

The New Normal – Teleworking Challenges and Solutions

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The COVID-19 pandemic has turned the world upside down, and staying home has become the new normal. (For Instagram users, the #stayhome hashtag has 10.5 million posts!)

Whether to comply with a local stay-at-home order or to heed public health social distancing guidance, countless businesses have sent their workforce home—to telework. For some businesses, this was relatively painless due to the growing trend of flexible working. For others, significant adjustments were required. And for many businesses, telework is not an option for all employees all of the time.

The following are some issues to address and less common problems to anticipate, along with practical solutions, for employers with teleworking employees. Also included are a few hypothetical scenarios that may hit close to home (pun intended).

Define Who Can (and Cannot) Telework

It seems simple, but it is important for employers to clearly communicate which employees can telework. Employers also must communicate that all (or substantially all) job duties are expected to be performed while teleworking. To that end, the U.S. Department of Labor ("USDOL") explains that telework is "no less work than if it were performed at an employer's worksite." (See USDOL Executive Summary for Temporary Rule 29 C.F.R. § 826). Businesses may need to, or choose to, keep workforces remote for several months, and employees must understand that they will be held to the same performance standards while teleworking.

Articulating whether an employee can telework also is critical to benefit eligibility under the Families First Coronavirus Response Act ("FFCRA"). On April 1, 2020, employees of certain businesses became eligible for FFCRA paid leave if they are unable to work or telework for certain covered reasons (all described in another article). Therefore, it must be clear whether an employee has the ability to telework.

Scenario: *An employee has been teleworking during the COVID-19 crisis and also is at home with her kids while schools are closed. On April 2, the employee indicates she can no longer telework and is eligible for FFCRA paid leave. It is not lost on anyone (including employers) that many teleworking employees have been juggling remote working with at-home childcare or homeschooling since many schools are closed. However,*

an employee who is able to telework generally is not eligible for FFCRA paid leave. On the other hand, if the employee provides an oral or written statement certifying that she is unable to telework because of the lack of childcare, she likely is entitled to the leave. (See USDOL Temporary Rule, 29 C.F.R. § 826.100). This scenario raises one of the complexities of teleworking during the COVID-19 crisis, where employers have to balance the credibility of employees' certifications with being flexible during uncontrollable circumstances. While there is no "right" answer to this scenario, it underscores the importance of employers setting clear expectations and being flexible during these unprecedented times.

Define Job Duties

Simply put, some job duties cannot be done remotely. For a period of time, an employer may be able to forego certain tasks and should communicate as much to the employee. However, it may be that some employees can telework 100% of the time, whereas others need to go outside of their home office to perform particular job duties. These expectations must be clear.

State and local stay-at-home orders may identify certain businesses as "essential," meaning they can (and, for some, should) stay open. This has raised questions among employees who wish to stay home but, under the applicable order, are permitted to go to work. Further, employees who are able to telework are ineligible for FFCRA paid sick leave for purposes of adhering to a stay-at-home order. (See USDOL Discussion regarding Temporary Rule 29 C.F.R. § 826.20).

***Scenario:** An administrative employee of a medical lab can conduct most of her job duties from home. However, one of her job duties is opening and distributing incoming mail. The administrative employee indicates she cannot come into the office due to a local stay-at-home order. If the medical lab is considered an essential business that can stay open, then the lab will need to clearly define which employees must work in the office or lab (while taking necessary precautions) and which employees can telework. For this particular employee, if one of her job duties is to open and distribute mail, she will need to come into the office. However, the medical lab may determine that this job duty can be reassigned (perhaps to another administrative employee who will be in the office).*

Define Work Schedules

For many employees, work can be conducted at any time of day, so long as deadlines are met. However, this is not the case for all jobs and is especially problematic for nonexempt employees who are accustomed to punching the clock at the worksite. For those nonexempt employees who are now teleworking, the new normal includes different forms of clocking in and clocking out, but there are some related pitfalls to consider.

Employers must continue to adhere to the Fair Labor Standards Act (FLSA) requirements of paying overtime for any hour worked in excess of 40 hours in a workweek. However, employers and employees can agree to adjust working hours to help the employee handle personal matters (e.g., teaching a child at home while schools are closed). The USDOL recently recognized the potential need for unconventional hours and acknowledged the disconnect from existing regulations (29 C.F.R. § 790.6) requiring that nonexempt employees be paid for time between the first and last principal activities, known as the "continuous workday" rule. The USDOL's Temporary Rule suspends enforceability of the continuous workday rule only while teleworking due to COVID-19. (See 29 C.F.R. § 826.10).

In line with establishing a certain work schedule, employers should remind nonexempt employees to keep

diligent time records and not work after they clock out. Because many teleworking employees use personal cell phones, it is important that supervisors not text or call employees outside of their scheduled working hours.

Scenario: *While teleworking, a nonexempt employee was logged into his computer from 8:30 a.m. until 8:30 p.m. However, the employee was scheduled to work for only 8 hours and did not request overtime. The key here is whether the employer has a mechanism for employees to approve their time records. While logging in and out of a computer system may be a new form of clocking in and clocking out, this may not be a sufficient timekeeping system for nonexempt employees. In other words, the employee should certify he only worked 8 hours by submitting or approving his time record. Otherwise, the presumption is that he worked for 12 hours. It is also helpful to note that, for the duration of the COVID-19 pandemic, it is irrelevant that the employee's first work-related act occurred at 8:30 a.m., and his last act occurred at 8:30 p.m., so long as he is compensated for the hours in which he did work.*

Ensure Employees on Leave Do Not Telework

There are benefits of being able to work at any time while at home, but teleworking also may create unintended consequences for employees on leave. During the pendency of the COVID-19 outbreak, businesses may have various employees on leaves of absence under company policy or according to local, state, or federal law, including the FFCRA. These employees should not be working from home while on leave. If they do, the employer will be required to pay these employees for any work performed and may be required to extend the length of leave. In short, any type of working while on an approved leave must be avoided.

Scenario: *An employee requests FFCRA leave to care for his spouse who has been diagnosed with COVID-19. The employee sends several work-related emails during his two-week leave. As previously discussed, there may be another issue here about whether the employee is truly unable to telework, which is a requirement for FFCRA leave. Regardless, if the employee is on approved FFCRA leave, he should not be working and instructed not to do so. If this employee is nonexempt, the employer must obtain an accurate time record and pay the employee based on how much time he worked. If he is an exempt employee, the employer may be required to pay him for a full week's salary for any week in which he performed work while on leave. And because he was on a protected leave under the FFCRA, as opposed to an employer's discretionary paid time off or unpaid leave of absence, the employee also is entitled to an extension of leave for the amount of time he worked. In this situation, the USDOL has recognized that certain types of FFCRA leave may be taken on an intermittent basis, but only upon agreement by the employer and employee.*

Transition Back to the 'Old' Normal

We are all hopeful that businesses will transition back to "normal" operations in the coming months. When that happens, the same type of communications required for initiating work-from-home arrangements will be necessary to ensure employees understand what their obligations are in coming into work in lieu of teleworking. Employers also may need to update their remote working policies (i.e., replace any "temporary" policies specific to COVID-19). I hope we will be back to normal soon. Until then, embrace the new normal by anticipating teleworking issues, and stay safe out there!

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