



Managing and Supervising the Workforce While Working Remotely

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The COVID-19 outbreak has forced countless employers to change their daily operations with little opportunity to prepare for the transition. Although the practice of working remotely is not new, the expedited conversion from a traditional office model to a virtual office has raised obvious logistical and technological issues. In addition, employers may be facing a number of new issues, particularly relating to the management and supervision of employees.

Employee Hours and Wages

While employers may be accustomed to salaried employees working from home, many nonexempt hourly employees are working from home for the first time. Nonexempt employees that are typically eligible for overtime remain entitled to compensation for all hours worked, including overtime, while working remotely. Without proper oversight, employers may notice an increase in unauthorized overtime hours. To manage overtime compensation while nonexempt employees are working outside of the office, employers should establish a protocol for remote overtime hours. For instance, employers may choose to designate hours during which an employee is expected to work and discourage work or require authorization to work outside of those time periods. In addition, employers should also establish a protocol or remind employees of the ongoing obligation to track and report their time to a designated supervisor or manager. Enabling employee access to time keeping software or systems may help ensure employee accuracy in time keeping while outside of the office.

Even though employees may now be working from home, they remain entitled to the same time for meals and breaks as they are in the office. Under New York Labor Law § 162, employers are to provide employees that work at least 6 hours a day with at least one 30-minute meal break. Employers should continue to provide these breaks even while employees are working remotely. Further, employers should be mindful of the fact that some employees have taken on caretaker roles while working from home which may necessitate some flexibility.

Managing Employee Productivity

While working remotely, employers may struggle to track employee productivity and workloads. Employers may find it useful to implement specific policies and standards regarding employee work product and communications while working outside of the office. Regular telephone conferences or virtual meetings, whether

weekly or daily, may address this issue. Employers may also request that employees provide an accounting of their workday to analyze productivity as employees settle into the work from home system. As employees grow more comfortable working from home, it may be beneficial to consider redistributing tasks and responsibilities based upon specific employee work patterns.

Proactive supervision of employees which may not necessarily have been implemented while in the office, may help avoid legal issues in the future. Although employers are generally permitted to monitor employees' business email accounts and there is no expectation of privacy, employers usually refrain from doing so unless there is a legitimate belief that an employee is misusing their email account for nonbusiness purposes. While working remotely, it is likely that email has become the main method of communication between employees and between employees and clients, and therefore, the value of the reviewing employee emails may have changed. Depending on the nature of the business or specific employee concerns, reviewing employee emails may be a helpful tool in limited circumstances. However, employees should be put on notice of the nature and extent of any email monitoring while working from home. Employers should also confirm that their employee handbooks clearly set forth that the employer has access to communications made through their business email account and in what situations the employer may access those communications. Employers may choose to take this opportunity to revise their email protocols or redistribute existing policies as a reminder to employees.

Harassment and Discrimination Concerns

Harassment and discrimination may obviously occur while employees are working remotely, not just while confined to the office. Given the different mediums through which employees are communicating, both during working hours and while employees are off the clock, it may be difficult for employers to monitor potential issues. However, there are a number of steps employers can take to help prevent and address complaints of discrimination and harassment while their employees are working from home.

Policy Considerations

Employers should already have a comprehensive discrimination and harassment policy and training program in place. However, some may need to amend their policies to include specific information regarding discrimination and harassment that can occur while employees are working remotely. Policies should clearly state that all forms of discrimination and harassment, whether or not they occur at the office, and by any medium, are strictly forbidden. Employers should make clear that discrimination and harassment can occur even when employees are working remotely through various forms of communication which may be less formal, such as text messages, emails, video conferencing, interoffice chats, or social media. Policies should also state that employees are expected to act professionally in all of their business interactions regardless of the setting or form of communication. Employers should also establish a point of contact or multiple points of contact to whom employees may reach out with complaints of discrimination or harassment, and the preferred method of reporting while working from home.

Employee Training Tips

In addition to addressing discrimination and harassment outside the workplace in their discrimination and harassment policies, employers should also revise their training programs for employees to include these issues. Employees should be trained on how to properly communicate with each other when working remotely whether it is through email, text or another service such as Zoom or Microsoft Teams. Employees should also be trained on what types of communication are appropriate which may vary depending on an employer's business. For example, employees should be discouraged from constantly attempting to video conference or call others, particularly during non-business hours, when an email would be sufficient. Constant attempts to communicate via nontraditional mediums during non-business hours (or even during business hours, in some cases) may be construed as intrusive and cause employees or co-workers to feel uncomfortable. Employees should be reminded to maintain appropriate boundaries.

Responding to Remote Discrimination or Harassment Complaints

Responding to a discrimination or harassment complaint from an employee who is working remotely may present a number of unique challenges. Typically, an employee working in an employer's physical location has the option of a face to face conversation with a supervisor or human resources representative regarding a discrimination or harassment complaint. While remote employees do not necessarily have this option, they should still be encouraged to come forward with complaints and designated representatives should make themselves available to timely respond in an appropriate manner to a complainant.

Investigating complaints made by employees working from home will look different than it did previously. Employers generally have less control over their employees' actions when they are not working in an employer's physical workspace. For example, it is much less likely that there exists a witness to an allegation of verbal sexual harassment or any subsequent change in behavior between the parties while employees are working remotely. Since employees are no longer sharing a workspace, an employee may be less likely to instinctively report an inappropriate incident to a trusted co-worker. Without a colleague's encouragement or confirmation, an employee may be less likely to report an incident in a timely manner. For these reasons, employers should remind employees to document any potentially harassing or discriminatory behavior to aid the employer in their investigation.

Workers' Compensation Issues

Generally, employers have a duty to provide their employees with a safe and secure workspace. Under certain circumstances, this duty may extend to employees working remotely. New York Worker's Compensation Law generally covers any injury suffered by an employee "arising out of" the employee's employment duties. Although the employee bears the burden of showing that an alleged injury was sustained while working for the benefit of employer, under certain circumstances, it is possible that an employee may have a viable worker's compensation claim for an injury sustained while working remotely.

Employers should include information regarding employee illness and injury in their work from home policies. Employers may set standards for employees' work areas and equipment even when they are working remotely. Employers can also establish certain safety protocols and best practices that employees must follow regardless

of where they are working. Employees should also be encouraged to document any potential injuries suffered while they are working, regardless of the location where the alleged injury was sustained.

Compliance with the ADA

Just as an employer's obligation to provide safe working conditions for their employees extends to their employees' home, so too does the obligation of an employer to provide reasonable working accommodations for employees with qualified disabilities. Under the Americans with Disabilities Act ("ADA"), an employer must provide employees with qualified disabilities with reasonable accommodations to help them perform their employment obligations. While an employee is working from home, this may include providing employees with special computers or equipment to mitigate issues resulting from a disability.

In addition, the ability to work from home itself may be considered a reasonable accommodation under the ADA depending on a given employee's disability. In the context of COVID-19, some employees may be more vulnerable to the disease than others. Allowing these employees to work from home, even once stay-at-home restrictions are lifted, could be considered a reasonable accommodation for some employees. At the same time, employers must ensure that the work from home policy is not discriminatory in any way, particularly once the stay-at-home restrictions related to COVID-19 are lifted. Employers are already facing complaints of discrimination where some employees were permitted to work remotely before others.

While employers should obviously seek to fulfill requests for reasonable accommodations, employers are still permitted to examine each request to determine whether it is appropriate given an employee's disability. Under the ADA, an employer must engage in an interactive process with any employee who makes a request for a reasonable accommodation. This may include requiring an employee to provide documentation of their disability and how a reasonable accommodation would alleviate an issue. For example, an employer may ask an employee to provide documentation confirming the existence of a particular disability, the ways in which the employee's ability to work may be limited, and the benefits of working remotely. Fear of returning to the office, without any supporting documentation, is generally insufficient to accommodate a request.

In addition, the U.S. Equal Employment Opportunity Commission ("EEOC") recently provided guidance specifically relating to COVID-19. This information can be found at https://www.eeoc.gov/facts/pandemic_flu.html.

If you have any questions concerning employment law related issues, please contact James G. Ryan at (516) 357-3750 or via email at jryan@cullenllp.com, Roxanne L. Tashjian at (516) 357-3704 or via email at rtashjian@cullenllp.com, or Ryan Soebke at (516) 357-3784 or via email at rsoebke@cullenllp.com.

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Practices

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