

With remote work here to stay, company policies should be created

As of mid-2020, full-time remote work in the U.S. was up more than 40 percent and continuing to grow. It is predicted that 25 percent of all professional jobs in North America will be remote by the end of the year, and this is likely welcome to many workers. According to a 2021 Gallup poll, more than two-thirds of employees working remotely indicated that they would prefer to stay remote permanently.

Whether a company provides temporary or permanent remote work options for its employees, creating a written policy and understanding the implications of employees working out of state are imperative. Otherwise, employers face real risks of significant disconnect with their employees and potential liability from unintentional situations.

Policy considerations

While each company's remote work policy will vary based on its unique needs and workers, there are a few key considerations that all companies should address.

First, think about the purpose of the policy. If the remote work policy is intended to be temporary, whether in response to a public health emergency or otherwise, and the company may shift back to in-person office work in the future, the company should clearly state that it is a temporary policy. This helps to ensure that employees do not have an expectation that the policy is permanent, and the company can change or alter the policy at its discretion.

Remote work may not be appropriate for all positions or employees within the company. If all employees are not permitted to work remotely, specify the criteria or state which positions are eligible for remote work. While some employees may be entitled to remote work as an accommodation, an employer otherwise has



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the discretion to determine whether an employee is permitted to work remotely.

However, to avoid potential discrimination and retaliation claims, implement and enforce a remote work policy uniformly and consistently. Be sure to include in the policy an approval process and designate who reviews and approves requests. The more discretion that is used to grant an employee the ability to work remotely or determine the terms of the arrangement, the more potential for risk. Allowing one responsible employee to work remotely, but not another less responsible employee, is a completely legitimate justification. However, any time two employees are treated differently – especially when one is in a protected class and the other is not – can create a rebuttable presumption of discrimination.

Given the independence that goes with remote work, employers often have less control over when and how remote employees work as well as less ability to track their time. Whether employees are working in the office or from home, nonexempt ones are still required to track their time and comply with meal and rest breaks.

In addition, an employer should set expectations regarding availability. When should employees be available to clients, customers, and other employees? Will they still be expected to travel, attend meetings, etc.? Companies should clearly outline when employees should be available and how quickly they should respond to emails, phone calls, and any other

forms of communication used by the company. This includes indicating which mode of responsive communication is appropriate. If employees should respond “promptly” or “in a timely manner,” consider defining what those terms mean.

Depending on the organization and clientele, there are numerous other considerations that may be relevant to the workforce: overtime approval, dress code considerations, confidentiality, ergonomics and other worker safety considerations, internet stability, etc. Organizations should carefully consider what is relevant to their remote workers and carefully spell out expectations in their policies.

Management of out-of-state employees

More and more employees are requesting to work remotely from other jurisdictions. During the more uncertain times of the pandemic, many states turned a blind eye to remote worker issues. However, the temporary nonenforcement of these laws is a thing of the past, and states are recognizing that employees are working remotely, both in and out of state at an unprecedented scale.

Having remote workers in other states (and in some cases, other cities, counties or even countries) can implicate a host of general business and employment obligations, including minimum wage and overtime laws, payroll timing and method requirements, meal and rest break requirements, leave laws, restrictive covenant require-

ments, unemployment and state disability insurance, workers' compensation and group health insurance, and tax issues.

Employers should have a policy requiring employees to inform them in advance where they are working when working remotely, and requiring they receive permission before working remotely in another jurisdiction. An employer has the discretion to decline permission for an employee to work remotely from a jurisdiction where they are not set up to do business. Before allowing an employee to work from a new location, the employer should partner with counsel to ensure it is complying with the requirements of that jurisdiction.

Policy application and implementation

As mentioned above, implementing and enforcing a remote work policy on a uniform, consistent basis whenever possible is paramount, whether employees are in the same jurisdiction as the business or are working out of state. Employees approved for remote work should review, acknowledge, and sign a policy and/or agreement describing their specific arrangements. Providing clear expectations at the outset can prevent unwanted headaches down the road – for a company and its employees.

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