



# Employment Law Update

## Dialed In – What Employers Need to Know About Telecommuters and Remote Working Arrangements

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# What Comes To Mind When You Think Of Telecommuting and Remote Working Arrangements?



# COVID Forced Everyone Remote

- Companies scrambled to figure out how to continue operations
- Governments relaxed requirements during the emergency
- Dust is settling and employers need to figure out how to operate in the new normal

# Possible Benefits of Remote Work Arrangements

- Improves attraction and retention of employees
- Increases employee engagement
- Improves morale and job satisfaction
- Enhances productivity for some tasks/less interruption
- Encourages a results-driven work environment
- Reduces business expense
- Reduces stress and burnout
- Enhances business continuity (coverage, extended hours, peak and valley staffing needs, customer service, production)
- Supports sustainability

# Possible Challenges of Remote Work Arrangements

- May not be feasible for all jobs
- Not all employees thrive in a telecommuting work environment
- Achieving fairness for all staff
- May create logistical difficulties in coordination
- Liability concerns regarding at-home sites

# Various Legal Considerations

- Workplace Safety and Health
- Workers Compensation
- Family and Medical Leave Act
- Wage and Hour Considerations
- Data Integrity and Confidentiality
- Communication and Accountability
- Performance Management & Terminations
- Payroll and Tax Considerations
- International Telecommuting



# Workplace Safety and Health

- OSHA created three agencies:
  - OSHA is responsible for creating and enforcing safety and health standards.
  - OSHRC adjudicates dispute between employers and OSHA.
  - NIOSH conducts research on safety and health matters.
- OSHA also granted states authority to establish and run their own occupational safety and health agencies, with some oversight from OSHA, but state programs must have standards that are as effective or more effective than the federal standards.



# Mitigating Workplace Safety and Health Risks

- In addition to identifying hazards, employer has a duty to provide the necessary training, personal protective equipment, or other appropriate controls for the employee's protection, including ensuring equipment is ergonomic when appropriate.
- Inspect premises in advance to evaluate whether it is a safe workplace free from recognized hazards.
- Designate specific work area and restrict work to that area.
- Designate specific work hours.



# Workers Compensation

- Remote employees still covered even though job location might be employee's home
- Covered for work-related injury or illness **(1) arising out of**, and **(2) in the course of**, employment
  - Arising out of employment (origin and cause of injury)
  - In the course of employment (time, place, and circumstances of injury)
- A clear telecommuting policy can potentially mitigate some issues
  - Define workplace scope (i.e., designated work area within home); provide instruction re: work area safety; provide ergonomics resources
  - Clearly define working hours
  - Clearly define job duties/work-related activities

# Family and Medical Leave Act

- Are telecommuting employees eligible for Family and Medical Leave Act (FMLA) leave?
- Must be a “**covered employer**” and employee must be an “**eligible employee**”
- Eligible employee = (1) worked for employer for 12 months, (2) worked at least 1,250 hours during 12 months prior to leave, and (3) employed at a location where there are at least 50 employees within a 75 mile radius
  - Home offices are not considered the work location for determining FMLA eligibility
  - Work location for “employees with no worksite” is “the site to which they are assigned as their home base, from which their work is assigned, or to which they report.” (29 CFR 825.111)

# Wage and Hour Sources

- Federal Fair Labor Standards Act (exempt vs. nonexempt)
- Parallel state specific laws
- Some city ordinances
- What do they cover?
  - Minimum wage
  - Overtime pay
  - Record keeping
  - Child labor
  - Meals and breaks (typically state dependent)
  - Notice requirements (posting and individualized)

# Wage and Hour Considerations in Remote Work Context

- Timekeeping/clocking in and out
- Meal and rest breaks
- Off duty and on call time
- Travel time
- Record keeping/posting requirements
- Deductions
- Notices

Field Assistance Bulletin No. 2020-5 – Employers' obligation to exercise reasonable diligence in tracing teleworking employees' hours of work

**Have a timekeeping policy**

# Data Integrity and Confidentiality

- To what type of confidential information will remote worker have access?
  - Ensure employee has signed a confidentiality agreement
  - Limit access to highly sensitive information (e.g., password protection, encryption, etc.)
- How will remote worker access the information?
  - Company issued device vs. employee's own device
    - Obtain written consent to immediate return of company property and confidential information at conclusion of employment relationship
    - Obtain written consent to install encryption software, antivirus software, remote 'wiping' capabilities

# Communication and Accountability

- Beware that "out of sight" can mean "out of mind".
- Maintain a high level of contact by encouraging a two-way flow of communication between management and the off-site worker.
- Promote team building between on-site and off-site employees.
- Hold off-site workers to standards set forth when entering into remote work arrangement and expectations set forth in written job description.

# Performance Management and Terminations

- Use periodic performance reviews to assess performance.
- Engage in informal performance counseling.
- Engage in formal performance management.
- If employee fails to perform after being informally and formally informed of deficiencies and given an opportunity to correct them, termination may be appropriate.



# Tax and Other Considerations

- Income tax withholdings
- Business registration
- Some states have convenience of the employer test
- On radar of some states because technology has enabled remote and telecommuter arrangements

# International Telecommuting

- Reasons for international telecommuting
  - International hire, known employee move (family relocation, trailing spouse), unknown employee move (domestic remote employee moves overseas without notice to company)
- Complexities surrounding international telecommuting
  - Employee work authorization
  - Establishing a corporate presence (requirement to file corporate taxes in host country); payroll compliance
  - Compliance with host country employment law
  - Compensation issues (currency, expense reimbursement); benefits
  - Rapidly changing immigration/travel restrictions post-COVID
  - All other operational concerns (technology, supervision, data security)

# Final Takeaways

- Audit current practice now
- Have a remote work policy/agreement
- Educate leaders and employees about the policy
- An interdepartmental workgroup can help monitor compliance issues
- Evolve as needed



# Thank You

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