

# **Working From Home: Best Practices & Cautionary Tales for Employers with Remote Workers**

Presented by:

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# The Rise of the Remote Worker

- ▶ Remote workers, working from home, telecommuting, telework
- ▶ Up to 30% of people in the US work remotely
  - ▶ Up 80% in the last decade, especially among recent graduates
- ▶ Many millennials consider the ability to work remotely a job requirement, rather than a fringe benefit
- ▶ The DOL “strongly supports telecommuting and telework” because “family-friendly, flexible and fair work arrangements, including telecommuting, can benefit individual employees and their families, employers, and society as a whole.”
- ▶ Advantages: cost savings; increased morale, loyalty, and retention; recruiting tool

# The First Steps

- ▶ Business decision as to whether and to what extent telecommuting will be available
  - ▶ 100% remote, part-time, as needed
  - ▶ Eligibility
  - ▶ Conditions
- ▶ Considerations
  - ▶ Can the job be done effectively outside of an office environment?
  - ▶ Will current technology support telecommuters?
  - ▶ Recruiting goals
  - ▶ Increased due diligence efforts
  - ▶ Increased legal compliance issues

# Remote Worker Policy

- ▶ Written policy is critical first step
- ▶ Important purposes:
  - ▶ Defines eligibility and procedure for telecommuting
  - ▶ Details conditions of an authorized telecommuting arrangement
  - ▶ Details employee responsibilities and expectations
    - ▶ Work hours (including reporting requirements); Accessibility during work hours; Frequency of communication with management; Safeguarding company equipment and confidential information (including PHI); Workplace set-up; Compliance with the employer's policies
  - ▶ Designates employee's work area and break times
- ▶ Acknowledgment of receipt and understanding

# Employee Classification

- ▶ Employee or independent contractor?
- ▶ Right to control is key
- ▶ It is easy to assume you don't have control of a worker who is not on-site, but remember: the right to control is different than actual control
- ▶ Topic Update:
  - ▶ In 2015, the DOL published informal guidance giving an expansive view of employment under the FLSA, essentially creating a presumption of employment
  - ▶ In June 2017, the DOL withdrew that guidance but stated that “Removal of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act...as reflected in the department’s long-standing regulations and case law.”
  - ▶ Could signal a shift from the prior administration’s views

# FLSA

- ▶ Requires employers to compensate an employee for all hours worked, regardless of location and to keep records of hours worked each workday/workweek for nonexempt employees
- ▶ When an employee works from home, the line between working time and non-working time is not always clear
- ▶ Clarify what constitutes compensable time
- ▶ Require strict adherence to timekeeping policy
- ▶ Regularly review timekeeping records for accuracy
- ▶ Prohibit “off the clock” work, unless specifically authorized
- ▶ Alternative: only allow exempt employees to work from home

# FMLA

- ▶ FMLA applies to employers with at least 50 employees, including remote workers
- ▶ The trickier question is whether a remote worker is an “eligible employee”
- ▶ The FMLA does not apply if: the employee works at a worksite with fewer than 50 employees and the employer has less than a total of 50 employees within 75 miles of that worksite
- ▶ A remote worker’s worksite is: the office to which they report or from which assignments are made (not the employee’s home)
- ▶ Example:
  - ▶ In *Connors v. SpectraSite Commc’ns, Inc.*, a sales executive worked from home and was assigned to and worked with employees at the employer’s headquarters (50+ employees). However, during the last year of his employment, he received his assignments from and reported to a supervisor in a local office with fewer than 50 employees. He was not an “eligible employee” under the FMLA.

# Workers' Compensation

- ▶ Applies to injuries arising out of and in the course of employment
- ▶ Cases are harder to defend
- ▶ Not many reported cases on the application of this rule as it relates to telecommuters, but the TN Supreme Court has weighed in once
- ▶ In *Wait v. Travelers Indemnity Company of Illinois*, a telecommuting employee was assaulted by a third party while she was preparing lunch in her home where she had an employer-approved office
  - ▶ Court held that she did suffer injuries “in the course of her employment”
    - ▶ Injuries sustained during personal breaks are generally compensable
    - ▶ Plaintiff assaulted in a place her employer would expect her to be
    - ▶ Plaintiff not engaging in prohibited conduct or violating any policy by preparing lunch in her kitchen



# Workers' Compensation Cont.

- ▶ Unless instructed otherwise, an employee working from home that answers the door and briefly admits an acquaintance in, does not depart so far from the employee's duties that it removes the employee from the course of employment
- ▶ However, the Court held that the employee's injuries did not "arise out of her employment" because there was no causal connection between the employment and the assault, therefore, employee not entitled to workers' compensation benefits
- ▶ To reduce risk of workers' compensation liability for non-work related injuries, employers should specify the following in a written policy:
  - ▶ Job duties
  - ▶ Location in home where work is to be performed
  - ▶ Work hours, including when and how breaks should be taken
  - ▶ Activities permitted or prohibited during work hours

# OSHA

- ▶ The purpose of the Occupational Safety and Health Act is to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”
- ▶ However, OSHA “respects the privacy of the home” and has never conducted inspections of home offices
- ▶ A home office is defined as office work activities in a home-based worksite (e.g., filing, typing, research)
- ▶ It will not conduct inspections of employees’ home offices
- ▶ It will not hold employers liable for employees’ home offices
- ▶ OSHA will only conduct inspections of other home-based worksites (e.g. home-based manufacturing operations) when it receives a complaint or referral that indicates a violation of health or safety standard that threatens physical harm, or that an imminent danger exists

# Information Security

- ▶ Confidential employer & HIPAA protected information
- ▶ Provide security training and specifically instruct workers to:
  - ▶ Secure employer property (physical and electronic)
  - ▶ Avoid keeping confidential information in a place where family members or visitors to the employee's home can view or access it
  - ▶ Be vigilant when working in any public location
  - ▶ Dispose of confidential information properly
- ▶ Make sure employer insurance policies account for remote work arrangements
- ▶ Regularly monitor how remote workers handle confidential information
- ▶ HIPAA security standards apply equally to remote workers – requires physical, administrative, and technical safeguards
  - ▶ Cases involving remote workers on the rise

# Discrimination

- ▶ Handle all requests to work from home consistently and in accordance with written policies
- ▶ Ensure that conditions for working from home are clearly stated (e.g., only full-time employees, employees in certain positions, employees who have completed a certain length of service, etc.)
- ▶ Letting some workers telecommute, but denying that option for others may lead to a discrimination claim if the worker denied the option is a member of a protected class

# ADA Accommodation

- ▶ The EEOC recognized that telecommuting may be a reasonable accommodation
- ▶ Determine whether working from home is a reasonable accommodation by engaging in an interactive process, considering :
  - ▶ Limitations of the disability that make it difficult to do the job on site
  - ▶ How the job can be performed from the employee's home
  - ▶ Other types of accommodation that would allow the person to remain on site
- ▶ Employees in certain positions cannot work from home
- ▶ Do not deny a request to telecommute simply because a job involves some contact/coordination with other employees where telephone and email conferences are sufficient for that purpose
- ▶ If some duties can be performed from home, consider whether working part-time from home and part-time on site is feasible

# ADA Accommodation Cont.

- ▶ Employer does not have to remove any essential job duties to permit the employee to work from home
- ▶ If other employees are permitted to telecommute, be very careful when refusing to permit telecommuting as a reasonable accommodation
- ▶ Application of the rules:
  - ▶ Telecommuting not a reasonable accommodation for a purchasing agent with fibromyalgia, where physical presence in the office during regular business hours was an essential function of the job. Garrison v. City of Tallahassee, 2016 WL 6610210.
  - ▶ Telecommuting not a reasonable accommodation for a clerical employee's ulcers. Vande Zande v. Wis. Dep't. of Admin., 44 F.3d 538.
  - ▶ Telecommuting was a reasonable accommodation for an insurance underwriter's Chron's disease. Davis v. The Guardian Life Ins. Co., 200 WL 122357.

# Managing Conduct & Performance

- ▶ Require compliance with all employer policies (e.g., employee handbook)
  - ▶ Failure to comply may result in discipline, termination of telecommuting arrangement, or termination of employment
- ▶ Monitor productivity/performance
  - ▶ Regular email, phone calls, video conferences, in-person meetings
  - ▶ Review employee's use of electronic communications systems
    - ▶ No expectation of privacy
- ▶ Set goals and expectations
  - ▶ Discuss how performance is measured and at what frequency
- ▶ Provide appropriate training
- ▶ Communicate
- ▶ Create environment of inclusion

# Other Considerations

- ▶ Employee Benefits
- ▶ WARN Act
- ▶ Taxation (both employer and employee)
- ▶ Drug and alcohol testing
- ▶ Electronic signatures
- ▶ Remote hiring process
- ▶ Intellectual Property Protection
- ▶ Other state and local laws



## A Little About Your Presenters

Bill Mason received his law degree from Harvard Law School in 1974, and has been practicing more than 40 years, most of that time in employment and employee benefits for employers. Bill joined Kennerly Montgomery in 2009. He serves on the Board of Directors for the Legacy Parks Foundation and the Education Subcommittee for the United Way of Greater Knoxville. He is the past Chair of the Hillcrest Healthcare Board of Directors. In 2016, the US Treasury Department appointed him as the IRS Taxpayer Advocacy Panel (TAP) representative for Tennessee.

As a leader of Kennerly Montgomery's employee benefits practice, Kathy Aslinger assists clients in maneuvering through the complex world of employee benefit plan design and implementation, benefit considerations in mergers and acquisitions, audits, fiduciary liability issues, DOL and IRS compliance, HIPAA, COBRA, ERISA and state law obligations, and Affordable Care Act compliance. Kathy has been practicing law for almost 20 years and has been with Kennerly Montgomery since 2010. In addition, Kathy serves on the Board of Directors for Uplands Village, a continuing care retirement community in Pleasant Hill, Tennessee.

Ashley Trotto joined Kennerly Montgomery as an associate attorney in the Firm's employment law and employee benefits practice in 2013. Ashley concentrates on the Affordable Care Act and health and welfare plan compliance. She also regularly assists clients in navigating through the FLSA, HIPAA, COBRA, FMLA, ADA and other employment-related legislation. Ashley serves on the Board of Directors for the Smoky Mountain Animal Care Foundation and is also a member of the East Tennessee Benefits and Compensation Association, serves on the Hunger and Poverty Relief Committee of the Knoxville Bar Association and is a member of the United Way Health and Basic Needs Investment Committee. She's also the energy behind the Firm's on-going kindergarten book project at Christenberry Elementary.

# Additional Information on the Firm

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