

Legal Implications for Telecommuting / Working from Home in Response to the Coronavirus

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As part of the escalating coronavirus (a/k/a “COVID-19”) threat, government and health authorities continue to stress the importance of social distancing and are encouraging employers to allow employees to work from home where possible. As employers contemplate telecommuting – some for the first time in their company’s history – there are several legal issues that should be considered.

Establishing a Work-at-Home Policy

First, if they have not already done so, employers should establish a policy to allow employees to work from home tailored as a response to the coronavirus pandemic. This policy does not have to be – and should not be – implemented as a formal part of an employee handbook. It can be a stand-alone document or even an e-mail addressed to those who will be offered the opportunity to work from home. The policy should clearly address:

Who will be allowed to work from home (as not all jobs are conducive to telecommuting); Employees’ expected hours of work (i.e., start and stop times, and meal and other break periods);

Any expected productivity standards; Connectivity and logistical issues (such as logistics for turning in work, conference calls, and online meetings); and Parameters for bringing work documents home, including employees’ continued adherence to confidentiality and data security protocols.

For companies that are enacting a “work from home” policy for the first time or that are significantly expanding an existing policy, it may be important to clarify that the policy is being enacted solely as a response to COVID-19 (and perhaps future pandemic situations). To help avoid setting a permanent precedent, employers should make clear that:

The telecommuting arrangement is temporary and based solely on the extraordinary circumstances

presented by the COVID-19 pandemic; The policy will be subject to re-evaluation and modification at-will, in the employer's sole discretion; Once the pandemic subsides, the policy may be terminated, and employee attendance at the workplace will be considered an essential job function.

As noted above, not all jobs are conducive to working from home. It is permissible to offer telecommuting to some, but not all employees. For instance, there is no meaningful work for bank tellers to perform from home, but bank administrative workers (e.g., human resources) may be able to transition to working from home. In selecting who can work from home, employers need to be careful not to discriminate on the basis of race, gender, age, or other legally protected characteristic. For example, employers should not mandate that all employees over the age of 60 must work from home (as well intentioned as such a policy might be), although employers may give certain employees the choice to work from home as long as that option is not being offered on a discriminatory basis. For further clarification, see the Equal Employment Opportunity Commission's publication: *Work at Home/Telework as a Reasonable Accommodation*.

Payment of Employees While Working at Home

There are several wage and hour issues employers must consider. Under the federal Fair Labor Standards Act ("FLSA"):

Salaried exempt employees must be paid their full salary while working from home, unless the employer's business is closed and the employee performs no work for the entire workweek. Note that telecommuting may cause exempt employees to perform certain duties that are not considered exempt from overtime. Although the FLSA provides some leeway for exempt employees to perform more non-exempt work in emergency situations, employers should carefully monitor and limit such non-exempt work where possible or risk losing the exemption.

The FLSA (and Florida law) only requires employers to pay hourly non-exempt employees for hours they actually work, including any overtime hours worked. Therefore, employers must have accurate means for tracking all time that hourly employees work.

This means that employees need to record and be encouraged to report all start and stop times – at the beginning and end of each day, at the beginning and end of all breaks taken in excess of 20 minutes, and for any work performed outside the normal workday (e.g., text messages and e-mails and working on projects after normal working hours). There are several strategies that can be implemented to maximize accurate time reporting and to maximize productivity for telecommuters that are too lengthy for an alert like this. Employers that utilize automatic deductions for lunch breaks should consider suspending those deductions while employees telecommute because it is more difficult to monitor whether a lunch break was actually taken, including whether an employee “multi-tasked” eating lunch at his/her home work station while working (e.g., taking work calls and responding to e-mails). Alternatively, employers should emphasize that employees must report their working during lunch to ensure accurate payment for that time.

Switching to Part-Time Work

Employers are not required to pay hourly non-exempt employees for hours not worked (subject to paid time off rules currently in place in several states and certain municipalities). However, employers may allow employees to take vacation, sick, and other paid time off if available.

However, please note though that

a bill recently passed by the U.S. House of Representatives may significantly change this. The House Bill proposes an employer mandate to provide sick leave to employees affected by COVID-19, as well as several changes to the FMLA that will have a significant impact on employers. This mandate would include small businesses with less than 50 employees. If passed, many of the statements and recommendations made in our initial coronavirus alert and in this alert will be trumped by the new law. That bill is currently under consideration in the Senate and may be passed in some form within the next few days.

Potential Disability Considerations

While rolling out a telecommuting policy, employers must also consider disability accommodation issues. If an employee has a disability-related accommodation at work (e.g. taking additional breaks or using an ergonomic keyboard or chair), employers need to consider providing those same accommodations for an employee's work at home, subject to the same undue hardship considerations as exist with providing such accommodations when working in the office.

If an employer is not asking its workers to work from home, but an employee personally requests to do so because he/she has a health condition that could be negatively impacted by COVID-19, the Americans with Disabilities Act ("ADA") and

Family and Medical Leave Act
("FMLA") could be triggered.

Under the ADA, working from home may be a reasonable accommodation for certain employees. For instance, an employee with a respiratory condition may request to work from home to avoid contracting coronavirus at work. When such requests are made, employers must engage in the "interactive process" to determine whether the employee has a qualifying disability within the meaning of the ADA, whether working at home (or perhaps another accommodation) would be effective, and whether working at home would cause an undue hardship on the employer. As part of this process, employers may require the employee to produce documentation "proving" the claimed disability and the functional limitations caused by it from an appropriate health care or rehabilitation professional (e.g., doctors, psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, and licensed mental health professionals).

If there is no work for an employee to perform while at home (e.g., the bank teller in the example above), time off may be required under the FMLA. In the event that the FMLA applies to an employee's situation, employers can require employees to use available vacation leave, sick leave, and other paid time off (although this is subject to change under legislation under consideration in Congress as well as certain states' and even municipalities' paid leave laws).

It is important to note that this Client Alert is based upon federal and Florida law. Several states and municipalities have enacted their own laws (e.g., wage and hour laws and sick leave laws) that should be considered whenever making decisions in a jurisdiction outside of Florida.

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