

How to Craft an Effective Work From Home Policy

DAVID BARRON, AARON HOLT, BETHANY VASQUEZ AND JANICE S. AGRESTI



Today's Presenters



Janice S. Agresti
jagresti@cozen.com



David L. Barron
dbarron@cozen.com



Aaron Holt
aholt@cozen.com



Bethany A. Vasquez
bavasquez@cozen.com

Overview of Webinar Topics

- Duty to Accommodate Remote Work
- Potential Discrimination Claims in Application of Remote Work Policy
- Protecting Company Data and Trade Secrets
- Privacy Considerations
- Practical Problems



Remote Work During The Pandemic: Pros and Cons

- The Good:
 - Most employees feel they are more productive working from home.
 - Most employers have seen an increase in productivity after the initial months of the pandemic
 - Most working parents want the flexibility of working remotely
 - According to a survey conducted by Global Workplace Analytics, 93% of employees would like to keep working remotely at least some of the time
- The Bad:
 - A majority of parents have found it difficult to balance household demands while working from home
 - A majority of managers identify inability to communicate in person as one of their top three challenges.
 - 4 in 5 HR managers think working from home has led to “ePresenteeism” - - be ever present on line.
 - Most employees are working longer while working remotely

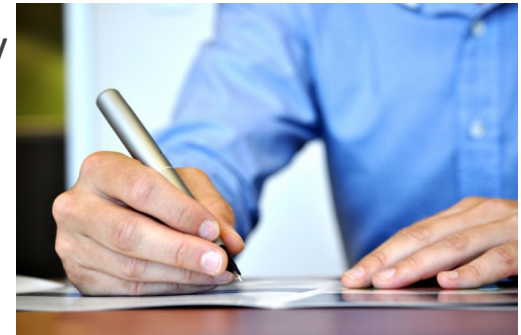


Teleworking Policy Basics

DAVID BARRON

Teleworking Policy Checklist: Essential Components and Considerations

- Define eligibility for telecommuting
- Procedure for requesting approval to telecommute
- Direct employees to reasonable accommodation procedures/policy
- Employer may discontinue remote work at any time for any reason
- Employee must notify Employer if they intend to work from another location other than their home for 30 days or more
- Workers Compensation
 - Clarify WC does not apply to injuries outside the course and scope of employment, including while working remotely
 - Does not apply to injuries to any third parties, including but not limited to remote employee family members on the same premises

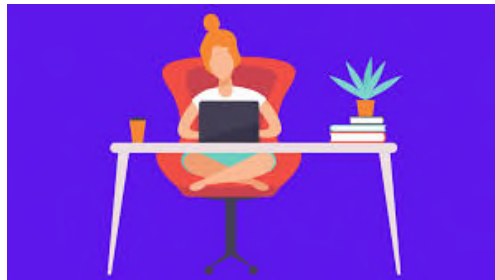


Teleworking Policy Checklist: Essential Components and Considerations

- Detail employee responsibilities while telecommuting:
 - Clarify teleworkers are expected to comply with all policies while teleworking
 - Set specific work hours
 - Designate specific job duties, work area and break times (to avoid liability for injuries that are not work-related)
 - Define how hours are recorded & require the employee to affirm their accuracy regularly (weekly, monthly, etc.)
 - Prohibit unauthorized work during remote hours for non-exempt employees
 - Establish procedure to reporting unscheduled work
 - Set expectation for frequency and method of communication with manager
 - Clarify how employees are expected to manage any dependent care and personal responsibilities in a way that does not interfere with their job duties

Teleworking Policy Checklist: Essential Components and Considerations

- Define proper use and expectations for Company property and information:
 - Company equipment/property is for business only
 - Employee is required to safeguard company equipment and confidential information
 - Secure remote access procedures (*e.g.* VPN)
 - Home workplace set up (reimbursements, if any)
 - Procedure for using and returning company equipment while teleworking

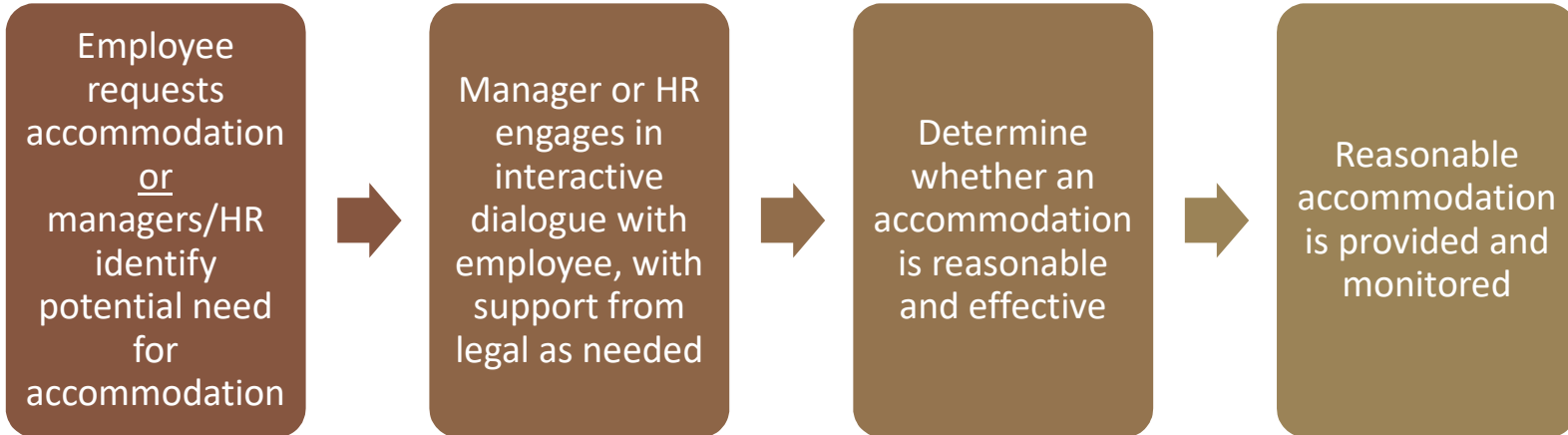


Duty to Accommodate Remote Work

BETHANY VASQUEZ



Overview of the ADA Process



Remote Work as a Reasonable Accommodation

- The ADA does not require an employer to offer a telecommuting program to all employees, but:
 - Employers that do must allow employees with disabilities an equal opportunity to participate;
 - Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telecommute; and
 - Employers may be required to modify workplace policies for a new employee with a disability seeking to work at home where the job can be performed at home (e.g., by waiving a one-year eligibility requirement)



Determining Whether Remote Work is a Reasonable Accommodation: The Interactive Process

- The interactive process should consider :
 - The limitations of the disability that make it difficult to do the job in the workplace;
 - How the job can be performed from the employee's home; and
 - Other types of accommodations that allow the person to remain full-time in the workplace.



Determining Whether Remote Work is a Reasonable Accommodation: The Interactive Process

- An employer and employee should determine whether a particular job can be performed at home by:
 - Determining what functions are essential (meaning those tasks that are fundamental to performing a specific job); and
 - Determining whether some or all of the functions can be performed at home (recognizing that for some jobs , the essential duties can only be performed in the workplace).
 - An employer should not deny a request to work at home solely because a job involves some contact and coordination with other employees
 - An employer does not have to remove essential job duties to permit an employee to work at home, but may need to reassign minor job duties or marginal functions if they cannot be performed outside the workplace

Frequency of Remote Work as an Accommodation

- How frequently may someone with a disability work at home as a reasonable accommodation?
 - To the extent his/her disability necessitates it
 - For a particular period of time
 - Part time on a set schedule
 - Intermittently on “as needed” basis



Accommodations: Continued Remote Work

- What about continued telework: can we require employees who have been working from home during COVID-19 to return to our physical office location?
 - Does the reason why an employee was working remotely matter?
- Pre-COVID-19: employers could argue that physical presence is essential and remote work is not a reasonable accommodation.
- Post-COVID-19: Significant shift of most business operations to remote work during the pandemic.
 - Will this make it easier to request remote work as a reasonable accommodation?

EEOC Updated Guidelines on COVID-19: Teleworking as an Accommodation

- Section D.15, Reasonable Accommodation.
- An employer who grants telework for the purpose of slowing COVID-19 does not have to automatically grant telework as a reasonable accommodation when it reopens the worksite. For example, if:
 - there is no “disability-related limitation”
 - “the employer can effectively address the need with another form of reasonable accommodation, then the employer can choose that alternative to telework”
 - the “employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request – after the workplace reopens- to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function.”

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

EEOC Updated Guidelines on COVID-19: Teleworking as an Accommodation

Section D. 16, Reasonable Accommodation.

- Previously allowing employees to telework does not mean:
 - That employee's essential job functions are changed
 - Telework is always a feasible accommodation
 - Telework does not pose an undue hardship

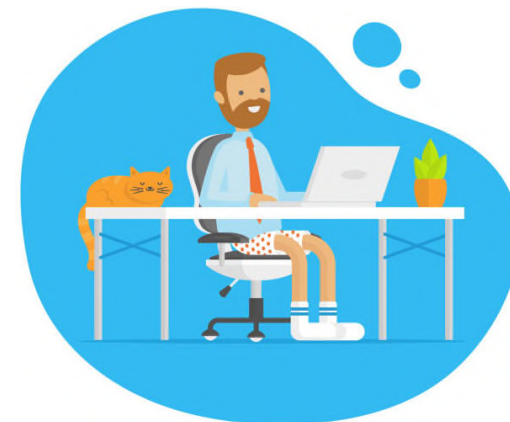
EEOC Updated Guidelines on COVID-19: Teleworking as an Accommodation

Section D. 16, Reasonable Accommodation.

- Prior telework experience is relevant to the reasonable accommodation analysis.
- “[F]or example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employee should consider any new requests in light of this information.”

Accommodation Best Practices

- Ensure managers/supervisors know to send employees to HR for interactive process
- Update job-specific documents such as job postings and essential duties
- If have been temporarily excusing performance of essential job functions while teleworking during pandemic, make clear that was temporary and that time is ending as of a certain date
- A remote work policy should include language stating that the policy *does not apply* to requests for reasonable accommodation for a disability and that such requests should follow the employer's procedures for requesting a reasonable accommodation



Potential Claims in Application of Teleworking Policy

AARON HOLT

Communicating Policies to Remote Workers

- When communicating policies to remote workers, employers should:
 - Ensure emails accurately describe and underscore the importance of the policy.
 - Require an affirmative response from remote employees, including:
 - a signed acknowledgment; or
 - clicking a box on a computer screen that gets recorded; or
 - Use a tracking log to monitor whether employees opened the email and actually clicked on the links to read the policies (and following up with employees not appearing to have opened the policy).
 - Have procedures in place to prevent remote employees claiming they did not receive or acknowledge a certain policy.



Wage & Hour Compliance: Remote Workers

- The Fair Labor Standards Act requires employers to compensate an employee for all hours worked.
- Work not requested by the employer but “suffered or permitted” is still work time that must be compensated (29 U.S.C. §§ 203(e)(1) and (g); 29 C.F.R. § 785.11).
- This rule applies to work performed away from the employer’s premises or the job site, including work performed at home (29 C.F.R. § 785.12).
- The FLSA also requires employers to keep records for nonexempt employees, including records of hours worked each workday and workweek (29 C.F.R. § 516.2(a)(7)).



Wage & Hour Compliance: Remote Workers

- Department of Labor - **Field Assistance Bulletin 2020-5** (August 24, 2020) provides guidance on tracking compensable time for teleworkers:
 - Employers **must pay for all work** they know or have reason to believe is being performed, *including unauthorized work*.
 - Employers can satisfy their obligation to exercise reasonable diligence to track working time by providing a reasonable procedure for reporting unscheduled work.
 - Reporting procedures are not reasonable if an employer:
 - prevents or discourages employees from reporting working time;
 - does not provide proper training on the procedure; or
 - requires employees to waive their right to compensation for hours worked.



Wage & Hour Compliance: Remote Worker Expenses

- Generally, an employer is **not required** to pay or reimburse the employee for expenses incurred while teleworking (e.g. internet access, computer, phone line, use of electricity, etc.) UNLESS:
 - Expenses so reduced earnings below the minimum wage or required overtime compensation (FLSA);
 - Telework is being provided as a reasonable accommodation under the ADA;
 - State law requires it



State	Summary	Statute
California	Employers must reimburse employees for all necessary expenses, including internet access and phone bills for remote workers.	Cal. Lab. Code § 2802(a), (c).
District of Columbia	Employers must reimburse employees for all necessary tools.	D.C. Code Mun. Regs. tit. 7 §§ 909.1, 910.1.
Illinois	Employers must reimburse employees for all necessary expenses or losses, including reimbursement for internet access, phone, routers, laptops and printers when used for remote work purposes w/in scope of employment.	Illinois Wage Payment and Collection Act, Section 9.5; 820 Ill. Comp. Stat. 115/9.5(a).
Iowa	Only required to reimburse authorized expenses, but must do so in 30 days.	Iowa Code 2022, Section 91A.3(6).
Massachusetts	Same protection as FLSA (only required if reduces below min. wage or OT)	Mass. General Laws Part I, Title XXI, Chapter 149, Section 148
Minnesota	Employers must reimburse employees for travel, uniforms, purchased or rented equipment, or consumable supplies required for employment.	Minn. Stat. Ann. §§ 177.24; 181.11.
Montana	Employers must reimburse for all amounts incurred when discharging employment duties or obedience to the employer's directions	Mont. Code Ann. § 39-2-701(1), (3), Mont. Admin R. 24.16.2519
New Hampshire	Employers must reimburse employees for expenses connected with their employment.	N.H. RSA §§ 275:48(V)(b) and 275:57; N.H. RSA §§ 275:48(V)(b) and 275:57; N.H. Admin. R. Lab. 803.02(e).
New York	Reimbursement required if an agreement to do so (i.e. employment contract).	New York Labor Law Section 198-C
North Dakota	Employers must reimburse for all amounts incurred when discharging employment duties or obedience to the employer's directions	N.D. Cent. Code §§ 34-02-01, 34-02-02.
South Dakota	Employers must reimburse for all amounts incurred when discharging employment duties or obedience to the employer's directions	S.D. Codified Laws §§ 60-2-1, 60-2-2
Washington	Employee reimbursements are at the employer's discretion.	RCW 49.12.450; Wash. State Dep't of Labor & Industries: Uniforms.

Wage & Hour Compliance: Timekeeping Policy

- Timekeeping policy **best practices**:
 - require all employees to record all working time accurately;
 - prohibit off-the-clock work;
 - provide a reasonable procedure for reporting unscheduled work;
 - make falsification of time records or fraudulent timekeeping practices subject to discipline, up to and including termination;
 - require managers or supervisors to review and verify the time records of their direct reports on a regular basis (i.e. daily or weekly);
 - require remote employees to verify the accuracy of their time records on a regular basis (i.e. daily or weekly); and
 - Require remote employees to affirm the accuracy of reported hours worked.



Health & Safety Compliance: Remote Workers

- Workers Compensation
 - *Wait v. Travelers Indemnity Company of Illinois*, 240 S.W.3d 220 (Tenn. 2007) – telecommuter sustained injury as a result of an assault at her home during a personal break while making lunch in her kitchen.
 - *Sandberg v. JC Penney Co. Inc.*, 260 P.3d 495 (Or. Ct. App. 2011) – telecommuter (custom decorator) was injured while walking to her garage (where she stored samples and materials)to perform a work task.
- Telecommuting Policy should include:
 - Admonishment that **workers' compensation does not apply to injuries to any third parties**, including members of the employee's family on the employee's premises.
 - Remote employees **must report any job-related injury to their supervisor as soon as possible** (and direct the employee to the applicable reporting procedures)



Health & Safety Compliance: Remote Workers

- **Occupational Health & Safety Act** requires reporting within seven calendar days of certain work-related injuries and illnesses (29 C.F.R. § 1904.4)
- An at-home injury is “work related” for OSHA reporting purposes if:
 - Occurs *while the employee is performing work* for pay or compensation in the home; and
 - Is *directly related to the performance of work* rather than to the general home environment or setting. (29 C.F.R § 1904.5(b)(7).)

Work Related	NOT Work Related
Dropping a box of work documents on the employee’s foot	Tripping over the family dog while rushing to answer a work phone call
Puncturing a fingernail from a sewing machine used to perform work at home	Employee is electrocuted because of faulty home wiring

Workplace Postings: Remote Workers

- Employers are required to post certain state and federal notices in central locations (e.g. kitchen, central office or break room).
- **Field Assistance Bulletin No. 2020-7 (Dec. 29, 2020)** provides the DOL considers electronic posting an acceptable substitute for the continuous posting requirement only where:
 - **All of the employer's employees exclusively work remotely.**
 - All employees customarily receive information from the employer by electronic means.
 - All employees have readily available access to the electronic posting at all times. This may include, for example:
 - an employee information internal or external website; or
 - a shared network drive or file system.
- **Take away:** For employers with both onsite and remote workers, they should supplement a hard copy posting with electronic posting.



Protecting Company Data and Trade Secrets in a Remote Environment

JANICE SUED AGRESTI



Protecting Company Data

- Consider implementing an employment policy addressing how employees should handle company data, including an employer's confidential information.
- Train all employees on how to protect company data generally.



Train All Employees On Cybersecurity Issues

- Common methods of attack:

- Phishing emails referencing the COVID-19
- Text messages to mobile devices that include malicious links
- Exploitation of VPN products that have not been updated
- Communication platform exploits to conferencing solutions such as Zoom and Microsoft Teams
- Attacks through unsecured Remote Desktop sessions



Cybersecurity Best Practices

General

- Avoid links from unsolicited emails and be cautious opening attachments.
- Be suspicious of any email from an unknown source with a sense of urgency
- Watch out for unsolicited messages labeling themselves as a medical authority or information about COVID-19 related stimulus checks.

For Remote Workers

- Require strong passwords for any teleworkers using their home network.
- Require VPN connections and two-factor authentication, if possible.
- Update your VPN platforms. Exploits are being found and patched on a weekly basis.
- Lock virtual meetings when they begin (no new participants can join) and require meeting passwords.



Protecting Confidential Information and Trade Secrets

- **New problems created during the pandemic:**
 - Employees using confidential information on personal computers while teleworking;
 - Employees working in potentially unsecured locations;
 - Employees taking home physical copies of confidential information;
 - Employees sending work emails to cloud-based personal accounts; and
 - Security concerns for virtual meet platforms.



Employers should take steps to protect their trade secrets and other confidential information with remote employees.



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- This includes providing information security training to remote employees and instructing them to:
 - Secure any employer property.
 - Use secure remote access procedures like a VPN.
 - Maintain confidentiality by using passwords and locked file cabinets, if applicable.
 - Maintain regular anti-virus updates and computer backup.
 - Refrain from downloading company confidential information or trade secrets onto a non-secure device, including personal devices.
 - Keep passwords safe and not share them with anyone and notify the employer immediately if any unauthorized access or disclosure occurs.
 - Refrain from using personal devices or personal emails to conduct company business.
 - 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 (for example, by never leaving the employee's computer unattended and by ensuring confidential information is not viewable by anyone in the public place).
 - Dispose of sensitive documents properly.

What Else Can Businesses Do To Ensure Safety of Trade Secrets?



- Limit access of any trade secret or proprietary information to the employees that need to know it to perform their job function;
 - develop or strengthen your company's remote work policy, work from home policy and establish a remote desktop protocol;
 - track who has access to the trade secret information;
 - mark the information as confidential;
 - have employees sign confidentiality agreements such as non-disclosure agreements acknowledging that they will be provided with confidential information and are required to keep the confidential information safe not only during their employment, but also if it ends;
 - restrict employees to using only company issued devices when accessing the trade secret information (i.e. prohibit access from personal devices);
 - use passwords for participants in all video and/or web conferencing meetings if the protected information is likely to be shared and/or discussed; and
 - send a letter to employees at the end of their employment reminding them of their obligation to return all confidential information and not use it going forward.
- Exercising diligence around the protection of intellectual property and trade secret information will demonstrate to a court that the company values the information and takes the matter seriously.*

Best Practices For Work From Home Policies

- Create/revise **written acknowledgement** *for employees allowed to telework* who need access to Confidential Information:
 - Required to abide by Confidentiality Agreement while Teleworking, including protecting Confidential Information;
 - Affirm will use a password protected, encrypted (WPA2 or WPA3) home network;
 - Affirm will never leave laptop unsecure or unattended.



Best Practices When An Employee Separates From Employment



- Create/revise written acknowledgement *for employees who leave employment* while teleworking:
 - Acknowledge continued obligation to abide by terms of Confidentiality Agreement *after* employment ends;
 - Affirm they have searched for all Confidential Information on any electronic device used while teleworking;
 - Affirm they have returned all Confidential Information used while teleworking;
 - Affirm they have not disclosed any Confidential Information to any unauthorized third party pursuant to the terms of the Confidentiality Agreement.

Privacy Considerations: *Employee Privacy and Monitoring*

JANICE SUED AGRESTI



What About Electronic Monitoring and Surveillance in the Remote Workplace?

- Many employers conduct electronic workplace monitoring and surveillance of employees, such as:
- Reviewing employee emails, including:
 - emails sent to or from the employer's email systems; and
 - emails sent to or from an employee's personal email account (such as Gmail, Yahoo, or Hotmail) accessed by the employee via the employer's computer systems.
- Monitoring internet usage, including:
 - websites employees visit using the employer's computer systems;
 - content posted by employees on the internet (for example, on blogs and social networking sites), whether at work or from home; and
 - the amount of time employees spend on the internet while at work.
- Blocking employee access to inappropriate or illicit websites from the employer's computer systems.
- Tracking employees' keystrokes while using an employer-owned computer.
- Tracking employees using a global positioning system (GPS).



If you do monitor your employees electronically, ...

- Implement and distribute a clear electronic communications systems policy that informs remote employees that they have no expectation of privacy when using employer-owned resources and provides notice that the employer may:
 - review employee emails;
 - monitor internet usage;
 - track employees' keystrokes; and
 - monitor employees' login activity.
- Employers must also ensure that their monitoring of electronic communications and restrictions on employee use of electronic communication systems do not run afoul of employees' rights under the National Labor Relations Act (NLRA).



If you do monitor your employees electronically, understand state law restrictions.

In addition to the federal Wiretap Act, state and local wiretapping laws may impose additional or different obligations on employers. Notable state wiretapping and monitoring laws include:

California	Connecticut	Delaware
<ul style="list-style-type: none">• California employers cannot eavesdrop on or record employees' private telephone, email, or in-person conversations without prior consent by all participants.• Employers cannot conduct video or audio surveillance in specified areas in the workplace, such as restrooms or locker rooms	<ul style="list-style-type: none">• With limited exceptions, Connecticut employers engaging in electronic workplace monitoring must provide prior written notice to all employees who may be monitored. The notice must identify all types of electronic monitoring that may be in use and must be posted in a conspicuous place.• Employee monitoring is impermissible in areas designed for employee health or personal comfort, or for the safeguarding of their possessions, such as restrooms and locker rooms.	<ul style="list-style-type: none">• Delaware employers generally cannot monitor employees' telephone or computer use without providing advance notice of the monitoring. The notice must be provided electronically at least once during each day that employees access employer-provided email or internet, unless the employer provides a one-time written or electronic notice of the monitoring that is acknowledged by employees, either in writing or electronically.• Employers cannot conduct video or audio surveillance in areas where employees have a reasonable expectation of privacy.

And note that these protections are expanding...

- Beginning earlier this month, May 7, 2022, New York employers that monitor their employees' electronic activities have certain notification obligations.
- The new law applies to all private employers, regardless of size, with a place of business in New York.



