

# Telecommuting: The Legal Landscape and Best Practices For Employers

*Allowing employees to work offsite can be beneficial all around provided certain legal, policy and management issues are addressed*

*Paul M. Ostroff*

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 has 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 it. Many employees view telecommuting as a way to address family obligations, reduce expenses and commute time, and improve productivity.

## **Increased Interest**

Survey data show dramatic increases in telecommuting. In 1999, only 17 percent of employers offered telecommuting as even a possible work alternative option. At that time, approximately 8 percent 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 percent of employees). More recent survey data show significant increase in companies offering telecommuting arrangements, and of employees participating in them. For example, a recent Society for Human Resource Management survey indicates that 40 percent or more of employers now offer telecommuting, and that as many as 17 percent of employees now telecommute either entirely or through part of their work week. *The Economist* magazine recently published figures showing that in the United States and European Union, approximately 16 percent of employees telecommute for either part or all of their work week. Recent increases in fuel prices have also encouraged telecommuting, as reflected in an April 26, 2006, Reuters article, "*Fuel Prices Have U.S. Workers Eyeing Telecommuting.*"

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*Paul M. Ostroff, a shareholder in the Portland, Oregon, office of Lane Powell PC, provides advice and counsel to employers in all phases of labor and employment law. He can be reached at [ostroffp@lanepowell.com](mailto:ostroffp@lanepowell.com).*

## Legal, Policy and Management Issues

The potential benefits to management and employees notwithstanding, telecommuting arrangements raise several legal, policy and management issues that must be considered (see below).

### Key Considerations in Adopting Telecommuting Policies

A short list of some 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 having the employee work at home may implicate?
- 3) **Workplace safety and Occupational Safety and Health Act (OSHA) compliance.** What OSHA issues do telecommuting arrangements present? What are an employer's recordkeeping 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, might workers' compensation laws cover? 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?
- 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 (ADA), Family and Medical Leave Act (FMLA), 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 depending on where the employee works? 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 this chapter, an employer can meet these challenges, maintain efficiency and ensure 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; and (3) requiring telecommuters to enter into express telecommuting agreements with their employer.

## Wage and Hour and Fair Labor Standards Act Issues

The federal Fair Labor Standards Act (FLSA) has 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 U.S. Department of Labor (DOL) for a special certification, and observe special recordkeeping requirements. Except for the above-noted industries, there are no specific federal prohibitions on home work, such as telecommuting, telemarketing and home computing.

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, occur regarding 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 two decisions *Armour & Co. v. Wantock* (323 U.S. 126, 1944) and *Skidmore v. Swift & Co.* (323 U.S. 134, 1944), the U.S. 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. 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.

For these reasons, employees who are parties to a telecommuting arrangement should have their hours and work schedules clearly explained. 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 DOL’s Web site, <http://www.dol.gov>) might be adapted.

### **Rest and Meal Breaks**

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. 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.

### **Travel Time**

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, DOL's Wage and Hour Division concluded that an employee who normally works from home or from an outlying office, 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.

### **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 type of business. The ordinances generally prohibit employment in the home of those living outside it. Floor space devoted to the business cannot exceed 10 percent of a single family home or 300 square feet, the dwelling may not be structurally altered, and adjacent buildings may not be used for the business.

### **Workplace Safety and OSHA**

In 2000, the U.S. 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 said that it does not expect employers of employees who are engaged in telecommuting arrangements to inspect their home offices. OSHA has further indicated that in most circumstances it will not 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 could be subjected to physical harm or conditions that pose an imminent danger. Though 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, including use of printing cartridges and chemicals.

### **Health and Safety Risks**

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

- physical and psychological stress from the longer work hours telecommuters tend to keep;
- higher rates of injuries from auto collisions for so-called “road warriors,” such as field sales and service professionals;
- physical and psychological stress from inefficient break and recovery times;
- psychological stress from isolation, limited social support, time pressures and higher work loads; and

- psychological stress due to inadequate support for the technologies necessary to complete job-specific duties.

### **Inspection and Monitoring of the Home Workplace**

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 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?

### **Best Practices Concerning Workplace Safety Issues Involving Telecommuters**

- Even if OSHA does not require inspections, employers should ensure that telecommuters 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 their receipt of these policies in writing.
- A record of workplace injuries to a telecommuter must be kept.
- Employers should specifically notify telecommuters, 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 telecommuters with special training for 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 relationships with their co-workers.

## **Workers' Compensation Issues**

Issues that may arise from telecommuting include interstate travel, compensable injuries, resident employees, and "going and coming."

### **Telecommuting From One State to Another**

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 for telecommuters who may work out of state. Many insurers will provide an "all states" endorsement to the policy, covering employees who may perform work in another state. The laws of some states may provide reciprocal coverage of varying degrees for policies issued on behalf of employers from outside the state. A summary of state laws in all 50 states that addresses insurance coverage issues for out-of-state employers may be found at the Oregon Workers' Compensation Division Web site, <http://www.cbs.state.or.us/wcd/compliance/ecu/etsummary.html>.

#### *Interstate Agreements*

Some states have entered into interstate agreements with neighboring states that address cross-border issues. For example, Washington and Oregon have an agreement under which 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. 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 if 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.

In light of the Washington-Oregon experience, employers with employees working in other states should familiarize themselves with similar reciprocal arrangements with neighboring states.

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 12-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 30 days.

### **Telecommuting Activities That May Give Rise to a Compensable Injury**

Very few cases have been decided that specifically address this issue as it applies to 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 result in a compensable injury to a telecommuting employee.

#### *Resident Employees*

Cases under workers' compensation law dealing with resident employees point to the importance of clearly defining work hours, work responsibilities and negating any

### Washington-Oregon Reciprocal Agreement on Temporary Workers

Oregon and Washington have entered into a reciprocal agreement that explains 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 must secure the payment of workers' compensation benefits under the workers' compensation law of the state the employment contract 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 employment contract 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 agreed 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, i.e., a beginning date and expected ending date;
- 6) the circumstances and directives surrounding the worker's work assignment;
- 7) the state laws and regulations to which the employer is otherwise subject;
- 8) the residence of the worker; and
- 9) other information relevant to the determination.

inference of "on call" work requirements. Under workers' compensation law in several states, resident employees are employees whose duties require them to live on the job premises. Under the "bunkhouse rule," which many jurisdictions have adopted, if the resident employee has fixed work hours 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 the claimant lived because of the requirement that he or she remain on the premises.

Whether the rules that have come to be applicable to resident employees apply to telecommuters is not yet certain. However, as discussed below, the rules applicable to resident employees may substantially broaden an employer's potential liability to telecommuters for workers' compensation claims.

In a 1983 decision, *Wallace v. Green Thumb, Inc.* (296 Or. 79 1983), the Oregon Supreme 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. The employer had failed to provide food service for him, so it not only allowed – but virtually required – that he prepare his own meals. Under this test, an employee need only show

that the injury was sustained while he or she was engaged in conduct for personal comfort that the employer expressly or impliedly allowed. On the other hand, coverage has been denied when the employee was: (1) continuously on call but off the premises; (2) on the premises but not on call; and (3) permitted but not required to reside on the premises.

### *Going and Coming Rule*

In most jurisdictions, an employee's injury sustained going to or coming from the regular place of employment is deemed not to arise in the course of employment, unless the employee is then on the employer's premises. General principles of law under the "going and coming" rule, and a small but developing body of cases that deal with telecommuters, provide some guidance to help employers administer telecommuting arrangements in a way that minimizes their potential liability under workers' compensation laws.

One of the most important exceptions is for paid travel time. An employer can control and manage potential liability under the exception for paid travel time 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. Consequently, employers may wish to consider not providing mileage reimbursement or paid travel when telecommuters drive to the company's premises.

#### **Exceptions to "Going and Coming" Rule**

- There are several exceptions to the going and coming rule. These include the following:
- 1) travel in a conveyance the employer furnished or required;
  - 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.

Whether an employee's home constitutes a "site" of employment may also be a factor in determining whether a telecommuting employee's travel between home and the employer's principal place of business may be considered to take place within the course of employment, and hence covered under workers' compensation laws. Travel between two employer sites may be considered within the course of employment. Whether the home will be considered a site of employment may depend on the presence of three factors:

- 1) a regular and substantial quantity of work to be performed at home;
- 2) the continuing presence of work equipment in the home; and
- 3) special employment circumstances that make it necessary rather than personally convenient to work at home.

An employer may exercise control over one or more of these factors (most particularly, factor (3)) through a careful telecommuting agreement and policy.

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

Under the workers' compensation laws of most states, temporary total disability payments may be terminated when, among other things, written medical evidence demonstrates that the worker may return to modified employment, the employment is offered to the worker and the worker fails to begin the employment.

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. An offer of a telecommuting position may afford a vehicle for terminating a permanent partial disability award. Similarly, the ability of the employee to perform in a telecommuting position may be valid evidence that justifies a reduced permanent disability rating.

### Best Practices Concerning Workers' Compensation Issues

- Review your workers' compensation insurance policy to make certain that telecommuting employees' activities are covered.
- Be conscious of cross-border issues and questions of interstate workers' compensation coverage.
- Carefully instruct the employee and define in writing his or her working hours.
- Carefully define the employee's obligations; that he or she 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 that 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 than the home or nearby being claimed as a work-related injury.
- Set up procedures that define 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 or her request and wholly voluntary, and that the 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 ADA

### *Uncertainties in the Legal Landscape*

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

At least two courts have held that an employer must 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 U.S. Circuit 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 another decision, *Misek-Falskoff v. IBM*, 854 F. Supp. 215 (S.D.N.Y. 1994), a federal district court in New York 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 7th Circuit 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 teamwork, and that the employer’s objectives could not be met without a reduction in the quality of employee performance.

Several other courts have reached the same result. For example, in *Whillock v. Delta Airlines, Inc.*, 926 F.Supp. 1555 (N.D.Ga. 1995), a federal district court in Georgia agreed with the *Vande Zande* ruling in concluding that a request to telecommute was not reasonable as a matter of law; the 4th Circuit in *Tyndall v. National Education Centers, Inc. of California*, 41 F.3d 209 (4th Cir. 1994), declared “excepting the 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”; and the 10th Circuit in *Mason v. Avaya Communications*, 357 F.3d 1114 (10th Cir. 2004), held 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.

### **Case-by-Case Analysis**

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. 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 the employee, and failed to discuss with her the appropriateness of the home assignment. The 9th Circuit reversed the trial court’s order granting summary judgment, and returned the case for trial before a jury to determine whether the employee’s requests of a home work assignment were properly considered 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 Is 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 under the ADA (see sidebar).

### **Telecommuting as a Reasonable Accommodation**

Employers faced with a request for a telecommuting assignment as a "reasonable accommodation" should do the following:

- Assess whether all or most 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 a 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.

## **FMLA and State Leave Laws**

Employees should be cognizant of how the FMLA and state leave laws may affect requests to telecommute.

### ***Eligibility and Coverage***

Under the 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 DOL 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. The employee's residence is not a work site.

A related question may arise under state employment laws that set a threshold for application to employers having a specified number of employees "within the state." For example, the Oregon Family Leave Act (OFLA) requires that an employer must employ 25 or more persons in the state of Oregon in order to be covered under the OFLA. Although the issue has not been definitively addressed, it appears that an employee who telecommutes and is physically resident outside of the state would not be included in the "head count" of persons employed "in the state."

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

As noted earlier, an employer may be required to consider telecommuting to accommodate a disability that qualifies under the ADA. The same obligation does not arise under the FMLA. Under the FMLA, an alternative work assignment may only be made at the employer's discretion. Note, however, denying a telecommuting assignment because the

employee has requested leave under the FMLA or similar state leave laws is unlawful discrimination.

### ***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 the employer requested or not, must be counted as hours worked and may not be charged against the employee’s FMLA leave entitlement.

## **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 that clearly had either a disparate impact on, 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. In another case, a California-based insurer 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.

### ***Training Opportunities***

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.

### ***Female Self-Selection***

A third area of concern, which has not been the subject of any specific case law developments, relates to female employees’ disproportionate self-selection of telecommuting arrangements because of family or other caregiving responsibilities. 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 the Office of Federal Contract Compliance Program’s (OFCCP’s) review and audit, such self-selection may have an impact on the multiple regression analysis that an employer performs in order to demonstrate to OFCCP that its practices are not discriminatory. (See Chapter 8 for more information on OFCCP contractor audits.)

## **Cross-Border Issues**

If an employee who is telecommuting is physically based in another state, he or she may be entitled to the benefits of the state labor and employment laws where he or she works. This may have dramatic implications on matters such 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, and laws in several other states restrict or limit the enforcement of covenants not to compete. Wage and hour law in California is markedly different from such laws in most other states and on the federal level. Some states may require an employer to reasonably accommodate an employee who has a pregnancy-related disability while other states impose no such requirement.

### **Employment Taxes**

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 under 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, 2003), the New York Court of Appeals rejected an unemployment claim of a Florida-based telecommuter who worked for a New York-based employer. The court interpreted a provision in New York unemployment insurance law governing out-of-state employment (Section 511), which is virtually identical to provisions in the laws of many 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 the 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 the claimant was regularly physically present in Florida when she worked for her New York employer, her work was localized in one state – Florida.

### **Income Taxes**

A third possible issue concerns the personal income tax consequences of a telecommuting arrangement. Under the income tax laws of some states, an employee who is not a resident must pay personal income taxes on all income “that is ascribable to sources within this state.” Some states have imposed personal income tax on a telecommuting employee; in *Huckaby v. New York State Division of Tax Appeals* (4 N.Y.2d 427, 2005) the New York Court of Appeals 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 App. B, paragraph 15.

## **Employee Privacy Issues**

Unless the employer 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, e-mail and voicemail privacy and monitoring policies should be made expressly applicable to telecommuters. 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 legal 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 a home computer to verify that all security systems and appropriate firewall protection are retained. The employer also should ensure 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 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 should maintain a telecommuting policy in their employee handbook and require employees who enter into a telecommuting arrangement to sign an agreement defining specific mutual understandings. At the end of this chapter, in App. A, is a sample telecommuting policy. App. B is a sample telecommuting agreement.

Among other things, a company's policy should take into account some of the following issues:

### Issues to Consider in a Telecommuting Policy

- Which positions or types of jobs will a telecommuting arrangement cover? 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 occur for telecommuting employees. What access will be afforded to e-mail, voicemail and Internet systems?

# APPENDIX A

## Sample Telecommuting Policy

**What is telecommuting?** Telecommuting is an arrangement in which the company may permit employees who so request to work at home or near their home in lieu of traveling to their usual place of work.

**Submission of requests.** An employee who believes that telecommuting will enhance his or her ability to get the job done must submit a written request on the accompanying form to his or her immediate supervisor and the director of human resources. The request should explain what equipment is necessary, how the employee will responsibly carry out his or her duties, and how the employee will remain accountable to the company and handle communication issues.

**Approval by company.** Whether or not a telecommuting arrangement will be approved is reserved to the company in its sole and exclusive discretion. The company may consider any relevant factors, which may include (but not be limited to) the employee's position, job duties, past performance record, work skills, interrelationship with duties of other persons, need for communication with and interaction with co-workers and supervisors, costs, and the benefit (if any) and detriment to the company or the employee's department.

**No change in duties, responsibilities, schedule, etc.** If an employee is permitted to telecommute, his or her work status, schedule, performance expectations, working time, compensation and benefits will be unchanged, unless the employee's supervisor and the Human Resources Department expressly authorize changes in writing.

**Work schedules when telecommuting arrangement has been approved.** The employee's supervisor shall direct the work schedule of an employee who is telecommuting. Supervisors will attempt to arrange an agreement concerning the schedule. In the absence of an agreed-upon schedule, or other direction from the employee's supervisor, the employee's work hours shall be the same as before the employee began telecommuting.

**Job-related injuries.** Workers' compensation benefits may be available for job-related injuries that occur in the employee's at-home workspace during the employee's designated working schedule only. The employee shall promptly report any job-incurred injuries, and shall otherwise fully comply with the company's policies concerning work-related injuries. An employee may be subject to discipline, up to and including discharge, for failing to comply with applicable injury reporting requirements.

**Safety, injuries.** The company will not be responsible for injuries that occur in the employee's home workspace, or any other areas to nonemployees; or that occur outside the scheduled work hours or that occur outside the home workspace. As a condition of continuing in a telecommuting arrangement, the employee shall maintain safe conditions in the home workspace, and adhere to the same safety standards and practices as apply on the company's premises.

**Eligibility, telecommuting agreement, employee duty of compliance.** Telecommuting is not an employee benefit. The company has complete discretion over whether it will make telecommuting available to an employee. The company may terminate a telecommuting arrangement at any time. To be eligible for consideration for telecommuting, an

employee must have received a rating of \_\_ or more in his or her last performance evaluation. Only employees whose duties and responsibilities may be effectively and efficiently performed under a telecommuting arrangement will be considered for telecommuting. Employees must enter into a signed telecommuting agreement before they begin a telecommuting arrangement. Employees must also fully comply with all of their obligations under the telecommuting agreement and this policy.

# APPENDIX B

## Sample Telecommuting Agreement

Company (Company) and Employee (I or Employee) hereby agree:

1. On an experimental basis only, we agree that the Employee may try telecommuting. Telecommuting is an arrangement in which the company may permit employee to work at home or near his/her home in lieu of traveling to his/her usual place of work. However, any telecommuting the company permits shall be only in accordance with this agreement.
2. Nothing in this agreement changes the at-will nature of employee's employment. Nothing in this agreement shall be considered a promise of employment for any term or period. The company or employee may terminate the employment relationship at any time.
3. I understand that the company may modify this telecommuting agreement at any time for any reason. Telecommuting is not an employee benefit. When my employment with the company ends, this agreement will also permanently end.
4. Workplace Location and Surroundings.
  - a. I will be required to maintain work surroundings that are professional, and not subject to noise or distraction. This telecommuting arrangement is not designed for child care or other home care arrangements, and I am the only person who will be in the workplace area while I am working. Any family care concerns must be resolved before the telecommuting arrangement begins, and I agree to make appropriate arrangements to address them.
  - b. My home must have a designated work space of sufficient size to accommodate any necessary equipment, as well as a desk and chair. If mandated under applicable law, and if I so request, the company will provide a desk and chair that meet ergonomic requirements. The designated space in my home shall be the exclusive place where I will perform work on behalf of the company under this telecommuting arrangement. This location will not change unless the Company specifically authorizes. I am responsible for keeping the work area free from dangerous or safety hazards. The company shall not be responsible for any modifications, maintenance or remodeling to my home related to my home-based workplace.
  - c. Consent to Company Entrance and Inspection. I acknowledge and agree that the company may, upon 30 minutes' notice, and at any other time that it later designates, enter into my home to inspect the work area.
5. At all times, I acknowledge that I am bound by all applicable employer policies, rules, regulations and directives.
6. If I incur a work-related injury, I will report it immediately to my supervisor. An injury may be compensable under workers' compensation law *only* if it occurs in the designated workspace during my designated working hours.
7. My job responsibilities may require that I commute to the local office, attend meetings at the local office (which I will attend in person) and meet with my supervisor at the local office. I may also be required to work at the local office whenever the company requests it.

8. If the company provides me with equipment for use at the designated location, I will use it only for the performance of my duties as an employee of the company. I will not allow others to use the equipment. If there is any problem or malfunction in the equipment, I will immediately contact my supervisor. If the equipment requires repairs resulting from its misuse, I will be responsible to pay for the repairs.
9. I will return the company's equipment and property (including, but not limited to, any software, files, intellectual property and documents, in whatever form) no later than five (5) days after this telecommuting agreement or a telecommuting arrangement ends and/or if my employment terminates for any reason. To the extent applicable law permits, I authorize the company to deduct from my paycheck the value of any property or equipment that is not promptly returned. Upon receiving an accounting from the company, I agree within fifteen (15) days of receipt to pay all amounts for the unreturned equipment.
10. If I move my principal residence and the company has paid for installation of equipment or telecommunication lines, I agree to reimburse the company for the cost of installing same in my new residence.
11. All policies, rules, and requirements of the company relating to the use of its computer equipment, telecommunication systems and any other information technology apply to my use of equipment under this telecommuting agreement. I will take all necessary steps to preserve the confidentiality of the company's information, and of the telecommunication and computer systems. I will comply fully with the company's attendance and time recording procedures, and will accurately report and record all working hours. I will maintain a contemporaneous record of each time that I start working and stop working. I will take all required lunch breaks and rest periods.
12. As a condition of participating in a telecommuting arrangement, I agree to provide homeowner's liability insurance or renters insurance in an amount and type acceptable to the company, to furnish proof of such insurance to the company on request and to notify the company of any change in insurance carrier or coverage.
13. To the fullest extent permitted under applicable law, I agree to defend, indemnify and hold the company harmless from any all injuries, damages or claim arising from or relating to this telecommuting arrangement. I also agree that the company is not liable for any claims, injuries or damages that I incur (except injuries covered by workers' compensation laws).
14. Any work that I perform for the company, and all work that I perform from my home office, belongs to the company. Nothing in this agreement alters, changes or supersedes any agreement with the company to which I am otherwise bound relating to intellectual property, works made for hire or the ownership of work that I produce on behalf of the company while working for the company or using the company's equipment or resources.
15. I agree that the company has made no representations concerning the tax implications of this agreement or a telecommuting arrangement, or concerning any other legal issues relating to this Agreement. I have been advised to seek professional advice on these matters if I so choose.

Employee Acknowledgment: I have taken the time I believe is necessary to read this agreement. I understand this agreement, and agree to be bound by it. I understand what my responsibilities are under this agreement, and also understand that the company can modify or terminate it any time.

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

