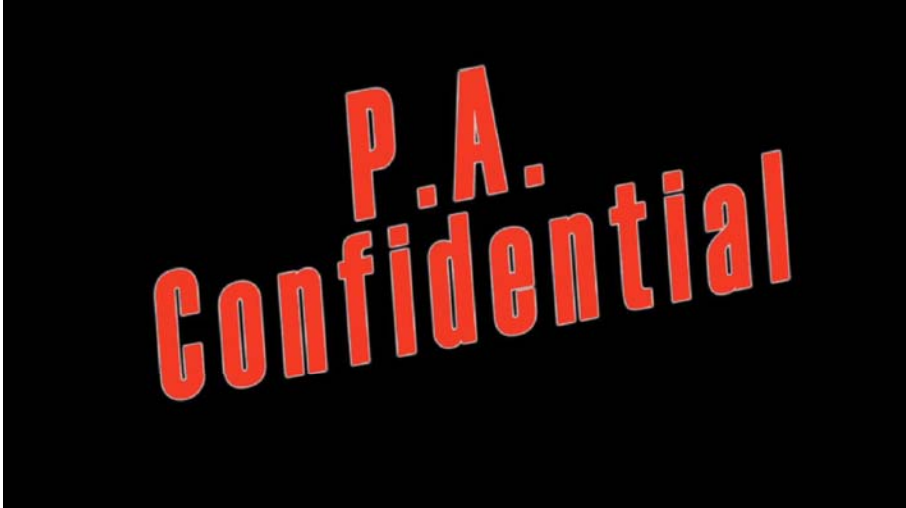


Telecommuting: A Trend in Reverse?
Policy and Legal Issues in Working From Home


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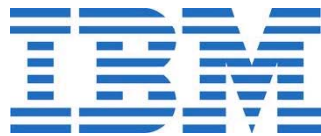
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75

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Recent Trends

- Approximately 3.1 million people work primarily from home (2.5% of American work force)
- Represents a 73% increase since 2005



Benefits of Telecommuting

- Family-Friendly Culture that Promotes Work/Life Balance
- Company Cost-Savings (e.g., real estate)
- Environmental Benefits (commuting)
- Expands geography to allow company to find the best candidates globally
- Employers report increased productivity



Problems with Telecommuting

- In-person interactions foster:
 - Innovation (from random, unplanned interactions)
 - Trust
 - Solidarity
- Two major companies recently eliminated telecommuting, citing similar concerns



Key Legal Issues with Telecommuting

- Discriminatory Enforcement of Telecommuting Policies
- Whether Telecommuting is a “Reasonable Accommodation” under the ADA
- Fair Labor Standards Act (issues with reporting overtime)
- Safeguarding Confidential, Proprietary, and Trade Secret Information
- Injuries at Home: OSHA and Worker’s Compensation

Non-Discriminatory Telecommuting Policies

- Protected Classes under Federal Law

- Race
- Color
- Religion
- Gender
- National Origin
- Age
- Disability



- Protected Classes under State and Local Laws (e.g., Sexual Orientation)

Non-Discriminatory Telecommuting Policies

- Facially non-discriminatory
- Must not be enforced in a discriminatory manner
- “[I]f an employer has permitted a manager in a non-protected class to work from home but has denied that opportunity to a manager in a protected class, it must demonstrate that there is a legitimate, nonpretextual basis for its discrimination.” *Rafeh v. Univ. Research Co. L.L.C.*, 114 F. Supp. 2d 396 (D. Md. 2000).

Non-Discriminatory Telecommuting Policies

- Legitimate Factors for Consideration:
 - Whether job duties can be performed effectively at home
 - Employee job performance
 - Employee disciplinary record
 - Length of employment



ADA: When *Must* Employers Allow Telecommuting?

- Americans with Disabilities Act
 - Prohibits discrimination against employees with “a physical or mental impairment that substantially limits a major life activity.”
 - Must provide “Reasonable accommodations” that do not pose “undue hardship” - includes:
 - (A) Changes to existing facilities; and
 - (B) Job restructuring, part-time or modified work schedules, ... and other similar accommodations for individuals with disabilities.



ADA: When *Must* Employers Allow Telecommuting?

- EEOC Enforcement Guidance (October 2002): “Whether [telecommuting] is effective [as a reasonable accommodation] will depend on whether the essential functions of the position can be performed at home. . . .”
- The EEOC will consider “the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home.”



ADA: When *Must* Employers Allow Telecommuting?

- Jobs for which telecommuting most likely **is** a reasonable accommodation
 - Telemarketer
 - Proofreader
- Jobs for which telecommuting is **not** a reasonable accommodation
 - Server in Restaurant
 - Cashier



ADA: When *Must* Employers Allow Telecommuting?

- *Kiburz v. England*, 361 Fed. Appx. 326 (3d Cir. 2010) – Plaintiff, IT Team Leader, “could not carry out the essential functions” of job, including attending meetings, both planned and unplanned.
- *Bisker v. GGS Info. Servs.*, 2010 U.S. Dist. LEXIS 53879 (M.D. Pa. 2010): Plaintiff suffering from MS survived summary judgment because interacting with co-workers did not necessarily require “face to face” interaction.
- *Rauen v. U.S. Tobacco Mfg. L. P.*, 319 F.3d 891 (7th Cir. 2003): “The reason working at home is rarely a reasonable accommodation is because most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation.”

Fair Labor Standards Act Issues

- Fair Labor Standards Act of 1938
- Created National Minimum Wage
- Requires Payment of “Time-and-a-Half” for “Non-Exempt” Employees who work more than forty hours per week
- “Exempt” vs. “Non-Exempt” Employees



Fair Labor Standards Act Issues: Recordkeeping

- Employers must maintain accurate payroll records
- Employees usually “self-report” (punching time clocks)
- Difficulty of Employer Validation
- Solutions:
 - Track network login and logout times
 - Devise methods for other, non-computer based work



Fair Labor Standards Act Issues: Compensable Time

- Commuting into office
 - First thing in morning vs. mid-day
- Preliminary/Postliminary Activities
 - Start computer, log into network, throw in load of laundry, then start working
 - Take 10 minute break to get mail in middle of day
- “On Call” Telecommuters
 - “Engaged to Wait” vs. “Waiting to Be Engaged”



Fair Labor Standards Act Issues: Paying Overtime

- Overtime (40+ hours /week)
- Employers may require prior approval for overtime hours, but “cannot sit back and accept the benefits without compensating for them.” 29 C.F.R. § 785.13.



Safeguarding Trade Secrets at Home

- Pennsylvania Uniform Trade Secrets Act defines “Trade Secret” as “Information ... that:
 - (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
 - (2) Is the subject of efforts that are **reasonable under the circumstances** to maintain its secrecy.”



Safeguarding Trade Secrets at Home



- Non-disclosure agreements
- Maintain written policies that:
 - Define confidential information and permissible uses
 - Require safeguarding
 - Require prompt return upon termination of employment
 - Prohibit use of personal email accounts for work-related activities
 - All work must be performed on company's electronic systems
 - All information on company systems is company property
- Work with IT to ensure that remote access is secure, encrypted, and password-protected, and access to company systems is terminated immediately upon termination of employment



OSHA Concerns

- Occupational Safety and Health Act of 1970
 - “General Duty Clause”: “Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(5)(a)(1).
- OSHA Concerns:
 - Home Inspections
 - Record-Keeping Requirements



Workers' Compensation Claims

- Dependent on state laws and interpretations
- Courts usually evaluate:
 - Quantity and regularity of work performed at home
 - Continuing presence of work equipment at home
 - Special circumstances of the particular employment that make it necessary and not merely personally convenient to work at home



Workers' Compensation Claims

- Decorator, who kept fabric samples at home, tripped over the dog and broke her arm when moving the samples to her car. *Sandberg v. JC Penney Co.*, 260 P.3d 495 (Or. Ct. App. 2011).
- Chief of Police accidentally killed while cleaning service revolver in his basement. *Aldan v. Workmen's Compensation Appeal Board*, 422 A.2d 733 (Pa. Cmwlth. Ct. 1980).



Local Considerations

- What Law Applies?
- Zoning Laws
- Business Permits
- Income Tax Laws (depending on the state)
 - Allowing employees to telecommute may subject the employer to taxation in state where telecommuter resides (*Telebright Corp. v. Director, N.J. Div. of Taxation*, 424 N.J. Super. 384 (App. Div. 2012))
 - Likewise, telecommuting employees may be required to pay taxes to state of employer's principal operations (*Huckaby v. N.Y. State Div. of Tax Appeals*, 829 N.E.2d 276 (N.Y. 2005))
 - Telecommuting Tax Fairness Act of 2012, which would prohibit states from imposing gross income taxes on telecommuting employees who are not located in-state, stalled in Congress

Key Elements of a Telecommuting Policy

- Eligibility
- Performance Requirements
- Timekeeping
- Use of Company Equipment
- Security of Company Information