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Teleworking Compliance Issues Amid the COVID-19 Crisis

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AGENDA

- 1 — Teleworking is here to stay.
- 2 — Teleworking and the Families First Coronavirus Response Act
- 3 — Data security when employees work from home
- 4 — Wage and hour issues associated with teleworking
- 5 — Teleworking as a reasonable accommodation



Teleworking is here to stay.

- Telework was gaining in popularity long before COVID-19 hit.
- But after almost everyone was forced to work from home this spring, it has gained in popularity.
- Price Waterhouse Cooper study in June 2020 found that 72 percent of office workers wanted to work from home at least two days a week.
- More than half the employers polled by PWC expected telework to continue after COVID-19 crisis is over.
- A Gallup poll conducted in May 2020 found that about half of the remote workers polled wanted to continue working from home after restrictions were lifted.

But there's at least one naysayer

- In “Telecommuting is not the future,” a May 20 op-ed piece in the *Washington Post*, Helaine Olen said remote work wasn’t “all that”:
 - Misunderstandings caused by email communications.
 - Zoom is no replacement for face time.
 - Loss or reduction in ability of bosses to monitor and assess work performed.
 - More stressful to be home all the time, heightened family tension.

Ms. Olen believes telecommuting will continue, but only one or two days a week.

Teleworking and the Families First Coronavirus Response Act

- FFCRA requires paid leave for specified absences from work related to coronavirus, including school or child care closings.
- Applies to private sector employers with fewer than 500 employees, and virtually all public sector employers. The law will expire on December 31.
- If an employee is able to telework during period of COVID-19-related absence, then employer does not have to provide paid leave. (Instead, the employee would be paid for working.)
- Non-exempt teleworkers are not subject to the “continuous workday rule,” which generally says that an employee must be paid from the first work-related task of the day through the last. A non-exempt teleworking employee can have unpaid “interruptions” to do personal errands, help the kids with school work, etc.

More on Telework and the FFCRA

- Employer can allow a teleworking employee to take intermittent FFCRA leave. Intermittent FFCRA leave can be taken in any increment of time agreed upon by the employer and employee.

FFCRA versus Family and Medical Leave Act

- FMLA leave is unpaid. FFCRA leave is paid.
- FMLA applies to employers with 50 or more employees. FFCRA leave applies to employers with fewer than 500 employees, no matter how small.
- To be eligible for FMLA leave, the employee must have been employed for 12 months or more. An employee is eligible for leave under the Emergency Paid Sick Leave Act provisions of the FFCRA upon hire, and for leave under the Emergency Family Medical Leave Act after 30 days of employment.
- Many of the qualifying reasons for FFCRA leave would not be qualifying under the FMLA, including a school closing or lack of availability of child care.
- BUT if an employee has to self-quarantine because of another medical condition that is a “serious health condition” within the meaning of the FMLA and is not able to telework, then he or she might be entitled to FMLA leave.

Data Security Concerns with Telework

- Use of wifi that is not secure.
- Lack of firewalls or up-to-date antivirus software.
- Falling for COVID-19-related scams that put the employer's data at risk.

Data Security: How Employers Can Address

- Require work (or, at least, sensitive work) to be done using VPN or Citrix.
- Require employees to install appropriate firewalls and antivirus software on equipment that is not company-issued.
- Periodically inform employees about latest cyberscams.
- Advise employees to never click on links or reply to email that looks suspicious. If they believe the email might be legitimate, they can go to the website of the alleged sender without using the link provided in the email. They can also call the alleged sender and ask whether that person really sent the email.

Wage and Hour Issues Associated with Telework

- Exempt/non-exempt.
- The two nightmare teleworkers.
- How to stay in compliance.

Exempt versus Non-exempt

- Exempt employee is not entitled to overtime pay. To be exempt under the most common categories, the employee must be paid on a “salary basis,” receive at least \$684 a week or \$35,568 a year, and perform job duties consistent with regulations issued by the U.S. Department of Labor.
- Exempt employees must generally be paid in full for a workweek in which any work is performed.
- Under federal law, non-exempt employees are entitled to overtime if they work more than 40 hours in a workweek. Some states have more stringent requirements (e.g., daily overtime in California).
- Non-exempt employees need to carefully document their hours worked and hours not worked. This can be more of a challenge in a teleworking environment.

Two Nightmare Teleworkers

- **The Cheating Goof-Off.** Performs very little work, but still posts 40 hours a week.
- **The “Dream” Employee.** Loves her job and her company, extremely dedicated, happy to work as long as needed, would never in a million years ask you to pay overtime!

How to Stay in W-H Compliance with Teleworking Employees

- Pay exempt employees for a full workweek in which they perform any work. (Limited exceptions may apply.) If they're slackers, deal with that through your performance management process, not by docking their pay.
- Require non-exempt employees to accurately document all time worked and not worked.
- After things go back to normal, consider requiring non-exempt teleworkers to abide by a "set" schedule.
- Make sure that your "good" employees know you really do want them to document *all time worked!* (You may have to say this a few times before they start to believe you.)
- Prohibit unauthorized overtime work, but still require employees to accurately post all time worked. If an employee works unauthorized overtime, treat it as a disciplinary issue but don't withhold their pay.

Teleworking as a Reasonable Accommodation

- Allowing an employee to work remotely can be a type of reasonable accommodation within the meaning of the Americans with Disabilities Act and most state disability discrimination laws.
- This could apply to employees who don't have COVID-19 but do have medical conditions that make them vulnerable to COVID-19, such as immunodeficiency disorders or Type 2 diabetes.
- Teleworking can also be a reasonable accommodation for pregnant employees.
- The Centers for Disease Control and Prevention says that older workers are more vulnerable to COVID-19 than younger workers. Although the Age Discrimination in Employment Act doesn't require reasonable accommodation for age, the EEOC encourages employers to allow older workers the option of teleworking if they are concerned about returning to the workplace. (But it should be their choice, not the employer's.)

FAQ and Other Resources

- U.S. Department of Labor Questions and Answers about the FFCRA: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- Equal Employment Opportunity Commission guidance related to COVID-19: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- Federal Trade Commission information about COVID-19 cyberscams: <https://www.ftc.gov/coronavirus/scams-consumer-advice>
- My blog, *Employment & Labor Insider*: <https://www.constangy.com/employment-labor-insider/>

Any questions?

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Thank you



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