

Managing Telecommuting in a Changing Legal Environment: New Challenges from COVID-19

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INTRODUCTION

Telecommuting is a work arrangement or alternative work schedule in which an employee may spend part or all of the regular work week at a location other than the employer's office, e.g. the employee's home. The increasing availability of internet-based communication systems and remote access software systems have resulted in a substantial increase over the last several years in the number of employers offering telecommuting as an alternative work arrangement, and in the number of employees who choose to telecommute. Many employees view a telecommuting arrangement as a way to address family obligations, reduce expenses and commute time, and improve productivity by eliminating interruptions and distractions in the workplace.

Dramatic increases in telecommuting are demonstrated by some of the following survey data. In 1999, only 17% of employers even offered telecommuting as a possible work alternative option. At that time, approximately 8% of employees responding to one survey indicated that they telecommute in part, although there was a substantially higher level of interest in telecommuting (as much as 59% of employee respondents). More recent survey data shows a significant increase in companies offering telecommuting arrangements, and of employees participating in them. For example, a recent survey conducted by the Society for Human Resource Management indicates that 40% or more of employers now offer telecommuting arrangements, and that as many as 17% of employees now telecommute either entirely or through part of their work week. *The Economist* magazine recently published figures showing that in the U.S. and E.U., approximately 16% of

employees engage in telecommuting for either part or all of their work week. Recent increases in fuel prices have also encouraged telecommuting. *See, e.g.*, “Fuel Prices Have U.S. Workers Eyeing Telecommuting”, Reuters, April 26, 2006.

Despite the potential benefits to management and employees presented by telecommuting arrangements, a number of legal, policy, and management considerations must be considered and addressed. A short list of some of the key considerations includes the following:

1. **Wage and Hour Compliance.** How will the employee’s activities be monitored, reported, and recorded. What activities are considered compensable? How can management most effectively meet its obligations in this area?
2. **Zoning.** Are there local zoning law requirements that may be implicated by the employee performing work at the home?
3. **Workplace Safety and OSHA Compliance.** What OSHA issues are presented by telecommuting arrangements? What are an employer’s record keeping obligations associated with a telecommuting arrangement under OSHA?
4. **Workers Compensation.** What injuries associated with working at home, or with traveling associated with a telecommuting arrangement, may be covered by workers’ compensation laws? How can management best protect its interests? Can an assignment to telecommuting work qualify as a “light work” or modified duty assignment under workers’ compensation laws?
5. **Risk Management.** Who is responsible if the employee receives business visitors at the home? What happens if a family member is injured in the “work” area?
6. **Americans with Disabilities Act, Family Medical Leave Act, and Related State Laws.** Is an employer obligated to provide telecommuting to an employee as a reasonable accommodation under the ADA? May telecommuting arrangements be

used in lieu of FMLA leave, or to accommodate intermittent leave under FMLA?

How may the telecommuting employee's work location affect FMLA eligibility?

7. Employment Discrimination Issues in the Administration of a Telecommuting Program.
8. Right of Access. Does the employer have the right to gain access to the employee's home?
9. Cross Border Issues. Are there employment tax and other tax issues raised by the employee's location? Will the law of the jurisdiction where the telecommuting employee is located apply, or the laws of the employer's home or regional office?
10. Preservation of Intellectual Property Rights.
11. Privacy, Confidentiality, and Electronic Monitoring.

As will be explored in these materials, an employer can meet these challenges, maintain efficiency, and assure itself of legal protection by: 1) having in place a well thought out, complete, telecommuting policy; 2) observing certain "best practices" relating to telecommuting arrangements; 3) requiring employees who telecommute to enter into express agreements governing their relationship with the employer.

WAGE AND HOUR and FAIR LABOR STANDARDS ACT ISSUES

The federal Fair Labor Standards Act ("FLSA") contains restrictions on so called "industrial homework" that apply to certain industries. These include knitted outerwear; gloves and mittens; button and buckle manufacturing; jewelry manufacturing; handkerchief manufacturing; women's apparel; and embroidery. Employers who use "home workers" to perform work in these industries must apply to the Department of Labor for a special certification, and observe special recordkeeping requirements. *See* 29 U.S.C. § 211(d), 29 C.F.R. Part 530. Despite suggestions that such home based work arrangements such as telecommuting,

telemarketing, and home computing, should be governed by the Federal Home Work Regulations, there is no specific federal prohibition on home work, except for the above-noted industries.

All state and federal laws, including those governing minimum wage and overtime compensation, apply to employees who are telecommuting. Thus, an employee who is exempt, and fails to work part of a day while telecommuting, must still be paid all compensation for that week in order to continue to be treated as an employee compensated on a “salary basis.”

The more significant issues, however, arise with respect to non-exempt employees. Telecommuting employees should not be treated as “on duty” outside of their normal business hours. To do so may result in changing their noncompensable time into compensable time. Under the FLSA, when an employee is placed in an “on call” situation, at home or at another location, such time is compensable where the conditions placed on the employee’s activities are so restrictive that the employee cannot use the time effectively for personal pursuits. In *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court explained that whether the time is compensable depends on whether the restrictions on the employee’s activities are so significant that the time is being spent predominantly for the employer’s benefit. This determination depends on all the circumstances of the case. An employment relationship may contemplate that an employee so restricted has been hired to spend time waiting to respond to the employer’s needs, in which case the employee is traditionally described as having been “engaged to wait,” and such time constitutes compensable hours of work. *Wantock, supra*, 323 U.S. at 133. *See also* 29 C.F.R. § 785.16-17 (Regulations addressing off-duty and on-call time). On the other hand, where the restrictions on employees’ activities while on call do not prevent them from pursuing their normal pursuits, such employees are described as “waiting to be engaged,” and such time is not compensable. *Skidmore, supra*, 323 U.S. at 139.

For these reasons, employees who are parties to a telecommuting arrangement should have their hours and work schedules clearly set forth. The employer must insist that the employee

accurately record all hours worked. Although their use is not required for telecommuting employees, the Employee Industrial Homework recordkeeping forms (available on the DOL's website) might be adapted. The employee must also comply with rest breaks and meal break requirements of state law. To ensure that an otherwise non-compensable lunch period not be converted into work time (or that an employee not be unlawfully deprived of a break), employers should also require that employees' phones not be on or in use during the time that they take their breaks or during their meal periods. In order to accurately monitor working hours and meal and rest breaks, employers may wish to require employees to log on or log off their computer, or to notify a supervisor.

Another issue that may arise under the FLSA is whether travel time from the employee's home work location to the employer's main office for meetings, training, or other reasons, is compensable. In a fact situation that was analogous to the circumstances of a telecommuting employee, the U.S. Dept. of Labor, Wage and Hour Division, concluded that an employee who normally works from home or from an outlying office, and who travels from home to a central office before his or her regular work day and returns home at the end of the work day, is engaged in ordinary home-to-work travel, which is a normal incident of employment. This was true whether the employee works at a fixed location or at different job sites. Under these circumstances, normal travel from home to work is not work time. Wage and Hour Division, U.S. Dept. of Labor, April 17, 1998 (1998 WL 852776). *See also* 29 C.F.R. § 785.35.

ZONING ISSUES

Many cities have zoning laws that limit or restrict the activities of home-based businesses. Although most of these ordinances do not apply to the activities of an employee who is telecommuting, it is possible that a telecommuting arrangement could cross over the line and violate zoning ordinances. For example, most local ordinances require a home-based business to apply annually for a license, which requires disclosure of the location and the type of business.

The ordinances generally prohibit employment of those living outside the home. Floor space devoted to the business cannot exceed 10% of a single-family home, or 300 square feet, and the dwelling may not be structurally altered, nor may adjacent buildings be used for the business. *See, 100 Daily Labor Report* (BNA) (May 24, 1995).

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