

AUTHORS

Jeffrey S. Tenenbaum
David R. Warner
Kristine A. Sova
Nicholas M. Reiter

RELATED PRACTICES

Labor and Employment

RELATED INDUSTRIES

Nonprofit Organizations
and Associations

ARCHIVES

2012 2008 2004
2011 2007 2003
2010 2006 2002
2009 2005

Articles

February 21, 2012

How Nonprofits Can Avoid the Legal Pitfalls of Telecommuting Employees

Related Topic Area(s): Employment Law

As technology for the home office improves, more nonprofits and employees are taking advantage of the benefits of telecommuting. Laptops are lighter, faster, and more portable. Smartphones, iPads, and other e-readers continue to sell in record numbers. Cloud computing enhances colleagues' ability to share information efficiently. Video conferences are becoming the norm, not the exception. These technological advances, when combined with the growing concerns over gasoline prices and work-life balance, make telecommuting a very attractive option for many nonprofits and their employees.

Of course, federal and state labor laws still apply to the telecommuting employee. Whether a nonprofit should, or in some cases must, permit telecommuting depends upon an analysis of the unique issues that telecommuting raises under federal and state law. Set forth below is an overview of some of the logistical and legal issues nonprofits should consider when creating or reforming their telecommuting programs.

Which Positions Are Best Suited for Telecommuting?

No matter the technological developments, telecommuting will likely never be appropriate for every employee. For example, it is very unlikely that a nonprofit's receptionist could perform his or her duties while telecommuting. Similarly, employees performing client intake services may need to physically perform their duties at the job site. In contrast, positions which primarily entail the electronic transfer of documents or other information are typically better suited for telecommuting, subject to proper safeguards for confidentiality and client privacy. Other common characteristics of roles fit for telecommuting include a low need for direct supervision or guidance, limited face-to-face interaction, and easily measured performance benchmarks such as quantity of output instead of actual time spent at the job site.

Wage and Hour Requirements

The Fair Labor Standards Act ("FLSA") and its state law counterparts raise issues for how nonprofits monitor the work schedules of their telecommuting employees. Assuming an employee is not exempt from the overtime wage law, he or she must be paid time-and-a-half for all hours worked beyond 40 hours in a workweek. Additionally, employers are required to maintain accurate records of the hours their employees work.

Given the inherent difficulty of monitoring the work hours of a telecommuting employee, some employers offer telecommuting to exempt employees only. However, an across-the-board prohibition against telecommuting for non-exempt employees may give rise to a disparate impact claim depending upon the demographics of a nonprofit's workforce. As an alternative, many nonprofits create something akin to a virtual sign-in sheet, requiring their telecommuting employees to log-in and log-out of a web-based program at the beginning and end of their work day. Other nonprofits simply require that their telecommuting employees receive authorization from their manager prior to working beyond 8 hours in a workday or 40 hours in a workweek. However, in the event a telecommuting employee works overtime without proper authorization, the employer may not simply refuse to pay the employee overtime wages. Instead, the employer must still pay the employee overtime wages and treat the violation of the telecommuting policy as a disciplinary issue.

Occupational Safety and Health Issues

The Occupational Safety and Health Act ("OSHA") creates recordkeeping and workplace safety requirements for most employers, including many nonprofits. In contrast to the traditional work environment, the employer is typically absent when an injury to a telecommuting employee occurs. In

addition, it is necessarily more difficult for an employer to monitor the safety of a telecommuting employee's workspace.

The employer's obligation to provide a safe work environment is balanced against the telecommuting employee's right to privacy in his or her home. Accordingly, an employer is not obligated to inspect a telecommuting employee's home office. However, a nonprofit's telecommuting policy should nonetheless help promote a safe home office environment. The policy should state that the telecommuting employee is responsible for ensuring that his or her workspace complies with the same safety requirements for the employer's site. The policy also should acknowledge that the telecommuting employee either has been provided equipment from the employer or has assumed responsibility for the safety of his or her own equipment.

Workers' Compensation Laws

Although the specific statutes vary among different states, workers' compensation laws generally require that an employer compensate its employees for injuries sustained in the course and scope of employment. Nonprofits may find it more difficult to ascertain whether an injury occurs in the course and scope of employment for telecommuting employees. Unlike with injuries at the employer's site, there are usually no witnesses when a telecommuting employee is injured at his or her home. In order to curb against the risk of fraudulent injury reports, the telecommuting policy should require that work-related injuries be recorded within a certain number of hours of the occurrence and that the employee make his or her home work-space available for inspection following the injury.

Implications of the Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") prohibits workplace discrimination based upon an employee's disability. Assuming that an employee meets the ADA's definition of disabled, nonprofits with 15 or more employees must reasonably accommodate the employee so long as such accommodation does not result in an undue hardship for the employer. In the telecommuting context, the most critical question is whether the disabled employee can perform the essential functions of his or her job from home. Common considerations include whether: (1) the employee regularly meets with clients or customers; (2) the employee supervises other employees and/or regularly meets in person with a team of co-workers; and (3) the employee's productivity or quality of work will suffer if he or she is permitted to telecommute.

In light of these concerns, nonprofits should ensure that they have written job descriptions which clearly set forth the essential job functions of each position. As part of the interactive process, a nonprofit should refer to an employee's job description when explaining whether it permits the employee to telecommute as a reasonable accommodation. An employer is not necessarily required to permit telecommuting merely because it is the employee's preferred reasonable accommodation. In one recent case, an employee requested that she be permitted to telecommute because her disability required that she lay down periodically during the workday. Although the employer denied her request, the employer did not violate the ADA because it provided the employee with a cot in her office as an alternative reasonable accommodation for her disability.

Anti-Discrimination

Federal and state laws prohibit discrimination based upon an employee's membership in a protected class, including an employee's race, gender, national origin, religion, disability, age, and marital status, among others. In particular, telecommuting raises concerns of potential disparate impact claims. Unlike intentional forms of discrimination, disparate impact claims typically arise from a company-wide policy which adversely, albeit unintentionally, affects a disproportionate number of employees who are members of the same protected class.

For example, a nonprofit may require its telecommuting employees to dedicate an entire room in their homes as their work-space. At first glance, this policy may seem harmless. However, what if only the most affluent employees can afford to cordon an entire room in their homes for telecommuting purposes? Depending upon the socioeconomics of a nonprofit's work-force, this hypothetical telecommuting policy may disproportionately exclude members of various protected classes. In order to safeguard against a disparate impact claim, nonprofits should either allow all employees in a given position to telecommute, or alternatively, determine a number or percentage of such employees who are permitted to telecommute on a first-come, first-served basis. Nonprofits also should document all telecommuting requests and decisions so that the non-discriminatory administration of its telecommuting policy is memorialized. Finally, nonprofits must ensure that all compensation schedules and benefit programs are uniform, regardless of whether an employee telecommutes.

Medical Leave Needs

Under the Family Medical Leave Act (“FMLA”), qualified employees are permitted up to 12 weeks of leave time during any 12-month period in order to receive care for a serious health condition; to care for a spouse, child, or parent; or following the birth or adoption of a new child. An employer is subject to the FMLA’s requirements so long as it employs 50 or more employees at a worksite or within 75 miles of such worksite. For telecommuting employees, their “worksite” is not their home. Rather, for purposes of the FMLA, their worksite is the office to which they report.

The most common problem arises when employers use telecommuting to pressure employees not to take medical leave. Although tempting, employers cannot require or otherwise coerce employees to telecommute in lieu of taking medical leave as permitted under the FMLA. However, employers can still offer (but not require) a reduced leave schedule with telecommuting as an option.

Privacy Issues

Telecommuting policies must balance an employee’s right to privacy against the employer’s need to monitor the employee’s performance. Generally, a person has a valid privacy right in any matter which he or she can “reasonably expect” to remain private. Accordingly, any telecommuting policy must set forth the employee’s unequivocal acknowledgment that various facets of his or her home work-site may be monitored unexpectedly, including his or her use of the employer’s computer, telephone lines, or other equipment.

Protection of Confidential and Proprietary Information

Another concern telecommuting raises is the risk of unauthorized disclosure of confidential and proprietary information. Unlike work performed at the employer’s work-site, there is often no way of knowing who outside the employer’s organization is privy to sensitive information at the employee’s home. Therefore, it is strongly recommended that any telecommuting policy include a non-disclosure agreement applicable to all information and materials used or prepared in connection with the telecommuting program. Nonprofits also should consider whether to implement stronger password and other security measures than those used at their work-sites. Furthermore, home office equipment such as computers and other devices containing work product and sensitive employer information should be dedicated for work-related activities only.

Income Taxes

Telecommuting raises tax issues where an employee telecommutes from a different state than where his or her employer is located. Although tax laws vary widely amongst the different states, income is traditionally taxable wherever it is earned. However, at least one state has departed from this norm. In 2005, New York State’s highest court held that, under the state’s tax law, all of an employee’s wages were subject to tax in New York despite the employee having telecommuted from his home in Tennessee during 75% of the time he worked for his employer located in New York. The decision suggests that wages are “earned” wherever the employer is located unless the interstate work was performed out of necessity rather than convenience to the employee. Unfortunately, there is no blanket answer for all states, and employers must evaluate their home state’s tax laws to ensure compliance.

Tort Liability

In most cases, employers bear responsibility for injuries and damage to property as a result of their employees’ negligence, especially if such injury or damage occurs on the employer’s property. Telecommuting asks whether the same is true for harm to a third party at an employee’s home. Take, for example, the courier who slips on the snowy steps outside an employee’s front door while delivering a package of work-related documents. In some cases, the employer will bear responsibility for his injuries.

In order to protect against such claims, nonprofits should make sure that their liability insurance policies cover the telecommuting employee’s home when used in the course and scope of employment; be sure to consult all potentially applicable policies (e.g., commercial general liability insurance, property insurance, directors and officers liability insurance). In addition, nonprofits may require as a condition of telecommuting that employees secure liability coverage for such injuries as part of their own homeowner’s or renter’s insurance.

Zoning Laws

Depending upon the employee’s responsibilities, applicable zoning laws and regulations may prohibit the employee from performing his essential job functions in his or her home. Many cities’ zoning laws

and regulations limit or restrict the operation of home businesses. In some cases, such laws and regulations will require that the employee secure a permit or license before engaging in specific work activities within his or her home. If so, nonprofits should consider whether they or their employees will bear responsibility for securing the necessary permits or licenses.

Recommended Components of any Telecommuting Policy

In addition to the considerations outlined above, it is strongly recommended that any employer's telecommuting policy also include the following:

- A clear definition of "telecommuting" for purposes of the telecommuting policy and any related agreements between the employer and employee (*i.e.*, does telecommuting include work at home only, or does it also include other off-site locations?)
- Easy-to-understand eligibility requirements (*e.g.*, minimum length of employment and the employer's considerations for whether an employee's position is fit for telecommuting)
- The steps of the telecommuting approval procedure
- That participation in the telecommuting program is a privilege and not a right, subject to revocation at any time for any lawful reason
- That the abuse of telecommuting can result in disciplinary action, including termination of employment
- The employer's right to monitor and inspect the home work environment
- A non-disclosure and confidentiality agreement
- The employer's right to change the terms of its telecommuting policy
- That the telecommuting employee is expected to meet the same performance standards as on-site employees

Given the growing prevalence of telecommuting and the advances in related technology, nonprofits should look for changes in the labor and employment laws that affect telecommuting employees. As explained above, many state laws vary from both different jurisdictions and their federal counterparts. As always, it is recommended that nonprofits consult with legal counsel to ensure compliance with their specific jurisdictional requirements.

For more information, please contact Jeff Tenenbaum at jstenenbaum@Venable.com, David Warner at drwarner@Venable.com, Kristine Sova at kasova@Venable.com, or Nick Reiter at nmreiter@Venable.com.

The authors are attorneys in the law firm of Venable LLP. This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.