



Annual Meeting
Meeting Total
20
8

PRINT	JOB
ORDER NUMBER	DATE
VID/HSTI RECONN	CUSTOMER NUMBER
JOB DESCRIPTION	TIME
SALES REP	PHONE

BY KEVIN FRITZ

HOME WORK EQUALS

HOMWORK

HAVING EMPLOYEES LEGALLY AND SAFELY WORK AT HOME REQUIRES EMPLOYERS TO DO PLENTY OF PREPARATIONS BEFORE THE TELECOMMUTING BEGINS.

Working from home. Those three words bring smiles to many employees' faces as they envision the luxury of working away from all the distractions and politics that come with the office package. Then there's avoiding that dreaded commute so many area workers have to conquer.

"People are demanding flexibility, and it is becoming very popular," acknowledges Marilyn Moran, an employment litigation attorney with Baker Hostetler. "They seek a work-life balance."

According to the International Telework Association and Council, the number of employees nationwide who telecommute at least one day per month has increased to more than 24 million. Further, the number of employers offering telecommuting has increased 22 percent, according to Lori Rosen, a workplace analyst, and author of "HR Networking: Work-Life Benefits."

Employers have reason to smile, too, as the benefits add up. Money-FromHome.com, an organization that provides career and job information to people who want to work at home, points out that telecommuters do not occupy company space and do not use company-paid utilities, while usually being more productive than those working in house, reducing the number of employees needed to achieve the same results. Moreover, those same employees are highly motivated to work at home and may work for less money.

Ah, yes, but the grass is always greener until you start taking a closer look and discover the weeds. Telecommuting employees also take the chance that they may be passed over for promotions, that their professional skills may deteriorate and that they could become alienated from the workplace.

Also, employers have a more difficult task trying to manage telecommuters and keeping themselves out of court. As

such, the legal pitfalls must be understood, or the whole grand idea of a happy employee void of his or her commute, as well as a joyous employer saving money, can disappear in a single lawsuit.

For starters, there's insurance coverage, along with network security, the Fair Labor Standards Act, workers' compensation and the employee vs. independent contractor designation. The real quandary is that the book has yet to be written on telecommuting; there is no manual to follow.

It's a quagmire of ambiguity.

"There are no special designations or guidelines from the [U.S.] Department of Labor for telecommuting," says Susan Maupin, an employer-and-law attorney with Akerman Senterfitt in Orlando. "Employers are finding themselves with some unusual issues, so it is essential to have a clear understanding of expectations."

FirstMonday asked four local attorneys who specialize in employee law to address some of the legal issues employers should understand before they consider jumping on the telecommuting bandwagon. Indeed, there's a lot more to consider than just the bottom line.

TRACKING TIME

One of the biggest issues an employer must deal with is the number of hours that employees are working at home. Telecommuters at times work hours that are different than those in the office workplace, but that doesn't necessarily mean they are working overtime.

"There should be a clear policy [on] what the employee's expected hours will be," says Maupin, noting that it is essential for employers to control odd-hour work habits the employee may try to claim as overtime. "Don't threaten not to pay overtime. Just keep it under

control. There are severe consequences when an employer is getting a benefit and not paying for it."

Maupin cites the U.S. Department of Labor as not looking kindly on employers who do not fully compensate employees.

Maupin believes that an employer must first understand that a work-at-home employee needs to be one the employer trusts, since a lot of faith goes into tracking the hours worked. "It is a lot of responsibility to monitor an employee outside of the workplace," says Maupin. "That's why the right employee is essential."

Maupin strongly recommends a written agreement be forged between the employee and employer that includes

- designated working hours;
- an explanation of time sheets, how they should be filled out, signed and certified;
- an explanation that the employee must track time spent taking breaks;
- a section noting that disciplinary actions will be taken if the employee fails to comply with the agreement;
- a requirement of prior approval by a supervisor if the employee needs to work overtime.

Maupin always tells her clients to have a procedure in place to deal with the issue of pay discrepancy. She explains it should state that the employer must be notified first and that the employer has a certain amount of time to address the situation and correct it if necessary.

According to Maupin, there is little or no case law and few standard procedures or agreements for dealing with telecommuters. For this reason, she advises employers to visit government Web sites, such as the Department of Labor's www.dol.gov), for assistance, since they are starting to address some of these unique issues.

DEFINING EMPLOYEE STATUS

"Some employers think they can just say, 'You will work at home, and you will be an independent contractor.' But, unfortunately, that is not the case," says Steve Ball, a labor and employment attorney for Holland & Knight.

While Ball agrees with Maupin that the chief issue for employers is adhering to the Fair Labor Standards Act, they must also not ignore the definition of the worker.

Typically, he notes, employers know that the most difficult issue with employees working from home is the ability to supervise or track their hours. With an independent contractor, the employer doesn't have those problems, but any misrepresentation of the worker's status could land the employer in a world of trouble.

Ball says that the Internal Revenue Service has a test that needs to be applied to determine the status of a worker. The "IRS Twenty-Factor Test" addresses issues such as how services are rendered; whether the employee is required to work full time and whether he or she is required to work set hours; whether the worker receives training and is required to attend meetings; and whether the worker is supervised. Ball advises employers to do the test themselves before deciding on a work-from-home relationship — or, down the road, the test may be applied by the IRS or through litigation. Even so, he adds, uncertainty abounds.

Ball makes it clear that an employer cannot improperly classify someone just to get out of paying taxes, benefits and the like. He says that it's akin to an employer classifying an employee as exempt to avoid paying overtime.

"You can't just put someone on salary and then consider them exempt,"

he says, noting that it depends on the actual duties of the position, not what the position is called.

"In the end, if the employee is considered an employee by the IRS test,

then the Fair Labor Standards Act kicks in — and with it, keeping track of compensable working hours, whether that employee works from home or not.

HOME LIABILITY

Before agreeing to telecommuting, an employer must first determine who is eligible to work from home in relation to gender, age, race and national origin,

because the eligibility cannot be discriminatory, says Moran of Baker Hostetler.

She says that, for example, employers cannot allow a work-at-home program to be geared strictly toward working mothers with family responsibilities since they may be discriminating against males. They also may be excluding very good workers of either gender who don't have kids.

Moran notes that many of the telecommuter jobs are targeting stay-at-home moms, which isn't in itself a bad idea, but the program has to be open to anyone who is eligible, based on employment history and position with the company.

Another liability factor that must be addressed with telecommuters, says Moran, is whether the employee is allowed to meet with clients at his or her home because of possible Occupational Safety and Health Administration violations. OSHA is currently working on establishing guidelines, entitled "Safety for Telecommuters," but those rules are still unpublished.

"There is no definite answer," Moran says. "There is no case law on that."

Nevertheless, Moran recommends that, for safety reasons, employers not allow telecommuters to have business meetings at the home office. An employee's homeowners' insurance policy may not cover accidents at the home office under the "business pursuits exclusion," she cites, and a visitor could slip and fall, making the employer liable.

"OSHA requires employers to offer an environment free from harm in the place of employment, but it does not specify home offices," she explains, adding that many of the rules were written long before telecommuting became a part of the working world.

Besides limiting business associates' and clients' visiting the home office, the employer should make it clear that there must be limited access to family members and outsiders during working hours.

"A family member or neighbor could get hurt by falling equipment, or an electrical shock," Moran points out. The answer, she says, is to require that locks be installed on the home office, when practical.

Finally, to avoid possible workers' compensation claims by the employee,

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employers should conduct an inspection of the home office to be sure it's a hazard-free environment. And Moran recommends that a home-safety checklist be part of the telecommuter's employment package.

SECURITY MEASURES

Remote workers across the globe are engaging in risky network behavior, despite being aware of the security problems that such actions could pose. That's according to a recent study released by Cisco and Insight Express, an independent surveyor. The study polled 1,000 remote workers in 10 countries and found telecommuters were hijacking neighbors' wireless networks, sharing computers with non-employees and opening e-mail from unknown sources.

Keith White, a labor and employment attorney with Broad and Cassell, says that network security can make or break the idea of allowing employees to telecommute, because the need to maintain the integrity of the company's computer network system is paramount. Those networks are usually home to all the company's confidential information, as well as their clients' confidential information and their employees' personal data and day-to-day working documents.

"There could be some potential liability," White says. "If you are going outside the network, there are additional risks of network security." He adds that it's especially disheartening for employers if they're unable to monitor what the employee is doing at home.

White recommends telecommuters sign acknowledgment forms that specify what they can access through the network and via the Internet. He says the privacy issue really comes into play if the telecommuter is using his or her personal home computer to do company work.

That begs the question: Can you spy on your telecommuting employee?

"Say someone is at their house using their own computer, and you are telling them you are going to monitor their computer use. Well, you should be able to. There should be no expectations of privacy," says White.

If nothing else, he says, employers

should at least require reasonable security measures such as blockers to prevent the worker from visiting inappropriate Web sites, akin to what is already common practice in many offices.

Of course, White concludes, once you open your network to a telecommuter, you make it easier for hackers to steal your information.

"You can't have the same measure of

security," he warns, "so you really need to think seriously [about the question or whether] this is something you want to do."

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