



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



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Introduction

- What Changes Have Occurred in the Legal Terrain That Create Legal Compliance and Liability Challenges in the Management of Telecommuting Employees?

Introduction

- Changes in the Legal Terrain
- Changes to white collar exemption regulations have resulted in previously exempt employees being subject to the overtime provisions of the FLSA
 - Time and Record Keeping Requirements
 - Hours Worked

Introduction

- Changes in the Legal Terrain
- Covid-19 and The Families First Coronavirus Response Act
 - Expanded use of telecommuting
 - Paid leave issues associated with telecommuting related to Covid-19
 - Intermittent leave issues
 - Changes in wage and hour rules
- Increasing “Balkanization” of labor and employment law at the state and local level regarding:
 - Minimum Wages
 - Paid Leave
 - Hiring and Recruitment (Background checks, credit checks, “ban the box”)
 - Payroll practices (e.g., “wage theft” statutes and ordinances)

Introduction

- Wage and Hour Compliance
- Workplace Safety and OSHA Compliance
- Workers' Compensation
- Risk Management
- Americans with Disabilities Act
- Recruitment and Hiring Across Multiple States and Cities

Introduction

- Family Medical Leave Act and State Family Leave Laws
- Paid Leave at the State and Local Level
- Employment Discrimination Issues
- Right of Access
- Cross Border Issues
- Preservation of Intellectual Property Rights
- Privacy, Confidentiality, and Electronic Monitoring
- Zoning

Objectives

- Understand the Legal Landscape
- Understand the Best Practices to Minimize the Risk of Exposure to Wage and Hour Claims by Telecommuting Employees
- Observe Best Practices in Other Aspects of the Employment Relationship
- Develop a Telecommuting Policy
- Require a Telecommuting Agreement

Wage and Hour Law Applicability

- The Fair Labor Standards Act (FLSA) requires:
 - That employers pay certain employees (“nonexempt” workers) a specified minimum wage.
 - That employers pay nonexempt employees at least one and one half times the regular rate of pay for hours worked in excess of 40 hours per week.
- These rules apply equally to office-based employees and telecommuting employees.

Wage and Hour Law Applicability

- State Wage and Hour Laws

- Employers must comply with state and federal law.
- Some states impose more severe limitations on exemptions.
- Meal and rest breaks.
- State-by-state differences concerning timing and frequency of wage payments, including payment of compensation on termination.
- Differing state law treatment of vacation, commissions, bonuses, and incentive payments.

Why Does Telecommuting Create Special Wage and Hour Concerns?

- The Monitoring Problem: It can be difficult to track the hours of non-exempt employees working in the office. These difficulties are multiplied when the employee is working from home.
 - For example, it can be hard to distinguish work time from personal time when an employee lives and works in the same place.

Special Wage and Hour Concerns, Cont'd.

- The Record-Keeping Problem: Employers are required to maintain detailed records tracking hours worked by employees. These records are critical in proving that an employer properly paid its employees and gave them requisite breaks. Record-keeping can be made more difficult with off-site employees.

TIPS TO HELP YOU COMPLY WITH WAGE and HOUR LAWS WITH YOUR TELECOMMUTING EMPLOYEE

1. Offer Option Only to Overtime Exempt Employees

- Monitoring work hours not as much a concern
- Make sure employee is performing duties that clearly fall with overtime exemption (e.g., executive, administrative, professional, outside sales, computer professional)
- Observe requirements for salary basis test
- Issues regarding fee-based compensation

New FLSA White Collar Regulations

- Salary amount increased from \$455/week to \$684/week (\$35,568/yr.)
- At least 10% of the minimum compensation may be paid in the form of a bonus or commission
- Salary basis and amount do not apply to lawyers, physicians, teachers or outside salesmen

New FLSA White Collar Regulations

- Salary amount for “highly compensated” employees to increase from \$100,000 to \$107,342 per year
- All increases are effective January 1, 2020

Offer Option Only to Overtime Exempt Employees

- Special rules for bonus payments
- Up to 10% of the minimum salary amount can consist of non-discretionary bonuses, incentive payments or commissions
- Must be paid at least annually

Offer Option Only to Overtime Exempt Employees

Executive Exemption (Federal)

- Must meet all four parts of the test in the federal rule to be exempt from overtime pay:
 - Effective January 1, 2020, must be paid at least \$684/week on a salary basis (bonus/incentive may comprise up to 10%);
 - Primary duty is managing the enterprise, or a customarily recognized department or subdivision of it;
 - Customarily and regularly directs the work of two or more other full-time employees or their equivalent; and
 - Has authority or input that is given particular weight over hiring and firing, promoting, or demoting employees.

Offer Option Only to Overtime Exempt Employees

Administrative Exemption (Federal)

- Must meet all parts of this three-part test in the federal rule:
 - Paid at least \$684/week on a salary or fee basis (bonus/incentive may comprise up to 10%);
 - Non-manual office work directly related to management or general operations of employer or employer's customers; and
 - Primary duty includes discretion and independent judgment on matters of significance.

Offer Option Only to Overtime Exempt Employees

Learned Professional Exemption (Federal)

- Must meet all parts of this four-part test in the federal rule:
 - Paid at least \$684/week on a salary or fee basis (bonus/incentive may comprise up to 10%);
 - Primary duty must be the performance of work requiring advanced knowledge, defined as work that is predominantly intellectual in character and that requires the consistent exercise of discretion and judgment;
 - Advanced knowledge must be in a field of science or learning; and
 - Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Offer Option Only to Overtime Exempt Employees

Creative Professional Exemption (Federal)

- Must meet all parts of this two-part test in the federal rule:
 - Paid at least \$684/week on a salary or fee basis (bonus/incentive may comprise up to 10%); and
 - Primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Offer Option Only to Overtime Exempt Employees

Highly Compensated Employee (Federal)

- Under the 2020 federal rules, highly compensated workers are exempt from overtime pay if they perform office or nonmanual work, their total annual compensation of \$107,432 per year or more paid on a salary or fee basis, and they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard federal tests for exemption.
- Many states do not include the highly compensated employee exemption.

Offer Option Only to Overtime Exempt Employees

Computer-Related Occupations Exemption (Federal)

- Must meet all of these requirements:
 - Paid at least \$684/week on a salary or fee basis(bonus/incentive may comprise up to 10%); or not less than \$27.63/hour, if paid hourly;
 - Must be employed as a computer systems analyst, computer programmer, software engineer, software developer or other similarly skilled worker in the computer field; and
 - Primary duties must consist of:
 - Application of systems analysis techniques and procedures to determine hardware, software or system-functional specifications;
 - Design development, documentation, analysis, creation, testing or modification of computer systems programs based on and related to user or system-design specifications;
 - The design, documentation, testing or modification of computer programs related to machine operating systems; or
 - A combination of the duties in item 3.

Offer Option Only To Overtime Exempt Employees

Outside Sales Employees Exemption (Federal)

- Must meet all parts of this two-part test in the federal rule:
 - Customarily and regularly engaged away from his/her employer's place or places of business; and
 - Primary duty must be making sales or obtaining orders or contracts for services (or the use of facilities) for which a consideration will be paid by the client or customer.

Inside Sales "Exemption"

- Commissioned sales employees of retail or service establishments if more than half of the employee's earnings come from commissions and the employee averages at least one and one-half times the minimum wage for each hour worked.

2. Non-exempt Employees: Enter Into a Formal Work Agreement with Employee Regarding Work Hours

- Too much flexibility or a lack of firm guidance will lead to disputes over what is and is not compensable time.
- The basis for the employer's ability to make this agreement is a regulation known as the "homeworker's exception."
- The regulation provides that where an employee lives and works in the same place and has periods of complete freedom from work, the employer may make a reasonable agreement with the employee concerning the number of hours worked for which the employee must be compensated.

29 CFR § 785.23 - “The Homeworker’s Exception”

- “An employee who resides on his employer’s premises on a permanent basis or for an extended period of time is not considered as working all the time he is on the premises.
- Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own.
- It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted...”

What Is a “Reasonable” Agreement Governing Hours Between an Employee and an Employer

- To be “reasonable,” as is required by 29 C.F.R. § 785.23, an agreement must, at a minimum, take into account some approximation of the number of hours actually worked by the employee or that the employee could reasonably be required to work.

The Effect Of Having a Reasonable Agreement Regarding Hours With a Telecommuter

- Employers may be able to defeat workers' claims that they are entitled to hourly back pay for specific hours of work performed at home if a court finds the parties negotiated a reasonable agreement regarding the number of hours worked.
- For such an outcome to occur, the employer and the telecommuter must have a mutual agreement regarding hours worked. An employer may not unilaterally announce the number of compensable hours.

3. Utilize Time Sheets to Record The Actual Hours Worked By The Telecommuting Employee

- Train employees how to correctly input time entries.
- Require employees to sign and date timesheet and represent that these are all of the hours worked during that period.
- Instruct them not to falsify time sheets, even if instructed by a manager.
- Create channels for employees to report forced timesheet falsification.
- Do not retaliate against employees for reporting forced falsification.
- Draft “safe harbor” policies.

The Employer's Duty to Maintain Accurate Records

29 U.S.C. § 211(c) Records

- Employer must:
 - Make, keep, and preserve such records of the persons employed by him and of the wages and hours;
 - Preserve such records for at least three years; and
 - Make such reports available for inspection.

4. Develop A Written Policy That Bans Overtime Work Without Prior Approval

- A special concern with telecommuting employees is that, with 24 hour access to work tools, they may work excessive hours and increase an employer's overtime pay obligations.
- "Work not requested but suffered or permitted is work time."

29 CFR § 785.11

- This means that once an employer allows an employee to continue working past their shift, or knows or should know that the employee is working, the employee must be compensated.
- It is immaterial whether the overtime work is performed at home or at the workplace.

29 CFR § 785.12

Preventing Unauthorized Overtime

- The employer CAN create a written policy prohibiting the performance of overtime work.
- However, simply issuing this policy is not enough. It is the employer's duty to enforce the policy. 29 CFR § 785.13.
- Notably, even with a written policy in place, employers may still violate the FLSA if, due to off-the-clock work, the employee is not paid for hours worked in excess of a 40-hour workweek.

Preventing Unauthorized Overtime

- Adopt a clear time and attendance policy. The policy should:
 - Outline when employees are allowed to work.
 - Emphasize that the policy is the authoritative guide on working time.
 - State that any falsification of payroll records, such as under- or over-reporting, is prohibited.
 - Instruct employees to report any person who encourages them to falsify timesheets.

Other Steps Employers Can Take To Prevent Unauthorized Overtime Work

- Require managers to review weekly time entries for accuracy.
- Train all staff about timekeeping policies.
 - For example, well-trained payroll personnel should be able to identify questionable timesheets and flag those sheets for investigation.
- Uniformly address any policy violations by employees or supervisors.
- If employee violates policy, pay employee for hours actually worked including overtime, and discipline employee for violating policy.

5. Implement Strategies For Monitoring Employees' Work-Related Activities

- Use electronic monitoring software which notes log-on and log-off times.
 - Potential concerns with this approach:
 - Privacy Concerns. (Mitigated if company equipment and clear policy regarding monitoring.)
 - Computer monitoring may not capture all of an employee's work time (e.g., reviewing hard copies of documents).

6. Reduce The Time The Telecommuter Spends Waiting For Work Or Instructions

- Unnecessary waiting time can increase an employer's expenses by requiring compensation for unproductive employee time.
- Whether waiting time is time worked under the FLSA, and therefore requires compensation, depends on the particular circumstances.

29 CFR § 785.14

- Consider: Was the employee "engaged to wait" or were they "waiting to be engaged"?
- If you are "engaged to wait," you must be compensated.
- If you are "waiting to be engaged," you need not be compensated.

29 CFR § 785.15. “On Duty” Waiting

- If the employee is unable to use the time effectively for his own purposes, it belongs to and is controlled by the employer. In all of these cases, waiting is an integral part of the job. The employee is engaged to wait.

“Engaged To Wait” Is Work Time

- This means that any time belonging to and controlled by the employer is compensable time.
- It is key to have a clear method for assigning work to the commuter in order to avoid unnecessary waiting time.

Employee Waiting Time

- That some of the employee's personal activities may have been affected is not enough. An employee's free time must be severely restricted for off-time to be construed as work time for purposes of the FLSA.

Compensability of At-Home Waiting Time

- The “waiting rule” applies equally to on-the-job employees and telecommuters.

29 CFR § 785.15

- An employee may be entitled to compensation even though he or she is on call at home or elsewhere.

Compensability of At-Home Waiting Time

- An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company official where he or she may be reached is not working while on call.
- Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits.

7. Develop a Policy Addressing Pay For Travel Time Between Home and The Office or Other Work Sites

- Have a written policy delineating the employer's rules regarding pay for travel time
- General Rule: An employer is not required to compensate employees for activities such as traveling to and from the actual place of performance of an employee's principal activity, if such travel occurs either prior to the time at which the employee commences, or subsequent to the time at which he ceases, his principal activity

Compensability Of Travel Time

- Ordinary home-to-work and work-to-home travel is NOT compensable.

29 C.F.R. § 785.35

- Even where the employee is expected to report to work at a location away from the location of the employer's premises, ordinary home-to-work travel is still not compensable.

29 C.F.R. § 553.221(e)

Travel Time Between Work Sites

- Travel between work sites during the work day IS compensable.

29 C.F.R. § 785.38

- If the commuting employee is required to report to some location between travel from his home to a customer site (or from a customer site to home), then only the travel time between the employee's home and the reporting location is non-compensable; the travel time between the reporting location and the customer site is "travel that is all in a day's work" and, thus, compensable.

29 C.F.R. § 785.38

Special Travel Time Concerns For Telecommuting Employees

- Scenario: The telecommuter works at home all morning, performing his “principal activities.” He must travel to the employer’s main office in the afternoon. Is travel time compensable?
 - Is this time considered merely non-compensable “commute time” because it is the telecommuter’s first trip from his home to this office for the day?
 - Or is this time considered travel “that is all in a day’s work” and, therefore, compensable?

The Travel Time is Most Likely Compensable

- The telecommuter's mid-day trip is probably not "commute time"
- It is travel time that occurred after the employee had begun to perform his principal activities on that workday and before he had stopped performing his principal activities

Compensability of Telecommuter Travel Time

- If the employee is traveling to the main office for the benefit of the employee and if he must travel to perform his principal activities, the travel time is probably compensable
- It is best to include whether or not such travel time is compensable in the formal work agreement between the parties

TELECOMMUTING AND THE FFCRA

- Expanded use of telecommuting
- Paid leave issues associated with telecommuting related to Covid-19
- Intermittent leave issues
- Changes in wage and hour rules
- Documentation for medical certification must specifically rule out telework

FFCRA OVERVIEW

- **Covered Employers.** This law covers employers with *fewer than 500 employees*.
- **Reduced Threshold for Eligible Employees.** Employees are eligible to receive leave from an employer if they have been employed by that employer for at least 30 calendar days. This is lower than the general FMLA threshold of 12 months and 1250 hours worked.
- **Qualifying Need Related to a Public Health Emergency Defined.** Eligible employees will have the right to take up to 12 weeks of FMLA to care for a child under 18 years old if the child's school or place of care has been closed, or the paid childcare provider is unavailable due to a public health emergency; *provided that* the employee is unable to work or telework.
- **Job Protection.** FMLA job protections still apply, but employers with less than 25 employees do not have to return the employee to the previous position if that position no longer exists but must make reasonable efforts to place the employee into an equivalent position.

FFCRA OVERVIEW – PAID FMLA LEAVE

- **Limited to certain circumstances.** Paid leave only applies to “qualifying needs related to a public health emergency.” Other FMLA leave remains unpaid.
- **First 10 days.** The first 10 days of leave may be unpaid but employees can choose to use accrued paid leave.
- **Subsequent Leave Paid at Two-Thirds of the Regular Rate.** The leave must be paid at no less than two-thirds of the employee’s regular rate of pay (note that this may be greater than an employee’s *hourly* rate, see [the Department of Labor’s regular rate guidance](#) for more information) The daily rate of paid leave cannot exceed \$200, and aggregate leave shall not exceed \$10,000.
- **Calculating Number of Hours.** Generally, employers must use the number of hours the employee would otherwise be normally scheduled to work. Special rules apply, however, for employees with varying schedules.
- **Mandatory Substitution Prohibited.** Employers cannot require employees to use other paid leave in lieu of leave granted under the FFCRA.

FFCRA OVERVIEW – QUALIFIED PAID SICK LEAVE – COVERED REASONS

1. The employee is subject to a federal, state, or local quarantine or isolate order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to an order as described in reason 1 (above) or has been advised as described in reason 2 (above);
5. The employee is caring for their child if the school or childcare has been closed, or the childcare provider is unavailable, due to COVID-19; or
6. The employee is experiencing any other substantially similar COVID-19 condition as specified in rules from the Department of Health and Human Services.
7. Tax credits available for qualified paid federal sick leave and emergency FMLA.

FFCRA TELECOMMUTING ISSUES – WAGE AND HOUR

“Telework” means work the Employer permits or allows an Employee to perform while the Employee is at home or at a location other than the Employee’s normal workplace. An Employee is able to Telework if:

- (a) his or her Employer has work for the Employee;
- (b) the Employer permits the Employee to work from the Employee’s location; and
- (c) there are no extenuating circumstances (such as serious COVID-19 symptoms) that prevent the Employee from performing that work. Telework may be performed during normal hours or at other times agreed by the Employer and Employee.

Telework is work for which wages must be paid as required by applicable law and is not compensated as paid leave under the EPSLA or the EFMLEA.

FFCRA TELECOMMUTING ISSUES – WAGE AND HOUR

FFCRA REGULATIONS CHANGE THE COMPENSABILITY OF TIME SPENT DURING A WORKDAY FOR EMPLOYEES WHO ARE TELECOMMUTING.

- Under 29 CFR 790.6, periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked.
- DOL Relaxes 790.6 under FFCRA and encourages flexibility.
- An employer allowing flexibility during the COVID-19 pandemic shall not be required to count as hours worked all time between the first and last principal activity performed by an employee teleworking for COVID-19 related reasons as hours worked. For example, an employee may agree with an employer to perform telework for COVID-19 related reasons, and also address child care and school instruction issues during the normal workday, without making that activity compensable.

FFCRA TELECOMMUTING ISSUES – PAID LEAVE

Employees may take paid sick leave if covered by a quarantine order only if:

- Being subject to the order prevents him or her from working or teleworking.
- The question is whether the employee would be able to work or telework "*but for*" being required to comply with a quarantine or isolation order.

An employee subject to a quarantine or isolation order is able to telework, and therefore may not take paid sick leave, if (a) his or her employer has work for the employee to perform; (b) the employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and (c) there are no extenuating circumstances that prevent the employee from performing that work.

FFCRA ISSUES – INTERMITTENT LEAVE

INDIVIDUAL AGREEMENT REQUIRED AND FLEXIBILITY ENCOURAGED

- FFCRA Regulations maintain the requirement that intermittent leave is purely subject to individual agreement between the employer and the employee.
- FFCRA Regulations afford teleworking employees and employers broad flexibility to agree on arrangements that balance the needs of each teleworking employee with the needs of the employer's business.
- Clear mutual understanding required that the employee may take intermittent paid sick leave or intermittent expanded family and medical leave, or both.
- Must include the increments of time in which leave may be taken.
- Written agreement strongly encouraged, although not explicitly required.

FFCRA ISSUES – TELECOMMUTING AGREEMENTS

- Specify that the agreement is entered into because of COVID-19 related reasons
- Consider tying the duration of the agreement to current COVID-19 related conditions, as determined by the employer in its discretion.
- Include provisions allowing flexibility as to periods during the work day during which the employee may attend to child care or instruction, and specify that the time is non-compensable

State Wage and Hour Issues

- Employees rendering service in other states will, in most cases, be subject to the employment laws of the state in which those services are performed and where they reside
- A choice of law provision in the telecommuting agreement may, in some cases, permit application of the laws of another state to some aspects of the employment relationship
- Many states, however, will not permit a contractual choice of law provision to avoid the application of state wage and hour and other employment laws that apply to an employee rendering service in the state
- Factors such as place of residence, where taxes are paid, where work is performed and where the benefit of the work is received may determine the validity of a choice of law clause

State Wage and Hour Issues

- Evaluate state by state differences concerning exemptions from overtime and minimum wage
 - White Collar Exemptions
 - Salary amount
 - Some states have retained the “long test” (e.g., Minnesota, New Jersey, Wisconsin)
 - Other states have retained the old “short test” (Connecticut, Illinois, Penn., Montana, Washington)
 - Other states apply their own unique standard (e.g., California, Colorado, Oregon)

State Wage and Hour Issues

- Some states do not grant a combined exemption for overtime and minimum wage
 - Some states differ from the FLSA with respect to the computer professional exemption
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- Evaluate state by state differences in overtime compensation
 - Some states require payment of daily overtime (e.g., California, Colorado, Puerto Rico,)
 - Some states may require an increased premium for overtime (e.g., California, Puerto Rico)
 - Some states require premium pay for working extra hours on a holiday, sixth day or Sunday (e. g, Rhode Island)

State Wage and Hour Issues

- Evaluate state by state differences in minimum wages
- Evaluate the application of municipal minimum wage ordinances (coverage thresholds, industries, amounts)
- Cities that have adopted minimum wage ordinances include: New York City, Los Angeles, Seattle, San Francisco, Oakland, Long Beach, Emeryville, Berkeley, Chicago, Tacoma, Sea-Tac.

State Wage and Hour Issues

- Identify state by state differences in mandatory payday timing
- Identify differences in the requirements for final wage payments
 - Some states permit payment on next regular payday
 - Many states impose specific, short time frames in case of termination or resignation (e.g., California, Colorado, Mass. - immediately upon termination, Oregon, Hawaii - next business day)

State Wage and Hour Issues

- Be aware of state by state differences in the treatment of unused vacation (e.g., whether unused vacation is treated as “wages” and whether vacation becomes “vested” and may have to be included in final pay)
- Identify state by state requirements concerning commission payments
- Identify states that restrict deductions from paychecks, and the conditions under which deductions may be made

State Wage and Hour Issues

- Rest and Meal Breaks

- No FLSA requirement, but rest breaks must be compensated
- State laws vary significantly, and a violation may result in a regulatory sanction, or wage and hour liability
- Possible liability arising from meal breaks in which an employee is not “completely relieved” of all duties
- Risk may be best managed by including a rest and meal break provision in telecommuting agreement, requiring employees to log off during rest and meal breaks, and monitoring compliance with that requirement

State and Local Recruitment Issues

- Many states and some municipalities have adopted laws governing background checks that must be complied with if hiring or recruiting for a telecommuting employee in that locale.
 - “Ban the box”
 - Restrictions on credit checks

State and Local Recruitment Issues

“BAN THE BOX”

- Prohibit questions on applications concerning prior criminal convictions or arrests
- May limit inquiries until the interview stage
- May limit inquiries until the “conditional offer” stage
- May require employer notice to applicant and justification for decision not to hire

State and Local Recruitment Issues

“BAN THE BOX”

- States with “ban the box” laws that may be relevant to telecommuting employees include: California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Maine, Maryland (expunged records only), Massachusetts, Michigan, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont

State and Local Recruitment Issues

“BAN THE BOX”

- Local Governments with “ban the box” laws that may be relevant to telecommuting employees include Austin, Baltimore, Buffalo, Chicago, Cook County, Columbia (MO), the District of Columbia, Montgomery County (MD), New York City, Philadelphia, Portland (OR), Prince George's County (MD), Rochester, San Francisco, and Seattle.

State and Local Recruitment Issues

CREDIT CHECKS

- May prohibit credit checks entirely
- May permit in limited circumstances, e.g., employees with access to funds or financial information, or bonding or insurance requirements.

State and Local Recruitment Issues

CREDIT CHECKS

- States that have banned or severely restricted credit checks in the hiring process include:
 - California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, Oregon, Rhode Island, Vermont, and Washington

State and Local Paid Leave Laws

- A number of states and cities have enacted paid leave laws that may apply to telecommuting employees
- Determine whether coverage threshold is met
- Amount of leave, conditions, documentation
- Consider use of PTO plans
- Notice and payroll statement requirements

State and Local Paid Leave Laws

- **States:** California, Connecticut, Massachusetts, Oregon, Vermont
- **Local Government:** Washington DC, Emeryville, Long Beach, Oakland, San Diego, San Francisco, Santa Monica, Montgomery County, MD, Minneapolis, NYC, Eugene, Portland OR, Philadelphia, Pittsburgh, Seattle, Sea-Tac, Spokane, Tacoma, and a number of cities in New Jersey, including Newark and Trenton.
- **Other:** Puerto Rico

Creating a Telecommuting Policy

- 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.

Creating a Telecommuting Policy

- 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.

Creating a Telecommuting Policy

- 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.

Creating a Telecommuting Policy

- 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?

Telecommuting Agreements

- Carefully define the telecommuting employee's obligations; explain that the employee is not "on call"
- Establish written policies and a written agreement between the employer and the employee concerning the telecommuting arrangement that addresses that the activities are understood to be in the course of employment

Telecommuting Agreements

- Specify that a single room in the house be used as the home office. This avoids the problem of an injury occurring elsewhere, within the home or nearby, being claimed as a work-related injury
- Set up procedures that define when the employee performs work, e.g., calling a supervisor or logging onto the computer network

Telecommuting Agreements

- 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

Workplace Safety and OSHA

- OSHA Withdrawal of its Directive Concerning Home Inspections
 - Hazardous materials still subject to regulation
- Safety and Health Risks for Telecommuting Employees
 - Physical and psychological stress
 - Isolation, limited social support, time pressures, higher work loads
 - Injuries associated with travel

Workplace Safety and OSHA

- Safety Checklist for the Inspection and Monitoring of Home Workplaces
- Best Practices Concerning Workplace Safety Issues Involving Telecommuting Employees
 - Ensure that employees comply with workplace safety policies
 - Employees should receive a copy of the company's safety policies and acknowledge receipt in writing

Workplace Safety and OSHA

- Workplace injuries must be recorded
- Notify employees of their obligation to report injuries
- Promptly investigate any injury
- Consider special surveys and special training for telecommuting employees
- Have telecommuting employees meet on site and participate in social gatherings

Workers' Compensation Issues

- Issues That May Arise When Employees Telecommute From Another State
 - Review insurance policies
 - Check with State Workers' Compensation Agencies.
 - Is the assignment to another state "temporary"?
 - Intent of the employer and understanding of the worker
 - Location of the employer's permanent facilities
 - Duration of the assignment
 - Circumstances and directives
 - Residence of the worker
 - Specific number of days designated by some states

Workers' Compensation Issues

- Activities of a Telecommuting Employee That May Give Rise to a Compensable Injury
 - When does an Injury “Arise Out of Employment”?
 - Resident employees
 - Going and Coming rule
 - Exception for paid travel
 - Employer furnished transportation
 - Dual purpose trips

Workers' Compensation Issues

- Telecommuting as a Form of “Light Duty” or Modified Duty Assignment
 - A possible vehicle to terminate temporary disability payments, and permanent total disability status

Workers' Compensation Issues

- Best Practices Concerning Workers' Compensation Issues
 - Review your workers' compensation insurance policy to make certain that activities of telecommuting 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

Telecommuting and The Americans With Disabilities Act

- Uncertainties in the Legal Landscape
 - Employers may be required to consider telecommuting as a reasonable accommodation
 - Employers may not be required to consider telecommuting, or only in extraordinary circumstances
 - Ninth Circuit's decision in *Humphrey v. Memorial Hospitals Association*

Telecommuting and The Americans With Disabilities Act

- What's an Employer to Do?
 - 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

Telecommuting and The Americans With Disabilities Act

- If an employee has prior work-related absences that may be related to his or her 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

Telecommuting and The Americans With Disabilities Act

- 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 Issues

- FMLA – A telecommuting employee is deemed employed at the worksite to which he or she reports and from which assignments are made
 - The employee's home is not a worksite

Family and Medical Leave Act and State Leave Laws

- State Leave Laws - An out-of-state employee may not be “employed” in the state from which he receives direction
 - Review the facts to determine whether a telecommuting employee whose home is out of state may be includable in the “head count” or considered eligible as an employee of the location from which he receives assignments

Family and Medical Leave Act and State Leave Laws

- Telecommuting as an Alternative Work Assignment
 - No obligation to permit, but don't discriminate
 - Requirement of employer consent under FMLA
 - Requirement of mutual consent under some state leave laws

Family and Medical Leave Act and State Leave Laws

- Intermittent Leave and Telecommuting Arrangements
 - No duty by an employer to agree to intermittent leave. For FMLA purposes, this is solely a function of individual agreement.
 - Time spent working at home is not chargeable to FMLA leave
 - Only hours of leave actually taken are chargeable to FMLA entitlement

Employment Discrimination Issues in The Administration of Telecommuting Arrangements

- Don't Discriminate on the Basis of Any Protected Class
- Don't Implement a Telecommuting Program in a Discriminatory Manner
- Watch Out for Retaliation Issues

Employment Discrimination Issues in The Administration of Telecommuting Arrangements

- Ensure That Telecommuting Employees Receive Equal Training Opportunities
- Be Conscious of the Potential Problem of Gender Based Self-Selection

Cross Border Issues

- Employees Telecommuting from Another State will Be Covered By the Laws of That State
- Areas of Concern May Include:
 - Non-compete agreements
 - Wage and hour law
 - Employment discrimination issues

Cross Border Issues

- Employment Tax Issues
- Personal Income Tax Issues
 - Disclaimer should be included in telecommuting agreement

Employee Privacy Issues

- Employee Must Consent in Writing to:
 - Physical access by the employer
 - Electronic monitoring
 - Telephone and voicemail monitoring

Intellectual Property and Information Security Issues

- Install Firewall and Computer Security Software on Employee's Home Computer
- Monitor Use of Home Computer By IT Department
- Software Licenses
- Invention Agreements

Zoning Issues

- Check local ordinances
- Not likely to be an issue unless employees “double-up”
- Ordinances customarily prohibit anyone who is not a resident from working in the home

Thank You



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