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Telecommuting Employees: How Nonprofits Can Avoid the Legal Pitfalls

September 14, 2011

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Introduction

- n What is telecommuting?
- n Benefits of telecommuting
- n Policy and practice challenges raised by telecommuting
- n Legal risks of telecommuting



Objectives

- n At the close of this seminar, you will be able to:
 - Identify the types of positions suitable for telecommuting
 - Describe the characteristics an employee must have to be a successful telecommuter
 - Identify legal implications and considerations in any telecommuting arrangement
 - Identify policy considerations for any telecommuting policy/practice and agreement



Positions Suitable for Telecommuting

- n Not all positions are suitable for telecommuting
 - Employers must consider whether the job purpose and respective duties are location-specific
 - Positions where the majority of the work involves the electronic transmission of information or documents may be suitable for telecommuting, when the organization or client privacy or confidentiality are not at risk
 - Other characteristics that make a position suitable for telecommuting include minimal supervision requirements or limited face-to-face contact with customers or clients
- n A position's suitability does not guarantee that the employee is suitable for telecommuting



Employees Suitable to Telecommuting

- n Generally, the best telecommuters possess the following characteristics:
 - Organized
 - Excellent time management skills
 - Self-motivated/self-starter
 - Strong written and verbal communication skills
 - Work well with limited supervision
 - Self-disciplined
 - Strong performance record and job knowledge
 - Successfully completed their training phase
 - Comfortable using telecommuting equipment
 - Comfortable working alone
 - Resourceful when handling technology issues
 - Ability to communicate effectively using mixed media such as phones, email and video conferencing
 - Ability to establish work life/home life boundaries
 - Supportive home environment free from household distractions



Wage and Hour Laws

- n Overtime laws still apply to non-exempt telecommuting employees
- n Telecommuting increases difficulty monitoring hours worked



Wage and Hour Laws (cont'd)

- n Policy considerations
 - Whether to make telecommuting available to exempt workers only
 - Must weigh potential for disparate impact
 - Whether to prohibit overtime without prior authorization
 - Whether to require telecommuting employees to clock or log in/out via telephone or email



Occupational Safety and Health

- n Work-related injuries are subject to OSHA recordkeeping requirements even if they occur in a telecommuter's home
- n Employers remain responsible for hazards caused by all materials, equipment, or work processes they provide or require to be used in a telecommuter's home
- n As per OSHA guidance, employers are not expected to inspect home worksites
- n Policy considerations
 - Whether to require telecommuting employees to comply with all workplace safety policies



Workers' Compensation Laws

- n Workers' compensation laws vary across states
- n Generally, the injury must be sustained in the course and scope of the employee's job duties to be compensable
- n Work-related injuries in a home worksite raise unique problems:
 - Not as many witnesses (if any) to injury
 - More difficult to investigate
 - May need to visit employee's home worksite and take statement



Workers' Compensation Laws (cont'd)

- n Policy considerations
 - Whether to require telecommuting employees to sign agreement authorizing periodic investigations of home worksite
 - Whether to require telecommuting employees to sign agreement authorizing mandatory on-site investigations if injury takes place



Americans with Disabilities Act Implications

- n If telecommuting is requested by a “disabled” employee, employers must consider whether telecommuting is a reasonable accommodation
- n Can the employee perform the essential functions of his/her job from home?
- n The more an employer permits telecommuting, the more difficult it will be to show that allowing a disabled employee to telecommute constitutes an “undue hardship”



Americans with Disabilities Act Implications (Cont'd)

- n Policy considerations
 - Review job descriptions
 - Engage in interactive process and consider in-office accommodations
 - Require medical certification



Administering Your Telecommuting Policy in a Non-Discriminatory Manner

- n Federal, state and local anti-discrimination laws prohibit adverse employment decisions motivated by an employee's membership in a protected class
- n Disparate treatment
- n Disparate impact



Administering Your Telecommuting Policy in a Non-Discriminatory Manner (cont'd)

n Policy considerations

- Identify positions for which telecommuting is available
- Determine telecommuting availability in light of business needs – all, none, or first come/first serve?
- Document the process
- Ensure uniformity for compensation schedules and benefit programs
- Evaluate likelihood of disparate treatment or disparate impact



FMLA and Sick Leave

- n Qualified employees permitted up to 12 weeks per 12 month period
- n Need 50 or more employees at or within 75 miles of the employee's "worksite"
- n Tempting to ask an employee on leave to telecommute, but may be a violation of FMLA
- n Can offer reduced leave schedule with telecommuting, but cannot be mandatory



FMLA and Sick Leave (cont'd)

- n Policy considerations
 - May be appropriate for employees who take FMLA leave to care for a sick parent or child – e.g., telecommute for 2 hours per day while parent or child with serious health condition remains under temporary care of another person
 - Not appropriate for employees recovering from serious health condition or with a need to administer full-time care of a parent or child



Privacy Concerns

- n Privacy right only when “reasonable expectation” of privacy
- n Any company property or work product is subject to review, such as:
 - Files/Documents
 - Computers
 - Blackberrys, iPhones, PDAs
 - Telephone lines – cellular or landline



Privacy Concerns (cont'd)

- n Policy considerations
 - Consider consent to allowing monitoring of the home worksite, such as:
 - Electronic monitoring of IP address during work hours
 - Video monitoring
 - Required check-in times
 - Consider signed waivers and acknowledgement forms



Protecting Confidential and Proprietary Information

- n Extra precautions are needed for sensitive information taken out of the traditional worksite
- n Policy considerations
 - Consider mandatory nondisclosure and/or confidentiality agreements for telecommuting employees
 - Mandate passwords and other security measures on computers and other equipment used at the home worksite
 - Coordinate with IT personnel
 - Consider additional restrictive covenants for telecommuting employees
 - Geographic scope of non-compete and non-solicitation clauses may lose significance for telecommuting employees
 - Consider inquiring who, if anyone, will be present at the home worksite during telecommuting hours



Tax and Other Wage Deduction Issues

- n Tax issues arise if the telecommuting employee works from home in another state than the employer's office
- n Unemployment benefits may be owed in the telecommuting employee's home state
- n Reimbursement issues arise for travel expenses – for example, should employees be reimbursed for traveling to destinations closer to home worksite than if they had to travel to the employer's worksite?



Tort Liability

- n Generally, employers are liable for injuries to third parties caused by employees' negligence
- n Homeowner's insurance likely does not cover torts committed in the course of a telecommuting employee's job duties
- n Some states require that an employer's liability insurance cover telecommuting employees' homes
- n Policy consideration
 - Consider requiring that telecommuting employees purchase extra insurance



Zoning Laws

- n Zoning laws may prohibit operation of a business within a residential home
- n Policy considerations
 - Consider whether employer or employee must pay for zoning application, permit, or other necessary license
 - Require inspection of necessary documents



Must Haves in Any Telecommuting Policy

- n Clear definition of telecommuting
- n Clear definition of eligibility requirements
- n Information on how to identify telecommuting-eligible positions
- n Procedures for establishing a telecommuting arrangement (e.g., application, approval levels, timeline for approval/denial, training requirements (if any), written agreement, etc.)



Must Haves in Any Telecommuting Policy and Agreement

- n Emphasize that:
 - telecommuting is an arrangement established first and foremost to facilitate the accomplishment of work
 - the right to telecommute is not an entitlement and can be revoked at any time
 - the abuse of telecommuting privileges can result in termination of employment
- n Expectation that the employee will be required to meet the same performance standards as do on-site employees
- n Expectation that the employee is responsible for ensuring a safe work environment, reporting work-related injuries, and obtaining insurance for injuries to third parties on the employee's property
- n Employer's right to monitor and inspect worksite
- n Non-disclosure and confidentiality agreement
- n Return of company property
- n Statement that employer has discretion to impose additional terms and conditions on a telecommuting arrangement



Must Haves in Any Telecommuting Agreement

- n Responsibilities of telecommuting employee
- n Responsibilities of supervisors/managers of telecommuting employees
- n Expectation regarding communication between employees and supervisors; employees and co-workers; employees and customers/clients; and others
- n Specifics regarding the employee's work schedule (including overtime work) and reporting requirements
- n Support, materials, and equipment the employer is provided to the telecommuting employee; what the employer will not provide; and what may be shared between the employer and the employee



Questions?

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