

CLIENT ALERT

Remote Work Considerations in Light of the Coronavirus (COVID-19)

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The novel coronavirus known as COVID-19 has effectively required employers to consider remote work alternatives. Any decision to move a few, some or all of an organizations to remote work status – even on an interim basis – requires a myriad of decisions and considerations, including the following:

1. The Basics
 - a. The term “remote work” is often used interchangeably with “telework”.
 - b. It is the practice of working at home or at another work site instead of physically traveling to the offices of the Company, or to a client site.
 - c. As a general rule, employees do not have a “right” to work remotely. In certain situations, employees may request to work remotely as an accommodation under the American with Disabilities Act (ADA) or comparable state and local laws, provided the requested accommodation does not create an undue hardship for employers during a pandemic.

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- d. As a best practice, all employers who permit remote work, whether in connection with COVID-19 or otherwise, should have a remote work policy.

2. Can Employers Require or Encourage Employees to Work Remotely as a Response to COVID-19?

- a. Yes, remote work arrangements are considered an effective infectious disease strategy.
- b. Impact of government mandated closures or government mandated limits on gathering of people.
- c. Under the ADA, employers can exclude employees with disabilities in the workplace if they pose a “direct threat” to themselves or others (see discussion below)

3. Can Employees Request to Work Remotely?

- a. Yes, employees who are at high risk for complications of COVID-19 from a medical condition may request remote work as a reasonable accommodation to reduce their chances of infection during a pandemic.
- b. Employers must engage in the interactive process.
- c. Employers may require appropriate documentation.

4. Relationship Between the ADA and Remote Work

- a. The ADA regulates inquiries and medical examinations that employers can conduct for employees and applicants, including others who do not have disabilities as defined under the ADA.
- b. The ADA prohibits employers from excluding individuals with disabilities in the workplace for health or safety reasons unless they pose what is known as a “direct threat” either to themselves and/or others; that is, a significant risk of harm to themselves or others even with a reasonable accommodation.
- c. The ADA requires reasonable accommodation for individuals with a disability as long as it does not create an undue hardship for employers during a pandemic.
- d. Whether COVID-19 rises to the level of direct threat typically



depends upon the severity of the illness.

- e. If CDC or state or local public health authorities conclude that the illness is similar to a seasonable flu, it would generally not pose a direct threat or warrant disability related inquiries or medical examinations.
- f. If CDC or state or local health authorities would determine that the COVID-19 is significantly more severe, it could pose a direct threat.
- g. An assessment by CDC or public health authority would provide the objective *evidence* needed for a disability related inquiry or medical examination.

5. Factors to Determine Whether a Position is Suitable for Remote Work

- a. Does the position have clearly defined tasks?
- b. Can the employee's job be done at home?
- c. Can results and productivity be effectively measured with limited supervisory direction and observation?
- d. Can work be completed without undue hardship on the employer, its business, and employees?
- e. Does technology currently available at the employer permit or facilitate remote work as an option?
- f. Does the employee have an exceedingly long commute to and from the employer's Company's headquarters?

6. Preparing for Remote Work

- a. Necessary infrastructure in place including security and privacy protocols.
- b. Reduce security risks.
- c. Determine equipment remote workers will need; whether employer will supply equipment; equipment maintenance obligations, return of equipment, etc.



- d. Establish remote work rules including but not limited to: can employees work other than from their homes? How will meetings be held?
- e. Establish and enforce rules for use of electronic devices for organization business.
- f. Establish guidelines for working remotely, such as how often and in what way employees check in with their manager or team.
- g. Review agreements with clients/customers for confidentiality obligations, maintenance of files, etc.
- h. Determine whether remote work expenses incurred by employees will be reimbursed.

7. Managing Remote Work

- a. Review job descriptions and job duties
- b. Compliance with all organization policies
- c. Establish effective methods and times for communication
- d. Schedule regular calls and phone check-ins.
- e. Decide whether attendance at certain in person meetings will be required
- f. Schedule regular meetings between supervisors and employees to review job duties and assignments
- g. Manage client/customer expectations.
- h. Anticipate possible conflict with and among employees, and prepare appropriate strategies for resolving conflict.
- i. Generally, remote work is a privilege and not an entitlement.

8. Compensation Issues

- a. Establish work schedules.
- b. Expectation that remote work will be performed during normal work hours
- c. Part-time employees. Establish limitations on hours worked.



- d. Review exempt/non-exempt status of employees
 - e. Repeatedly communicate overtime policy
 - f. Prohibit “off the clock” work
 - g. Establish ground rules for checking emails and texts during non-working hours
 - h. Track hours worked, particularly by non-exempt employees.
 - i. Carefully and regularly review hours worked by remote employees.
9. Potential Liability Issues
- a. Fair Labor Standards Act (FLSA) claims (including overtime claims)
 - b. Workplace injuries
 - c. Loss of data
 - d. Wrongful termination and other performance related claims
10. Insurances
- a. Employment Practices Liability Insurance
 - b. Workers Compensation
 - c. General Liability.
11. Best Practices
- a. Create Remote Work Policy
 - b. Consider using a Remote Work Agreement
 - c. Create criteria for when and under what circumstances employees can work remotely
 - d. Carefully monitor travel by employees to areas affected by COVID-19.
 - e. Communicate overtime policy.
 - f. Review and update job descriptions.



- g. Establish regular times for conferences between supervisors and employees.
- h. Inform clients/customers that employees will be working remotely.
- i. Manage client/customer expectations while employees work remotely.
- j. Review insurances to ensure coverage for all aspects of remote work.
- k. Determine equipment that organization will provide to employees and ground rules for use and return of equipment
- l. Mandate timely reporting of all workplace accidents and injuries