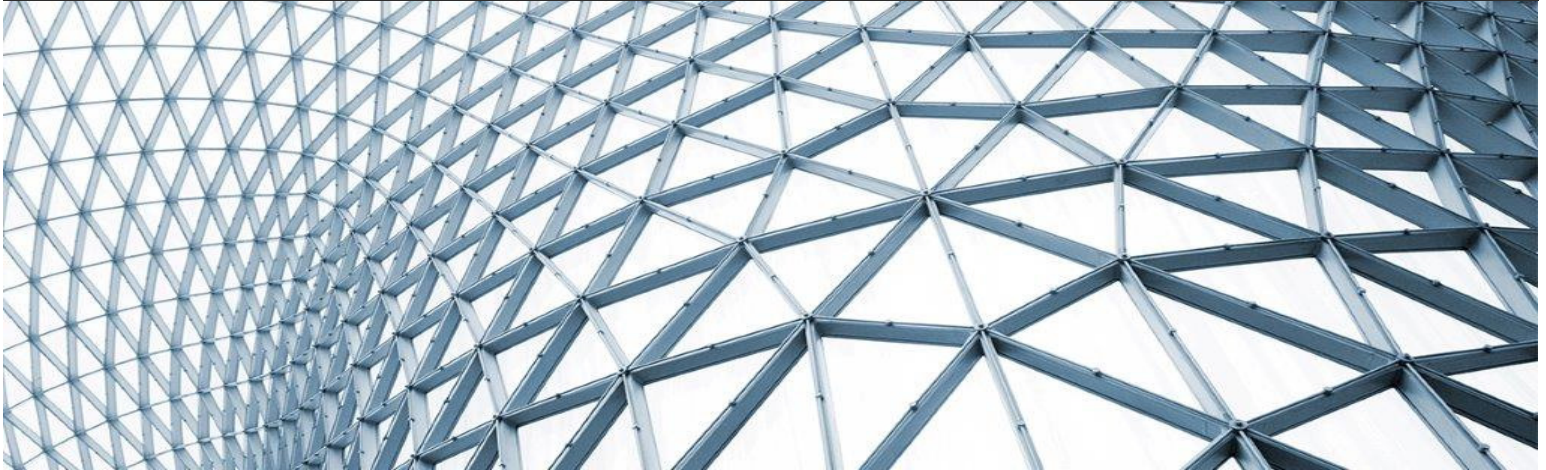


Teleworking: The New Normal?



Rules, considerations and potential pitfalls for employers who permit employees to work from home.

By Michael Slocum and Ryan O'Connor | July 15, 2020 | New Jersey Law Journal

During the past few months, millions of Americans (including a significant portion of New Jersey's working population) have been relegated to work from home. For many of these employees, it has been their (and their employers') first meaningful experience with teleworking. In many instances, the experience has demonstrated that teleworking can be a feasible alternative for office employees. Even as concerns about the Coronavirus Disease 2019 (COVID-19) for some may be abating, many employers may still be considering adopting more permanent telework policies or expanding currently existing telework policies.

Whether as an accommodation, perquisite, or simply as a way for employers to reduce space requirements and associated costs, telework may likely become increasingly commonplace. Accordingly, employers who permit their employees to telework should develop detailed policies and follow applicable laws, in order to avoid potential legal risk.

Increased Prevalence of Telework

According to the U.S. Department of Labor's Bureau of Labor Statistics, approximately 25% of workers worked at home at least occasionally in 2017-2018, and 15% of wage and salary workers had days they worked only at home during that same period. (Bureau of Labor Statistics Sept. 24, 2019, News Release: Job Flexibilities and Work Schedules 2017-2018). Between 2005 and 2015, the number of U.S. employees working remotely at least part of the time increased by 115%. The trend toward increased telework has been accelerating for years, and COVID-related office closures have shown its feasibility like never before.

Compensation

Historically, employees who worked from home—whether regularly or only on rare occasions—were generally those classified as “exempt” from overtime requirements under the Fair Labor Standards Act and comparable state law. More recently, however, and especially during the “stay at home” periods imposed by the COVID-related executive orders in New Jersey and other states, employers have allowed increasing numbers of “non-exempt” employees to work from home as well.

Although exempt employees must, with few exceptions, receive their full salary regardless of how many hours they work in a week, employers are required to pay non-exempt employees only for the actual hours they work. Where non-exempt employees telework, therefore, employers should communicate their expectations regarding timekeeping and schedules (including start/end times and rest/lunch breaks) to mitigate the risk of being saddled with unexpected overtime liabilities. Employers also should confirm that non-exempt employees can track their working time (for example, through timekeeping software) to ensure that work time is accurately recorded, and consequently that non-exempt employees are paid properly and timely.

Teleworking as an Accommodation

The Americans with Disabilities Act (ADA) does not require employers to offer telework as an accommodation in every situation. Employers that permit teleworking generally, however, must allow employees with disabilities an equal opportunity to participate in the program as those without disabilities. Additionally, the ADA’s reasonable accommodation obligation may require an employer to waive certain eligibility requirements or otherwise modify its telework program for someone with a disability. For example, an employer may ordinarily require that employees work at least one year before they are eligible to telework. But, if a new employee needs to telework because of a disability, and the job can be performed at home, the employer may need to waive its one-year rule. Additionally, employees who receive an ADA-related accommodation in the workplace (such as ergonomic chairs or schedule adjustments) may be entitled to similar accommodations when working from home.

Even employers who do not ordinarily permit their employees to telework may have previously allowed certain employees to work from home as an accommodation for a temporary or partial disability. The EEOC has, for two decades, expressly recognized teleworking as a reasonable accommodation where an employee’s job, or at least part of it, can be performed at home without causing significant difficulty or expense.

Telework may also serve as a reasonable accommodation for employees concerned about complications from viral infection due to underlying conditions. In the age of COVID-19, employers may consider telework as an accommodation to employees who belong to certain at-risk/vulnerable populations, and may want to consider adopting a policy expressly addressing the issue.

Written Teleworking Policy

Any employer intending to permit its employees to telework—even on a limited basis—should have a written policy, either stand-alone or incorporated into the employer’s company handbook. Employers may also consider updating their technology and timekeeping policies as well to address issues related to working from home.

An effective teleworking policy may consider the following:

- Be in writing and clearly define what employees are eligible and, if the policy is only temporary, the expected duration of the arrangement;

- Set forth in explicit and unambiguous terms the employer’s expectations and the employee’s responsibilities;
- Confirm that the employer retains the ability to revise the policy’s duration and scope;
- Detail how hours are to be recorded by non-exempt employees;
- Clarify expectations regarding frequency and method(s) of communication expected from employees;
- If applicable, identify what technology and/or supplies will be provided to teleworking employees and explain any reimbursement process;
- Include provisions regarding network security and protection of confidential information;
- Remind employees that they must continue to comply with existing company policies even when working from home.

A written teleworking policy should also include a place for employees to acknowledge their receipt, review and understanding of the policy. Employers should retain signed acknowledgments in each employee’s personnel file (or in a database if signed electronically).

Reimbursement Issues

One issue with which employees frequently grapple in connection with telework is whether, and to what extent, it should reimburse employees for telework-related expenses. Such expenses may include costs incurred on tangible items such as office supplies or printers as well as services like cell phone data plans and high-speed internet access.

New Jersey does not generally require employers to reimburse these expenses, unless an employer has otherwise promised employees that it will do so. But several jurisdictions—including most notably California and Illinois—have adopted laws which may require employers to reimburse some portion of telework-related expenses incurred by employees. For example, for “intangible” expenses such as cell phone and internet use, there is limited case law suggesting an employer should pay for “some reasonable percentage” of the employee’s bill, based on work-related use.

Best Practices

Finally, even where a teleworking policy is well-drafted, implementation may still present challenges. Employers should consult with their lawyers regarding best practices to be followed should they decide to implement such a policy, including preparing for cybersecurity risks, training employees and supervisors, and ensuring the network can handle a large influx of simultaneous telework.

Employers are permitted to monitor employee activity through company-issued devices (like phones and laptops) and email, so long as they inform employees at the outset that the devices and emails will be monitored and are not for personal use, which is often addressed in existing technology policies.

Conclusion

As with employee email accounts, videoconferencing, and flexible scheduling before it, telework is shaping up to be the wave of the future in offices across the nation. Although the home office may not fully replace the office park anytime soon, employers are already adapting to this growing trend by adopting sound telework policies and practices. An express work from home policy can provide potential benefits to both employees and their employers, but only if it is well drafted, properly implemented, and consistently enforced.

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