Teleworking and the COVID-19 Outbreak

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One of the most pressing questions presented by the COVID-19 coronavirus is how companies can balance employees’ health and wellbeing (including both virus-related symptoms and associated anxieties) with the business’s operating needs. Although not a cure-all, the implementation of teleworking (i.e. remote working) is one way that certain equipped companies can keep their employees (and those they interact with) safe, without significantly impacting business operations. We highlight below the benefits of teleworking, where possible, and suggest best practices for employers looking to institute temporary teleworking arrangements.

Telework Reduces Transmission of the Virus

Allowing telework, where possible, is one major step companies can take to assure the safety and well-being of its workforce and clients. The Centers for Disease Control and Prevention (CDC) has implored employers to explore the availability of
telework arrangements in response to the COVID-19 outbreak. According to the CDC and other health authorities, teleworking is one of the most effective methods of reducing the spread of the virus, given that teleworking significantly reduces the frequency and duration of interpersonal contact that is inherent in the workplace. By allowing employees to telework, companies are also limiting employees’ need to physically commute to and from the workplace, which employees in many major markets do via crowded public transit systems.

Aside from engaging in proactive telework accommodation efforts to support public health initiatives, some employers may be required to consider alternative working arrangements due to new government-mandated quarantine restrictions, such as the efforts we saw in New Rochelle, NY this week, which have shuttered businesses entirely. Even if a workplace is not permeated with the virus itself, an increasing number of workers are being impacted by coronavirus-related disruptions such as school closures and public transit closures, which affect employees’ abilities to attend work.

Whether a voluntary or mandatory consideration, employers should be ready to grapple with teleworking policies as the crisis unfolds.

**Implementing a Workable and Compliant Telework Policy**

A company considering the expansion or implementation of teleworking should review and update its existing policies or craft temporary new ones. The CDC’s published guidance for employers, *Recommendations for an Infectious Disease Outbreak Response Plan*, includes the following telework suggestions:

- Explore whether the company can establish policies and practices, such as flexible worksites (e.g., teleworking) and flexible work hours (e.g., staggered shifts), to increase the physical distance among employees and between employees and others.

- For employees who are able to telework, employers should encourage employees to telework instead of coming into the workplace until symptoms are completely resolved.

- Ensure that the company has the information technology and infrastructure needed to support multiple employees who may be able to work from home.

In addition to the above CDC guidance, a reasonable and effective teleworking policy should be guided by the following considerations:

- **Eligibility & Procedures**: If a company is looking to implement a temporary telework policy in response to the viral outbreak, the company should clearly define which employees are eligible for teleworking, the duration of expected telework accommodations (with a provision that the employer is authorized to change the duration of the policy as the situation develops), and the responsibilities both the employee and employer have under the telework policy (e.g. how will hours be recorded, what technology or equipment will the employer provide to ensure compliance with the policy, what reasonable work expenses are reimbursable for telework needs). In addition to employees,
companies should consider the implications of the policy on non-employee workers such as staffing company workers and third-party service providers working onsite, and keep the lines of communications open with such workers’ employers. Employers with union employees should also be mindful of obligations under their collective bargaining agreements. The policy should also designate a point of contact for any questions regarding telework requirements.

- **Communication Expectations:** Given that some employers may not be accustomed to interacting with employees through strictly remote platforms, employers’ telework policies should clarify the expectations regarding the frequency and method of communication expected from the employee. An employer may implement specific expectations such as mandated daily or weekly phone calls with appropriate supervisors.

- **Security & Oversight:** If remote working is not already a standard practice for an employer, the employer should design, adopt, and utilize policies governing remote employee access with respect to issues like network security, protection of corporate confidential information, and timekeeping (including practical issues such as prohibiting employees from working out of coffee shops, etc.). Employers should be prepared to review and revise existing policies on these topics to incorporate telework-related restrictions for employees. Employers should work with their information technology teams to ensure that their networks are capable of supporting a large influx of teleworking employees, and that the company is capable of providing employees with secure, encrypted access to the company’s platforms and networks. If employees are offered the choice to use their personal electronic devices for telework purposes, the company’s policies should speak to any additional safeguards needed to protect company property, or any inspection expectations the company has regarding those personal devices. If the company is required by the OSHA to keep records of work-related injuries and illnesses, it will be responsible for keeping such records while its employees are working from home (OSHA does not have any regulations regarding teleworking in home offices, though the agency did just release [general guidance](https://www.osha.gov) on preparing workplaces for COVID-19).

- **Reminder of Existing Policies:** The written policy should remind employees that they must continue to abide by all pre-existing workplace policies during their time teleworking. Employers should emphasize that failure to follow existing policies during the teleworking period may result in disciplinary action and/or termination of the telecommuting arrangement.

- **Non-Discriminate Application:** While there is currently no legal mandate (apart from disability-related obligations) that employers provide telework as an accommodation to employees, whether related to the virus or otherwise, employers should ensure that flexible workplace policies are administered in a non-discriminatory way. Accordingly, an employer should never mandate, grant or deny telework based upon an employee’s protected characteristic such as race, sex, age, or any other class protected under law. All efforts should be made up front to ensure that the policy is consistently applied to all eligible...
employees. If an employer grants flexible teleworking arrangements to some employees, but not others, the employer should be prepared to explain its legitimate, nondiscriminatory grounds for the disparity in its decision-making.

- **Impact on Non-Exempt Workers**: telework programs present particular challenges with respect to non-exempt workers, i.e. employees who are eligible for overtime under the Fair Labor Standards Act (FLSA) and parallel state laws. Employers are only required to pay non-exempt employees for actual hours worked. Although employers are not required to pay non-exempt workers if the worksite is closed and teleworking is not possible, companies can choose to continue to pay non-exempt employees for a set period of time, for a set amount, or indefinitely. Importantly, employers must clearly communicate to their non-exempt employees whether they are permitted to telework; if not, how the company is addressing the loss of pay (for example, allowing employees to use paid time off or voluntarily providing a stipend or pay continuation to non-exempt employees), and either way, the expectations regarding timekeeping and schedules. Subject to collective bargaining agreements, another option is assigning special projects or other assignments that can be completed remotely. Any telework-related costs incurred by a non-exempt employee (for internet access, equipment, etc.) cannot reduce their earnings below minimum wage and any required overtime compensation. Earlier this week, the U.S. Department of Labor Wage & Hour Division posted helpful guidance answering FLSA questions in the COVID-19 context. Relevant state wage and hour laws should also be taken into account.

- **Disability-Related Accommodations**: The U.S. Equal Employment Opportunity Commission (EEOC) and various state and local discrimination enforcement agencies have widely held that teleworking, if not an undue burden, can provide an effective reasonable accommodation for certain disabilities. The EEOC Guidance on “pandemics” states that “telework is an effective infection-control strategy” that also serves as a reasonable accommodation for individuals who have a disability and are fearful that their underlying conditions might inflame the seriousness of viral complications if contracted. Nonetheless, employers should be cautious about the intersection between precautionary teleworking and disability law. Because temporary or intermittent telework arrangements may be a “reasonable accommodation” under disability laws, employers that liberally grant telework accommodations as a precautionary measure now may be restricted in the future from claiming that these telework accommodations provide an “undue burden” for the employer. If the employer is only allowing employees to telework because of the viral outbreak when it would not otherwise do so, the employer should make clear in its policy that the telework accommodation is being granted solely due to the extraordinary circumstances posed by COVID-19, despite any undue hardship for the employer.

- **Acknowledgment of Receipt and Review**: As with any employment policy, the employer should have employees review and sign the teleworking policy and retain copies of the employee’s signature and understanding of the policy. The acknowledgment portion should require employees to accept that they understand that the employer has the maximum discretion permitted by law to administer, change, modify, or revoke the policy at any time (with or without
notice), and clarify whether the policy is meant to be temporary or permanent. If employees are already working remotely, and cannot physically sign the policy document in person, employers should consider whether the employee can sign the policy through use of a verified electronic signature.

Businesses should continue to monitor the constantly shifting situation closely as it unfolds, recognizing and grappling with the particular issues faced in their local and state jurisdictions. In the meantime, employers should explore the viability of telework accommodations, where possible, to support containment efforts, and should review, revise, or create applicable policies that ensure employees are complying with the business’s needs during the crisis.

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