

WIT AND WISDOM OF WINTHROP

IN THE NEWS

HYBRID WORK MODELS

Hybrid work models are the new norm, with employees splitting time between working in the office and at home. If your company is instituting a hybrid work model, it is helpful as an employer to have written policies or guidelines outlining where, how, and when employees should work. Below are answers to the top three questions we receive relating to hybrid work policies:

What is a hybrid work policy and do I really need one? A hybrid work policy sets clear guidelines on when, where, and how employees should work if there is a mix of remote/in-office work. A hybrid work policy or remote work policy can help to clearly communicate the expectations and procedures of employees working remotely, to remove any subjective assessments of work performance or attendance.

What should be included in a hybrid work policy? One size will **not** fit all when it comes to hybrid work policies, and each policy should be customized on a corporate, location, or even team basis. At a minimum, however, each policy should include:

- > Which employees are eligible to work on a hybrid or remote schedule, and the criteria that must be met for eligibility (if any);
- > A clear schedule or expectation of when employees may work remotely or be on-site, and any guidelines or approvals that are needed if the employee wishes to deviate from that schedule;
- > Clear expectations on working hours/work product, and when employees are expected to be available when they are working remotely;
- > Expectations regarding security of company information;
- > Expectations regarding workspace safety and guidelines for employees to notify their employer of any injuries sustained for workers' compensation coverage.

Am I required to give every employee the option to work on a hybrid schedule or can I require some employees to work entirely remote or entirely on-site? You are not required to provide every employee the option to work on a hybrid schedule, and you can allow some employees to work fully remote or fully on-site. In doing so, however, make sure that the eligibility requirements are clear in your hybrid work policy and that those requirements are consistently enforced. Whether or not you allow some employees to work remotely or require them to be present on-site may depend on a variety of factors such as the employee's tenure, experience and/or performance, or the nature of that employee's work, such as whether their work tasks can only be completed on-site or are more efficiently accomplished when on-site. Be prepared to distinguish why some workers are permitted to work remotely and why some are not, and ensure that you are not making any decisions on a discriminatory basis.

EMPLOYMENT LITIGATION UPDATE

WIN FOR EMPLOYERS AT THE MINNESOTA SUPREME COURT

On April 6, 2022, the Minnesota Supreme Court issued a decision in *Hanson v. State of Minnesota*, reaffirming the use of the *McDonnell Douglas* burden-shifting framework to analyze claims of retaliation under Minnesota law. The decision is considered a win for employers, as the plaintiff-appellant and amici urged the Court to completely abolish using the burden-shifting framework.

The *McDonnell Douglas* burden-shifting framework is a three-step test that was first articulated by the U.S. Supreme Court in 1973 in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The test is intended to be used in cases where there is no direct evidence of retaliation by the employer.

For the first step, the employee must establish a prima facie case of discrimination, the elements of which will vary depending on the facts of the case. This raises a rebuttable presumption that the employer discriminated against the employee.

At the second step, the burden shifts to the employer to provide "some legitimate, nondiscriminatory reason" to explain why it took the adverse employment action. *McDonnell Douglas*, 411 U.S. at 802. If the employer is able to provide a legitimate nondiscriminatory reason, the presumption of discrimination no longer applies and the burden shifts back to the employee.

At the third step, the employee must demonstrate that the employer's reason for termination is pretextual. In Minnesota, an employee could alternatively offer evidence during the third step that an improper reason "motivated the discharge decision," rather than proving that the employer's reason is untrue. *McGrath v. TCF Bank Sav., FSB*, 509 N.W.2d 365, 366 (Minn. 1993).

Overall, however, the *McDonnell Douglas* burden-shifting framework is favorable to employers as the ultimate burden of proof lies with the employee and proof that the action was pretextual is a difficult hurdle to overcome.

SPOTLIGHT ON CIANNA HALLORAN



WHAT WAS YOUR FIRST JOB? I was first employed at my local town's bike shop. I soon fell in love with helping individuals and families find the perfect bike for when the sun appears in MN (or for those fat tire bike enthusiasts in the winter). I ended up working there for six years through high school and college and could have probably sold bikes for the rest of my life! Now I often reflect on those times and the demand that goes into running a business when working with employers who are striving to make each business day successful.

WHAT IS ONE FUN FACT ABOUT YOU? I have dual citizenship with Brazil because my mother and her family are from Brazil. I have grown up visiting Brazil and speak conversational Portuguese! I always say that Brazil is an underrated country and if you ever get a chance to visit you won't regret it!



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Put the law to work.