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Telework

In this BNA Insights article, Margaret Hart Edwards, a shareholder with Littler Mendelson PC, and Sandy Burud, a principal at FlexPaths, discuss the many issues human resources practitioners must consider when implementing a telework program.

Making Telework Work for Your Organization: Taxes, Wage & Hour Compliance, and Other Legal Issues

BY MARGARET HART EDWARDS AND SANDY BURUD

As the ''cloud''[1] replaces the file cabinet and dispersed teams communicate through technology rather than face-to-face, enabling employees to work from home or other remote locations has become a core competency for HR. Telecommuting (or telework), once perceived as a perk bestowed only on worthy employees, has morphed into a standard way of working in some environments. Leaders are now promoting—even *requiring*—telework in certain jobs in order to save money and increase performance. Reaping average savings of $500,000 per year in office space alone for each group of 100 full-time equivalent teleworkers[2] is shifting the focus from ''allowing'' telework to encouraging or even requiring it. There are other advantages as well: the ability to draw talent from a pool unrestricted by geography, the ability to retain employees with caregiving responsibilities, boosting engagement, reducing lost productivity caused by commute problems, reducing greenhouse gases, and reducing health care costs by lowering employee stress and burnout. For many managers the question is no longer, ''Should we?'' but, ''How do we do it right?''

Having a small number of employees telework is one thing. Making it work organization-wide requires changing common HR practices. What do HR practitioners need to know? The following provides answers to the four questions that arise most often:

1. What costs does the employer have to pay for?

The laws in various states are just beginning to define what costs must be assumed by the employer. The most common standard is that the employer must reimburse reasonable and necessary costs incurred by the teleworker. Thus, a threshold question is whether the telework is for the convenience of the worker, or required by the employer. If telework is required by the employer, these costs are likely to include: the cost of a dedicated computer if the computer must meet certain technical and security requirements; associated equip-

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[1] With ''cloud-computing,'' company software and documents are stored on servers ''in the cloud'' over the internet instead of on company computers.

[2] ''The calculation assumes 30 sq. ft. per person space @ $168/ sq. ft. office lease cost based on a 2005 study from Old Dominion University which places the national average price for commercial 'office' real estate at $168 per sq. ft.'' OLD DOMINION UNIVERSITY CENTER FOR REAL ESTATE AND ECONOMIC DEVELOPMENT, 2005MARKET SURVEY (2005), *available at* http://www.odu.edu/creed.

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ment necessary for work, such as a printer/scanner/fax; the monthly cost of a broadband connection sufficient to handle the employer's data; locking file cabinets; a shredder; and ergonomic equipment such as a chair, keyboard tray, and document holder. In addition, the employer would be expected to reimburse the employee for office supplies and cell and landline telephone charges (other than those that are personal). If the employee already owns the required equipment, and retains the ownership and personal use of the equipment, the employer's duty to reimburse becomes less obvious and harder to calculate. One solution is for the employer and employee to enter into an explicit agreement for the employer to pay a ''usage charge'' for the business use of the personal equipment. For this charge to meet state law requirements, it should be reasonably related to the actual proportional cost of the equipment or to the proportional cost of equivalent equipment in an employer's office environment (based on the proportion of business use of the equipment). As the employer may wish to retain full monitoring control and security of employer data, it may be more advantageous for the employer to purchase and issue equipment to the teleworker rather than to allow the employee to retain ownership and control of the equipment.

If the employer requires the teleworker to attend outside meetings, including meetings at the employer's site, the employer may have to reimburse the costs of travel to those meetings. When a worker teleworks only a certain number of days per week, but must work in the employer's office the remaining days, the commute costs for the days in the employer's office are not required to be reimbursed, as ordinary commute costs are not paid by the employer.

If the employer does not require telework, but simply permits employees to telework for their convenience, then the costs of equipment and internet connections for telework may be the responsibility of the employee.

2. What steps can an employer take to help ensure compliance with wage and hour laws?

The difficulty of complying with wage and hour laws has caused some employers to restrict telecommuting to employees who are exempt from overtime. One of the biggest concerns is that nonexempt employees will make claims that they worked off-the-clock. However, technology now offers better means to comply with wage and hour laws. There are multiple steps that will help an employer to be in compliance, including:

■ Determine which wage and hour laws apply. The federal Fair Labor Standards Act will apply as a baseline in every state. However, some states have additional rules for daily overtime, meal and rest breaks, premium pay on the seventh day of work, etc. If a teleworker is in a state with protections beyond the FLSA, even if the worker reports to a boss in another state with fewer protections, the employer should apply the protections in the state where the teleworker actually performs services.

■ Adopt very clear policies regarding work hours, meal and rest breaks, overtime, and timekeeping.

■ Adopt a protocol for email approval of overtime work in advance.

■ Make sure that teleworkers and their supervisors are trained and periodically retrained on the policies, and that teleworkers have signed off on the policies, agreeing to comply with them.

■ Implement electronic timekeeping systems that require a certification by the employee that all time worked has been entered and that all time entries are accurate.

■ Conduct periodic audits of other electronically generated records against the time records. These other records could include time stamps on emails, in log-in records, in web logs, or in the employer's specialized systems.

■ Enforce a zero tolerance policy for off-the-clock work or inaccurate time keeping through discipline of both teleworkers and their supervisors.

■ As discussed above, in situations where travel time for the teleworker to the employer's place of business is compensable work time, adapt timekeeping policies and systems to include this compensable time. The employer may adopt a special hourly rate of pay (not less than the minimum wage) for all compensable travel time.

3. Can an employer require employees to telework?

In most cases, the employer will have the flexibility to require telework, because most private non-union employment relationships are presumed to be at-will. This means that terms and conditions of employment can usually be modified on a prospective basis by giving reasonable notice in advance. The amount of advance notice varies based on case law in each state. Generally, it is advisable to give 30 to 90 days of notice.

The employer may not be able to require telework unilaterally if there is an oral or written contract between the employee and employer specifying a location of employment, or under the terms of collective bargaining agreements. In the former case, the employee and employer would have to agree to amend the contract. In the latter case, the employer and union would have to bargain for a change in the terms and conditions of employment.

It is often easier to hire a person into a telework position than to convert a current employee relationship to telework if the current employee is reluctant to telework. An employee's reluctance may be due to a variety of reasons: the individual may value the separateness of work and home, lack the space for a home office, believe that the distractions of working at home will interfere with performance, or desire the companionship and social life of the workplace. If the worker is reluctant to telework, the arrangement may not be successful, so the reasons for his or her reluctance should be explored and alternative solutions considered. Such alternatives may include: (1) the gradual conversion of a work unit to telework as incumbents leave, (2) incentives to telework to make it more attractive, (3) the option to telework part of the time, and (4) the creation of substitute social structures to create a sense of belonging and reduce isolation.

4. Where must an employer pay its employee's employment taxes—in the state where the company is located, where the employee lives, or both?

There are really two separate questions when it comes to taxes. The first question is, to which state must ''employment taxes'' be paid? In most cases, that generally refers to state unemployment taxes, although in several states there are additional taxes. For ex-

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ample, California also has state disability insurance taxes and an employment training tax. Regardless of how many states an employee works in, unemployment insurance taxes are only paid to a single state. All states use the same four-part test to determine the proper state to report and pay unemployment insurance taxes:

(1) localization;
(2) base of operations;
(3) place of direction and control; and
(4) state of employee's residence.

This test must be applied in hierarchical order; that is, it must first be determined if the work is localized to a particular state. An employee's services are ''localized'' in a particular state if all or most of the employee's services are performed in such state, with only incidental services performed elsewhere (for example, where the out-of-state service is temporary or transient in nature, or consists of isolated transactions). Where the services performed outside of the state are permanent, substantial, or unrelated, it cannot be treated as localized to a particular state.

If an employee's services are not localized to a particular state (because, for example, he or she spends 33 percent of his or her time in three separate states), then the next test to apply is the ''base of operations.'' Under this test, unemployment insurance taxes are paid to the state in which the employee has his or her only base of operations. A base of operations is generally considered to be a more or less permanent place from which the employee starts work and customarily returns to receive the employer's instructions, to receive communications from customers or others, to replenish stocks or supplies, to repair equipment, or to perform other functions relating to the rendition of services. For example, if an employee telecommutes, but is assigned to an office location where he or she comes for meetings, obtains supplies, etc., such office location would be considered a base of operations.

If the employee's services are neither localized nor subject to a base of operations, the third test is the ''place of direction and control.'' Under that test, if an employee performs some services in a state and it is also the place from which the employer exercises basic and general direction and control over all the employee's services, then unemployment insurance taxes are sourced to such state.

Finally, if none of the previous three tests apply, then unemployment insurance taxes are sourced to the employee's state of residence.

The second question is, in which states must the employer withhold and remit an employee's income taxes? Unlike unemployment insurance taxes that are paid to a single state, income taxes may be paid to several states. Residents of a state are generally subject to tax on 100 percent of their income, regardless of where it is earned. Nonresidents, however, are only subject to income tax on income earned within the state. Thus, when an employee works in more than one state, an employer may be obligated to withhold and remit income taxes to more than one state.

The states have very different rules about when income taxes must be withheld. For example, New York and Connecticut both have a 14-day de minimis rule that states if an employee is working in the state for 14 days or less in a calendar year, then there is no income tax withholding. Other states use a dollar threshold. In addition, some states have reciprocity agreements. For example, if an employee lives in New Jersey but works in Pennsylvania, the employer is not required to withhold Pennsylvania income taxes under an agreement between New Jersey and Pennsylvania.

As a general proposition, then, if employees will work in several states, it becomes imperative that an employer require an employee to track and record time in different locations in order to determine whether tax withholding should occur in more than one location. Generally, taxes are withheld in the state where a person is a resident (and presumably works on a regular basis, and also assuming the state has an income tax) because a resident is taxed on all their income, regardless of where it is earned. For a nonresident, however, income can only be taxed to the extent it is earned. Many states allow for offsets for multistate withholding. For example, if a California resident works in Arizona, and withholding in California is $100 while withholding in Arizona on Arizona source income would be $80, California law states that the employer should withhold $80 for Arizona and $20 for California. This alleviates the double taxation caused by multistate withholding.

Conclusion These four questions— what costs the employer may have to pay, how to comply with wage and hour laws, whether the employer can compel telework, and what tax implications might arise—require employers to engage in thoughtful analysis before embarking on a program of telework. As a practical matter, implementing a telework program properly can help employers attract and retain excellent employees, reduce overhead costs, and increase productivity. However, if employers are not attentive to the legal constraints going in, they may find that they face expensive and legally complex claims that reduce or eliminate the savings in overhead.

The practical benefits of telework are being realized by ever greater numbers of employers and employees. The estimates of the number of teleworkers in the United States vary widely, depending on the source of the statistics, and whether the statistics count only full-time teleworkers, or those who telework on an ad hoc basis. Thus, only a small percentage of the workforce teleworks most of the time, but an ever-growing percentage, about 25 percent, teleworks at least some of the time.[3] The Bureau of Labor Statistics studied telework patterns and found that they were age and gender agnostic, but that those who had college educations and were in managerial and professional occupations were more likely to telework, and that teleworkers work five to seven hours more per week than non-teleworkers.[4] Cisco Corporation reported in 2012 that by 2016 43 percent of U.S. employees will telework at least part time, so employers must master the legal issues involved.[5]

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[3] *Make Telework Pay Off*, 56 HR Magazine No. 6 (June 1, 2011), *available at* http://www.shrm.org/Publications/hrmagazine/EditorialContent/2011/0611/Pages.

[4] Mary C. Noonan and Jennifer L. Glass, *The Hard Truth About Telecommuting*, Monthly Labor Review, 38-45 (June 2012).

[5] Michael Moffa, *The Future of Teleworking: You Can Bed on It* (Apr. 4, 2012), http://www.recruiter.com/i/the-future-of-teleworking-you-can-bed-on-it/.