

# Working Remotely: Legal Implications for Employers



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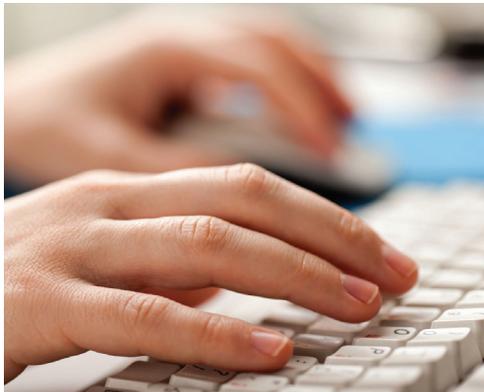
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## Shifting Paradigm

Recently, there has been an increase in popularity of alternative work schedules, working from home, telecommuting and flexible work hours. The shift centers around employees seeking to work where they feel comfortable and productive. Thanks to continued technological advances, home offices and telecommuting have become more feasible.

## Win-Win Situation?

Teleworking can be seen as a win-win situation. Employees get added flexibility and save money on transportation, gas, etc., while employers can save money on office space and supplies. However, employers need to be proactive in addressing potential risks to maximize the benefits of teleworking.



## Is Telecommuting Right For Your Business?

To decide if telecommuting is right for a business, employers should consider:

- (1) office culture;
- (2) whether such a policy is practical in the industry;
- (3) whether employees can achieve collaboration through technology; and
- (4) whether employees can work without supervision.

## The Bottom Line

Despite the potential challenges and legal implications for telecommuters, the legal risks can be mitigated by having comprehensive policies, procedures and agreements in place. Considering the growing popularity of telecommuting and flexible work schedules, it is worthwhile for employers to take the time to consider the benefits of these arrangements and take the steps necessary to mitigate legal risks.



### Company Property

A number of issues come into play with property used by employees, such as: (1) Do telecommuting employees use company computers or their own computers when working from home? (2) Are employees issued smartphones or other electronic devices? (3) What happens if the equipment/devices are lost, stolen, or damaged?

Having a telecommuting policy or agreement in place that addresses these issues can mitigate and allocate risk. For example, employees can sign documents that acknowledge receipt of equipment, limit use to business purposes, request action to prevent damage or theft of equipment, and allocate responsibility for maintaining/replacing equipment.

### Confidentiality

There are a number of potential issues concerning security and confidentiality of information, such as: (1) Do telecommuting employees take home sensitive documents and/or data? (2) What security measures have they taken in their home offices to protect confidential information? (3) Do they use wireless Internet connections that may not be secure?

Written policies/agreements can address these issues. Policies/agreements should communicate the importance of safeguarding confidential/proprietary information. Consider requiring locked cabinets and frequently changing passwords. The company can also consider having an information technology (IT) professional from the company ensure the employees' home offices use secure connections.

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# LEGAL ISSUES continued

## Workers' Compensation

What happens if an employee sustains an injury while working from home? Employers have a duty to create safe working environments regardless of whether the employee is in the office or working from home.

To mitigate safety risks, employers should try to designate telecommuting employees' work time and work environment. For example, employers should require employees to designate a particular area as a home office and take breaks (for lunch, etc.) at certain designated times. Employers may consider site checks to ensure there are no safety hazards.

## Wage and Hour Issues – Generally

Wage and hour issues can present some of the biggest challenges for employers. Some of these issues include maintaining accurate payroll records, properly compensating employees and payment for overtime. The "look-back" period for Fair Labor Standards Act (FLSA) violations is three years if the violation is found to be "willful". Therefore, failing to comply with these regulations can be very costly.

## Wage and Hour Issues – Payroll

With respect to non-exempt employees, the FLSA and applicable state law requires that employers pay employees for all hours they have worked and keep accurate records of hours worked. This applies even to work performed away from the office, including work at home.

Employers should be sure to track telecommuting non-exempt employees' hours and have a system in place that can ensure accuracy (especially because there is no supervisor to monitor the working hours). Employers should encourage open communication between employees and their supervisors. Written policies and acknowledgments are also useful tools to lay out the number of hours the employee is expected to work each day/week, how hours are recorded, and prohibiting non-exempt employees from working off-the-clock.

## Wage and Hour Issues – Compensation

Federal and state laws regarding compensation for waiting time, on-call time, and rules regarding break periods apply to telecommuters just as they do to employees working in the office. This makes tracking non-exempt employees' hours very important to avoid the risk of potentially costly collective actions down the road.

## Wage and Hour Issues – Overtime

The FLSA requires that non-exempt employees be paid overtime compensation for all hours worked over 40 in a workweek. Again, this highlights the importance of tracking employees' working time.

## Discrimination

Employees who work from home should be treated the same as employees working in the office. If certain employees are allowed to work from home while others are denied that opportunity, those denied may claim the decision was based on membership in a protected class. Employers should be careful to make decisions uniformly and without regard to membership in a protected class.

## Americans With Disabilities Act (ADA)

Under the ADA, employers may need to consider whether they can offer an employee the option of working from home as a reasonable accommodation for a disability. While an employer can argue that such an accommodation would pose an undue hardship on the business, there has been a recent trend of finding in favor of employees on this issue. In other words, some courts have held that employers have not met the high burden of demonstrating that telecommuting is an undue hardship.

## Out-of-State Employees

Additional issues may arise with telecommuters that are in different states. If employees are located in a different state than where the employer is located, certain tax, leave and other laws may be applicable.

**Sources:** Arsen, Hera S. "Let's get physical: five legal issues with telecommuting," *Lexology*. 4 Apr. 2013; Binford, Tammy. "Beyond Yahoo! hoopla: Legal issues have place in work-from-home debate." *HR Hero*. 14 Mar. 2013.



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