and include[s] a vehicle or mobile equipment used by a worker in an occupation.”⁴⁰ In Nova Scotia’s act, a workplace is defined as “any place where an employee or a self-employed person is or is likely to be engaged in any occupation and include[s] any vehicle or mobile equipment used or likely to be used by an employee or a self-employed person in an occupation.”⁴¹

New Brunswick’s *Occupational Health and Safety Act* has similarly broad language defining the workplace; however, the act also has an ambiguous exclusion clause that may cause dispute in the applicability of the act to WFH (similar to Ontario’s legislation). Section 3(1) of the act states that “this act does not apply to a place of employment that is a private home unless the work that is carried on has been contracted to the employer of one or more persons at that private home.”⁴² The provision suggests people WFH are likely excluded from the act except in the context of contract work.

WORKERS’ COMPENSATION AND WORKING FROM HOME

Workers’ Compensation (WC) legislation, Board policies and guidelines, and the limited case law suggest that workers can still access compensation for workplace injuries, even if the injury occurs while working from home.

Workers’ Compensation Boards (WCB) have provided guidance specifically on WFH. For example, the Alberta WCB released a fact sheet on telecommuting. The Board states that “when telecommuting is authorized by an employer, as a general rule, coverage is confined to the defined workspace unless the worker is engaged in an activity that directly relates to the telecommuting work.”⁴³ The Alberta WCB further states that when assessing a claim, the Board looks at the following factors:

- Was the activity on work time?
- Was the activity for the employer’s benefit?
- Was the worker paid for the time?
- Was the worker in that time and place due to employment reasons?
- Was the work arrangement authorized by the employer?
- Did the injury occur in the course of using equipment or materials supplied by the employer?⁴⁴

Additionally, the Alberta WCB provides example scenarios of injuries incurred at home that likely would or would not be covered. For example, if the worker slips and falls on their way to their basement office, they are not likely covered because they were not in the workspace and the injury was not related to employment. However, if the worker has neck and wrist pain from using their own desk and chair that were not ergonomically assessed, the worker is likely covered because the injury is work related and the desk and chair were required for the worker to do their job.⁴⁵

WorkSafeNB's policy outlines how the tests of time, place, and activity apply to determine if the injury arose in the course of employment. With regard to the place of the injury, WorkSafeNB's policy states that "where an accident occurs at a location other than on the employer's premises, WorkSafeNB must consider whether the worker was exposed to the risk because of the employment or as a member of the general public."⁴⁶ Section 2.3 of the policy specifically deals with working from home, and states that "WorkSafeNB generally considers that an accident meets the tests of time, place and activity when the worker has an accident while working from home and performing a function of the job, during hours that the worker would normally be expected to work."⁴⁷

While some guidelines do not expressly address telework or WFH arrangements, the language suggests that WFH would not bar a claim. For example, Saskatchewan's WCB policy states, "an injury occurs in the course of employment when it happens in a time and place linked to employment and if the worker is performing a task which is part of their obligations and purpose of employment. Time and place are not limited to the normal hours of work or the employer's premises."⁴⁸ While not specifically addressing WFH, the language and specific inclusion of locations that are not the employer's premises suggest that the Board will assess WFH claims like any other claim.

In addition, the case law supports the conclusion that the Board does not bar claims on injuries incurred while WFH. ONWSIAT and the BC Workers' Compensation Appeals Tribunal (WCAT) have accepted claims for workers injured while working from home for carpal tunnel syndrome⁴⁹ and ulnar neuropathy.⁵⁰ In another BC case, the worker worked in 2 different areas of his home. One space was used as an office, while the other was his laboratory. The WCAT found that the worker was injured in the course of employment when he hurt his foot walking from one space to the other.⁵¹ Finally, in a Quebec case, the worker had to carry heavy suitcases full of documents for work. The Commission found she should be compensated for a back injury, even though the injury happened at home, because carrying the suitcases was directly related to her employment.⁵²

However, borderline cases may arise when the worker incurs an injury and the distinction between the worker's personal life and work life is not clear. In these situations, a claim for workers' compensation may be harder to prove. For example, in a BC case, a worker fell and broke her ankle in her laundry room while waiting for documents to print. The Review Officer found the fall was not in the course of employment, because the laundry room was not included in the home office.⁵³ Without clear definitions of what areas or activities are considered work, many situations could fall on the borderline between work and personal time.

The WCAT of BC has commented on these borderline cases, stating:
It is clear that a worker is generally not entitled to coverage under the act while at home and while engaged in primarily personal activities. On the other hand, coverage under the act may be appropriate where a worker performs significant work activities at home, for example, in a home office or workshop.

The latter circumstance is all the more difficult to adjudicate because work activities and home life do not always occur in a clearly defined and distinct sequence. It might be that a worker is at one moment in the course of employment while in the home office, but at another moment in the role of homemaker when responding to a neighbor knocking at the front door. It is where an injury occurs in the transition between work life and personal life that coverage under the act may be at its most complex.⁵⁴

Thus, while WFH does not exclude a worker from receiving compensation, workers may have more difficulty getting compensation when the separation between their work life or personal life is not clear. A worker who hurts themselves walking from their home workstation to their home kitchen may have more difficulty making a claim than a worker walking from their office to the office kitchen on the employer's premises. The analysis to determine whether the injury occurred in the course of employment will always be fact specific.

USING ANALOGIES TO BETTER UNDERSTAND POTENTIAL LEGAL GAPS

Analogies to other unique employment contexts can help us better understand and predict how health and safety legislation may apply to WFH scenarios. For example, the experiences of workers with employment-related geographical mobility (E-RGM)⁵⁵ provide insight into some of the regulatory issues and gaps teleworkers may encounter. In their paper titled, "Regulating health and safety and workers' compensation in Canada for the mobile workforce: Now you see them, now you don't," Katherine Lippel and David Walters find that the effectiveness of OHS and WC frameworks is reduced for mobile workers. The nature of employment, time and distance needed to travel to work, and other considerations such as migration status, which make the worker more vulnerable, can present OHS challenges that are not accounted for in the legislative framework.⁵⁶ Similarly, the unique context of teleworking could have consequences for the effectiveness of OHS and WC regulation when WFH is not explicitly addressed in the legislation.

Lippel and Walters explain how commuting accidents are not usually compensable in Canada as a workplace injury. For E-RGM workers this means that commuting injuries or deaths are "invisible to OHS regulators in Canadian provinces."⁵⁷ Thus, fatigue's impact on the workers' health and safety once they leave the workplace is not considered as a workplace health and safety concern. Or, for example, since commuting is not considered a workplace health and safety issue, workers are unlikely to have job protection if they refuse to commute for safety reasons.⁵⁸ Commuting may not be considered in the regulatory framework because it is not technically part of the job; however, commuting conditions can impact worker health and safety. The concern is especially prevalent for E-RGM workers who have long commute times.

Commuting accidents may seem like an irrelevant comparison for WFH hazards because, by definition, people who WFH are not commuting. However, what the example above illustrates is how silence in the regulatory framework addressing the specific context of the workers' working conditions can mean that workers who are put in dangerous situations because of work may still not be covered by OHS or WC legislation. As a hypothetical in the WFH context, a worker's domestic living situation may not be considered a workplace health and safety concern. Yet, for a worker living in a home with domestic violence, WFH can exacerbate the risk of harm for that worker.⁵⁹ In this situation, the WFH condition likely makes the worker more at risk of harm, similarly to how the condition of a long commute can put the E-RGM worker at higher risk of an accident. As with the case of commuting, dangers at home are unlikely to be considered by the regulatory framework. And so, even if the worker is placed in more danger because of working conditions, the worker likely has little recourse to ensure job protection and safety at work. Thus, policies that recognize that WFH may not be a better option for every worker, such as those in which the worker has to consent to a WFH arrangement if their initial job offer did not stipulate WFH as a condition, are needed to make sure WFH is the safest and healthiest option for the worker.⁶⁰

Lippel and Walters also find that the mechanisms for worker participation in workplace health and safety are less effective and more difficult to implement when workers are dispersed or working remotely.⁶¹ Similarly, when workers are WFH, even if their workplace is covered by legislation, they may be less likely to enforce their rights, or even to know their rights to begin with. NUPGE has highlighted concerns about union organizing and solidarity building when workers are dispersed and working alone.⁶² Similar problems regarding limited collective action and organizing could arise with regard to enforcing OHS rights, or acting on health and safety concerns.

Regulations on working alone, or in isolation, may also be relevant and provide guidance on health and safety requirements for WFH. In BC, section 4.20.1 of the OHS regulations defines working alone, or in isolation, as "circumstances where assistance would not be readily available to the worker (a) in case of an emergency, or (b) in case the worker is injured or in ill health."⁶³ Provisions under the regulations outline specific duties on the employer to ensure the worker's safety. For example, the employer must eliminate potential hazards and must establish procedures for checking the worker's well-being, including timed check-ins.⁶⁴

While many teleworkers may not meet the definition of working alone, or in isolation, people who live alone and live remotely may fall under these guidelines. The regulations may provide guidance for how best to ensure workers are safe if they are working alone and at home all day.

Finally, the Supreme Court's recent decision in *Canada Post Corp v Canadian Union of Postal Workers* may provide guidance for the extent to which employers will be held accountable for ensuring private residences are safe and meet health and safety guidelines. In 2012, a CUPW union representative filed a complaint claiming the workplace health and safety committee had failed to comply with their obligations under

the *Canada Labour Code* by limiting annual health and safety inspections to the postal depot. The union wanted safety inspections along the letter carrier routes and locations where mail is delivered. At issue was an interpretation of section 125(1)(z.12) of the *Canada Labour Code*, which states,

[E]very employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity...ensure that the work place committee or the health and safety representative inspects each month all or part of the work place, so that every part of the work place is inspected at least once each year.⁶⁵

The Appeal Officer found that section 125(1)(z.12) only applied to the parts of the workplaces over which the employer had control.⁶⁶ While postal workers' workplaces did include their routes outside the depot, the officer distinguished places the employer controlled from those it did not, and found that some obligations, including the annual safety inspections, only applied to places where the employer had control of the physical space. The Appeals Officer considered the Code's purpose and found that control over the workplace was necessary because the purpose of the inspection is to identify and fix hazards.⁶⁷ Thus, it would be impractical for the employer to inspect places they have no right to alter.⁶⁸ The majority of the Supreme Court upheld the Appeal Officer's reasoning as reasonable.

Two judges of the Supreme Court dissented and found that a plain reading of the provision meant that "if Canada Post controls the activities of its letter-carriers, it is bound by the inspection duty."⁶⁹ The dissent went on to state,

by drafting s 125(1) to cover workplaces within *and* outside an employer's physical control, Parliament sought to protect the thousands of employees working outside an employer-owned location. The beauty of s 125(1) is that all employees are afforded the same quality of safety protection wherever they work, so long as their work is controlled by their employer.⁷⁰

The dissent's approach is more in line with an interpretation that suggests health and safety obligations are the same for workers at home unless explicitly stated otherwise. As with the postal routes, the employer does not control the home office. Each case will depend on the facts and the wording of the legislation at issue. However, the *Canada Post* decision suggests that there may be instances in health and safety legislation where employers can challenge their duties to take certain measures when the worker is working from home because the employer cannot alter or control the physical space.

CONCLUSION AND NEXT STEPS

While governments may address some legislative gaps as WFH becomes a more permanent reality, the CCOHS recommends the employer and the teleworker should have a written agreement to avoid complications, to ensure that both parties know who is responsible for what, and to ensure that the worker's health and safety protections are not reduced. The CCOHS recommends that the agreement should answer the following questions:

- Will the employer or the health and safety committee have access to the house for safety inspections? Or will alternative arrangements be made such as the worker using checklists or submitting photos of the work area?
- What parts of the house will be considered the *workplace*? Is the bathroom and/or kitchen included?
- That teleworkers must immediately report any incident or injury to their supervisor (just as they would at the office).
- How will incidents be investigated?⁷¹

At the beginning of the pandemic, some provinces issued guidance on best practices for health and safety and WFH.⁷² WorkSafeBC's web page on the application of health and safety standards to WFH stated that, at minimum, the employer should have a work-from-home policy that requires employees to assess their workplace and report any hazards.⁷³ WorkSafeBC recommended the policy include

- protocols for evacuating from the home or temporary workplace to a safe location if needed and how to contact the employer in case of emergency;
- discussion of safe workplace practices and how to report any work-related incidents or injuries;
- discussion of ergonomic considerations.⁷⁴

These questions and points address many of the gaps identified in this paper and could help with preemptively settling disputes over borderline cases between work and personal life. Most importantly, the guidelines address a needed distinction over what is and what is not the employer or worker's responsibility concerning health and safety and can help define how the current regulatory framework applies to WFH.

As another example, Alberta published a bulletin with occupational health safety best practices for WFH. Compared to the WorkSafeBC publication, the Alberta bulletin similarly recommends employers develop a WFH policy that covers

- communication between employer and workers,
- accessing tools and technology for working remotely,
- health and safety protocols, and
- practices for contact with customers.⁷⁵

Along with suggestions on how to set up an ergonomic workspace, the Alberta bulletin also provides information for best practices regarding mental health and WFH, including keeping a schedule, dedicating a specific space for work, and staying connected to the workplace.⁷⁶

While this paper sought to provide clarity on the application of health and safety legislative frameworks to WFH, many gaps still exist, and new issues may arise moving forward as WFH becomes the new normal for some workers. While some health and safety concerns are similar to those in an office space, teleworkers are also likely to face unique health and safety challenges that include access to ergonomic workspaces, increased feelings of isolation and stress, as well as potentially unsafe home environments, that current legislative frameworks do not fully address. Future advocacy and policy development should identify and respond to teleworkers' unique health and safety concerns to make sure that workers WFH do not fall through the cracks.

This paper was prepared for NUPGE by Emily McBain-Ashfield.

BIOGRAPHY

Emily McBain-Ashfield is a third-year student in the Common Law program at the University of Ottawa. Before law school, Emily completed a Master's in History at the University of Ottawa with a focus on immigration policy in the early years of the HIV/AIDS epidemic. During the summer of 2020, Emily worked as a summer student at Raven, Cameron, Ballantyne & Yazbeck LLP, giving her the opportunity to pursue her interests in union-side labour law and human rights. As part of her summer term, she did a six-week placement with NUPGE.

¹ Jason Foster & Bob Barnetson, *Health and Safety in Canadian Workplaces*, (Edmonton: AU Press, Athabasca University, 2016) at 59-60.

² *Ibid* at 59.

³ Canadian Centre for Occupational Health and Safety, "OSH Answers Fact Sheet: Telework/Telecommuting" (23 July 2020), online CCOHS < <https://www.ccohs.ca/oshanswers/hsprograms/telework.html> >.

⁴ See e.g. Eurofound and the International Labour Office, *Working anytime, anywhere: The effects on the world of work*, (Luxembourg: Publications Office of the European Union, and Geneva: The International Labour Office, 2017) at 34.

⁵ Bonnie Allen "Employers need to get serious about preventing workplace injuries in the home during the pandemic, expert says", *CBC News* (28 May 2020), online: <<https://www.cbc.ca/news/canada/saskatchewan/work-from-home-injuries-1.5587164>>.

⁶ NUPGE, "Working From Home: Considerations for Unions" (2020) online (pdf) at 13: <https://nupge.ca/sites/default/files/documents/Working%20From%20Home%20Considerations%20for%20Unions%20web_0.pdf>; and "OSH Answers Fact Sheet", *supra* note 3.

⁷ Eurofound and the International Labour Office, *Working anytime, anywhere: The effects on the world of work*, (Luxembourg: Publications Office of the European Union, and Geneva: The International Labour Office, 2017) at 36.

-
- ⁸ NUPGE, “Working From Home: Considerations for Unions” (2020) online (pdf) at 13: <
https://nupge.ca/sites/default/files/documents/Working%20From%20Home%20Considerations%20for%20Unions%20web_0.pdf>.
- ⁹ *Ibid.*
- ¹⁰ Eurofound and the International Labour Office, *Working anytime, anywhere: The effects on the world of work*, (Luxembourg: Publications Office of the European Union, and Geneva: The International Labour Office, 2017) at 37.
- ¹¹ NUPGE, “Working From Home: Considerations for Unions” (2020) online (pdf) at 8: <
https://nupge.ca/sites/default/files/documents/Working%20From%20Home%20Considerations%20for%20Unions%20web_0.pdf>.
- ¹² *Ibid.*
- ¹³ Michael Quinlan, “The effects of non-standard forms of employment on worker health and safety” in *Conditions of work and employment series No. 67* (Geneva: ILO, 2015) at 8.
- ¹⁴ Jason Foster & Bob Barnetson, *Health and Safety in Canadian Workplaces*, (Edmonton: AU Press, Athabasca University, 2016) at 59.
- ¹⁵ Michael Quinlan, “The effects of non-standard forms of employment on worker health and safety” in *Conditions of work and employment series No. 67* (Geneva: ILO, 2015) at 8.
- ¹⁶ Jason Foster & Bob Barnetson, *Health and Safety in Canadian Workplaces*, (Edmonton: AU Press, Athabasca University, 2016) at 59.
- ¹⁷ *Ibid.*
- ¹⁸ *Occupational Health and Safety Act*, RSO 1990, c O.1, s 3(1) [*OSHA*].
- ¹⁹ Decision No 2249/16, 2016 ONWSIAT 2410; Decision No. 2510/18, 2018 ONWSIAT 2946.
- ²⁰ Decision No. 2510/18, 2018 ONWSIAT 2946.
- ²¹ *Watkins v The Health and Safety Association for Government Services*, 2013 CanLII 57037.
- ²² Hilary Page, “Working Safely From Home” Spring Law, reproduced in the Canadian Employment Safety and Health Guide, June 2020, Number 447, online: <
<https://www.canadaemploymenthumanrightslaw.com/2020/04/working-safely-from-home/>>.
- ²³ *Occupational Health and Safety Act*, RSO 1990, c O.1, s 32.0.7
- ²⁴ Hilary Page, “Working Safely From Home” Spring Law, reproduced in the Canadian Employment Safety and Health Guide, June 2020, Number 447, online: <
<https://www.canadaemploymenthumanrightslaw.com/2020/04/working-safely-from-home/>>.
- ²⁵ *Blue Mountain Resorts Limited v Ontario (Labour)*, 2013 ONCA 75 at para 66.
- ²⁶ *Ibid* at paras 23, 26.
- ²⁷ *Ibid* at para 44.
- ²⁸ *Ibid* at para 49.
- ²⁹ WorkSafeBC, “Health and safety responsibilities when working from home” (19 March 2020), online: <
<https://www.worksafebc.com/en/about-us/news-events/announcements/2020/March/health-safety-responsibilities-when-working-from-home>>.
- ³⁰ *Workers Compensation Act*, RSBC 2019 c 1, s 106.
- ³¹ *Ibid*, s 181(1).
- ³² *Ibid*, ss 28.8, 28.9.
- ³³ *Occupational Health and Safety Act*, SA 2017 cO-2.1, ss 51(1)(a), 51(2).
- ³⁴ *The Workplace Safety and Health Act*, CCSM c W210, s 24(1)(a).
- ³⁵ *Occupational Health and Safety Act*, RSPEI 1988, c O-1.01, s 7(3).
- ³⁶ *Saskatchewan Employment Act*, SS 2013, c S-15.1, s 3-63.
- ³⁷ *Ibid*, s 3-1(2).
- ³⁸ WorkSafeSask “What employers should do” (2020) online: <
<http://www.worksafesask.ca/covid-19/what-employers-should-do/>>.
- ³⁹ *Ibid.*
- ⁴⁰ *Occupational Health and Safety Act*, RSNL 1990, c O-3, s 2(n).
- ⁴¹ *Occupational Health and Safety Act*, SNS 1996, c 7, s 3(ah).
- ⁴² *Occupational Health and Safety Act*, SNB 1983, c O-0.2, s 3(1).
- ⁴³ Workers’ Compensation Board – Alberta, “Employer Fact Sheet – Telecommuting” (3 April 2020) online: <
https://www.wcb.ab.ca/assets/pdfs/employers/EFS_Telecommuting.pdf>.
- ⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ WorkSafeNB, Policy 21-104, “Conditions for Entitlement – Tests of Time, Place, and Activity” online: <<https://www.worksafenb.ca/policy-and-legal/policy/view-our-policies/conditions-for-entitlement-tests-of-time,-place-and-activity>>.

⁴⁷ *Ibid.*

⁴⁸ Saskatchewan WCB, “Arising Out Of and In The Course of Employment” (POL 03/2017) online: <<http://www.wcbask.com/wp-content/uploads/2016/02/SK-WCB-Policy-Procedure-Manual-May-1-2020.pdf>>.

⁴⁹ Decision No 1223/19, 2019 ONWSIAT 1873; Decision N 724/10, 2010 ONWSIAT 1113; WCAT-2005-02879-RB (Re), 2005 CanLII 88803 (BC WCAT).

⁵⁰ Decision No 2608/17, 2017 ONWSIAT 2685.

⁵¹ WCAT-2011-01701 (Re), 2011 CanLII 51421 (BC WCAT)

⁵² *Desrochers et Agence du revenu du Canada*, 2011 QCCLP 7562, at para 72, 76.

⁵³ WorkSafe BC Review Reference R0177627.

⁵⁴ WCAT-2010-03333 (Re), 2010 CanLII 88225 (BC WCAT), at paras 50-51.

⁵⁵ In their paper, Katherine Lippel and David Walters describe E-RGM as “a spectrum of mobility that encompasses extended daily commutes taking more than sixty minutes each way through to more prolonged travel for work to regions, provinces, or countries different from place of residence.” Katherine Lippel and David Walters, “Regulating health and safety and workers’ compensation in Canada for the mobile workforce: Now you see them, now you don’t” (2019) 29:3 *New Solutions: A Journal of Environmental and Occupational Health Policy* 317 online (pdf) at 2-3: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3585413&download=yes>.

⁵⁶ *Ibid* at 3.

⁵⁷ *Ibid* at 10.

⁵⁸ *Ibid.*

⁵⁹ NUPGE, “Working From Home: Considerations for Unions” (2020) online (pdf) at 13: <https://nupge.ca/sites/default/files/documents/Working%20From%20Home%20Considerations%20for%20Unions%20web_0.pdf>.

⁶⁰ See e.g. this policy example in Europe. European Social Partners, “Implementation of the European Framework Agreement on Telework” (28 June 2006) online (pdf) at 16: <http://resourcecentre.etuc.org/linked_files/documents/Framework%20agreement%20on%20telework%20EN.pdf>.

⁶¹ Katherine Lippel and David Walters, “Regulating health and safety and workers’ compensation in Canada for the mobile workforce: Now you see them, now you don’t” (2019) 29:3 *New Solutions: A Journal of Environmental and Occupational Health Policy* 317 online (pdf) at 14: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3585413&download=yes>.

⁶² NUPGE, “Working From Home: Considerations for Unions” (2020) online (pdf) at 14: <https://nupge.ca/sites/default/files/documents/Working%20From%20Home%20Considerations%20for%20Unions%20web_0.pdf>.

⁶³ Occupational Health and Safety Regulation, BC Reg 296/97, s 4.20.1

⁶⁴ *Ibid*, ss 4.20.2, 4.21

⁶⁵ *Canada Labour Code*, RSC 1985, c L-2, s 125(1)(z.12).

⁶⁶ *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67.

⁶⁷ *Ibid* at para 19.

⁶⁸ *Ibid.*

⁶⁹ *Ibid* at para 79

⁷⁰ *Ibid* at para 80.

⁷¹ Canadian Centre for Occupational Health and Safety, “OSH Answers Fact Sheet: Telework/Telecommuting” (23 July 2020), online *CCOHS* <<https://www.ccohs.ca/oshanswers/hsprograms/telework.html>>.

⁷² Provincial publications: WorkSafeBC, “Health and safety responsibilities when working from home” (19 March 2020) online: <<https://www.worksafebc.com/en/about-us/news-events/announcements/2020/March/health-safety-responsibilities-when-working-from-home>>; “Working from home during a pandemic” (2020) online (pdf): Alberta <<https://open.alberta.ca/dataset/f1e33f8b-e58c-4813-9b36-848d0d3f90c9/resource/e093812f-e98e-4b04-8594-94d989a753bc/download/lbr-working-from-home-during-pandemic-2020-04.pdf>>; WorkSafeSask “What employers should do” (2020) online: <<http://www.worksafesask.ca/covid-19/what-employers-should-do/>>; SafeWork Manitoba, “Safety and health responsibilities when working from home” (2020) online: <<https://www.safemanitoba.com/COVID-19/Pages/Safety-and-health-responsibilities-when-working-from-home.aspx>>. While not a written guide, WorkplaceNL hosted webinars in the Spring of 2020 on working safely from home: WorkplaceNL, “Working Safely From Home” (2020) online: <<https://workplacenl.ca/event/working-safely-at-home/>>.

⁷³ WorkSafeBC, “Health and safety responsibilities when working from home” (19 March 2020) online: <<https://www.worksafebc.com/en/about-us/news-events/announcements/2020/March/health-safety-responsibilities-when-working-from-home>>. This is also the case in the Saskatchewan guidelines: WorkSafeSask “What employers should do” (2020) online: <<http://www.worksafesask.ca/covid-19/what-employers-should-do/>>.

⁷⁴ *Ibid.*

⁷⁵ “Working from home during a pandemic” (2020) online (pdf): Alberta <<https://open.alberta.ca/dataset/f1e33f8b-e58c-4813-9b36-848d0d3f90c9/resource/e093812f-e98e-4b04-8594-94d989a753bc/download/lbr-working-from-home-during-pandemic-2020-04.pdf>>.

⁷⁶ *Ibid.*



NATIONAL UNION OF PUBLIC AND GENERAL EMPLOYEES

- B. C. Government and Service Employees' Union (BCGEU)
- Health Sciences Association of British Columbia (HSABC)
- Health Sciences Association of Alberta (HSAA)
- Saskatchewan Government and General Employees' Union (SGEU)
- Manitoba Government and General Employees' Union (MGEU)
- Ontario Public Service Employees Union (OPSEU)
- Canadian Union of Brewery and General Workers (CUBGW)
- New Brunswick Union of Public and Private Employees (NBU)
- Nova Scotia Government and General Employees Union (NSGEU)
- PEI Union of Public Sector Employees (PEI UPSE)
- Newfoundland & Labrador Association of Public and Private Employees (NAPE)

The National Union of Public and General Employees is an affiliate of the Canadian Labour Congress and a member of Public Services International.

15 AURIGA DRIVE
NEPEAN, ONTARIO
CANADA / K2E 1B7

[613] 228-9800
FAX [613] 228-9801

www.nupge.ca

national@nupge.ca

