

**TELECOMMUTING –  
THE LEGAL LANDSCAPE AND  
BEST PRACTICES FOR EMPLOYERS**

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**TELECOMMUTING –  
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**By**

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**INTRODUCTION**

Telecommuting is a work arrangement or alternative work schedule in which an employee may spend part or all of the regular work week at a location other than the employer's office, e.g. the employee's home. The increasing availability of internet based communication systems and remote access software systems have resulted in a substantial increase over the last several years in the number of employers offering telecommuting as an alternative work arrangement, and in the number of employees who choose to telecommute. Many employees view a telecommuting arrangement as a way to address family obligations, reduce expenses and commute time, and improve productivity by eliminating interruptions and distractions in the work place.

Dramatic increases in telecommuting are demonstrated by some of the following survey data. In 1999, only 17% of employers even offered telecommuting as a possible work alternative option. At that time, approximately 8% of employees responding to one survey indicated that they telecommute in part, although there was a substantially higher level of interest in telecommuting (as much as 59% of employee respondents). More recent survey data shows a significant increase in companies offering telecommuting arrangements, and of employees participating in them. For example, a recent survey conducted by the Society for Human

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Resource Management indicates that 40% or more of employers now offer telecommuting arrangements, and that as many as 17% of employees now telecommute either entirely or through part of their work week. *The Economist* magazine recently published figures showing that in the U.S. and E.U., approximately 16% of employees engage in telecommuting for either part or all of their work week.

Despite the potential benefits to management and employees presented by telecommuting arrangements, a number of legal, policy, and management considerations must be considered and addressed. A short list of some of the key considerations includes the following:

1. Wage and Hour Compliance. How will the employee's activities be monitored, reported, and recorded. What activities are considered compensable? How can management most effectively meet its obligations in this area?
2. Zoning. Are there local zoning law requirements that may be implicated by the employee performing work at the home?
3. Workplace Safety and OSHA Compliance. What OSHA issues are presented by telecommuting arrangements? What are an employer's record keeping obligations associated with a telecommuting arrangement under OSHA?
4. Workers Compensation. What injuries associated with working at home, or with traveling associated with a telecommuting arrangement, may be covered by workers' compensation laws? How can management best protect its interests? Can an assignment to telecommuting work qualify as a "light work" or modified duty assignment under workers' compensation laws?

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5. Risk Management. Who is responsible if the employee receives business visitors at the home? What happens if a family member is injured in the “work” area?
6. Americans with Disabilities Act, Family Medical Leave Act, and Related State Laws. Is an employer obligated to provide telecommuting to an employee as a reasonable accommodation under the ADA? May telecommuting arrangements be used in lieu of FMLA leave, or to accommodate intermittent leave under FMLA? How may the telecommuting employee’s work location affect FMLA eligibility?
7. Employment Discrimination Issues in the Administration of a Telecommuting Program.
8. Right of Access. Does the employer have the right to gain access to the employee’s home?
9. Cross Border Issues. Are there employment tax and other tax issues raised by the employee’s location? Will the law of the jurisdiction where the telecommuting employee is located apply, or the laws of the employer’s home or regional office?
10. Preservation of Intellectual Property Rights.
11. Privacy, Confidentiality, and Electronic Monitoring.

As will be explored in these materials, an employer can meet these challenges, maintain efficiency, and assure itself of legal protection by: 1) having in place a well thought out, complete, telecommuting policy; 2) observing certain “best practices” relating to telecommuting arrangements; 3) requiring employees who telecommute to enter into express agreements governing their relationship with the employer.

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## WAGE AND HOUR and FAIR LABOR STANDARDS ACT ISSUES

The federal Fair Labor Standards Act (“FLSA”) contains restrictions on so called “industrial homework” that apply to certain industries. These include knitted outerwear; gloves and mittens; button and buckle manufacturing; jewelry manufacturing; handkerchief manufacturing; women’s apparel; and embroidery. Employers who use “home workers” to perform work in these industries must apply to the Department of Labor for a special certification, and observe special recordkeeping requirements. *See* 29 U.S.C. § 211(d), 29 C.F.R. Part 530. Despite suggestions that such home based work arrangements such as telecommuting, telemarketing, and home computing, should be governed by the Federal Home Work Regulations, there is no specific federal prohibition on home work, except for the above-noted industries.

All state and federal laws, including those governing minimum wage and overtime compensation, apply to employees who are telecommuting. Thus, an employee who is exempt, and fails to work part of a day while telecommuting, must still be paid all compensation for that week in order to continue to be treated as an employee compensated on a “salary basis.”

The more significant issues, however, arise with respect to non-exempt employees. Telecommuting employees should not be treated as “on duty” outside of their normal business hours. To do so may result in changing their noncompensable time into compensable time. Under the FLSA, when an employee is placed in an “on call” situation, at home or at another location, such time is compensable where the conditions placed on the employee’s activities are so restrictive that the employee cannot use the time effectively for personal pursuits. In *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the

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Supreme Court explained that whether the time is compensable depends on whether the restrictions on the employee's activities are so significant that the time is being spent predominantly for the employer's benefit. This determination depends on all the circumstances of the case. An employment relationship may contemplate that an employee so restricted has been hired to spend time waiting to respond to the employer's needs, in which case the employee is traditionally described as having been "engaged to wait," and such time constitutes compensable hours of work. *Wantock, supra*, 323 U.S. at 133. *See also* 29 C.F.R. § 785.16-17 (Regulations addressing off-duty and on-call time). On the other hand, where the restrictions on employees' activities while on call do not prevent them from pursuing their normal pursuits, such employees are described as "waiting to be engaged," and such time is not compensable. *Skidmore, supra*, 323 U.S. at 139.

For these reasons, employees who are parties to a telecommuting arrangement should have their hours and work schedules clearly set forth. The employer must insist that the employee accurately record all hours worked. Although their use is not required for telecommuting employees, the Employee Industrial Homework recordkeeping forms (available on the DOL's website) might be adapted. The employee must also comply with rest breaks and meal break requirements of state law. To ensure that an otherwise non-compensable lunch period not be converted into work time (or that an employee not be unlawfully deprived of a break), employers should also require that employees' phones not be on or in use during the time that they take their breaks or during their meal periods. In order to accurately monitor working hours and meal and rest breaks, employers may wish to require employees to log on or log off their computer, or to notify a supervisor.

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Another issue that may arise under the FLSA is whether travel time from the employee's home work location to the employer's main office for meetings, training, or other reasons, is compensable. In a fact situation that was analogous to the circumstances of a telecommuting employee, the U.S. Dept. of Labor, Wage and Hour Division, concluded that an employee who normally works from home or from an outlying office, and who travels from home to a central office before his or her regular work day and returns home at the end of the work day, is engaged in ordinary home-to-work travel, which is a normal incident of employment. This was true whether the employee works at a fixed location or at different job sites. Under these circumstances, normal travel from home to work is not work time. Wage and Hour Division, U.S. Dept. of Labor, April 17, 1998 (1998 WL 852776). *See also* 29 C.F.R. § 785.35.

### **ZONING ISSUES**

Many cities have zoning laws that limit or restrict the activities of home-based businesses. Although most of these ordinances do not apply to the activities of an employee who is telecommuting, it is possible that a telecommuting arrangement could cross over the line and violate zoning ordinances. For example, most local ordinances require a home based business to apply annually for a license, which requires disclosure of the location and the type of business. The ordinances generally prohibit employment of those living outside the home. Floor space devoted to the business cannot exceed 10% of a single family home, or 300 square feet, and the dwelling may not be structurally altered, nor may adjacent buildings be used for the business. *See, 100 Daily Labor Report* (BNA) (May 24, 1995).

## WORKPLACE SAFETY AND OSHA

In 2000, the Federal Occupational Safety and Health Administration (“OSHA”) issued a directive that home offices, including offices used for telecommuting arrangements, would not be exempt from job safety inspections. Following a public and congressional uproar, OSHA withdrew this directive. In its most recent communications on the issue, OSHA has stated that it does not expect employers of employees who are engaged in telecommuting arrangements to inspect the home offices of such employees. OSHA has further indicated that it will not, in most circumstances, inspect a home office, although it will inform an employer if it receives a complaint from an employee who works at home. Consequently, OSHA has still reserved its right to conduct an inspection of a home workplace if an employee is potentially subjected to physical harm or conditions that pose an imminent danger. Consequently, although there has been little activity in this area, OSHA may still attempt to hold an employer responsible for home office injuries that involve hazardous materials or work. Consequently, hazardous materials used in a home office (*e.g.* printing cartridges, chemicals), remain at least potentially subject to OSHA regulation.

Two researchers for Liberty Mutual Insurance’s Research Institute for Safety have identified some of the following as safety and health risks for telecommuting employees:

- Physical and psychological stresses from the longer work hours telecommuters tend to observe
- Higher rates of injuries from auto collisions for so-called “road warriors,” such as field sales and service professionals
- Physical and psychological stresses from inefficient break and recovery times

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- Psychological stresses from isolation, limited social support, time pressures, and higher work loads
- Psychological stresses due to inadequate support for the technologies necessary to complete job-specific duties.

33 *BNA Occupational and Safety and Health Reporter* 903 (Sept. 2003).

Another researcher has suggested the following checklist for the inspection and monitoring of home workplaces:

- Is there a smoke detector installed and working in the employee's home?
- Is there more than one way out of the work area (e.g., both a door and a window)?
- Does the employee have and use proper protective equipment-safety glasses, respirator, etc., if needed?
- Is protective clothing provided, if necessary, and properly cleaned and maintained separate from family laundry?
- Is ventilation adequate for tasks to be performed?
- Is employee exposure to hazardous chemicals kept within acceptable levels?
- Are aisles and passageways in the work area kept clean?
- Is the work area illuminated?
- Do extension cords, if any exist, have a grounding conductor?
- Have appropriate provisions for any necessary material handling been made?
- Are hand tools and equipment in good condition?
- Are power tools and other machinery properly grounded?

R. Bonham, The Hidden Risks of Telecommuting, *Risk Management* (July 1, 1996) 58, 60.

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## **Best Practices Concerning Workplace Safety Issues Involving Telecommuting Employees**

- Although OSHA may not require inspections, employers should ensure that telecommuting employees comply with workplace safety policies, particularly when hazardous substances may be used
- Employees should receive a set of the employer's safety policies, and acknowledge, in writing, their receipt of these policies
- Workplace injuries to a telecommuting employee must be recorded
- Employers should specifically notify telecommuting employees, in writing, of their obligation to immediately report work-related injuries or illnesses
- Promptly investigate any injury to determine whether it may be work-related
- Consider conducting telecommuter safety and health surveys and providing telecommuting employees with special training related to maintaining a healthy work environment
- Arrange to have telecommuting employees meet on site and participate in social gatherings to combat isolation and to integrate better work with those of those co-workers

## **WORKERS COMPENSATION ISSUES**

### **Issues That May Arise When Employees Telecommute From Another State**

As a preliminary issue, an employer should review its workers' compensation insurance policies to confirm that they will cover injuries arising out of home-based employment. This can be a particular problem with respect to telecommuters who may work out of state. Many insurance carriers will provide an "all states" endorsement to the policy, covering employees who may perform work out of state. Employers covered by Washington workers' compensation

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law may contact the Department of Labor and Industries to obtain out of state coverage for employees temporarily working out of state by calling 360-902-4817. Oregon employers may consult the website of the Workers Compensation Division at <http://www.cbs.state.or.us/wcd/compliance/ecu/etsummary.html> for a list of states in which an Oregon workers' compensation insurance policy will be valid during a temporary assignment of an Oregon based employee to an another state.

Cross-border issues may arise concerning employees of Oregon companies who render service in Washington under telecommuting arrangements, or vice versa. An employee rendering service in Washington under a telecommuting arrangement may be entitled to elect to recover benefits under either Oregon or Washington workers' compensation law if the employee originally worked in Oregon, and the telecommuting arrangement is not temporary. *Quinton v. Lt. & L Logging, Inc.*, 146 Or. App. 344, 347 (1997), and ORS 656.126. The employer's failure to pay employment taxes to the Washington Department of Labor & Industries attributable to the employee's activities may subject it to penalties in the event that the employee files a claim for a work-related injury arising from his/her activities in Washington. Similarly, a Washington employer whose employees work as telecommuters in Oregon might not be covered for the loss, if the employee elected to pursue rights under Oregon workers' compensation law, and Oregon insurance coverage is not in place.

Oregon and Washington have entered into a reciprocal agreement that sets out when an employee temporarily employed in the other state may be covered by the workers' compensation laws of the state where the employment services are performed. When a contract of employment

arises in Washington and the worker is temporarily working in Oregon or when the contract of employment arises in Oregon and the worker is temporarily working in Washington:

- Employers shall be required to secure the payment of workers' compensation benefits under the workers' compensation law of the state the contract of employment arose in, and pay premiums or be self-insured in that state for the work performed while in the other state; and
- Workers' compensation benefits for injuries and occupational diseases arising out of the temporary employment in the other state shall be payable under the workers' compensation law of the state the contract of employment arose in, and that state's law provides the exclusive remedy available to the injured worker.

In determining whether a worker is temporarily working in another state, Washington and Oregon agree to consider:

1. The extent to which the worker's work within the state is of a temporary duration;
2. The intent of the employer in regard to the worker's employment status;
3. The understanding of the worker in regard to the employment status with the employer;
4. The permanent location of the employer and its permanent facilities;
5. The extent to which the employer's contract in the state is of a temporary duration, established by a beginning date and expected ending date of the employer's contract;
6. The circumstances and directives surrounding the worker's work assignment;
7. The state laws and regulations to which the employer is otherwise subject;

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8. The residence of the worker; and
9. Other information relevant to the determination.

For how long must the employee work in the out of state assignment before it is no longer deemed “temporary”? The Oregon Workers Compensation Board has held that an employee who worked in Washington for more than 30 days in a twelve month period was not working “temporarily” in Washington, and was not covered by Oregon workers’ compensation law. *In the Matter of the Compensation of James Lafoya*, 50 Van Natta 1182 (1998) (Or. Work. Comp. Bd.), *In The Matter Of The Compensation Of Rodney W. Carothers*, 48 Van Natta 2372 (1996), (Or. Work. Comp. Bd.). Consequently, Oregon employers may wish to consider obtaining Washington coverage when an employee performs a telecommuting assignment in Washington lasting more than thirty days.

### **What Activities of a Telecommuting Employee May Give Rise to a Compensable Injury?**

No specific cases have been decided by the Oregon Workers Compensation Board concerning telecommuting employees. General principles of workers’ compensation law concerning whether an injury arises out of employment, and cases decided concerning resident employees, may help to define what activities will give rise to a compensable injury to a telecommuting employee.

### **When Does An Injury “Arise Out Of Employment”**

Under Oregon law, the phrase “arising out of” employment points to the cause or origin of the accident or injury. *Larsen v. State Industrial Accident Comm’n.*, 135 Or. 137 (1931). In order for an injury to arise out of the employment, there must be some connection between the injury and the employment other than the mere fact that employment brought the injured party to

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the place of injury. The injury must have its origin in a risk connected with employment and flow from that source as a rational and natural consequence. *Phillip A. Livesley Co. v. Russ*, 296 Or. 25, 29-30 (1983) (claimant having proved that the injury occurred on the employer's premises during work hours and having shown that the cause of injury was unknown and not personal carried her burden of proof). A worker's usual exertion, however, may no longer be enough for the injury to "arise out of" employment. *See Johnson v. Beaver Coaches*, 142 Or. App. 234 (1997) (denying a compensable injury when an employee, after talking to a co-worker about a work-related matter, took a step to return to his work station, at which time his knee "popped." In the absence of evidence that the employee tripped, the court concluded that there was no causal connection between the injury and his work activities other than the mere fact that the step occurred at work). The work must also be a task or activity that is "within the boundaries of the employee's ultimate work." *See, e.g., Andrews v. Textronix, Inc.*, 323 Or. 155 (1997) (employee's injury, which he incurred while helping an employee of a different company lifting an espresso machine, was not compensable because the machine did not belong to claimant's employer and there is no evidence that the employee routinely assisted strangers as part of his job).

### **Resident Employees**

Cases under Oregon workers' compensation law dealing with resident employees point to the importance of clearly defining work hours, work responsibilities, and negating any inference of "on call" work requirements. Under Oregon law, resident employees are employees who are required to live on the job premises by the nature of their employment duties. Whether the rules that have developed applicable to resident employees apply to telecommuting employees is not

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as yet certain. However, as discussed below, the rules applicable to resident employees may substantially broaden an employer's potential liability to a telecommuting employee for workers' compensation claims.

In *Wallace v. Green Thumb, Inc.*, 296 Or. 79 (1983), the court held that a very liberal test applies to injuries from on-premises personal comfort activities of resident employees who are on call continuously, if the activity is sufficiently connected to the "on duty" work of the resident employee. In that case, the employee's injury resulting from an explosion of a butane stove on which he was preparing dinner was held compensable because the employee's duties required him to live on premises, and by failing to provide food service for him, the employer not only allowed, but virtually required, that claimant prepare his own meals. Under this test, an employee need only show that the injury was sustained while he was engaged in conduct for personal comfort that was expressly or impliedly allowed by the employer. On the other hand, coverage has been denied when the employee was continuously on call but off the premises, when the employee was on the premises but not on call, and when the employee's residence on the premises was permitted but not required. *See Larson, Workers Compensation* §§ 24.23, 24.30, 24.40. *See also SAIF v. Reel*, 303 Or. 210 (1987); *In the Matter of the Compensation of Maria L. Hernandez*, 44 Van Natta 1029 (1992) (Or. Work. Comp. Bd.).

Oregon courts have also adopted the "bunkhouse rule," which applies when an employee is required to live on the premises. Under the bunkhouse rule, "if the resident employee has fixed hours of work and is not continuously on call, an injury suffered on the premises is compensable if the cause of injury was a risk associated with the condition under which claimant lived because of the requirement of remaining on the premises." *Leo Polehn Orchards v.*

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*Hernandez*, 122 Or. App. 241, 245 (1993). In that case, the Court of Appeals found enough of a connection between the employee's employment and his injury to find compensability when the employee, who was a migrant farm worker and had no alternative but to live on the employer's premises, was injured due to the condition of the property.

### **Going and Coming Rule**

Under Oregon law, an injury sustained by an employee going to or coming from the regular place of employment is deemed not to arise in the course of employment. *Wyatt v. S.I.A.C.*, 236 Or. 444, 447 (1954). How or whether the going and coming rule may apply to telecommuting employees has not been definitively established in an Oregon case.

There are several exceptions to the going and coming law.<sup>1</sup> One of the most important exceptions is for paid travel time. Potential liability under the exception for paid travel time can be controlled and managed by an employer to limit its workers' compensation liability. If an employee receives pay for travel time, or if an employee travels during normal working hours and is reimbursed for mileage expenses, injuries occurring during such travel are likely to be held compensable. *Bernards v. Wright*, 93 Or. App. 192 (1988) (paid travel time, injury held compensable); *Liberty Northwest Insurance Corp. v. Over*, 107 Or. App. 30 (1991) (injuries arising during travel when the employee is reimbursed for mileage expenses will probably be held compensable). Consequently, employers may wish to consider not providing mileage reimbursement or paid travel when telecommuting employees drive to the company's premises.

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<sup>1</sup> These include the following: 1) travel in a conveyance furnished or required by the employer; 2) paid travel time; 3) injury on the employer's premises; 4) road or way leading to the place of employment; 5) special errand exception; 6) dual purpose trips; and 7) deviations or detours with a business purpose.

See also discussion above concerning payment for travel time under the Fair Labor Standards Act.

### **Telecommuting as a Form of “Light Duty” or Modified Duty Assignment**

Under Oregon law, temporary total disability payments may be unilaterally terminated when, *inter alia*, written medical evidence demonstrates that the worker may return to modified employment, the employment is offered in writing to the worker and the worker fails to begin the employment. OAR 436-060-0020.

Assuming all other requirements are met, it appears that an offer of modified duty employment as a telecommuter may provide a valid basis for terminating temporary disability benefits. See *In the Matter of the Compensation of Edward J. Witsberger*, 48 Van Natta 68 (1996) (Or. Work. Comp. Bd.) (in the context of a permanent partial disability award, the employer’s offer of a telecommuting position, which the medical evidence showed he was able to perform at least four hours per day, was evidence supporting a finding that the employee was able to engage in suitable and gainful employment). Similarly, an offer of a telecommuting position may afford a vehicle for terminating a permanent partial disability award. *In the Matter of the Compensation of Edward J. Witsberger, supra*.

### **Best Practices Concerning Workers Compensation Issues**

- Review your workers’ compensation insurance policy to make certain that activities of telecommuting employees are covered.
- Be conscious of cross-border issues and questions of interstate workers’ compensation coverage.

- Carefully instruct the employee and define in writing the telecommuting employee's working hours.
- Carefully define the telecommuting employee's obligations; that he is not "on call."
- Establish written policies and a written agreement between the employer and the employee concerning the telecommuting arrangement that addresses the activities are understood to be in the course of employment.
- Specify that a single room in the house be used as the home office. This avoids the problem of an injury occurring elsewhere that the home or nearby being claimed as a work-related injury.
- Set up procedures that defines when the employees perform work, e.g., calling a supervisor or logging onto the computer network.
- Document that the employee's telecommuting arrangement is at his request and wholly voluntary, and that his performance of work at home is not a requirement of employment.
- Do not compensate employees for travel or reimburse them for their mileage if they come to the main office for a meeting.
- Consider the use of telecommuting assignments as a form of light duty to reduce your liability for workers' compensation benefits.

## **TELECOMMUTING AND THE AMERICANS WITH DISABILITIES ACT**

### **Uncertainties in the Legal Landscape**

Is an employer required to consider telecommuting in connection with a request for reasonable accommodation? The courts have taken a variety of approaches.

At least two courts have held that an employer is required to consider telecommuting as a possible reasonable accommodation as part of the interactive process. However, the employer may reject telecommuting as an option, provided the appropriate facts and circumstances are shown to exist. In *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994), the District of Columbia Court of Appeals found that the employer did not unreasonably reject telecommuting because the employee, a coding clerk, conceded that the job could not be performed at home. In *Misek-Falskof v. IBM*, 854 F. Supp. 215 (S.D. N.Y. 1994), *affirmed without opinion*, 60 F.3d 811 (2nd Cir. 1995), the court concluded that the employer did not unreasonably reject telecommuting because the facts showed that the employee's presence in the workplace to interact with her co-workers was essential to the tasks to be performed.

Other courts have indicated that telecommuting is a "reasonable accommodation" only under extraordinary or unusual circumstances. In *Vande Zande v. State Dept. of Administration*, 44 F.3d 538 (7th Cir. 1995), a paraplegic employee who performed clerical and secretarial tasks claimed that the employer was required to provide a desktop computer in her home so that she could work full-time during a medical leave. The court rejected her claim, stating that reasonable accommodation does not require an employer to "allow disabled workers to work at home, where their productivity inevitably would be greatly reduced." The court also pointed out that most jobs require supervision, and working with a team, and that the employer's objectives could not be met without a reduction in the quality of employee performance. *See also Whillock v. Delta Airlines, Inc.*, 126 F. Supp. 1555 (N.D. Ga. 1995) (agreeing with *Vande Zande* in concluding that a request to telecommute was not reasonable as a matter of law); *Tyndall v. National Education Centers, Inc. of California*, 41 F.3d 209, 232 (4th Cir. 1994) ("excepting the

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unusual case where an employee can effectively perform all work-related duties at home, an employee who does not come to work cannot perform any of his job functions essential or otherwise”); *Mason v. Avaya Communications*, 357 F.3d 1114 (10th Cir. 2004) (holding that physical attendance at work was an essential element of the employee’s service coordinator position, so her request for work at home as an accommodation was unreasonable as a matter of law).

Other courts, however, have stressed that a question of reasonable accommodation, as being specific to the nature of the job, the individual and the disability, requires that the employer conduct a case-by-case analysis of whether work at home is a reasonable accommodation under all circumstances. *Anzalone v. Allstate Insurance Co.*, 5 ADA Cases 455 (E.D. La. 1995). In *Humphrey v. Memorial Hospitals Ass’n.*, 239 F.3d 1128 (9th Cir. 2001), an employer refused to permit a medical transcriptionist with an obsessive-compulsive disorder to perform her duties at home. Because of the employee’s obsessive-compulsive disorder, she was unable to arrive at work on time. Initially, the employer had offered, and the employee had accepted, a flexible work schedule in which she could arrive at any time during a 24-hour period to perform her work. The employer rejected out of hand the employee’s request for a work at home assignment because, under its telecommuting policy, the employee had already been subjected to discipline for absences and tardiness, and the policy precluded home assignments for employees with such disciplinary violations. The employer did not suggest any alternative accommodation, or indicate that it would be receptive to reassessing its arrangements to accommodate Humphrey, and failed to discuss with her the appropriateness of the home assignment. The Ninth Circuit reversed the trial court’s order granting summary judgment, and

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returned the case for trial before a jury to determine whether or not the employer's rejection of a home work assignment had been improperly rejected as part of the interactive process, and whether she was terminated because of her disability. Notably, the Court rejected the employer's argument that the prior record of discipline (which was shown to result from absences attributable to her obsessive-compulsive disorder) could justify her termination.

### **What's an Employer to Do?**

One might conclude that *Humphrey* simply involved an extraordinary case in which the employee's job duties could easily be performed fully while at home. The employee was a medical transcriptionist, and consequently required no interaction with her co-workers. On the other hand, the court's opinion clearly prohibits an employer from relying on previous absences attributable to the employee's medical condition as a basis for denying a telecommuting assignment. The court also viewed the employer's conduct of cutting off any further discussion to be inconsistent with its duty to engage in the interactive process required by the ADA. Accordingly, employers faced with a request for a telecommuting assignment as a "reasonable accommodation" are well advised to do the following:

- Assess whether all or substantially all of the job can be effectively performed at home.
- Evaluate whether the employee's job requires regular interaction with supervisors or co-workers.
- Be certain that your telecommuting policy is not applied in a discriminatory manner to an employee who may be a qualified individual with a disability.

- If an employee has prior work-related absences that may be related to their medical condition, avoid reliance upon those absences as a basis for denying or not considering an at-home assignment.
- Create a record showing that the employer is receptive to considering and discussing the possibility of a home-based assignment.
- Obtain medical evidence bearing on the appropriateness of a home-based assignment.
- Do not deny a request for a home-based assignment until the issue has been fully explored with the employee through the interactive process.

## **FAMILY AND MEDICAL LEAVE ACT AND OREGON FAMILY LEAVE ACT**

### **Eligibility and Coverage**

Under FMLA, an employee is not eligible for leave unless the employer employs 50 employees within 75 miles of the work site where the employee needing leave is employed. According to the Department of Labor regulations, employees who “work at home, as under the new concept of flexiplace,” are deemed employed at the work site to which they report and from which assignments are made. 29 C.F.R. § 825.111(a)(2). The employee’s residence is not a work site. *Id.*

A related question may arise under the Oregon Family Leave Act (“OFLA”). In order for an employer to be covered by OFLA, and an employee to be eligible for OFLA leave, the employer must employ 25 or more persons in the state of Oregon. ORS 659A.153(1). Although the issue has not been definitively addressed, it appears that an employee who telecommutes and is physically resident outside of Oregon, would not be included in the “head count” of persons employed “in the state of Oregon,” nor would that employee be eligible for OFLA leave.

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### **Telecommuting as an Alternative Work Assignment**

As noted above, an employer may be required to consider telecommuting to accommodate a disability that qualifies under the ADA. No similar obligation arises under OFLA or FMLA. Under FMLA, an alternative work assignment may only be made at the employer's discretion. Under OFLA, the employer and the employee must both agree to the alternative work assignment. Note however that an employer may not discriminate against an employee by denying a telecommuting assignment because the employee has requested leave under FMLA or OFLA.

### **Intermittent Leave**

If the employer and the employee agree upon a telecommuting arrangement, or the employee has an existing telecommuting arrangement, how is intermittent leave to be addressed? When an employer and employee have agreed that the employee would continue to work out of the office between time spent caring for a seriously ill child, only the hours of leave actually taken may be charged as FMLA leave. The amount of time that the employee is "suffered or permitted" to work for the employer, whether requested or not by the employer, must be counted as hours worked and may not be charged against the employee's FMLA leave entitlement. Wage and Hour Division, United States Dept. of Labor, Opinion Letter FMLA-67 (July 21, 1995).

## **EMPLOYMENT DISCRIMINATION ISSUES IN THE ADMINISTRATION OF TELECOMMUTING ARRANGEMENTS**

Obviously, any telecommuting plan or arrangement must be carried out without discrimination on the basis of race, sex, national origin, color, religion or other prohibited basis.

While this may seem obvious, some employers have implemented telecommuting arrangements which clearly had either a disparate impact on female employees or resulted in disparate treatment of female employees. For example, one insurance company in the northeast reportedly offered its female workers the option of telecommuting in lieu of continuing to provide extended maternity leaves. As part of this offer, the women had to switch from employee to independent contractor status, as a result of which they made less than what they did before while doing the same work. See Travis, *Equality in the Virtual Workplace*, 24 *Berkeley Journal of Employment and Labor Law* 283 (2003). In another case, a California-based insurance company offered its insurance claims processors, who were predominantly female with family responsibilities, the opportunity to telecommute. The employer thereafter increased the case processing quotas and reduced benefits. *Id.*

A second area of concern relates to affording telecommuting employees training opportunities. If a substantial portion of the work force engaged in telecommuting is female, an employer's failure to make these training opportunities available could impair promotional opportunities for female workers who have chosen to telecommute and might result in employment discrimination claims.

A third area of concern, which has not been the subject of any specific case law developments, relates to the self-selection of telecommuting arrangements by a disproportionate number of female employees who may have family or other caregiving responsibilities. Travis, *Equality in the Virtual Workplace, supra*. Such gender-based self-selection may have an impact on pay and promotion of this group of employees. For employers that contract with the federal government, and whose employment practices are subject to review and audit by the

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Office of Federal Contract Compliance, such self-selection by female employees may have an impact on the multiple regression analysis which an employer performs in order to demonstrate to OFCCP that their pay practices are not discriminatory.

### **CROSS-BORDER ISSUES**

If an employee who is telecommuting is physically based in another state, the employee may be entitled to the benefits of the labor and employment laws of the state where he or she works. This may have dramatic implications with respect to such matters as wage and hour compliance, employment discrimination, and covenants not to compete. For example, California law prohibits enforcement of covenants not to compete in the employment context. Oregon law restricts the enforcement of covenants not to compete except when entered into at the commencement of employment or at the time of a bona fide advancement. Wage and hour law in California is markedly different from Oregon or Washington wage and hour law. Washington and California may require an employer to reasonably accommodate an employee who has a pregnancy-related disability. Oregon imposes no such requirement.

A second area of concern relating to cross-border issues is payment of employment taxes. Generally, an employee who is physically situated in another state will be covered by the unemployment tax system of that state. Consequently, an employer that provides a telecommuting arrangement for an employee who is physically located outside the state of residence, may be required to pay employment taxes to the state where the employee is performing work. In *In re Allen*, 100 N.Y.2d 282, 794 N.E.2d 18 (2003), the New York Court of Appeals rejected an unemployment claim by a Florida based telecommuter who worked for a New York based employer. The court interpreted a provision in New York unemployment

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insurance law governing out of state employment (Section 511), which is virtually identical to provisions in the law of most other states. The initial inquiry, noted the court, is whether the employee's entire service for the employer, with the exception of incidental work, is localized in New York or some other state. The court agreed with the position of the state Commissioner of Labor that because claimant was physically present in Florida when she worked for her employer (with the exception of her two-week visit to New York), her entire service was localized in Florida. The court concluded that physical presence determines localization for purposes of interpreting and applying Section 511 to an interstate telecommuter. Because claimant was regularly physically present in Florida when she worked for her employer in New York, her work was localized in one state – Florida.

A third possible issue concerns the personal income tax consequences of a telecommuting arrangement. Under Oregon law, for example, an employee who is not a resident of the state must pay personal income taxes on all income “that is ascribable to sources within this state.” ORS 316.007(3). No Oregon case has specifically addressed the status of a telecommuting employee. However, other states have imposed personal income tax on a telecommuting employee. *See, e.g. Huckaby v. New York State Division of Tax Appeals*, 4 N.Y.2d 427, 829 N.E. 2d 276 (2005) in which the court upheld imposition of income tax on a Tennessee resident who, as a telecommuter, rendered service as a computer programmer for his New York based employer. For this reason, telecommuting agreements should specify that the employer makes no representations concerning the tax consequences of the arrangement. See Appendix B, paragraph 4.

## **EMPLOYEE PRIVACY ISSUES**

Unless the employee has the employee's consent, the employer may not be able to have physical access to the employee's home workplace. It is important that, in any agreement concerning a telecommuting arrangement, the employee expressly consent to grant physical access. Similarly, all internet, electronic mail, and voicemail privacy and monitoring policies should be made expressly applicable to telecommuting employees. Some employees may believe that they have a greater expectation of privacy in their home than at the home office. Any arrangement involving telecommuting should require that the employee expressly acknowledge and consent to all forms of electronic monitoring.

## **INTELLECTUAL PROPERTY AND INFORMATION SECURITY ISSUES**

Many home computer systems do not have adequate firewall protection. It is very important that the employee consent to installation of appropriate security software. The employer's IT department should be able to monitor the employee's use of their home computer to verify that all security systems and appropriate firewall protection are retained in place. The employer also should insure that software licenses are complied with in installing software on the employee's computer. Employers should also consider modifying invention agreements to encompass telecommuting activities so that if the employee develops an idea or a product, the company's ownership interests therein may be adequately protected.

## **CREATING A TELECOMMUTING POLICY**

Employers frequently enter into telecommuting arrangements on an ad hoc basis, without maintaining a policy or requiring the employee to sign a telecommuting agreement. Employers are well advised to maintain a telecommuting policy in their employee handbook and to require

employees who enter into a telecommuting arrangement to sign an agreement setting forth specific mutual understandings. Attached to these materials as Appendix A is a sample telecommuting policy. Attached as Appendix B is a sample telecommuting agreement.

Among other things, your policy should take into account some of the following issues:

- Which positions or types of jobs will be covered by a telecommuting arrangement. In this connection, jobs requiring supervision, regular interaction with co-workers, or physical work may be excluded.
- What conditions must employees meet in order to telecommute. Employers may wish to be assured that employees are responsible and capable of “self-management” before they are permitted to telecommute. An employer may wish to consider limiting telecommuting to employees who have a certain number of years of experience on the job, or in their particular assignment. You may wish to restrict eligibility to employees who have achieved a particular level of performance, e.g., a level above satisfactory in their most recent evaluation.
- Requirements for the home office. Employers want employees who have agreed to telecommuting arrangements to be productive. Consequently, a policy may specify that the employees have a separate room, and that telecommuting is not being authorized to avoid paying for child care.
- The policy should specify that the employee has the appropriate equipment. The policy may specify computers, supplies, furniture and other property that the employee may be required to acquire.

- Any technical support issues that may arise with respect to telecommuting employees.

What access will be afforded to email, voicemail and internet systems.

## APPENDIX A

### SAMPLE TELECOMMUTING POLICY

Telecommuting is the practice of working at home or at a site near the home instead of physically traveling to a central workplace. It is a work alternative that [Employer] may offer to some employees when it would benefit both the organization and the employee.

Employees who believe telecommuting can enhance their ability to get the job done should submit a written request in the form required by [Employer] to [position]. The request should explain how they will be accountable and responsible, what equipment is necessary, and how communication barriers will be overcome.

The decision to approve a telecommuting arrangement may be based on a number of factors which may include, but not be limited to, the employee's position, cost, job duties, performance history, related work skills, interrelationship with duties of other persons, and the impact on the organization. [Employer] retains full and complete discretion to permit or to not permit an employee to telecommute.

The employee's duties, compensation, benefits, work status, work responsibilities, and the amount of time the employee is expected to work per day or per pay period must not change due to participation in the telecommuting program (unless otherwise determined by [Employer] or agreed upon in writing).

The employee's at-home work hours will conform to a schedule agreed upon by the employee and his or her supervisor or manager. If such a schedule has not been agreed upon or established, the employee's work hours shall be the same as they were before the employee began telecommuting. Changes to this schedule must be reviewed and approved in advance by the employee's supervisor or manager.

During working hours, the employee's at-home workspace will be considered an extension of [Employer]'s workspace. Therefore, workers' compensation benefits may be available for job-related injuries to employees that occur in the employee's at-home workspace during working hours. All job-related accidents must be reported immediately for investigation.

[Employer] assumes no responsibility for injuries occurring in the employee's at-home workspace to persons not engaged in work, which occur outside the agreed-upon work hours, or occurring outside of the at-home workspace. The employee agrees to maintain safe conditions in the at-home workspace and to practice not less than the same safety habits and rules as those applying on [Employer] premises.

Telecommuting is an alternative method of meeting the needs of the organization and is not an employee benefit. As such, [Employer] has the right to refuse to make telecommuting available

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to an employee and to terminate a telecommuting arrangement at any time. Only those employees whose work is conducive to telecommuting and whose performance is and has been rated \_\_\_\_\_ or better in their last performance evaluation are eligible to telecommute. Employees must sign a Telecommuting Agreement before beginning any telecommuting arrangement, and must comply fully with all of their obligations under the Telecommuting Agreement.

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## APPENDIX B

### SAMPLE TELECOMMUTING AGREEMENT

[Employee] (“I” or “Employee”) and [Employer] (“Employer”) hereby agree as follows:

1. Employer and I agree to try telecommuting on an experimental basis.
2. I acknowledge that telecommuting is not an employee benefit. I further acknowledge that Employer may modify or terminate the telecommuting arrangement at any time or for any reason, and that this Agreement shall automatically terminate when I cease to be employed by Employer. I acknowledge that nothing in this Agreement alters the at-will nature of my employment with Employer and that this Agreement is not a contract or promise of employment for any term.
3. I acknowledge that I remain subject to all Employer policies, practices and programs.
4. I understand that Employer makes no representations about the personal tax implications or other legal issues arising from this telecommuting arrangement, and that it is my obligation to address these issues, seeking professional advice, if necessary.
5. I understand that I must maintain a designated work area at home that has sufficient space to accommodate comfortably a desk, chair, and equipment. This space must also provide a quiet, professional, secure and confidential work environment. When working from the remote work location, I agree to work only in the approved designated work space.
6. I understand I am expected to maintain professional work surroundings free from distractions or noise. Visitors or family members are not permitted in and around workspace during my work time. Telecommuting is not an opportunity for childcare or eldercare. If I have family care issues, I will make arrangements as needed so that such obligations will not interfere with my required work and safety obligations. I acknowledge and agree that conflicting demands must be resolved in advance of starting this telecommuting arrangement.
7. I understand that it is my responsibility to keep the designated work space free from safety hazards and other dangers, and to use equipment and supplies in a safe and appropriate manner.
8. I further understand that the Employer reserves the right to visit the remote work location at any time during pre-designated work times and at other times upon reasonable notice for performance, security and occupational health and safety reasons.

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9. If requested, the Employer will provide a desk and chair in accordance with the ergonomic guidelines set by [specify].
10. I understand that Employer responsibility for any work-related injuries will be limited to the state's workers' compensation laws. Workers' compensation liability will be limited to work-related injuries in this designated work space. I agree to report any work-related injury to my supervisor immediately, but not later than [amount] hours after such injury, in accordance with the Employer's standard injury reporting process.
11. I agree that the location of my designated work space may not be changed except on approval.
12. I understand that Employer is not responsible for operating costs, home maintenance, home or office remodeling, or any other incidental costs (i.e., utilities) associated with my use of the remote work location.
13. I understand that monthly [weekly] [occasional] department meetings will take place in the local office and I agree to attend these meetings in person.
14. I understand that regular meetings between supervisor and staff will be part of standard work-at-home procedures. These meetings may take place in-home, in the local office, or at another appropriate location.
15. I understand that, periodically, I may have to commute to the local Employer office for various business reasons. In cases of system outages, technology problems, or other issues that cannot be immediately addressed, I understand that I may have to work from the local office for extended periods of time.
16. I understand that I may be provided with Employer-owned equipment for use at the remote work location. I understand I may not use or permit others to use Employer's equipment for personal or non-Employer purposes except with express approval of my supervisor. This includes the use of broadband and telephone service provided by Employer.
17. I agree to notify my supervisor within [number] hours of any equipment malfunction or failure. Employer will provide or arrange for the maintenance and service of company-owned equipment; however, I understand and agree that I am personally responsible for the cost of any repairs caused by the misuse or abuse of the equipment or by my own negligence.
18. I agree to return all Employer equipment (e.g., computer, files, programs, furniture, etc.) and documents, including all copies of documents, whether on paper or electronic, within ten (10) business days upon termination of this Telecommuting Agreement and/or my employment, for whatever reason. I understand that if I fail to return Employer equipment or property upon the termination of the telecommuting arrangement, Employer may deduct

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the value of such equipment or property from any amounts owed to me by Employer, to the extent allowed by applicable state law. In the event that sufficient funds are not available to reimburse Employer for all amounts due within 30 days following termination of the telecommuting arrangement, I understand that the Employer, at its discretion, will take appropriate legal action to recover its property or amounts owed.

19. Periodically, personal situations change and, as a result, telecommuters may physically move their primary residence. If Employer previously paid for the initial set-up of broadband or additional telephone service greater than 18 months ago, then the new setup expenses will be paid by Employer; however, if the period is shorter, I will pay all such expenses.
20. I agree to abide by all Employer rules concerning the use of computer equipment and understand that these rules may be changed at any time. I agree to follow Employer procedures for network access and to take all necessary steps to protect the integrity of the Employer's systems.
21. I understand I am required to complete the Employer Time and Attendance procedures each pay period and accurately record and report all hours worked in a workweek. A workweek is a fixed period of seven consecutive calendar days commencing Sunday at 12:01 a.m. and ending Saturday at 12:00 midnight.
22. While telecommuting, I agree to record accurately each time I start and stop working. This time will be recorded as it occurs, rather than at the end of the day or workweek. I agree to comply with Employer policies concerning lunch periods and break times.
23. I understand that I will not be reimbursed for business expenses until they are recorded and submitted, with appropriate documentation and pre-approval, per Employer expense reporting procedures.
24. I understand and agree that Employer will not be liable for personal injury or damages to my personal or real property resulting from my participation in this telecommuting program. In signing this document, I agree to indemnify and hold Employer and all of its representatives harmless against any and all claims, excluding workers' compensation claims.
25. I understand and agree that I am liable for injuries or damage to the person or property of third parties and/or members of my family on the premises of the remote work location. In signing this document, I agree to indemnify and hold Employer harmless from any and all claims for losses, costs or expenses asserted against Employer by such third parties or members of my family.
26. I understand that I must have, and pay for myself, homeowners or renters insurance, including liability coverage, to participate in this telecommuting program. I will provide

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Employer with a Certificate of Insurance reflecting [amount] of insurance and will immediately notify Employer of any changes to my insurance.

27. I understand that all work I do from my home office, as well as any other work I perform on Employer's behalf, belongs exclusively to Employer.

I have read and understand this Agreement. I understand my responsibilities under this arrangement and further recognize this arrangement can be modified or terminated at any time by Employer.

Employee Signature: \_\_\_\_\_ Date: \_\_\_\_\_

I have reviewed the above with the employee and approved the telecommuting arrangement as outlined.

Manager Signature: \_\_\_\_\_ Date: \_\_\_\_\_

