LABOR AND EMPLOYMENT

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Telecommuting in the Time of COVID-19

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Now, as the United States reaches an inflection point on how to handle the novel coronavirus (COVID-19) outbreak, many employers are being ordered to close offices to help stop the spread of COVID-19. These closures are forcing employers to expand telecommuting to many employees who have not previously worked remotely. If employers have not already done so, now is the time to update telecommuting policies. This article is meant to assist employers in dealing with the primary risks involved with telecommuting. Most of the risk in telecommuting arises out of eligibility determinations; monitoring hours worked; managing equipment concerns, privacy concerns and security concerns; performance management; and safety.

Eligibility

- Determine who is eligible to telecommute.
- Draft a clear and concise statement outlining what specific parameters an employee must meet before being eligible to work from home.
- Confirm that eligibility is being applied in a legitimate non-discriminatory manner.

Monitoring Hours Worked

Many employers provide exempt and non-exempt employees the opportunity to work from home with the expectation that employees will work forty (40) hours. It is easy to manage wage-and-hour compliance for exempt employees working from home because exempt employees will be paid as long as they do any work during the payroll period. It is far more difficult to manage wage-and-hour compliance for non-exempt employees working remotely. A sound telecommuting policy addresses the following:

- Employers should communicate expectations regarding work hours and availability to employees.
- Provide non-exempt employees with expectations regarding scheduled work hours and availability during the workday. Strict timekeeping measures should be implemented for all non-exempt employees who work remotely.
- Reiterate to all non-exempt employees that they will be paid for all hours worked.
- Remind employees of any policy regarding impermissible overtime.
- Use electronic timekeeping via a call-in system or computer log-in system that provides the most control over monitoring hours worked. Weekly written timesheets provide the least control.
- Regardless of the timekeeping method used, require all employees working remotely to submit records of hours worked in a timely fashion.

Even though employees are working from home, employees may still take paid time off consistent with any employer policy. Likewise, ensure you are complying with local, state and potentially federal law regarding paid sick leave.

Managing Equipment Concerns, Privacy Concerns and Security Concerns

- Remind employees working from home that the employer will monitor all electronic communications using the employer's resources.

- Make employees aware that there is no expectation of privacy in e-mail communications just because they are working from home.

- Given that many employees need to access an employer's confidential information to perform their job duties, employers should make sure that this information is secure.

Failure to properly secure confidential or proprietary information could result in the information losing its legal status as protected information, and, therefore, it is important for employees to secure such information when telecommuting.

Aside from privacy and security, employers must address the equipment an employee is using to perform job duties from home. In some jurisdictions, employers may be required to reimburse employees who use their own devices for an employer's convenience. Similarly, under state and federal law, employers need to make sure that any expenses borne by an employee for an employer's convenience will not result in an employee's effective rate being reduced below the applicable minimum wage or, in the case of overtime, below the applicable overtime wage rate.

Performance Management

Having employees work from home may seem daunting to an employer who is used to walking down the hall to have job-related conversations. Telecommuting should not be thought of as something that will stop these conversations from occurring. Instead, consider having planned conference calls at regular intervals to address ongoing assignments. Companies increasingly use cloud-based applications that allow employees from different places to collaborate – consider using such applications for the time being. Ultimately, management style may differ, but all employers should clearly communicate that performance expectations will continue to be in place.

Safety

Finally, while employers may not consider safety a concern for employees working from home, employees can still suffer workplace injuries at home. Employers have obligations under the Occupational Safety and Health Administration (OSHA) to record all

workplace injuries. Moreover, employers may have to provide employees compensation and/or treatment for injuries occurring while working from home. Employers should remind employees of company policy regarding workers' compensation, OSHA, or any other safety policy as part of a comprehensive telecommuting policy.

While employers adapt to the "new normal" across the country, there is no need to fear telecommuting. Provided that employers are responsible in how they manage employees who telecommute, telecommuting carries no more risk for businesses than having employees work on location in a physical office.

This Alert was based on information available at the time of publishing. It is subject to change. You should consult government websites and publications for the most up-to-date information. ◆

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