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Legal Best Practices Magazine

Employers Beware: Legal Ramifications of Telecommuting

By Sheri D. McWhorter, J.D., SPHR

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Sheri D. McWhorter

As gas prices rise, so do the number of telecommuters, employees working from home rather than from the employer's worksite. And so, too, does the potential legal liability for unwary employers implementing telecommuting arrangements in their workplaces.

The lurking legal minefields associated with telecommuting span a wide array of topics, from concerns over the confidentiality of the employer's trade secrets and proprietary business information, to potential wage and hour and overtime issues, to employee safety and job related injuries, to possible employment discrimination issues. Although an exhaustive discussion of the legal ramifications associated with telecommuting is well beyond the scope of this article, here we will give a brief overview and touch upon as many as possible so that employers may benefit from heightened sensitivity to these potential trouble spots.

Proprietary Business Information and Trade Secrets

Employers implementing telecommuting arrangements list data security high on their list of concerns. Employees working from home may have sensitive information belonging to the employer stored on the hard drive of the employee's home computer or easily accessed through an unsecured network connection. Concerns range from protecting confidential information from the prying eyes of housemates and family members to possible theft and unauthorized dissemination of the data by the telecommuting employee. Employers are well-advised to develop a comprehensive data security policy for telecommuting employees, to train employees on the policy, and to vigilantly monitor compliance.

Wage and Hour - Overtime Issues

With more non-exempt employees joining the telecommuting ranks, it is imperative that employers establish a mechanism to track the hours actually worked by the telecommuting employee. Whether an employee is entitled to overtime is determined based upon the actual job duties of that employee, not by where the employee is performing the work. Where an employee's job duties cause the employee to be classified as non-exempt under the Fair Labor Standards Act (FLSA), the employer is legally required to pay the employee for all hours worked. Where the employee works more than 40 hours in a single workweek, the employee must be paid overtime, even though that work may have been performed from the

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employee's office at home, or on the employee's laptop or PDA while the employee is sipping coffee at Starbucks. Wage and hour lawsuits, particularly class action lawsuits, are being filed all over the country with employees seeking overtime compensation for hours worked at home and other locations away from the employer's workplace. To avoid liability for substantial overtime payments, employers must develop and uniformly apply a method for tracking and accounting for all of the hours actually worked by telecommuting employees.

OSHA – Home Office Safety

The Occupational Safety and Health Administration of the United States Department of Labor (OSHA) has stated in an advisory opinion that it will not hold employers ultimately responsible for ensuring telecommuters are maintaining safe home offices. Likewise, OSHA will not impose a duty upon employers to inspect the home offices of telecommuting employees. However, because of workers' compensation concerns, discussed below, some employers choose to require telecommuting employees to agree to periodic employer inspections of their home work area.

Workers' Compensation – Work Related Injuries at Home

Florida law provides that an employee who is injured while working from home will be covered under workers' compensation so long as the injury arose out of or is related to the employment and the injury occurred in the course of employment. Knowing this, employers often express concern over possibly fraudulent workers' compensation claims being made for home office injuries. Such claims are often difficult to defend, since where there are no witnesses to the accident, the employer is often left to rely solely upon the employee's version of how the accident occurred. As a result, many employers opt to retain liability insurance in addition to workers' compensation insurance so that where an employee is injured but the injury is not covered under workers' compensation, the employer may still enjoy protection under its liability insurance policy. The liability policy may also prove useful where a third party is injured, such as a visitor to the employee's home office.

The Americans with Disabilities Act (ADA) – Telecommuting as a “Reasonable Accommodation”

Telecommuting may be an attractive alternative for those employees who, because of a disability, are unable to work in a traditional office setting. Although telecommuting as a “reasonable accommodation” is not specifically addressed in the ADA, a number of courts have suggested that employers must not automatically rule out telecommuting during the interactive dialog between the employer and the disabled employee to identify a reasonable accommodation. Where an employer does offer a telecommuting option to its employees, the employer cannot discriminate against employees with disabilities when selecting who may participate in the program.

Conclusion

Employers considering implementing a telecommuting policy and/or program are strongly advised to seek guidance from appropriate legal counsel.

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