

Introduction

A growing number of employers are allowing their employees to choose whether to work at home or from an alternative worksite. Because the practice often involves computer and telecommunications technology, it is known as **telecommuting** (also referred to as telework, virtual, and working remotely). Reports indicate that almost 11.1 million employees telecommuted as far back as 1997. Today, more than two-thirds of Fortune 1000 companies have telecommuting programs in place. The volume of telecommuters is expected to double over the next 10 years.

Before implementing a telecommuting policy, management should consider the benefits for and concerns of both the employer and the potential telecommuting employee. In addition, the legal consequences of telecommuting must be considered.

Companies should formulate policies or guidelines that define criteria for evaluating positions eligible for telecommuting. Obviously, some employees will always be needed in an office to support co-workers or coordinate telecommuters in the field. Clear criteria can help employers determine whether telecommuting is right for them and distinguish which positions are suitable for home performance and which should remain traditional office or workplace jobs.

Note: For further information regarding flexible options in the workplace, see **Workplace Flexibility**.

Benefits for Employers

Employers offer alternative workplace arrangements for many reasons. Based on a number of recent studies and surveys, an employer considering telecommuting as a workplace option might expect the following benefits:

- **Improves the quality of work and increases productivity.** Employees concentrate on the project itself with less distraction from the office environment.
- **Improves morale and reduces stress** giving employees more options to balance work and family demands.
- **Saves hours of commuting time**, allowing the employee to spend more time on projects, completing them with a higher quality of work in a timelier manner.
- **Employer/supervisor can concentrate on the outcome and quality of the project at hand** rather than tracking hours an employee is present in the actual office. This enhances teamwork and communication in the office.
- **Mental health concerns are alleviated through telework opportunities.** The employee reduces the frustration and fatigue resulting from commuting to the official office.
- **Provides a valuable tool for recruitment of new employees** as well as retention incentive for experienced employees to continue their careers instead of opting for retirement.
- **Environmental issues**, including traffic congestion, air quality, energy issues, and limited parking availability, are significantly improved by reducing commuter traffic via telecommuting programs.
- **Expands the location and availability of employees**, thereby increasing access by the customer. For instance, in large metropolitan areas it may be difficult for customers to get to a central office “downtown”; however, telework centers located in surrounding suburbs are easier to access.
- **May be used to provide services when the duty station office is closed.** For example, after a natural disaster, inclement weather, etc.
- **Extends employment opportunities to people with disabilities**, including employees who

have partially recovered from work-related injuries who can perform their job from a remote location.

- **Accommodates employees who have temporary or continuing health problems** or who might otherwise have to retire on disability.

Jobs Adaptable to Telecommuting

Employers should consider their own circumstances and requirements to determine the likelihood of successfully implementing telecommuting in their organization. What job categories would be appropriate for telecommuting? What job functions or tasks can be accomplished away from the office? As a general rule, if an employee can close the office door for up to eight hours and effectively accomplish the job without the need for face-to-face contact with other employees, that employee's job is adaptable for telecommuting.

Job tasks that have been proven to be suited to telecommuting include the following:

- Tasks that are easily measured. Jobs that have countable or observable output with obvious beginning and ending points are a better choice than those that are not as clearly defined. This would include unit-oriented jobs such as data-entry jobs, as well as project-oriented jobs such as accounting, auditing, designing, and writing.
- Tasks that require very little unscheduled face-to-face contact. Most of the employee's contacts can be done via telephone or electronic mail or can occur at scheduled meetings. The job should require few, if any, critical face-to-face meetings.
- Tasks that do not require frequent access to files, equipment, or supplies that cannot easily or economically be moved to the employee's home or other telecommuting site.

Establish Thresholds

The first thing an employer should do is to establish threshold requirements that employees must meet before they can even apply for telecommuting arrangements. Some criteria to consider are as follows:

- **Disciplinary Record.** Because it is more difficult to monitor employees who work at home, trust is crucial to an effective telecommuting arrangement. Employees who have had recent disciplinary problems have not earned that trust and probably should not be allowed to apply for telecommuting privileges.
- **Length of Employment.** Individuals who have worked for an employer for less than a specified period of time, such as one year, should be ruled out. The employer probably will not know enough about new employees to assess whether they can be trusted, and the employees probably will not know enough about the organization's inner workings to function effectively at home.

Employers may wish to develop a list of positions that *per se* are ineligible for telecommuting. If an individual's request to perform one of those jobs at home is denied, the existence of this list will make it clear that the request was denied because of the nature of the employee's position, not because of the employee's gender, age, etc.

Selecting Between Applicants

When selecting between applicants, an employer should have already established general prerequisites that will determine which positions and employees would be most suitable for telecommuting. Employers also need to establish basic criteria for choosing among eligible applicants.

These factors may include the following:

- Specific requirements of the employee's job.
- The amount of interaction with supervisors, other employees, customers, vendors, etc., required.
- The necessary amount of day-to-day supervision.
- The company's business, both current and projected.
- Availability of other qualified personnel on site.
- The duration of the requested telecommuting arrangement.
- The reason for the request (medical, personal, etc.).
- The nature of the position (full-time or part-time).

In articulating the criteria, an employer should make clear that the organization reserves the right to determine how it will weigh each factor.

Making and Documenting the Decision

While it is important to establish the criteria for deciding who can telecommute, it is equally important to determine who will apply those factors. Effective implementation of a telecommuting policy requires input from both the employee's manager and the organization's senior human resource professional.

Having the would-be telecommuter's manager approve the arrangement is desirable to ensure that the setup makes tactical and strategic sense. The approval of the senior HR professional helps to guarantee consistency in the application of the criteria.

The basis for whatever decision is made should be documented, for a number of reasons. First, the documentation can help to promote consistency. In the absence of records, inconsistencies are inevitable. Second, documenting the nondiscriminatory reasons for treating employees differently is important. If an employee claims to have been unlawfully denied a telecommuting arrangement that was offered to another employee, the employer can use the documentation to show the lawful factors that distinguish the two situations.

Finally, documentation may be helpful when an organization denies a request for telecommuting as an accommodation for a disability. Although an employer can make a strong argument that telecommuting is not a reasonable accommodation, it will be less convincing if the organization has allowed telecommuting for employees without a disability. However, if the documentation clearly shows the business reasons for allowing employees to telecommute and if those reasons are not present in the case of an employee with a disability, the employer will be in a much stronger position.

Terms and Conditions of Work

Upon deciding to permit telecommuting, employers should provide employees with a memo explaining the terms and conditions of the arrangement. Although the organization's telecommuting policy should generally address these conditions, the memo for each employee should be more specific.

Some terms and conditions that the memo should address are provided in this section.

Right to Discontinue

The memo should make clear that the organization reserves the sole discretion to terminate the

telecommuting relationship at any time. Even if an employer has the right to terminate an employment relationship at-will, the employer may risk creating a legal claim by failing to make clear the at-will nature of the telecommuting relationship.

Trial Period

An employer may wish to subject the telecommuting relationship to a 90-day trial period. This would be similar to the introductory period at the beginning of most employment relationships. Although not legally necessary, as a practical matter the telecommuting trial period should give the employer an opportunity to focus closely on whether the relationship works.

The employer also should make clear that the employee's successful completion of the trial period does not restrict the employer's at-will right to terminate the telecommuting relationship at a later date. The employer's failure to expressly state this may result, by negative implication, in its waiver of this right.

Wage and Hour Issues

One of the biggest risks in telecommuting involves the recording of hours worked. Simply put, an employee can claim to have worked more hours than actually worked.

Employers should have a general idea of how long a telecommuting employee will need to complete an assigned task. However, an employee who works with above-average speed may be able to charge an employer for time in excess of that needed to complete the work.

A related risk is that the employee will accrue substantial overtime. Employees subject to the Fair Labor Standards Act's wage-and-hour requirements must be paid one and-a-half times their regular hourly rates for all hours worked over 40 in a week.

To minimize the chances of having to pay excessive overtime compensation, employers should require that telecommuters keep track of the hours they actually work per week and submit weekly time records. If an employee submits time records and later claims to have worked overtime in excess of the hours noted on the records, the claims will be suspect.

The employer also may wish to make it clear that an employee who telecommutes cannot work more than 40 hours in a given week without written or electronic permission from a supervisor for that week. To ensure that the employee does not work more than the agreed-upon number of hours, the employer should review time records regularly.

Because the law defines **employ** as "suffer or permit to work," an employer must compensate a telecommuter for unauthorized work if the employer allowed or acquiesced in the work.

Finally, the employer may wish to require that the telecommuter sign in and out with a supervisor by telephone, email, or other means. Employees who use a computer could be required to track time worked through computer-generated time reports that show log-on and log-off times. This not only may help in terms of wage-and-hour issues but also should reinforce the nature of the supervisory relationship, even if there are no face-to-face interactions.

Equipment

Most employees who telecommute will need the use of a computer and related equipment and services. This obviously raises the issue of who pays for the hardware, the software, and any special

monthly charges. These issues should be resolved up front. If the employer provides equipment to the telecommuter, the employee should be required to promise, in writing, to return the equipment upon request or automatically upon termination. The agreement also should provide — to the extent permitted by applicable laws, which vary from state to state — that the employee's failure to return the equipment at the agreed-upon time constitutes authorization for the organization to withhold wages otherwise due.

The employer also may wish to restate in the memo with greater specificity what already should be in its general search policy: The organization reserves the right to monitor any documents or messages sent, received, or stored on the employer's information systems. This specific reiteration for telecommuters is recommended to debunk any increased expectation of privacy that the employee may have simply because some or all of the hardware, software, or documentation is located within the residence.

Finally, telecommuting obviously creates greater risks in terms of unauthorized access and/or use of confidential information. Telecommuters should be required to sign a special confidentiality agreement that covers access, use, and dissemination of confidential information.

Statutory Notices

Under federal and state laws, an employer must post certain abstracts of statutes in the place of employment. Some laws specify that these notices must be posted not only at an employer's main office but also at each worksite.

For purposes of some posting requirements, a telecommuting employee's home may constitute a separate worksite. Yet it is hard to imagine that any employee would not object to having a Family and Medical Leave Act notice, for example, posted in the living room. While this may seem like a minor technical issue, it can have significant consequences in terms of the applicable statute of limitations. If a notice is not posted where it should be, the period for filing claims may be unlimited.

The memo that the employee receives upon the commencement of the arrangement should make clear where the statutory abstracts are to be posted and should remind the telecommuter to review them when on the company's physical premises. For this and other reasons it is recommended that the employer consider requiring that the employee be physically present at the employer's worksite on a regular basis, whether it be weekly, monthly, or quarterly.

Promotional Opportunities

An employee who requests the option to telecommute later may complain about feeling left out of the career advancement loop. Because an employee who is not physically present at the worksite has less contact with supervisors, the employee may be less likely to be considered for a vacant position. Employees should be told in the memos that telecommuting limits the potential for promotional opportunities. They also should be told that the burden is upon telecommuting employees to come to the primary worksites to see if vacancies have been posted.

Legal Concerns

A policy should contain guidelines to limit the organization's legal risks and the employer should follow the guidelines if telecommuting is put into practice.

Occupational Safety and Health Administration

Employers are required by law to maintain a safe workplace for employees, even if it is at home. Based on recent policy announcements, the Occupational Safety and Health Administration (OSHA) generally will not inspect, nor require employers to inspect, the home worksites of employees engaged in telecommuting. However, if employees are engaged in manufacturing or other physical activities at home in the interest of their employers, which may pose safety or health hazards to them (for example, making lead molds), then OSHA may seek to inspect the work areas upon a complaint. In any event, employers subject to recordkeeping requirements must record the occupational injuries and illnesses of all home workers and may need to take feasible measures to comply with relevant OSHA standards at least to the extent that they do not involve controlling the worksite.

Workers' Compensation

Another key legal consideration in telecommuting is workers' compensation. An employee who is injured while working at home may be eligible for workers' compensation, even though the employer has no effective control over the conditions of the employee's home.

Worse yet, the employee may claim to have been injured while telecommuting, even though the injury occurred while out of the home or not when working. At the very least, this is an issue of fact for a workers' compensation referee.

However, most telecommuting work is sedentary so it is unlikely that an employee will be injured while working at home or that an allegation that the employee was injured while doing so will be credible.

When an employee has been injured while telecommuting, it is unlikely that the injury will result in total disability. Most telecommuting intrinsically is light duty, at least in terms of the physical demands.

To minimize the workers' compensation risks an employer should require that an employee notify a designated manager immediately if the employee is injured at home. While this will minimize the risk, it will not eliminate it. Again, it comes down to a matter of trust.

In addition, the employer may wish to inspect the employee's home office to ensure that it is an ergonomically healthy environment and preclude the employee, at least on paper, from changing the environment without the employer's permission. Of course, any visitor to the employee's home must give due regard to the telecommuter's privacy rights.

Finally, as part of the pretelecommuting arrangement, an employer should secure a release from the employee allowing the employer to come in and inspect the employee's worksite immediately after any accident or injury. While such actions will not stop all fraudulent claims, they will help employers to better address such claims.

Fair Labor Standards Act

Telecommuting policies and procedures must remain within acceptable limits of federal and state wage-and-hour laws. The regulations do not contain any unique requirements or exceptions for telecommuters. Wage-and-hour requirements that apply to on-site employees also apply to off-site employees. If an employee is not exempt from the Fair Labor Standards Act (FLSA), the employer still has the obligation of maintaining time records for the employee, as minimum wage and overtime restrictions are still applicable. This may be done by having the employees fill out time sheets or log

on and off a computer or telephone at the beginning and ending of their work hours. Employers concerned about potential exaggeration of time records should develop methods for verification.

When establishing a system for evaluating the productivity of exempt or salaried employees, employers must take care not to compromise the employees' exempt status under the FLSA. The system should not undermine the fact that they are paid on a salary basis.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) requires employers to offer reasonable accommodation for qualified applicants and employees with disabilities. Reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job, or gain equal access to the benefits and privileges of a job. According to the Equal Employment Opportunity Commission (EEOC), allowing an individual with a disability to work at home may be a form of reasonable accommodation.

Although the ADA does not require an employer to offer a telework program, if an employer does offer telework it must allow employees with disabilities an equal opportunity to participate in the program. An employer may be required to waive certain eligibility requirements or otherwise modify its telework program for someone with a disability who needs to work at home. For example, an employer may generally require employees to work at least one year before they are eligible to participate in a telework program. If a new employee needs to work at home because of a disability, and the job can be performed at home, the employer may have to waive its one-year rule for this individual.

If an employer does not allow employees to telecommute, changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying the workplace policies. Alternatively, the employer may select any effective accommodation, even if it is not the one preferred by the employee.

Reasonable accommodations include adjustments or changes to the workplace for the ease of comfort of individuals with disabilities, such as the following:

- Providing devices or modifying equipment.
- Making workplaces accessible (installing a ramp).
- Restructuring jobs.
- Modifying work schedules and policies.
- Providing qualified readers or sign language interpreters.

An employer may provide an alternative method of reasonable accommodations, or a combination of them, to permit an employee to remain in the workplace. For example, an employee with a disability who needs to use paratransit requests to work at home because the paratransit schedule does not permit employee to arrive before 10 a.m., two hours after the normal starting time. If this may be coordinated with the paratransit schedule, the employer may allow the employee to begin the work shift at 10 a.m., rather than granting the request to work at home.

The ADA recommends an employer determine an employee's need to work at home through a flexible, interactive process between the employer and the employee. Initially, the employee must request to work at home by notifying employer that a medical condition interferes with employee's ability to do the job. Then, the employer and the employee should conduct an open discussion detailing why the employee needs to work from home, the employee's medical condition, available accommodations, and all reasonable options. The employer may request information about the

employee's medical condition (including reasonable documentation) if it is unclear whether the disability of the employee's is within the parameters of the ADA. As the dialogue continues, the employer and the employee must determine whether a particular job may be performed at home. First, the employer and the employee should identify and review all of the essential job functions (that is, those tasks that are fundamental to performing a specific job). Second, the employer and the employee should determine the feasibility of working at home, including the employer's ability to supervise the employee adequately and whether any duties require the use of certain equipment or tools or require face-to-face time that cannot be replicated at home. If the employer determines that some job duties must be performed in the workplace, the employer and the employee must consider whether working part time at home and part time in the workplace will meet their needs.

The frequency an employee with a disability may work at home is only to the extent that the disability of the employee necessitates the reasonable accommodation. As part of the interactive process, the employer should discuss with the employee the nature of the disability and reach an agreement meeting both of their needs. Not all persons with disabilities want to work at home and not all jobs can be performed at home. However, allowing an employee to work at home may be a reasonable accommodation if the disability of the employee prevents the employee from successfully performing the job on site.

Insurance and General Liability Issues

Before implementing a telecommuting policy, an employer must determine how to handle certain insurance issues. Work injuries and workers' compensation have already been discussed. The employer and the telecommuter should consider other insurance and liability issues before telecommuting begins. For example, it needs to be determined who will be responsible for theft or damage to equipment. Will it be the employee's obligation to provide insurance coverage for such incidents or will the organization provide the insurance coverage? Likewise, who shall provide insurance coverage if third parties are injured at the telecommuter's home? It is unlikely that injuries to individuals at the telecommuter's home for social or personal reasons will be the employer's responsibility. However, injuries that are related to the telecommuter's work or equipment may be found to be the employer's responsibility.

Note: Preventive steps should be taken to lessen the chance of liability and insurance concerns. The employer and the employee should understand from the beginning where the liability for each begins and ends in the working relationship.

Zoning

Local zoning codes may prohibit home-based work at the telecommuter's home. Employers should ensure that zoning codes permit home-based work at the employee's location before investing time and equipment in setting up the employee's residence for work.

Telecommuting Written Agreement

To clarify expectations and obligations, employers and employees should enter into written agreements covering telecommuting arrangements.

Important subjects for an agreement would include the following:

- The employee's coverage for workers' compensation while working at the alternative jobsite.
- The employer's (or employee's) provision of necessary equipment.

- The maintenance of the employee's alternative workspace to the same standards as required for the on-site office. The employer may retain the right, subject to reasonable notice, to inspect the alternative worksite during scheduled work hours.
- The employee's responsibility to secure any equipment provided by the employer.
- Responsibility for the cost of utilities.
- Clarification of the employer's policy regarding dependent care during work hours.
- The employee's ability, accessibility, and/or flexibility for and the location of meetings.
- The employee's duty to make reports to the employer's office or to report in periodically.

Contact Information

Equal Employment Opportunity Commission

www.eeoc.gov

Job Accommodation Network

www.jan.wvu.edu