

Employment Law

Commentary

How to Save Gas . . . and Prevent Heartburn: The Legal Issues Surrounding Telecommuting

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If you skipped this morning's commute and are reading this article in your jammies, you understand the benefits of telecommuting. You are not alone. Although fewer than two percent of working Americans are considered to be full time telecommuters, roughly 20 to 30 million people telecommute at least one day per week.¹ There was a 39% increase in the number of employees working from home at least one day per month between 2006 to 2008, from 12.4 million to 17.2 million.²

Both employers and employees can enjoy the perks of telecommuting. Employees are able to reduce or eliminate their commute time, reducing the amount of money spent on gas or public transportation. Working from home may also help employees achieve that ever elusive work-life balance. Telecommuting also benefits employers due to increased satisfaction and productivity in employees, often resulting in higher retention rates. There is more to telecommuting, though, than this picture of work-at-home nirvana suggests. Telecommuting causes a host of practical and legal issues, which can trap the unwary employer, and although a telecommuting arrangement may initially appeal to both the employee and employer, it is important to take a closer look at the legal issues related to telecommuting before approving such an arrangement.

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Whose Law Applies?

Sometimes telecommuting employees live and work in different states from the employer's offices. Employers should be aware that, regardless of what their employee handbooks say, employees are likely to be protected by the employment laws of the state in which they primarily perform services. For example, an employee who telecommutes from California but reports to a New York office is likely to be protected by California law. Some states are stricter than others in applying their laws to a telecommuting employee.

If an employee is telecommuting from a different state, the employer must evaluate whether there are any differences in state laws that may affect the employee's entitlements. One example is California's treatment of non-exempt employees. Unlike most states, California requires non-exempt employees to be paid overtime for hours worked in excess of 8 per day, while most states require overtime pay only for hours worked in excess of forty per week. Although not universally enforceable, it may be advantageous for the employer to obtain the employee's written acknowledgement of which state's law governs his or her employment relationship during the telecommuting period.

Avoiding Discrimination Claims: Must An Employer Permit Everyone to Telecommute?

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) provides that an employer shall not discriminate against employees or job applicants based on their disability in terms of, among other things, hiring or the privileges of employment.³ Under the ADA, the employer must provide

reasonable accommodations where such accommodation does not cause the employer undue hardship.⁴ Although the Equal Employment Opportunity Commission has previously found that telecommuting can be considered a reasonable accommodation under the ADA, employers are not required to offer telecommuting as a reasonable accommodation.⁵

EMPLOYERS SHOULD BE AWARE THAT, REGARDLESS OF WHAT THEIR EMPLOYEE HANDBOOKS SAY, EMPLOYEES ARE LIKELY TO BE PROTECTED BY THE EMPLOYMENT LAWS OF THE STATE IN WHICH THEY PRIMARILY PERFORM SERVICES.

However, employers may choose, where it is consistent with their adopted telecommuting policy, to permit an employee who is considered disabled under the ADA to telecommute as a reasonable accommodation. Moreover, when the Company's policy permits telecommuting for a specified job, the option to telecommute must be equally applied to employees with disabilities and employees without disabilities.

Create a Telecommuting Policy and Be Consistent

To minimize the risk of discrimination claims, employers should use consistent standards in determining which employees are allowed to telecommute. The more objective the decision-making, the better. Employers can create a telecommuting policy enumerating which job positions are eligible for a telecommuting arrangement

and what criteria an employee must meet to be eligible for the program. After creating a policy, the employer should refrain as much as possible from making exceptions. As with all company policies, consistent adherence will limit an employee's ability to bring a successful discrimination claim.

Insurance Coverage

Workers' Compensation

All states require employers to maintain workers' compensation coverage. In California, workers' compensation insurance is required where there is at least one employee, unless the employee was hired in another state and is only temporarily working in California. An employer situated in another state must obtain workers' compensation coverage for an employee in California if the employee is "regularly employed" there or "a contract of employment is entered into" in California.⁶

The penalties for not having workers' compensation insurance may vary from state to state. In California, the Division of Labor Standards can issue a stop order which prohibits employees from working for the employer until workers' compensation insurance is obtained. Penalties for failure to obey the stop order include fines and/or jail time. Where an employee is injured, the employer can face additional fines for not having the proper coverage.⁷ Employers should verify whether their coverage is sufficient for the state(s) from which employees telecommute.

General Liability Insurance

Consider this situation: A telecommuting employee invites a business guest to his or her home office to discuss company-related matters. The business guest is injured inside the telecommuter's home. Will the employer's general liability insurance policy cover this business guest's injury?

Although employers will have general liability insurance policies for accidents that may occur on the employer's premises, employers should verify whether these policies cover personal injury or other claims that may arise against them

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based on acts or omissions at the telecommuting location.

Worker Classification Issue

As we previously reported, the IRS has launched an aggressive worker classification audit initiative (see, [“Employee or Independent Contractor: It’s Time to Assess”](#) and [“How to Deal with Worker Classification Tax Audits”](#)). With this initiative, there will be increased scrutiny of non-typical worker arrangements. Part of the reason for the audit initiative was the IRS’s perception that working relationships have changed dramatically with advances in technology and that once typical employment relationships have been transformed into other relationships, such as independent contractors. Telecommuting is one such example of a changed relationship between company and worker. The main concern of the IRS in the audit initiative will be to ascertain whether a company has properly treated its workers as employees or independent contractors. For most companies that allow telecommuting, this will not be an issue simply because the worker is being treated as an employee. However, if a worker is removed from the workplace, the company may be tempted to rely upon that fact in support of an independent contractor treatment of that worker. Of course, the IRS will likely look to the level of control that the company exerts over the worker even though the worker may never enter the company facilities. Based on recent experience, we believe the IRS may look at a company’s specific software requirements and interfaces between the worker and the company’s activities in order to establish the element of control. We view the IRS’s approach of imputing control through software as novel and aggressive, but companies should

anticipate the IRS raising this issue in these circumstances.

Taxes

Nexus

An employer that allows its employees to telecommute and perform work in a state in which it does not already have nexus, *i.e.*, does not have a sufficient connection with that state to allow the state to assert

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tax jurisdiction under the U.S. Constitution, could find itself subject to income tax and responsible for the collection of sales tax in the state from which an employee telecommutes, to name just two of the potential tax obligations a state could assert.

Recently, the New Jersey Tax Court ruled that a software developer that “regularly and consistently permits” an employee to work from her home in New Jersey is doing business in the state and is subject to New Jersey’s corporation business tax.⁸ The court concluded that a corporation is “‘doing business’ at the place where its employees are expected to report for work, where they are regularly receiving and carrying out their assignments, where those employees are supervised, where they begin and end their work day, and where they deliver to their employer and customers a finished work product.”⁹

Personal Tax Liability and Tax Withholding

An employee’s decision to telecommute can also have significant, unintended state income tax implications for the employee. Individuals are generally subject to tax on all of their income in their state of residence, regardless of where that income is earned. In addition, most states that impose a personal income tax also provide that even a single visit to the state by a nonresident is sufficient to subject that employee to tax by the nonresident state.¹⁰ Although most states provide a credit for personal income taxes paid to another state, this kind of credit mechanism has been found not to be required under the U.S. Constitution, leaving the potential for double taxation a real and serious problem.¹¹

A Byzantine labyrinth of state rules—that may or may not be tied to the employee’s personal income taxability threshold—exists with respect to employers’ withholding obligations. For example, in at least a couple of states, even though the nonresidents are subject to income tax based on a single day’s presence, employers are not required to withhold unless an employee is present for at least fourteen days.¹² In most states, the withholding obligation starts the first day the employee travels to the state, while in other states the employee’s earnings attributable to the state must exceed a certain wage threshold, and yet other states use an alternative of number of days or a dollar threshold. Even where a day threshold is adopted, the determination of what constitutes a day is not always clear. Does traveling through a state count? Does a portion of the day count? Implementing a tracking system for employees is essential, but even with such a system there remain difficulties in administration. Certain states have reciprocal agreements with other states that allow an employer to withhold income taxes in the employee’s state of residence irrespective of where the employee performs those services, which can help reduce an employer’s burden.

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Further complicating personal income tax and withholding are issues such as New York's "convenience of the employer" rule.¹³ New York's rule provides that days worked by a New York State nonresident employed to provide services in New York, but who works at home outside the State, are to be sourced to the New York office, unless such work was performed outside the New York office for the necessity of the employer rather than the employee's convenience. New York courts have consistently rejected challenges to this rule.

Federal Intervention

In response to increased audit activity over the last few years, business groups have advanced federal legislation to prohibit states' use of the "convenience of the employer" rule and to provide a uniform threshold before employers would be required to withhold taxes. One proposal would bar the "convenience of the employer" rule and require that the employee be physically present in the state as a precondition to imposition of tax. Another proposal, the Mobile Workforce State Income Tax Fairness and Simplification Act, would set a threshold number of days below which a state could not subject a nonresident to state income tax. Debate is still ongoing on the length of the threshold, with proposals ranging from sixty days to twenty days. At the moment, however, no clear federal guidelines apply at all, and the states remain free to set varying rules.

Unemployment Insurance

Employers will also need to determine the jurisdiction of employment for telecommuting employees for unemployment insurance purposes. Under the definition of "employment" adopted by most states, employment by a single employer of an employee performing

services in multiple states is not to be fragmented, but should be allocated to the state in which the employee is most likely to become unemployed and seek work. New York's highest court applied that definition to an employee telecommuting from Florida who performed services for a New York State-based corporation.¹⁴ The court held that the telecommuter was localized in Florida, where she was physically present and, therefore, Florida, not New York State, was responsible for the payment of unemployment insurance benefits.

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Protecting Company Data

When an employer allows an employee to telecommute, the need to protect the company's data is significantly increased. On the employer's premises, the employer will likely have an IT team in place to ensure there is sufficient virus protection, spyware-blocking applications, and even the ability to block certain applications or websites, such as social networking sites, from running on the computer. However, without the IT team travelling to the telecommuter's home, such protection is unlikely to be as strong, or even present, on the telecommuter's personal computer. Moreover, a computer in an employee's home will be more vulnerable to misuse by other members of the employee's household or even to theft.

There are several ways that an employer

can protect its data. The best way is to provide telecommuting employees with employer-provided computers and encourage use of a virtual private network (VPN) or other means of working remotely on its servers. This will help to minimize the amount of the employer's data stored on a computer in the telecommuter's home. The employer should also discourage or even prohibit employees from using personally-owned computers or devices to create or store company data or work product. The employer will also want to discourage or prohibit employees from using employer-provided computers or equipment for personal use, to reduce the risk of employees accidentally downloading spyware or viruses through their personal Internet use.

The employer can also require that the employee be the only person to use or have access to the employer-provided computer or VPN. Employees should also be required to secure the employer's materials and data, using passwords or encryption, to prevent unauthorized access by family members to the employer-provided computer.

An employer should also implement these safeguards for portable computers or devices, including using passwords or encryption, to help reduce the risk of viruses or security breaches of its data.

Occupational Health and Safety

Employers are aware of the importance of their employees' safety when on the employer's premises, whether the issue involves ergonomics or the prevention of other work-related injuries. These safety issues are just as important for a telecommuting employee. In fact, federal and state occupational health and safety agencies have indicated that employers need to be mindful of workplace safety for telecommuting employees, including proper ergonomics. However, there are no standard rules or regulations governing telecommuting employees.

The Federal Occupational Safety and Health Administration (OSHA) has stated

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that, due to privacy concerns, it will not inspect an employee's home office, even where there has been a specific complaint regarding the home office. There is also no requirement for employers to inspect an employee's home office, and OSHA will not hold employers liable for the safety of an employee's home office.¹⁵ Individual states can create their own safety and health requirements, which OSHA approves and monitors. These requirements must be "at least as effective as" OSHA's regulations, but a state may enact stricter requirements for health and safety in the workplace.¹⁶

Although there is no liability under OSHA, employers should consider implementing health and safety rules for telecommuting employees as there may be liability under state law. Employers are not required to supply furniture for the employee's home office, but employers might consider implementing safety measures such as requiring the telecommuting employee to undergo ergonomic training and to certify that his or her home office has appropriate furniture to ensure safety and prevent injury.

Regulating Hours Worked

Although telecommuting employees are typically accessible through email, telephone, and fax, employers may be concerned about how many hours employees work and how much work the employees are doing when they are not in the physical presence of the employer. Employers must be especially mindful of this issue when the telecommuter is a non-exempt employee, where missteps can lead to costly wage and hour claims. Employers can mitigate the risks through diligent administration of their usual scheduling and time recording policies.

Designating Work Hours

Employees can be required to maintain regular working hours designated by

the employer and to remain accessible during those hours. Employees can also be required to dedicate their full time and attention to their work during their regular working hours. To ensure employees pay full attention to their work, employers can prohibit employees during designated work hours from providing the primary care for any small child (e.g., under age 12) or any adult who would otherwise require the care of a nurse. If an employee seeks a telecommuting arrangement to allow him or

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her to act as a caregiver, the employer may want to consider, as an alternative, whether the employee is eligible for intermittent leave or a reduced work schedule under the Family and Medical Leave Act (FMLA) or similar laws.

Recording Hours Worked

To ensure proper payment, the employer can require the telecommuting employee to record hours worked. For example, the employer can require the employee to keep detailed timesheets of hours worked; employees can send an email to check in and out of work; or the employer can implement an Internet-based system for the employees to clock in and out.

Employers must remember that non-exempt employees—even telecommuters—are entitled to overtime. As with on-site employees, employers can require non-

exempt employees to obtain prior written authorization from their supervisors before working overtime. Non-exempt employees may also be entitled to meal and rest periods, depending on state law. Monitoring breaks to ensure they are taken (and, conversely, that not too many are taken) requires a certain amount of trust that the employee will comply with company rules. For this reason and others, employers may want to include demonstrated trustworthiness and self-discipline among the criteria for eligibility to telecommute. Employers should also require employees to record time away from work, such as sick time and vacation time, in accordance with the company's standard policies.

Telephone and Internet Service

Before the telecommuting arrangement is approved, it will be important to determine whether the employer or employee will pay for the cost of the telephone, landline or mobile phone, and Internet service for the employee's home office. Some state laws require employers to reimburse an employee for all necessary and reasonable costs incurred in performing his or her job duties. Specifically, California requires that an employee be reimbursed for "all expenses or losses incurred in the direct consequence of the discharge of the employee's work duties."¹⁷

Depending on the applicable state law, the employer may have different options for paying for these services. For example, the employer can pay for the telephone or Internet service directly. In such cases, the employer may be able to require the employee to designate the telephone or Internet service, or both, as work only and not for personal use. Alternatively, the employer may be able to require the employee to pay for the services upfront and then request reimbursement from the company.

An employer should check the law of the state where the telecommuter is working to determine which reasonable costs the employer must pay or reimburse to the employee before beginning the

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telecommuting arrangement.

State Jurisdiction and Qualifications to do Business

Telecommuter's State Jurisdiction

When a telecommuter or a third party sues a business in the state where the telecommuter works, the business may be required to defend such suit in the state where the telecommuter works. As a general matter, courts have disagreed on whether merely engaging a telecommuter in a state will constitute "systemic and continuous" activity in that state, such that the state's courts can exercise general jurisdiction over the employer. Employers should, however, be aware that there is at least the potential that they may be required to submit to the jurisdiction of the telecommuter's state courts.

Qualification to Do Business in the Telecommuter's State

If a foreign employer is a corporation, a state may require the employer to obtain the state's permission before doing business there. Companies must qualify to do business in a state only if the state considers the company's activities to be "doing business." Generally, employing a telecommuter who maintains a home office should not, alone, subject a company to the state's qualification requirements. However, if the nature of the work the telecommuter performs constitutes "doing business," the analysis may change. For example, if the telecommuter actually renders consulting services or sells company products to in-state customers from his or her home, such activities could well require the company to qualify.

Zoning Regulations

State or local law may place zoning regulations on the operation of business conducted from the telecommuter's home

office. While certain sales transactions may violate the zoning regulations, merely conducting administrative tasks may not. Zoning regulations may, as in Los Angeles County, place limits on the number of business guests allowed into the home office per day and limit how much or how many employee's can work from the same home.¹⁸

Zoning regulations may also require permits for using certain equipment in the home or due to the location of the home in the city or county. One concern is identifying who is responsible for obtaining and paying for such permits, the employer or the employee.

Recommendations

- Prior to adopting a telecommuting policy, consult with a tax attorney well-versed in state and local tax issues, and consider the tax implications and costs to the company and its telecommuting employees.
- Create a telecommuting policy which designates certain jobs or job duties that can be performed from a home office. Distribute this policy to all employees and apply such policy consistently to all employees and eligible jobs. This policy should reserve the employer's right to terminate or change the telecommuting arrangement at any time, at its discretion, and it can clarify other rules and guidelines for telecommuting employees.
- Ask the employee to sign a telecommuting agreement, stating that the employee will permit the company reasonable access to his or her home office upon request and that the employee will abide by the company's standard policies while working as a telecommuter.
- Consult a knowledgeable labor and employment attorney if there is ever any doubt as to the rules or policies that you as an employer are required to follow regarding telecommuting employees.

Now that you have finished reading this article and drinking your home-brewed

cup of coffee, don't forget to feed the dog before returning today's calls and email messages. ■

- 1 Undress for Success and the Telework Research Network, *Telecommuting Statistics*, <http://undress4success.com/research/telecommuting-statistics/>.
- 2 *Id.*
- 3 Americans with Disabilities Act of 1990, amended by the ADA Amendment Acts of 2008 (Pub. L. No. 110-325), § 12112.
- 4 *Id.* § 12113.
- 5 The U.S. Equal Employment Opportunity Commission, *Work at Home/Telework as a Reasonable Accommodation*, available at <http://www.eeoc.gov/facts/telework.html>.
- 6 See Department of Industrial Relations, Division of Workers Compensation, <http://www.dir.ca.gov/dwc>.
- 7 *Id.*
- 8 *Telebright Corp. v. Director, Div. of Taxation*, No. 011066-2008, 2010 N.J. Tax LEXIS 4 (N.J. T.C. Mar. 24, 2010).
- 9 *Id.* at 14.
- 10 Some states exempt certain activities, such as attendance at trade shows or seminars, from the category of activities that create nexus (and potential income tax liability) for an employee.
- 11 *Tamagni v. Tax App. Trib.*, 695 N.E.2d 1125 (N.Y.), *cert. denied*, 525 U.S. 931 (1998).
- 12 See, e.g., Connecticut and New York.
- 13 Other states that have analogous provisions include Nebraska (316 Neb. Admin. Code 22-003.01C) and Pennsylvania (61 Pa. Code §109.8).
- 14 *Matter of Allen (Commissioner of Labor)*, 794 N.E.2d 18 (2003).
- 15 United States Department of Labor, Occupational Health and Safety Administration, *Home-Based Worksites*, Directive No. CPL 2-0.125 (February 25, 2000), available at www.osha.gov.
- 16 United States Department of Labor, Occupational Health and Safety Administration, *Frequently Asked Questions about State Occupational Safety and Health Plans*, <http://www.osha.gov/dccsp/osp/faq.html#oshaprogram>.
- 17 California Labor Code § 2802.
- 18 See L.A. County, Cal., Code tit. 22, ch. 22.20.020 (2010).

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