

Managing Telecommuting in a Changing Legal Environment - New Challenges from COVID-19

Paul M. Ostroff

*DIRECT DIAL: (503) 778-2122
E-MAIL: ostroffp@lanepowell.com*

Lane Powell PC
*601 SW SECOND AVENUE, SUITE 2100
PORTLAND, OREGON 97204-3158
TELEPHONE: (503) 778-2100
FACSIMILE: (503) 778-2200*

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
WAGE AND HOUR and FAIR LABOR STANDARDS ACT ISSUES	4
ZONING ISSUES	6
WORKPLACE SAFETY AND OSHA	6
Best Practices Concerning Workplace Safety Issues Involving Telecommuting Employees	8
WORKERS' COMPENSATION ISSUES	9
Issues That May Arise When Employees Telecommute From Another State	9
What Activities of a Telecommuting Employee May Give Rise to a Compensable Injury?	11
Resident Employees.....	11
Going and Coming Rule	12
Telecommuting as a Form of “Light Duty” or Modified Duty Assignment.....	14
Best Practices Concerning Workers’ Compensation Issues	15
TELECOMMUTING AND THE AMERICANS WITH DISABILITIES ACT	16
Uncertainties in the Legal Landscape.....	16
What’s an Employer to Do?.....	18
FAMILY AND MEDICAL LEAVE ACT AND STATE LEAVE LAWS	19
Eligibility and Coverage	19
Telecommuting as an Alternative Work Assignment.....	20
Intermittent Leave.....	20

**EMPLOYMENT DISCRIMINATION ISSUES IN THE
ADMINISTRATION OF TELECOMMUTING ARRANGEMENTS.....20**

CROSS-BORDER ISSUES22

EMPLOYEE PRIVACY ISSUES24

INTELLECTUAL PROPERTY AND INFORMATION SECURITY ISSUES.....24

CREATING A TELECOMMUTING POLICY24

APPENDIX A – SAMPLE TELECOMMUTING POLICY

APPENDIX B – SAMPLE TELECOMMUTING AGREEMENT

Managing Telecommuting in a Changing Legal Environment - New Challenges from COVID-19

By

**Paul M. Ostroff
LANE POWELL PC**

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 Resource Management indicates

**PAUL M. OSTROFF
LANE POWELL PC**
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2122
ostroffp@lanepowell.com

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. Recent increases in fuel prices have also encouraged telecommuting. See, e.g., “Fuel Prices Have U.S. Workers Eyeing Telecommuting”, Reuters, April 26, 2006.

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?

PAUL M. OSTROFF
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2122
ostroffp@lanepowell.com

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.

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 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.

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

PAUL M. OSTROFF
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2122
ostroffp@lanepowell.com

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
- 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.

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. The laws of some states may provide reciprocal coverage of varying degrees with respect to policies issued on behalf of employers from outside the state. A summary of state laws in all fifty states that addresses insurance coverage issues for out of state employers may be found at the website maintained by the Oregon Workers Compensation Division at <http://www.cbs.state.or.us/wcd/compliance/ecu/etsummary.html>.

Some states have entered into interstate agreements with neighboring states that address cross border issues. For example, under an agreement between Washington and Oregon, 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.¹

¹ 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;
8. The residence of the worker; and

PAUL M. OSTROFF
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2122
ostroffp@lanepowell.com

What Activities of a Telecommuting Employee 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 give rise to 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 inference of "on call" work requirements. Under workers compensation law in a number of states, resident employees are employees who are required to live on the job premises by the nature of their employment duties. Under the so-called "bunkhouse rule", which has been adopted by many jurisdictions, 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. *See Larson, Workers' Compensation Law §§ 24.01, 24.03[1]* (hereinafter: *Larson*).

Whether the rules that have developed applicable to resident employees apply to telecommuting employees is not as yet certain. However, as discussed below, the rules applicable

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.

PAUL M. OSTROFF
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2122
ostroffp@lanepowell.com

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*, §§ 24.03, 24.04. 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.).

Going and Coming Rule

Under the law in most jurisdictions, 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, unless the employee is then on the employer's premises. *Larson*, § 13.01[1] *Wyatt v. S.I.A.C.*, 236 Or. 444, 447 (1954). General principles of law under the going and coming rule, and a small but developing body of cases that deal with telecommuting employees provide some guidance for

PAUL M. OSTROFF
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2122
ostroffp@lanepowell.com

employers in administering telecommuting arrangements so as to minimize potential liability under workers compensation laws.

There are several exceptions to the going and coming law.² 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. *Larson*, §§ 14.06, 14.07, *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. *See also* discussion above concerning payment for travel time under the Fair Labor Standards Act.

Whether an employee's home constitutes a "site" of employment may also have a determinative impact on whether travel by a telecommuting employee between home and the employer's principal place of business may be considered within the course of employment, and hence covered by workers compensation laws. Travel between two employer sites may be considered within the course of employment. *See Larson*, § 16.10[1]. Whether the home will be considered a site may depend on the presence of three factors: (1) a regular and substantial quantity

² 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. *Larson*, Chapters 13-17.

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. *Larson*, § 16.10[2] and cases discussed therein, *Labdie v. Norwalk Rehabilitation Services*, 2003 WL 22017340 (Conn.Work.Comp.Com.). 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, *inter alia*, 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. *See, Larson*, §§ 85.01, 85.03,

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). 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*. Similarly, the ability of the employee to perform in a telecommuting position may be valid evidence that justifies a reduced permanent disability rating. *Melissa Lantz and Monsanto Chemical Co.*, 2007 WL 740896 (Mo. Lab. Ind. Rel. Com.)

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.

PAUL M. OSTROFF
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2122
ostroffp@lanepowell.com

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-Falskoff 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 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 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 STATE LEAVE LAWS

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 state employment laws that set a threshold for application to employer having a specified number of employees “within the state.” See, e.g., the Oregon Family Leave Act (“OFLA”), ORS 659A.153(1), requiring that an employer must employ 25 or more persons in the state of Oregon in order to be covered by OFLA. Although the issue

PAUL M. OSTROFF
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2122
ostroffp@lanepowell.com

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 above, an employer may be required to consider telecommuting to accommodate a disability that qualifies under the ADA. No similar obligation arises under FMLA. Under FMLA, an alternative work assignment may only be made at the employer’s discretion. 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 similar state leave laws.

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 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. (*See e.g., California Business and Professions Code § 16600*) and laws in a number of other states restrict or limit the enforcement of covenants not to compete. *See, generally, Malsberger, Covenants Not to Compete: A State-By-State Survey*, 5th Ed. (BNA Books, 2005) Wage and hour law in California is markedly different from federal wage and hour law and the wage and hour laws of most other states. Some states may require an employer to reasonably accommodate an employee who has a pregnancy-related disability (*See, e.g., California Government Code § 12945(b)*) while other states impose 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 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 the income tax laws of some state, 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.” See, e.g., Oregon, ORS 316.007(3). Some 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. At the end of this article, in Appendix A is a sample telecommuting policy. 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

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 their ability to get the job done must submit a written request on the accompanying form to their immediate supervisor and the Director of Human Resources. The request should explain what equipment is necessary, how they will responsibly carry out their duties, 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 supervision, costs, and the benefit (if any) and detriment to the company or your department.

No Change in Duties, Responsibilities, Schedule, etc. If an employee is permitted to telecommute by the company (in its sole and exclusive discretion), her work status, schedule, performance expectations, working time, compensation and benefits will be unchanged, unless expressly authorized in writing by the employee's supervisor and the Human Resources Department.

Work Schedules When Telecommuting Arrangement Has Been Approved. The work schedule of an employee shall be as directed by the employee's supervisor. 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. Employee shall promptly report any job incurred injuries, and shall otherwise comply fully 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 persons not employed by the company, or which occur outside the scheduled work hours or which occur outside of the home workspace. As a condition of continuing in a telecommuting arrangement, the employee shall maintain safe conditions in the

PAUL M. OSTROFF
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2122
ostroffp@lanepowell.com

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. In order to be eligible for consideration for telecommuting, an employee must have received a rating of ___ or more in their last performance evaluation. Only those 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 permitted by the Company 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 employment relationship may be terminated at any time by the Company or Employee.
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 childcare 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 contain a designated work space of sufficient size to accommodate any necessary equipment, as well as a desk and chair. If mandated by applicable law, and if I so request, the Company will provide a desk and chair that meets 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 specifically authorized by the Company. 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 Entrance and Inspection by the Company. Employee acknowledges and agrees 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.

PAUL M. OSTROFF
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2122
ostroffp@lanepowell.com

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 the Employee's designated working hours.
7. The Employee's job responsibilities may require that he/she commute to the local office, attend meetings at the local office (which Employee will attend in person), and meet with his/her supervisor at the local office. The Employee may also be required to work at the local office whenever requested by the Company.
8. If I am provided with equipment by the Company 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 permitted by applicable law, 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 renter's 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.

PAUL M. OSTROFF
LANE POWELL PC
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Telephone: 503.778.2122
ostroffp@lanepowell.com

13. To the fullest extent permitted by 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 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: _____