In today’s world of technological advances allowing connectivity from almost anywhere, coupled with high gas prices and the popularity of flexible work schedules, more employees are telecommuting and working from off-site locations.

Telecommuting raises myriad employment law issues that employers should consider before allowing their employees to telecommute, including privacy considerations, workers’ compensation questions, and others. This Update, however, focuses on the wage & hour concerns for employers with telecommuting employees, highlighting the key areas regarding which employers should be aware when deciding how to set up telecommuting arrangements.

**THE IMPORTANCE OF A WRITTEN TELECOMMUTING AGREEMENT**

The most important thing to keep in mind is that employers should absolutely have WRITTEN telecommuting agreements with employees who work from home or other off-site locations. Having a written agreement will allow employers to avoid some of the common pit-falls involved in telecommuting arrangements (discussed in more detail below), or at least have a written agreement to fall back on when there are questions raised.

**DEFINING AND TRACKING “HOURS WORKED” FOR TELECOMMUTING EMPLOYEES**

- Non-exempt telecommuting employees’ hours are treated the same as on-site nonexempt employees.
- **Keeping track** of the hours can be harder.
• The federal DOL has a specific provision that applies to telecommuting employees. If the employer and the employee have a written agreement regarding what constitutes hours worked, that can dictate the calculation. It is a good idea to have such an agreement for many reasons, but especially because it can dictate that most types of at-home downtime/personal time is not compensable.

• Keep in mind, though, that waiting time IS compensable, even if done at home. If the employee is ready and willing to work, but waiting for an assignment to come through, that is compensable, EVEN if the employee is working from home.

• As with on-site employees, preliminary/postliminary activities are not compensable when they are before/after integral activities. There is a gray area with significant importance for telecommuting employees, though — what about booting up a computer or starting up other equipment at home? Does starting the computer at home prior to official “start” time, then going to put in a load of laundry, start the clock running? It is very important for an agreement to specify WHEN the employee should log in and/or start up equipment.

• What about when equipment goes down (e.g. internet connection is temporarily interrupted)? There is no clear answer, but if the employee has supplied his/her own equipment, there is a better argument for not compensating him/her. If the system goes down completely, and the employer tells the employee not to work any more hours that day, time would stop being compensable.

• On-call but not actively working time raises specific problems for telecommuting employees. Courts typically look at necessary response time and location restrictions (e.g. if an employee needs to be available within 5 minutes and must wait at a computer, this is similar to waiting time, which is compensable; if an employee has 1 hour to respond and may go anywhere, it is probably not compensable). It is best, therefore, to spell this out very clearly for employees.

• Basic home/work travel time is not compensable, and even traveling from home to first client is generally not compensable if it is in same metropolitan area. There is no precise Department of Labor standard, however, so this is a gray area. If a telecommuting employee works from home in the morning and then comes into the office for the remainder of the day, the travel time probably does NOT stop the clock for the compensable workday. Also, keep in mind that use of cell phone and Blackberry in car for ANY employee can make that time compensable.

• Remember that lectures, meetings, and training ARE compensable work time.

COMPENSATION PIT-FALLS

• Employers often want to set up piece rate or project-based payments for telecommuters. They still must pay minimum wage and overtime, though, so it is important to know the
number of hours worked. Many employers think that an “alternative” work arrangement, such as a work-at-home project-based employee, alleviates need to track hours worked, but that is NOT the case. Thus, if a project takes longer than anticipated, all time must be compensated, even if it is more than the negotiated piece rate.

- **Nondiscretionary bonuses** must be included in calculation of regular rate and overtime pay. Many employers forget to do this, and it must be done regardless of whether employees telecommute or work on-site.

- In most cases it IS permissible to pay telecommuting employees at different rates (e.g. lower rate of pay for travel time than for active work time). These must still meet minimum wage, however, and must calculate regular rate and overtime pay appropriately. This should be incorporated into the telecommuting agreement and employers should ensure that employees understand which pay scale applies to different types of work, and employees must document this very carefully.

- **Meals and rest breaks** are dictated by state law, just as they are for non-telecommuting employees.

- The most common pitfall is not to **monitor payroll and timesheets** carefully for telecommuting employees. This is a big mistake, especially because telecommuting employees may have MORE problems, such as on/off clock time throughout the day as they attend to personal/at-home needs.

- It is best to require **written manager approval** prior to working outside of already-approved schedule, even though the employee has a lot of flexibility, as changing the schedule on a regular basis without the employer’s knowledge can lead to compensation difficulties.

- Have **IT monitor system** to ensure that employee is not on electric system outside of scheduled/approved hours. It is easier for a telecommuting employee to log on at 8pm to check a few things, but for a nonexempt employee, this restarts the clock on compensable time, so the employer must know about it. This raises potential non-wage and hour issues, such as privacy concerns about monitoring the employee’s computer system when it is based at home, but if the employee is logging in strictly to a work-based system, such problems can likely be avoided. The employer might have a tendency to say “what I don’t know can’t hurt me.” That is NOT the case, however, if the Department of Labor gets involved and hits the employer with large fines and penalties. It is better for the employer to pay correctly in the first place.

**CHOICE OF LAW ISSUES**

- When an employee **telecommuting across state lines** has a legal claim, it is often difficult to figure out which state law applies – in fact, I looked into this issue for one of my clients recently. Is it the law where the company is based, where the employee is
Arguments can often be made that many states’ laws apply, making it difficult to favor one over other in absence of written agreement.

**TOP LINE**

- Employers should have **written agreements** with telecommuting employees. Such agreements should include: timekeeping requirements, when and where employees should work, what constitutes hours worked, rate of pay, choice of law, etc. It would also be prudent for employers to include at-will disclaimers in such agreements.
- Employers should **monitor, follow-up and audit** hours, locations, etc. of telecommuting employees. Still require strict timekeeping records, even from off-site employees.

**Related Practices**

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