

Working from Home in the Age of COVID-19 — Answers to 10 Questions Employers Should Be Asking

While working from home, sometimes referred to as “telecommuting,” has been around for a long time, it has become a priority as more employers close their offices, factories, shops, etc. in response to the coronavirus (COVID-19). This article will answer some key questions relating to employees who are asked to work from home. As employers increase the numbers and types of employees who will be working remotely it is likely that issues regarding pay and time worked will increase. Pay practices in particular need to be carefully reviewed and monitored for the remote work force.

What is considered “time worked” when employees work from home?

Pay issues will depend on whether the employee is non-exempt (i.e., entitled to overtime) or exempt from overtime. Many employees currently work from home or other locations without being requested to do so. Federal law requires an employee be paid for all time spent engaged on behalf of the employer. In other words, virtually anything the employee does on behalf of the employer, even if not specifically requested, is likely to be considered “time worked.” This includes routine review and responding to email, text messages, and phone calls, even if any one task is very short. For employees who by virtue of their compensation and job duties are classified as exempt from overtime this is not an issue and will be discussed below. Non-exempt employees whether paid on an hourly or salaried basis require greater attention.

Pay Issues for non-exempt employees.

For non-exempt employees, it is essential that the employee records time spent working and time not working including meal breaks. These employees must be paid overtime and recording hours worked are essential to compliance. This may be further complicated if the employee has children at home because school is closed. Best practices include:

- Consider using a system in which employees punch in and out on their computer.
- If an employee has a regular work schedule (e.g., 8:30 a.m. to 5:00 p.m., with a half hour unpaid break), discuss in advance whether the employee can maintain that schedule while working remotely or what changes to the schedule may be needed by the employer or employee.
- As part of the agreement with the employee discussed above, reaffirm that the employee is entitled to lunch/breaks and that, if lunch is normally unpaid, the employee is not to do any work during that time period.
- Try to anticipate unusual circumstances. For example, if an employee runs out of paper, rather than going down the hall to get more, the employee may have to drive to the store, which not only takes a lot of time but raises additional liability issues.
- Do not forget about expenses. Working at home may require the employee to make purchases that the employee would not make at work. If these purchases are related to work, these should be reimbursed by employers. In fact, in certain states, including California and Illinois, reimbursement is required.

As the remote work process begins for employees who have not worked remotely in the past the employee should submit his/her hours worked to a supervisor daily. If the supervisor has any questions about the time, discuss those with the employees immediately so that issues can be quickly resolved to avoid any delay in processing time for payroll. Employees need to be instructed it is their responsibility to record and report all time worked.

Pay issues for exempt employees.



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Employers need to treat exempt employees who work from home the same as if they were at work: they are entitled to receive their regular salary in any week in which they perform some work. Exceptions include (i) full work-weeks where the employee performs no work; (ii) absences, one or more full-day absences due to personal reasons; (iii) one or more full day absences due to the employee's illness or injury, provided the employer has a bona fide sick pay plan; and (iv) full-day absences due to certain disciplinary actions. The employer should require exempt employees to report any absences that are covered by the foregoing situations. In addition, the same issue relating to reimbursement for expenses applies to exempt employees.

How to apply time off policies for employees who work from home?

Technically, there should be no difference in how such policies are applied. As a practical matter, and from an employee relations perspective, there could be major differences. For example, an employer is allowed to dock time from an employee's paid time off bank for partial day absences. Is the employer going to do that when the employee is taking his/her spouse, child, parent, etc. to be tested for the virus? In addition, the federal legislation under consideration right now has provisions relating to paid leave and expanded FMLA. Therefore, as a best practice employers should:

- Keep up-to-date on new federal, state, and local statutes and regulations.
- Communicate with employees in advance any changes to benefit plans/policies during this time of uncertainty.
- Tell employees how long the changes will be in effect (e.g., continued until further notice; continued for 30 days unless extended by the company; etc.).

What happens if an employee working from home is a member of a collective bargaining unit?

Any changes to terms and conditions of employment need to be negotiated with the union. Since face-to-face meetings may be impractical at this point, the employer should notify the union in writing as soon as possible regarding any changes that are being considered and invite the union to communicate in writing any comments or concerns it may have. These issues should be resolvable through phone communications with union representative and any changes should be memorialized in written agreement.

Are there potential discrimination and ADA issues relating to employees who work from home?

Yes. If employers limit who can work from home, what resources they will be provided and/or what will be required of them, the employer needs to be careful to ensure that those decisions do not adversely impact employees in protected classifications.

In addition, if an employee has been given accommodations in the workplace, those accommodations and/or different/additional accommodations may have to be made to enable a disabled employee to work from home.

How does the employer maintain the confidentiality and security of its information?

The computer, telephone, and software systems the employee has at home may not provide the same level of protection as the employer's systems. In addition, if the employee leaves confidential business information out in the open at home, it may lose its confidential status. Best practices to address confidentiality and security include:

- Have the employee represent that s/he either has a room or area that can be closed off to others, or that confidential information will be kept in a locked cabinet when not being used.
- Have the employee sign a non-disclosure agreement (or amend an existing agreement) in which the employee agrees to take necessary precautions to protect confidentiality of the company's information.
- Provide the employee with a laptop computer that has all of the necessary software protections preloaded on it.
- If the employee loads company software on the employee's home computer, make sure that

is permitted under the company's software license.

Is the employer liable if the employee is injured while working from home?

While the answer to this question will depend on state-specific workers compensation laws, as a general matter, an employee working at home is "working." Therefore, if the employee is injured while working at home, the employer should assume that the injury will be covered. In addition, if an employee who normally drives a company car gets into an accident while using his/her own car while working at home, the employer may still be liable. Best practices for addressing this issue include:

- Talk to the company's general liability, auto, and workers' compensation carrier to ensure coverage is extended and ask for recommendations from the worker's compensation carrier about what the employer should do regarding working from home.
- As part of any agreement with the employee (including the confidentiality agreement discussed above), include a statement in which the employee acknowledges that his/her safety is important and that the employee will take appropriate steps to remove any hazards in or around the area where the employee will be working.
- In extreme cases, employers may even want to inspect the workspace in the employee's home.

What can the employer do to ensure that the employee is productive?

For employees who have not worked from home before, the employer has to accept that the employee will likely be less productive. This is particularly true if the employee (i) does not have colleagues, documentation, or information that is normally available to the employee, or (ii) the employee also has to watch children who are not permitted to go to school. Best practices to keep the employee productive include:

- Make sure the employee brings home manuals, reports, and other material that the employee may need over an extended period of time, even if they are not needed immediately.
- Make sure the employee has or has access to a copier and scanning machine, if that may be required as part of the employee's duties. The employer may even consider providing the employee with this equipment.
- Have regular teleconferences with individuals and groups of employees so that they stay connected and informed. These conferences can also be used for employees to discuss best practices.
- Determine in advance what projects or duties you want each employee to accomplish, recognizing that it might be much harder to accomplish certain duties while working from home.
- Have the employee report on a regular basis (daily/weekly) what the employee has done/accomplished during that time period.

Is the employee legally permitted to work from home?

Remember, there could be zoning laws and association regulations that prohibit the employee from working in his/her home. While one would hope that in this particular time period, such rules will not be enforced, if an employee objects to working from home because it could be unlawful, the employer should ask for documentation supporting the employee's position, but should not require the employee to work from home if the employee is correct.
