



LIEBERT CASSIDY WHITMORE

**CALIFORNIA SOCIETY OF
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CONFERENCE**

**Your Remote Work Policy –
Critical Now More than Ever**

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Your Remote Work Policy – Critical Now More than Ever

Agenda

- Introduction
- Eligibility Factors
- Teleworking Policies and Agreements
 - Oxnard Union High School District (2022)
- Legal Issues Arising From Teleworking
- Best Practices

Introduction

- “Remote” Workforce
 - Employees who are teleworking
 - Full-time, part-time, or as needed
- “Hybrid” Workforce
 - Any mix of employees teleworking and in the office
 - Some teleworking employees, some in-office employees
 - Full-time, part-time, or as needed

Introduction: Where Are We Today?

- Various surveys
 - 70-74% of employers anticipate allowing some, if not all, employees continue to work remotely after COVID-19
 - 82% of employers anticipate having more flexible remote work policies moving forward
- Employee attitudes towards remote work bolster the support for these trends
 - 72% of people stated that they would prefer to work away from the office at least two (2) days a week
 - ~33% of employees stated that they prefer to never go into the office at all

Introduction: Benefits of Teleworking

- Employee recruitment & retention
 - “Employer of choice”
 - Attracts candidates
 - Reduces turnover
- Increased employee productivity
- Potential for cost savings
 - Reduces absenteeism
 - Less office space needed

Introduction: Benefits of Teleworking

- Increased commitment & engagement
 - Higher job satisfaction
 - Millennials’ desire for flexibility in work
 - Succession planning considerations
 - Housing cost savings
- Decreased stress

Introduction: Costs of Teleworking

- Cultural & engagement issues
- Loss of face-to-face collaboration
 - Lack of camaraderie
 - Loss of mentorship opportunities
 - Loss of loyalty, likely for newer employees
 - Potential issues with communication
 - Remote work “fatigue”
- Potential substantial investment
 - Cybersecurity
 - Strain on IT resources

Eligibility Factors

Eligibility Factors

- Both exempt & non-exempt employees can telecommute/work remotely
 - FLSA considerations for non-exempt employees: Overtime, Tracking hours.
- Represented vs. non-represented
 - Eligibility for remote work may be a subject of bargaining
 - Discuss with legal counsel
- Teleworking not logical for all positions, Work must be conducive to remote work
 - Maintenance aide vs. IT tech
 - Administrative assistant vs. analyst
- Review essential functions

Eligibility Factors

- Years of service
 - Post probationary period
 - After minimum number of years of service
- Clean performance record
 - Set performance standards before employee can be considered eligible for remote work
 - For example:
 - 1 or 2 cycles of satisfactory performance/meets expectations; or
 - 1 cycle of exceeds expectations.

Teleworking Policies and Agreements

Oxnard Union High School District (2022)

Oxnard Union High School District (2022) PERB Decision No. 2803E

- The school district included in their MOU with the Union an option to continue allowing employees to work from home.
- The school district was required to negotiate to impasse regarding the decision to return to in-person work.

Key Components of Teleworking Policies

- Preserve management rights
- Prohibitions
 - “Off the clock” work
- Term
 - Limited term and extension only by written agreement
- Work schedule
- Health and safety of the remote workplace
- Acknowledgement and agreement to comply with policy
- Signatures of employee and agency

Setting Expectations for All Employees

- Job duties and expectations apply to all employees
- Standards expected of employees should provide the following:
 - Reflect actual job duties
 - Measure necessary skills for the position
 - Be consistently applied regardless of where the employee works
 - Be identified at the outset of employment
- Communicate expectation that job standards continue to apply to teleworking employees at outset of teleworking arrangement

Setting Expectations for All Employees

- Quality of work, including accuracy
- Expectations regarding the following:
 - Meeting deadlines
 - Communicating with supervisors
 - Tangible goals of assignment
 - Work product
- Increase electronic, phone, and video communications – make it the norm

Communication and Oversight

- Communicate expectations to employees early and often
- Staff meetings
- One-on-one meetings/regularly check-ins
 - In person or via video conferencing
- All-staff memos
- Supervisor memos to employees
- Performance evaluations
 - At least annually

Communication and Oversight

- Supervision should be occurring regularly
- Daily or multiple times per week, depending on nature of position
- Reasonable monitoring
- Communicate
 - Discuss the need for correction
 - Recognize exemplary performance
- Document
- Follow through

Discipline

- Discipline when necessary
- Face-to-face meetings if possible
- Document disciplinary action
- Implement progressive discipline if possible
- Give the employee the opportunity to respond
- If employee is represented, ensure employee made aware of right to include representative in meeting

Discipline

- As an alternative or in addition to discipline, where appropriate, consider the following for employees who telework:
 - Rescind the telecommuting/remove work agreement
 - Modify the arrangement
 - Limit the amount of time an employee can telecommute/work remotely
 - Establish a set time frame for remote work

Other Supervisory Skills

- Be a leader; in-person and via video
- Be clear, be honest, be transparent
- Facilitate collegiality between coworkers
- Help employees feel comfortable on all platforms

Legal Issues Arising From Teleworking

Legal Issues Arising From Teleworking

- Remote and hybrid work issues in lawsuits
- FLSA issues
- Workers' Compensation: "workplace" injuries
- Reimbursement for teleworking expenses
- Principal place of business

Legal Issues: Remote and Hybrid Work in Lawsuits

- Discrimination claims
 - Is denial of a remote work arrangement an adverse employment action?
- Failure to accommodate a disability claims
 - Is remote work a better accommodation than a leave of absence?

Legal Issues: FLSA

- Clocking in & out
- Overtime
- Use of electronic devices “after-hours”
- Meal and rest breaks (provided per contract)

Legal Issues: FLSA

- Accurate timekeeping for non-exempt employees
 - Telework schedule agreements
 - Ensure employees have access to and training on electronic timekeeping
 - Enforce existing policies regarding:
 - Overtime and approval of overtime
 - Off the clock work
 - Timekeeping
 - Uniformly enforce applicable policies for employees and supervisors
 - Maintain records related to enforcement

Legal Issues: FLSA

- “On-duty” time outside of normal business hours is compensable even if “off the clock.” Responding to emails from home on a personal device can constitute a form of “remote work.”
- Considerations for “after-hours” remote work:
 - FLSA, overtime pay
 - California Public Records Act disclosure
 - Workers’ compensation.

Legal Issues: FLSA

- Factors for determining whether an employee is “on-duty”:
 - Geographic restrictions on movement;
 - Required response time;
 - Nature of employment; and
 - Extent to which work impacts personal activities

Legal Issues: FLSA

- 29 C.F.R. § 785.11-12 (“Suffered or Permitted” Standard)
- 29 C.F.R. § 790.6(a) (“Continuous Workday Rule”)
- To establish a prima facie case for a wage claim, the employee or group of employees must establish that the employer knew or had reason to know of work performed by employee(s)
- An employee can establish that the employer had constructive knowledge of work performed by various means, including:
 - Employee responding to emails earlier in the morning and late in the evening
 - Employee reported time not corresponding to volume of work performed

Legal Issues: Workers' Compensation and "Workplace" Injuries

- Remote work spaces must be conducive to working
 - May be part of eligibility determination
 - Establish a dedicated workspace
 - Provide and enforce safety checklists
- Workers' compensation statute covers all employees, including teleworking employees
 - Injuries occurring at home may still be compensable if they arise out of and in the course of employment
- Seek advice and counsel from workers' compensation legal counsel

Legal Issues: Electronic Communications and Privacy

- California Electronic Communications Privacy Act (Penal Code sections 1546, et seq.)
 - Limits a government entity from being able to search or access information on an electronic device (e.g., smartphone, computer) or electronic information on a network (e.g., email) without a search warrant or court order
 - However, if the government agency is the owner of the device, it does not need to get permission to conduct the search

Legal Issues: Electronic Communications and Privacy

- Communications as Public Records
 - Emails and text messages sent by public officials on their personal accounts that involve official business are “public records” that must be disclosed under the California Public Records Act subject to any exceptions
 - Whether or not sent from personal devices or accounts

Legal Issues: Electronic Communications and Privacy – Agency Security

- Adequate protection software
 - Personal vs. agency-owned devices
 - If working offline, upload and save daily
- Policies regarding confidentiality, acceptable use and data protection
- Work with information technology department

Legal Issues: Reimbursement for Teleworking Expenses

“An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer” (Labor Code Section 2802.)

- Provide notice and opportunity to negotiate reimbursements as part of teleworking policy or be prepared to respond to requests for reimbursement
 - Distinguish between mandatory teleworking and circumstances under which teleworking may be a statewide interest and voluntary teleworking
- Negotiate “reasonable percentage” of covered expenses to reimburse where required

Legal Issues: Principal Place of Business

- When does a remote employee’s residence become a “principal place of business”?
 - IRC Section 280A
 - 1) Used exclusively on a regular basis as the principal place of business
 - 2) A place where patients, clients, or customers meet or deal with the taxpayer in the normal course of business
- Amount of time used for business is a factor
 - Employees who work from home more than 50% of the time with no more than 35 trips per year

Best Practices

Best Practices

- Best practices:
 - Draft telework policies and telework agreement
 - Determine employee eligibility
 - Set standards and communicate expectations
 - Establish and enforce hours tracking system
 - Communicate privacy expectations
 - Enforce safety standards
 - Consider equipment and expenses
 - Safeguard information and data
 - Specify choice of law in contracts and MOUs

Best Practices

- Written remote work agreement should include:
 - Alternative work location
 - Schedule
 - Certification of safety standards
 - Employee's contact information
 - Agency and employee provided equipment
 - Privacy expectations
 - Reimbursable expenses
 - Duration of agreement
 - Notice of rescission for poor performance

Best Practices

- Set standards and communicate expectations
 - Employee subject to the same job responsibilities and standards as all other employees
 - Employee should be available and accessible via phone and email during scheduled hours
 - Working remotely is not a substitute for child or dependent care
 - Employees should understand communications made while working remotely may still be subject to disclosure

Best Practices

- Enforce safety standards
 - Consider requiring photograph of alternative work location
 - Require address and description of workplace
 - Provide a safety checklist
 - Consider a safety compliance inspection

Best Practices

- Safeguard information and data
 - Require protection software
 - Use a secure server
 - Apply agency policies
 - Information security
 - Software licensing
 - Internet access
 - Data privacy
 - Daily uploads

Questions?

Thank You!

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