

THOUGHT LEADERSHIP

LEGAL UPDATES

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One Year Later: Compliance Guide for Employers with a WFH Workforce

On January 20, 2020, the first case of COVID-19 in the United States was confirmed in Washington state. By March, many employers began sending their workers home on what was expected to be a temporary basis. Almost one year later, that initial pandemic response has morphed into a long-term or potentially permanent work from home (WFH) arrangement for many employees. Prior to the pandemic, only about 10 percent of the American workforce worked remotely, typically as an accommodation, or a perk offered by tech companies. Now, more than one year after COVID-19 reached the United States, and due in no small part to broadband technology, WFH arrangements have become mainstream and look like they are here to stay.

Consulting firms have forecasted that one-third of businesses expect 50 percent or more of their employees will continue to work remotely.

Managing a WFH workforce poses unique challenges and employers who simply assume it is business as usual, albeit from a location other than the office, may be caught off guard. For example, employers may not realize that an employee who chooses to work remotely from another state can subject the employer to that other state's laws. Employers also may not realize that many of the same employment protections they are required to provide in the office also apply to the employee's remote work location.

Employers should review and revise their policies and practices to ensure compliance with employment laws administered by the state and local jurisdictions where the employees are performing the work, guidance from the Equal Employment Opportunity Commission (EEOC), Department of Labor (DOL), the Occupational Safety and Health Administration (OSHA), as well as state taxing authorities. This article provides a compliance guide for employers planning to continue with a WFH workforce.

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1. Communication

As always, a successful compliance strategy requires a successful communication strategy.

Communicate with employees that your policies and rules apply to onsite and WFH employees.

Keep the WFH workforce apprised of changes in policy or practice to support continued engagement.

Ensure that workplace posters notifying employees about their rights under federal, state and local laws are “posted” so as to be accessible to all employees, including those in WFH status.

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2. State and local law considerations

Do you know where your employees are located when they are working remotely? Will you need your employees to be able to report to an on-site work location with minimal notice?

Do you want to place limitations on where your employees can work?

More and more states and localities have their own laws related to topics like paid sick leave and pay transparency. If your employee is working remotely in one of those states, you will be required to comply with that state’s law.

For example, if your employee works remotely from Colorado, he or she will earn paid sick leave at a rate of 1 hour for every 30 hours worked.

For example, if you have even one employee working remotely in California or Colorado, you are likely obligated to comply with California’s pay data reporting laws or Colorado’s pay transparency posting laws.

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3. EEOC considerations

WFH policies should identify the positions eligible for remote work opportunities, provide a process for requesting and authorizing WFH arrangements, and provide a process for terminating the WFH arrangement. All notices should be in writing.

Administer WFH policies in a consistent and non-discriminatory manner. Denials of WFH requests must be based on legitimate, non-discriminatory reasons. Document reasons for a denial of a WFH request.

If WFH arrangements are temporary only, then clearly communicate to employees that WFH arrangements will cease when in-office operations can resume.

Ensure job descriptions are up to date and they identify the essential functions of each position. Be clear that temporary waiver of one or more essential job functions during WFH arrangements does not permanently change essential job functions.

If an employee requests WFH as an accommodation due to disability, follow the processes required under the Americans with Disabilities Act or applicable state law.

Past denials of WFH arrangements based on a belief that essential job functions cannot be performed remotely may necessitate reconsideration if the employee subsequently performs satisfactorily while working remotely and renews their request.

Comply with all legally mandated training under state law, such as the sexual harassment prevention training mandated in Illinois and California.

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4. Wage and hour considerations

Accurately track all time worked (and time off, including Family and Medical Leave Act) by employees who are working remotely.

Ensure that non-exempt employees are being paid overtime.

Consider applicability of shift differentials in remote work status.

Comply with state laws concerning meal and rest breaks for non-exempt employees.

Because working remotely may result in work outside of normal hours, establish a time-keeping method to track and record employees' hours of work, meal and rest breaks, and overtime pay while working remotely.

Communicate expectations regarding time worked, overtime, advance approval for overtime, reporting all time worked and disciplinary consequences for unauthorized overtime.

Determine whether paid leave requirements in cities and states from which employees work remotely are different from the non-resident employer's existing leave policies and whether the paid leave requirements are imposed on non-resident employers.

Plan for how employees are expected to return company property if their employment ends while they are WFH. Evaluate whether it is permissible under federal or applicable state law to deduct the cost of company property from an employee's final pay if the employee fails to comply with the conditions of return. Many states require this kind of wage deduction to be in a written agreement signed by the employee.

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5. Expense reimbursement considerations

Employees may be entitled to reimbursement of expenses incurred that are necessary to do their job under federal or state law.

Adopt a policy that identifies reimbursable expenses, the procedure for submitting expenses for reimbursement and the documentation required.

The DOL issued guidance during the pandemic prohibiting an employer from requiring non-exempt employees who are covered by the Fair Labor Standards Act (FLSA) to pay or reimburse the employer for items that are business expenses of the employer, if doing so reduces the employee's earnings below the required minimum wage or overtime compensation. Additional costs can include internet access or more secure or faster internet access, an additional phone line, a computer and increased use of electricity.

For exempt employees, deductions from salary of additional expenses related to remote work could be considered impermissible deductions under the FLSA salary-basis test.

Some state laws also address reimbursement of employers' business expenses and should be considered.

Employers may not seek reimbursement or require employees to pay expenses related to WFH arrangements provided to an employee as a reasonable accommodation for a disability.

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6. Privacy law considerations

Remote work arrangements raise concerns among employers about how to monitor productivity, protect intellectual property, and ensure the confidentiality of business information and prevent data breaches.

Advanced technology increases not only the ability to monitor employees while working remotely, but such increased monitoring comes with potential increased legal liability if employers violate federal, state and common laws by inappropriately monitoring employees.

Employers are legally permitted to monitor employees who use the employer's equipment and network. Infringement on employees' privacy rights is more likely if employees are using their own equipment and internet connection. But even then, some level of monitoring is permitted if the employer stays within the confines of the applicable laws and provides notice/consent to employees regarding monitoring and privacy expectations.

Monitoring policies should be consistent with federal and state laws and should balance employer concerns with employees' right to privacy.

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7. Confidentiality considerations

Adopt and communicate cybersecurity policies and protocols that employees must follow to protect proprietary information and minimize the risk of disclosure or data breach.

Engage IT departments and implement cybersecurity safeguards such as a virtual private network (VPN) to allow access to an employer's network while reducing security risks to confidential information.

Require employees to sign an acknowledgement of receipt of their company-owned devices and of their obligation to keep electronic devices and confidential information secure, including obligations under non-disclosure and confidentiality agreements.

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8. Safety law considerations

Workers' compensation laws may apply to work-related injuries experienced by WFH employees.

Review workers' compensation policies to ensure coverage of injuries that occur while working remotely in another state.

OSHA does not require employers to inspect worksites in employee's home offices according to a 2002 OSHA directive, and OSHA typically will not inspect workers' home offices and will not hold employers liable for workers' home offices.

OSHA will inspect other types of home-based worksites, such as home manufacturing operations. Employers are responsible for hazards at home worksites caused by materials, equipment or processes provided or required by the employer to be used in workers' homes.

Continue to maintain appropriate 300 logs related to injuries experienced by remote workers and train WFH employees to report work-related injuries. Employers who are required under the OSH Act to keep records of work-related illnesses or injuries, must maintain appropriate 300 logs for work-related injuries or illnesses that occur in a remote workplace or office if they meet the recordability requirement of 29 CFR 1904.

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9. State and municipal tax considerations

As a general rule, businesses are subject to state tax laws if the business has a nexus to the state, which can include the presence of a single employee who works remotely from the state.

Due to pandemic-induced WFH arrangements, employers may be subject to different withholding and payroll obligations and other state and municipal tax requirements based on the geographic location of employees' remote worksites, regardless of the employer's physical location. For example,

many employers in Kansas City, Missouri, have employees who have worked remotely from home in Kansas, raising questions about the applicability of the Kansas City, Missouri, earnings tax.

Some states have issued telecommuting tax policies or guidance on income-sourcing for state tax purposes and exemptions based on reciprocal agreements with other states that prevent double taxation. But state decisions on income-sourcing issues regarding employees working remotely from a different state during the pandemic are not uniform. State taxation of employees working remotely has spawned not only new tax obligations for employers and employees but also litigation among states.

Employers also are subject to state unemployment tax obligations which may be affected by WFH arrangements.

Employers should take the following steps regarding state and municipal tax obligations:

Determine the states and municipalities from which your employees are remotely working.

Determine the nexus and withholding rules related to each state and municipality in which an employee works remotely.

Determine potential state and municipal tax withholding obligations related to each WFH employee and register for payroll taxes in appropriate additional states and localities.

Determine which state unemployment taxes must be paid for each WFH employee.

Provide information to employees on any additional, applicable withholding obligations.

Stay abreast of evolving state rules, regulations and FAQs on this topic.

Contact us

If you would like guidance on remote workforce solutions or monitoring of these evolving employment issues, contact Barbara Grandjean, Julianne Story or your Husch Blackwell attorney.

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CARES Act, COVID-19 & Return-to-Work Guidance

Husch Blackwell provides guidance regarding COVID-19 updates, the CARES Act, and rapidly changing state-by-state orders, including those that impact stay-at-home and return-to-work protocols. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.