



GUIDANCE FOR TELEWORK IN THE PANDEMIC AGE

March 27, 2020

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A patchwork of shutdown orders is now in place across the country in response to the novel coronavirus COVID-19. States and localities differ substantially in the types of businesses impacted, the nature of the restrictions, and how long the restrictions are (currently) set to be in place. Regardless, whether by compulsion or by choice, employees are increasingly working from home if at all possible, and employers are correspondingly looking for guidance on what they can and cannot expect from employees who are working remotely.

If you already have a policy in place governing telecommuting or telework, now is a good opportunity to review it and make sure that it is up to date. If you don't have a policy in place that addresses working from home, now is a good time to put one in place. And, if you have never considered whether some types of jobs can be completed remotely, now is the time to do so.

Like all employment policies, a telework policy will not be able to cover every possible contingency. However, a well-designed policy will set expectations for employees and outline best practices to ensure that both employees and employers can optimize the work-from-home experience. And, as always, the policy that works for one employer or industry may not work for another – call your lawyer for more specific guidance or for a policy tailored to your specific needs.

THINGS TO INCLUDE IN THE POLICY

- **Permission to work remotely is discretionary and can be rescinded.** There won't always be a pandemic requiring that non-life-sustaining physical offices be closed – at least we hope there won't be. Under ordinary circumstances, permission for an employee to telework from home remains in the sole discretion of the employer; the policy should make clear that the employer reserves the right to change its telework policy, rescind the option for employees to work from home, or place additional parameters on the ability to telework at any time within the employer's reasonable discretion. Also, the policy can provide that all telework requests will be granted initially on a probationary or trial basis, which allows for both the employer and the employee to determine whether telework really works for that particular role and that particular employee.

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- **Spell out the technology required.** The policy should provide guidelines regarding what technology is required for employees to be able to work from home. Technology may change too quickly to include the specifics in the policy if policies are not updated annually, but the policy can direct employees to a different company source that can be updated more frequently (e.g., the company’s Intranet page, newsletter, etc.). Certain requirements related to information security are essential to preserve the legal protection of the company’s confidential, proprietary, and trade secret information. Work with your Information Technology department to make sure that necessary safeguards are in place to protect your information regardless of where your employee is physically working.
 - The employee must have the necessary equipment to perform the job from home – e.g., adequate broadband speed, webcam, scanner. If the employer needs to or elects to provide that equipment to permit the employee to work from home, maintain a written inventory of the equipment provided to each employee. Include language in the policy *and* in a separate acknowledgement signed by the employee that says all equipment provided by the company is the property of the company and must be returned to the company if the employee terminates employment.

- **Insist that business be conducted privately.** Employees who work from locations other than their own residence, in particular those who work from public locations, should be instructed that confidential business should not be conducted in a public place. Screens can be viewed over shoulders and at least one side of a cell phone conversation can easily be overheard. Remind employees who choose to or need to work in a non-private location to be mindful of confidentiality and privacy concerns at all times.

- **Underscore that all firm policies still apply.** The policy should make clear that the same in-office restrictions on computer and technology use still apply, even when working from home. Whatever restrictions are imposed on the use of company e-mail for non-business purposes should remain in effect, and the same directives not to harass, demean, threaten, or abuse employees continue even in the virtual space.

- **Set expectations about availability.** Employees should be provided clear guidance on the employer’s expectations for availability. Particularly when employees are working from home because schools are closed or to help care for a sick family member, it is not always reasonable to expect that the employee will be logged in and available from 9 AM to 5 PM. However, it is reasonable to require employees to advise the employer of discrete time periods when the employee knows they will be offline during regular business hours.
 - Each employer will differ on the best method or mechanism to track employee availability during the day, and that method/mechanism may change over time.

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The policy should outline when, how, and to whom an employee should convey their respective availability on any given day.

- For example, the policy could require each employee to report general availability (via e-mail) by 9 AM each day to the company's HR department. It can be something as simple as "I will be out from 1 PM to 3 PM for an appointment and will not be able to respond to calls or emails during that time; I am otherwise available all day." That information can either be circulated widely throughout the company, to a select set of employees, or on a "need-to-know" basis, as each company sees fit. Be mindful, of course, of privacy requirements and don't disclose more than is necessary to advise other employees about their colleagues' availability.
- The policy should outline how office telephone lines will be monitored while the employee is working remotely. If the office line is not forwarded to the employee's home/cell phone, the person monitoring the phone should be advised of any times when the employee will be unavailable to answer phone calls.
- **Remind employees to accurately report the hours they worked.** The policy should remind all non-exempt employees that they are required to keep accurate records of hours they worked and to report those hours to the employer in a timely fashion. A national health emergency won't waive the requirements of the Fair Labor Standards Act and its state counterparts. The Department of Labor issued guidance on March 9, 2020, to assist employers struggling with wage-and-hour related questions in light of the COVID-19 pandemic, and that guidance can inform the approach to telework in non-emergency situations as well. The specific guidance can be viewed at <https://www.dol.gov/agencies/whd/flsa/pandemic>.
- **Address reimbursement of telework expenses.** If the employer intends to pay for any expenses associated with telework, outline specifically what expenses the employer will cover. While federal law does not currently require employees to be reimbursed for telework-related expenses, the Department of Labor has advised that non-exempt employees cannot be required to pay for business expenses if doing so would reduce the employee's earnings below the required minimum wage or overtime compensation. Moreover, certain states have specific requirements related to employee expenses and what expenses must be reimbursed.
- **Require timely reporting of work-related injuries.** In most states, employees are covered by the employer's workers' compensation policy regardless of where a work-related injury occurs. Emphasize that an employee who suffers an occupational injury or illness at home must report the injury/illness promptly.

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WHAT NOT TO INCLUDE IN THE POLICY

- **A dress code.** Don't include a dress code requirement. It is fine to remind your employees that they remain representatives of the business at all times and should dress appropriately for video conference calls, but otherwise let employees dress in whatever makes them comfortable and productive.
- **An impermissible limitation on who can work remotely.** Don't limit the policy to certain categories of people. As the employer, you are entitled to make a determination as to whether certain employees should be eligible for telework for a variety of reasons – e.g., nature of the responsibilities, length of service with the company – so long as those requirements are not based on impermissible categories of individuals. You are not, however, entitled to refuse telework opportunities to older employees or male employees based on misguided notions of who will most benefit from telework opportunities. Consider each employee on his/her/their individual merits.

As always, this is general guidance and is not intended to substitute for tailored recommendations specific to an individual company or business. Contact your attorney for more specific guidance on the issues identified above, assistance in updating an existing policy, or preparation of a new policy.

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