

PERSONNEL NOTEBOOK

For Your Most Important Resource

TELECOMMUTING

Part II: The Legal Issues

In Part I of the *Personnel Notebook* on Telecommuting (TC) we reviewed the basic concept and the generally accepted benefits and problems with TC. In this and the next few issues on this subject, we will report on the legal requirements and issues, the recommended procedures for establishing a TC program, the recommended agreements to be signed, and several forms to support the program.

At the end of Part I, we asked readers to send us any comments about their experiences with telecommuting. We also sent requests to many companies, associations, and individuals who are using TC. We received, and are still receiving, many responses, good and bad including several tips on how to make the process more workable. In the final issue on TC, we will provide that interesting input.

In this issue, we will focus on the legal issues that you need to consider before embarking on a TC program.

The Legal Issues

- **Discrimination**
- **Wage and Hour**
- **Independent Contractors**
- **Americans With Disabilities Act (ADA)**
- **Family and Medical Leave Act (FMLA)**
- **Workers' Compensation**
- **OSHA and Safety**
- **State Laws**

- **Meal and Rest Breaks**
- **Data Security**
- **Tax Issues**
- **Unions**
- **Posting Requirements**

Discrimination

Telecommuters are not a protected class. But, both the home and the office are legal workplaces. If you treat telecommuters less favorably than in-house workers with regards to job assignments, promotions, and other opportunities, be sure that the differences do not adversely or positively affect a protected class (i.e., race, sex, religion, nationality, etc.).

Wage and Hour

Federal Labor Standards Act (FLSA)

Minimum wage and overtime regulations require employers to carefully monitor and document the work hours of employees, including telecommuters. For nonexempt workers (hourly paid), every hour must be recorded every day, including lunches and breaks. Keep a record of all hours worked for exempt workers as well, as DOL auditors often request them.

Overtime

Even if you have a policy or rule against working unauthorized overtime, if the non-exempt employee claims to have worked

overtime, you must pay for that time or reasonably prove that he did not work the overtime. You may discipline the employee, but you must still pay him. (Non-exempts)

On-Call or Waiting Time

Time waiting by the work station, Internet, or server (normally of short duration) is considered work time and must be paid. (Non-exempts)

Commuting

No pay is required for commuting to and from work. However, once the day has started, if the employee is called into the office because the Internet is down or other technical problems occur, that travel time is compensable. (Non-exempts)

Piece-rate Earnings

If the employee is being paid a piece rate for phone calls or mailing pieces, for example, be sure to calculate all earnings, including incentive pay and non-discretionary bonuses, as part of the pay.

Docking Pay

Docking pay for telecommuters is legal but it can be tricky. It's usually better to discipline employees under your employee handbooks policies.

Returning Equipment

If telecommuters are using company-provided equipment, when they leave the company, you will want to take steps to ensure that equipment is not damaged and is returned. However, deducting the cost of missing or damaged equipment from the paycheck can be difficult. I highly recommend having policies in place and newly signed agreements for each.

Independent Contractors

Telecommuters cannot be classified as independent contractors just because they telecommute. Many telecommuters can and do qualify as independent contractors. But, the procedure is complicated and full of potholes. This can be an important factor when considering benefit eligibility, taxes, and applicable labor laws.

Americans With Disabilities Act (ADA)

Telecommuting can be a form of reasonable accommodation for an employee or employment candidate if it thereby allows a worker to perform the job.

The EEOC does not require a company to provide TC as an accommodation. However, if the company does offer TC, it must allow employees with disabilities an opportunity to participate as a reasonable accommodation.

Family and Medical Leave Act (FMLA)

If the company has 50 or more employees within 75 miles, it must comply with the FMLA by allowing qualified employees up to 12 weeks of unpaid leave for family and medical problems. TCs are entitled to the same rights. That can get complicated, and in some cases, the company may have to remove the work equipment and re-install it for another employee during the FMLA leave. Or, it may have to acquire equipment for the additional employee. Remember, the employee on leave must be fully re-instated once the leave is over.

In some cases the employee and the employer may use TC as a solution for an employee who needs the leave time but cannot afford to take it. A TC arrangement may allow the employee to care for his or her family while telecommuting three days a week.

Workers' Compensation

An employee who is telecommuting at home is still at work, and as a result, injuries incurred in the course of the work must be covered by workers' comp. This is a hotly contested and a grey area. If the person was on a personal errand, it is not covered by workers' comp. If the employee was not in the work area, it may not be covered. But, if the employee is relaxing in the backyard and races to answer a call, is he covered if it was you calling? Also, if a third party is injured in what is technically your company's workspace, are you covered for the injury? Check all your workers' comp and liability coverage with your carrier.

OSHA and Safety

OSHA regulations require you to provide a safe and healthy work environment for your employees. That includes an advance inspection of the workplace to assure their safety-even if it's in the employee's home.

OSHA representatives say that it's not likely to inspect someone's home because the home owner (your employee) is not likely to file a complaint against his own home office. Others, however, point out that it's not the employee's responsibility to provide the safe environment. That responsibility rests with the employer. So, should you do the inspection or require the employee to do it? My recommendation is that the company conducts a thorough inspection that includes determining the following:

- Is the monitor positioned properly?
- Is the chair ergonomic?
- Is the floor slip proof?
- Can the electrical system handle the additional equipment?
- Will children have access to the workspace?
- Are there steps?
- Will there be coffee makers?
- Is there a first-aid kit?
- Are there any state safety laws that apply?

You will have to do this more than once. As the employer, you will always be the primary responsibility for safety in the workplace, even if it's in someone's home.

State Laws

Some states have laws regarding TC. Check out any for your state. If your TC employee's home is in another state, you must comply with the laws, which may be quite different, in that state.

Local Laws

Are there any zoning laws about business operations or work-at-home activities in the employee's community? Will vendors ever call there? Will there ever be a meeting there? Will supplies ever have to be delivered there and in

what volume? Many communities have parking restrictions for business activities. Some communities only allow self-employed businesses with no visitors or deliveries.

Meal and Rest Breaks

Although the federal regulations do not require meal or rest breaks, many states do. But, if you do provide such breaks, the federal regulations stipulate how they are to be administered. Some breaks must be paid some are not. (Non-exempts)

You should require TC employees to document and certify on their daily time sheets that they have taken these breaks. Identify at what time and the duration of each break. If necessary and applicable, you can install computer and phone monitoring equipment to document the work hours and the break times. Be aware, however, that privacy issues are already being raised.

Data Security

Many employees may have information, now in their home, that is proprietary to your company, including trade, financial information, and personal information about other employees. Some states have laws about data security that may protect you and your information.

You must, however, have security protection systems and confidentiality agreements in place where they are applicable. Discuss these issues with your attorney to determine who should sign such agreements and for what information. Have a procedure in place to secure all access and passwords in the event of terminations, resignations, or transfers.

Tax Issues

Unless you are providing and paying for all the equipment, space, utilities, etc., you should inform TC employees about any tax obligations and advantages. Advise them to talk to a personal tax adviser. **Note:** As an employer, you should never give tax advice to your employees.

Some states have reciprocity agreements so employees who TC from a state different from

where the company is located do not face double taxation on their income.

For the company there are some additional concerns. If your TC employee is in another state and is performing the sale of goods or services, it may mean that your company now has an official or physical presence in that state. Incorporation or tax issues may arise. It may require sales tax, registration, recordkeeping, and other legal requirements. However, if the employee is performing administrative or support work, that would not be an issue.

Unions

If you have a union, your collective bargaining agreements must be reviewed carefully and union representatives may have a significant say in how the process works, if at all. Unions generally see the TC process as a benefit for employees and, as such, they want to see the selection of TC employees to be based on seniority and allow union representatives the right to visit the employee's home.

Posting

Although the TC employee may not approve, all legal workplace postings must also be posted in the TC workplace. Of course this can be accomplished by posting them on the company's intranet. However, the employee must read them. So, company policy for telecommuters must include a requirement that periodically every employee must access the posting site and maybe even log on to document the action. It would be wise for companies to send emails out to employees whenever a change is made.

The overwhelming numbers of employers using TC are very large companies. But, even they are not likely to be in full compliance with all of these laws and regulations. Most of the smaller companies using TC may be winging it altogether. So, is it safe to ignore most of them? Probably not.

The federal government recently floated a new regulation requiring every employer in the nation to offer and provide a formal flex-time

program that includes telecommuting. The program had to be documented for the DOL audit. It didn't pass this time, but the proponents are promising to try again. However, they did hire 700 new field agents to investigate employment law violations. Will we see federal charges for TC violations in the future? Does GIECO make silly commercials?

In Part III of the *Personnel Notebook* on TC, we will take a look at how to go about establishing a TC program.

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