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“HOME ALONE!”

MANAGING THE REMOTE WORKFORCE



ABOUT OUR SPEAKER



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DEFINITION OF TELECOMMUTING

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- “Telecommuting” is defined as a work arrangement where the employer allows employees to work all or part of the time at a location other than the employer’s office, typically at the employee’s home.
- Rather than traveling to the office, the employee “travels” via telecommunication links, keeping in touch with co-workers and the employer by telephone, email, Skype, Instant Messaging, texting, etc.
- Advances in technology allow employees to work from home more easily now.

DATA & STATISTICS

- In 2009, approximately 34 million employees telecommuted at least part of the time in the United States.
- By 2015, these estimates skyrocketed to over 63 million employees.
- It is estimated that over 40% of U.S. employers allow some form of telecommuting.
- Currently, over 20% of U.S. employees telecommute for work.

PROS OF TELECOMMUTING

- Many employees view telecommuting as a way to address family obligations, reduce travel expenses, limit commuting time, and improve productivity.
- Employers often need to offer telecommuting to attract and retain good employees, reduce business costs, and increase productivity.

CONS OF TELECOMMUTING

- A virtual workforce may not make sense for employers that depend on daily employee collaboration and in-person interactions.
- There is also a “dark side” to telecommuting, as employees can easily take advantage of the “working from home” concept, and be much less productive.
- Some employers have become frustrated with this system, and have refused to allow any employees to telecommute (i.e., Yahoo, Best Buy, etc.)

WRITTEN TELECOMMUTING AGREEMENT

- Employers should have well-written, easy to understand Telecommuting Agreements.
- The Agreement should expressly define the parameters of what is expected and acceptable.
- Key terms:
 - At will employment
 - Employer's right to terminate arrangement
 - A privilege, but not a right

WRITTEN TELECOMMUTING AGREEMENT

- Acceptable telecommuting locations
- Defined home work space
- Acceptable methods of communication
- How much time expected in the office
- Reimbursable expenses
- Travel time pay

WRITTEN TELECOMMUTING AGREEMENT

- Not “on call”
- Safety issues
- Procedures if any employee suffers any injuries
- Homeowner’s insurance

Employers should consult with experienced labor counsel before finalizing any such agreements.

SAFETY

- Under OSHA, employers are required to provide employees with a safe work environment, even if the employee works from home.
- Employers who allow telecommuting face the challenge of being required to provide a safe work environment but not having much control over that environment.
- Employers should confirm that the home office is safe, in good working order, and free from all hazards.
- Consider conducting telecommuters' safety training and/or safety surveys.

HOME INSPECTION

- Employer should reserve the right to inspect a home work location upon advance notice.
- Key issues:
 - Ergonomic seating
 - Adequate desk space and supplies
 - Smoke detectors

HOME INSPECTION

- Multiple exits
- Adequate ventilation
- Employers who conduct home inspections should take photos of the work space for their records.
- Also, ensure that the employee's homeowner's insurance policy is up to date.

INJURIES

- Employers should specifically notify telecommuters in writing of their obligation to immediately report any work-related injuries at the home office.
- Employers need to promptly investigate any injury to determine whether it was work-related.
- Employers should maintain a record of the workplace injuries of telecommuters.

WORKERS COMPENSATION

- Work-related injuries can be simple to determine for employees who work on the employer's premises, but it is often harder to distinguish what happened when it comes to a virtual workplace.
- Employees who are injured while off-duty at home may claim they were injured on-duty in order to take advantage of worker's compensation benefits.

WORKERS COMPENSATION

- In Samberg v. J.C. Penney, the Court decided in favor of an employee who tripped over her dog while retrieving fabric samples when she was working at home.
- The Court determined that she was entitled to workers' compensation benefits because she was working for her employer at the time she sustained the injury.

CROSSING STATE LINES

- Most virtual offices will subject an employer to jurisdiction by a court in the state where the remote employee lives and works.
- Employers must consider where employees would file suit if they are working from home out of state.
- Employers may try to include a “choice of law” provision in the Telecommuting Agreement, but that often does not work in California.

TAXES

- Employers may be on the hook for paying corporate taxes in the states where their employees reside and work, even if they only work from home in that state.
- Some employees who work from home can claim tax deductions related to their home work spaces.

TAXES

- If employees are working from home because the employer lacks sufficient office space for the employee to work at the employer's business location, the employee's cost associated with home office may be tax deductible.
- Employers should consult with experienced tax attorneys concerning these issues.

EXEMPT OR NON-EXEMPT?

- It is much easier for an employer to allow an exempt salaried employee to work from home rather than a non-exempt hourly employee.
- Some employers strictly prohibit non-exempt hourly employees from telecommuting simply to avoid the headaches of tracking time, ensuring meal and rest periods, travel time pay, etc.
- Carefully consider the risks vs. rewards before agreeing to allow non-exempt hourly employees to telecommute.

TRACKING TIME

- If the employee allowed to telecommute is non-exempt, the employer must carefully track and record his/her hours worked.
- Employers should devise a system that tracks the employees' hours worked, including frequent telephone call-ins, email check-ins, and related checks to make sure that the employees are actually working.
- Some employers are using mobile tracking apps on devices that show where the employee is located during the time they are on the clock and supposed to be working.

CONTROLLED VS. UNCONTROLLED STANDBY

- It is important that telecommuting employees should not be treated as “on call” or on “controlled standby” outside of their normal working hours.
- To do so could result in changing in their non-compensable time (“uncontrolled standby”) into compensable time (“controlled standby”).

CONTROLLED VS. UNCONTROLLED STANDBY

- Rule of thumb: there is a difference between being “engaged to wait” (which is compensable) vs. “waiting to be engaged” (which is non-compensable).
- Make sure the Telecommuting Agreement is clear that the employee is not “on call.”

MEAL/REST PERIODS

- Employers must make sure that non-exempt employees working from home or otherwise outside the office must be given their meal periods and rest periods.
- Be sure to have employees clock out when they start and clock in when they stop their meal periods at the times they are actually taking them.

MEAL/REST PERIODS

- Employees should be required to log off their access to work through their home computers during rest periods and meal periods.
- Use “Certification Forms” that have non-employees self-verify that they are taking these breaks.
- Note: Do not use auto-deduct system for meal periods.

TRAVEL

- Travel time is another issue that must be addressed for non-exempt employees who telecommute.
- The DLSE has opined that the time a non-exempt employee who normally works from home but who travels from home to a central office and then back home is not compensable time.
- It is akin to an employee driving from home to work and back, which is not compensable time.
- But travel time to other locations may be compensable.

REIMBURSEMENT

- Labor Code Section 2802 requires employers to reimburse employees for expenses incurred in direct consequence of employees discharging their job duties.
- Labor Code Section 2802 precludes employer from passing their operating expenses on to their employees.
- Employers must carefully assess what expenses must be reimbursed for employees who work from home.

REIMBURSEMENT

- Typical expenses that will likely have to be reimbursed for employees who telecommute: cell phones use, home internet access, laptops, pens, paper, and other items needed to meet their work requirements.
- In Cochran v. Schwan's Home Service, the Court ruled that an employee's fixed cost must be reimbursed even if irrespective of the employer's demands, the employee would still have incurred that expense.

REIMBURSEMENT

- Here, the employer did not reimburse employees for cell phone use because the employees had unlimited minutes on their cell phone plans, so they did not incur any additional cost when they used their cell phones for work.
- The Court held that this policy was illegal; even if an employee had an unlimited plan, the employer must still reimburse some portion of the bill if the employee uses that cell phone for work.

REIMBURSEMENT

- The Court reasoned that limiting expense reimbursement to marginal costs would allow an employer to get “something for nothing” and have the employee bear the operating expense that employers would have otherwise needed to incur to ensure that the employee was working remotely.
- So it is important for the employer to pay some portion of the cell phone bill, even if a small percent.

WORKING FROM HOME AS AN ACCOMMODATION

- Employers may have to allow employees to work from home as a reasonable accommodation for disability under the ADA and/or the FEHA.
- Employers should review the following issues to determine if telecommuting is a reasonable accommodation:
 - Did the employee provide a doctor's note requiring telecommuting?
 - Can the job be effectively performed at home?

WORKING FROM HOME AS AN ACCOMMODATION

- Does the job require regular interaction with supervisors or co-workers?
- What is the expected length of time the employee needs to work at home as an accommodation (short-term, permanently, or indefinitely)?

WORKING FROM HOME AS AN ACCOMMODATION

- Credeur v. State of Louisiana, 860 F.3d 785 (5th Cir. June 23, 2017)
- Addressed whether employer was required to afford employee with permission to work from home indefinitely to accommodate employee's disability.
- Louisiana DOJ attorney developed serious health problems due to complications from a kidney transplant.
- She was granted an accommodation to work from home for approximately six months.

WORKING FROM HOME AS AN ACCOMMODATION

- After exhausting FMLA leave, DOJ again granted attorney's request to work from home in October 2013.
- In August 2014, DOJ formally denied attorney the ability to work from home.
- Attorney sued DOJ for its alleged failure to accommodate her disability.

WORKING FROM HOME AS AN ACCOMMODATION

- Court ruled that the attorney was not an otherwise “qualified individual” because attorney could not perform her essential job duties working from home.
- Court reasoned that the attorney’s position was interactive, team-oriented, and required day-to-day coordination with supervisors.
- Court noted that “regular work-site attendance is an essential function of most jobs.”

WORKING FROM HOME AS AN ACCOMMODATION

- Temporary work-from-home accommodations may be required as a reasonable accommodation under the ADA.
- If applicable, consider including “regular work-site attendance” as an essential job duty on employee job descriptions.
- However, employers are not required to provide employees with an indefinite work-from-home accommodation under the ADA so long as work-site attendance is essential to the position.

POSSIBLE DISCRIMINATION CLAIMS

- Employers may be accused of favoritism and/or discrimination if they allow some employees to work from home but not others.
- Once the employer opens that door, it may be very hard to limit who can work from home.
- Keep good records of why certain employees are allowed to work from and why others were not; have a good business reason why or why not.

CONFIDENTIALITY

- Employers who let employees work from home are often allowing technical, financial and other sensitive confidential information outside its own internal firewalls.
- Employers with virtual workforces have to take extra steps to protect their confidential information.

CONFIDENTIALITY

- Employers should consider having cybersecurity audits.
- Focus on cybersecurity by ensuring that all employee devices are protected from improper intrusion.
- Employers should require employees to check in and out of servers over a dedicated, secure line accessible only through a password-protected system.

REMOTE ACCESS

- Remote workers often have remote access to company systems.
- Use two factor authentication to log into company system (like RSA Tokens)
- Use remote access Virtual Private Network (VPN)
 - This allows an individual user to establish a secure connection to your private business network from a remote location using a computer connected to the Internet.

USING COMPANY COMPUTER FOR PERSONAL USE

- Remote workers have more opportunity to use their company computer for personal use.
- Activity that occurs outside the VPN and firewall (checking personal email accounts or shopping on Amazon) can create cyber risk.
- Update policies to limit personal use and prohibit downloading games and other applications that may also install malware.
- Coordinate with IT or InfoSec to devise protocols that will effectively limit risk to the organization.

BUSINESS EMAIL COMPROMISE

- Business email compromise (BEC) has cost US companies \$3 Billion dollars this year alone according to the FBI.
- Fraudulent wire transfers and transfers of sensitive data like W-2s are often accomplished by BEC.
 - Handouts of BEC Public Service Announcement from FBI.
- Remote workers must communicate by e-mail given they are not in the office to personally authorize.
- Create protocol that requires phone call to verbally authorize wire transfer, change in routing numbers or transfer of sensitive data.

BEST PRACTICES

- Explain to employees that telecommuting is a privilege, not a right.
- Be clear that if the practice is abused, it will be discontinued.
- Have a well-written Telecommuting Agreement.
- Carefully review and resolve any safety issues.
- Conduct home worksite inspection, where feasible.

BEST PRACTICES

- Require employees to report all injuries immediately.
- Consider choice of law and tax issues.
- Consider limiting telecommuting to exempt salaried employees only.
- Do not have non-exempt employees be “on call” at home.
- Be sure to pay non-exempt employees properly, provide them with meal and rest periods.

BEST PRACTICES

- Conduct regular check-ins to track time; consider time tracking apps.
- Reimburse employees for business expenses as required by law.
- Determine if working from home is a reasonable accommodation.
- Be fair and consistent about applying telecommuting policies.
- Take aggressive steps to secure confidential information.

THANK YOU FOR ATTENDING!



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