

## Special Issue Telecommuting

### Managing the Risks Of Telecommuting

#### *Get It in Writing*

By Karla Grossenbacher

With rapidly increasing advancements in technology, more and more employees have the capability and desire to work remotely from their homes, and employers are having to grapple with the issues raised by having employees who telecommute. Setting aside the issues of deciding whether a given employer should allow its employees to telecommute or which employees or positions are good candidates for a telecommuting relationship, there are several different areas of the law that impact an employer's ability to manage the telecommuting relationship.

In order to minimize the legal risks presented by telecommuting employees, a prudent employer will enter into written agreements with its telecommuting employees, setting forth the obligations and expectations of each party involved in the telecommuting relationship. A good telecommuting agreement should take into account and address the following issues:

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#### **EMPLOYMENT RELATIONSHIP**

As a threshold matter, the telecommuting agreement should expressly state that it is not an employment agreement and does not alter in any way the at-will nature of the employment relationship between the employer and the telecommuting employee. The agreement should reiterate that the telecommuting employee — even though she is working from home — is still subject to all of the employer's policies, procedures, rules and regulations. The duration of the telecommuting arrangement should be set forth in the agreement, noting that the agreement is not to be construed as a contract for employment for a period of time. The employer should reserve the right to revoke the employee's right to work from home at any time and for any reason.

#### **HOURS OF WORK AND OVERTIME**

The telecommuting agreement should address hours of work and the manner in which telecommuting employees will be expected to record their time. For employees that are exempt from overtime under the federal Fair Labor Standards Act (FLSA), the agreement should establish the hours during which the employee will normally be expected to perform her work and be available by phone and email. The agreement can specifically state the phone number at which the employee will be available and with what frequency she will be expected to check phone messages if away from the home worksite or otherwise engaged.

If the telecommuting employee is not exempt from federal overtime requirements under the FLSA, the employer must take steps to ensure that it will comply with the recordkeeping requirements for non-exempt employees and pay such employees for all hours worked, including overtime. When an employee telecommutes, it is difficult to keep track of the hours worked by the employee, and thus monitor overtime, because the employee is not physically present in the workplace. If a non-exempt employee telecommutes and his or her hours of work are not properly recorded, this could lead to underpayment of wages and overtime liability. Therefore, non-exempt employees should be instructed to keep meticulous time records, filling out timesheets or using an electronic system for recording their time.

The telecommuting agreement should also set forth the number of hours the non-exempt employee is expected to work each week and state clearly that additional time or overtime will not be permitted without prior authorization. If the number of hours that the non-exempt employee is expected to work will fluctuate based on business needs, or if the hours worked by the employee are sporadic, the employer can establish in the telecommuting agreement a fixed number of hours of work for which the employee will normally be paid. There is an infrequently-cited Department of Labor regulation (found at 29 C.F.R. § 785.23), which states that, because it is "difficult to determine the exact hours worked" by employees who are "work-

ing from home," the DOL will accept "any reasonable agreement between the employer and the employee that takes into consideration all of the pertinent facts" regarding the number of work hours for which the employee will be paid. This regulation is known as the "homeworker exception," and it can be useful in certain circumstances for minimizing risk where the non-exempt employee hours of work are sporadic or fluctuate.

### CLASS ACTION CONSIDERATIONS

Given the rapid increase in collective or class actions, especially under federal and state wage hour laws, employers should, to the extent possible, make sure that each telecommuting employee has a separate, individualized agreement. If all of an employer's telecommuting agreements with its employees are identical, and an employee brings suit on behalf of herself and other similarly situated employees alleging, for example, that the employer failed to record work hours properly or pay for all hours worked, it will be much easier for the employee's lawyer to argue that a class of all non-exempt telecommuting employees should be certified if they all signed the same agreement. A class action was recently filed in federal court in California on behalf of a group of insurance adjusters who participated in a "work at home" program and alleged they were owed unpaid overtime and travel time. Because the employees allegedly participated in a "work at home" program, as opposed to having individualized telecommuting agreements, it will likely be easier for the plaintiffs' lawyers to move successfully for class certification.

### OSHA

The federal Occupational Safety and Health Act (OSHA) mandates that employers maintain a safe workplace for employees, including those who work from home. OSHA mandates that employers are required to take reasonable steps to prevent foreseeable hazards in the workplace. An employer generally does not have the right to access its employees' homes, so it is important that the employer reserve the right to do so in the telecommuting agreement by specifically allowing for inspections of the employee's home worksite for purposes of establishing compliance with OSHA standards. The

employer should also require that the employee represent in the agreement that she will keep the work area in her home safe and healthy in compliance with OSHA standards. At the outset of the telecommuting arrangement, the employer can provide the employee with an informational packet or checklist on health and safety issues to help the employee keep her homework area in compliance with OSHA requirements.

### WORKERS' COMPENSATION

Although the case law is underdeveloped in this area, employers should assume that the same workers' compensation rules apply, whether the employee works in an office or works from home. Thus, the employer should address in the telecommuting agreement the possibility of a workplace injury. The agreement should designate a specific area of the employee's house in which the employee will perform work. This area should be clearly defined and set apart from the rest of the employee's house to help ensure that covered injuries can be distinguished from those that are not covered. The telecommuting agreement should also state that the same injury reporting rules that apply in the office also apply at the home work site. In addition to reserving the right to inspect the employee's home work site for safety on a periodic basis, the telecommuting agreement should also allow the employer to have immediate access to the employee's home work area following the report of any injury. The agreement should also allocate responsibility for providing coverage for injuries to third parties sustained at the employee's home.

### CONFIDENTIAL AND PROPRIETARY INFORMATION

An employer's confidential and proprietary information can lose its trade secret status if the employer does not take affirmative steps to protect and ensure the confidentiality of such data. Thus, the telecommuting agreement should describe the at-home security measures that the employee will take to secure company information and prevent unauthorized access to company information and systems. The employee agreement should represent in the telecommuting that she will take all nec-

essary precautions to secure proprietary, confidential and privileged information of the employer.

### ZONING AND TAXES

The telecommuting agreement should provide that it is the telecommuting employee's responsibility to ensure that she is in compliance with local zoning ordinances. Some local ordinances restrict the ability of individuals to conduct business in their homes, and in those cases, where working from home is permitted, certain taxes may apply. The telecommuting agreement should reflect the parties' understanding with regard to payment and withholding of applicable taxes.

### COMPANY PROPERTY

The telecommuting agreement should also set forth what equipment or property the employer will provide to the employee in connection with the telecommuting arrangement and provide for its return when the telecommuting arrangement terminates. The agreement should also require the employee to ensure that the employee's homeowner's or renters insurance covers such equipment or property.

### CONCLUSION

Telecommuting can be a great benefit to both the employer and the employee. Given the numerous potential pitfalls presented in a telecommuting arrangement, however, employers should be careful to document the respective rights and obligations of the employer and employee in a telecommuting agreement.

