

Remote Work or Remotely Working?: Formulating Effective “Telework” Policies

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The current pandemic has caused an exponential rise of remote working or telework. Driven by the ubiquitous work-from-home-directives in place across the country, the use of remote-working tools such as the videoconferencing service Zoom has exploded. According to JPMorgan, “third-party data indicate that daily usage [of Zoom] was up more than 300% from before the pandemic forced workers into their homes.”² Many executives and entrepreneurs expect that the expanded use of this decentralized work model, initially the result of social distancing measures, will remain in place for the foreseeable future. According to a March 30, 2020 Gartner, Inc. survey of 317 CFOs and Finance leaders, “74% [of these leaders] will move at least 5% of their previously on-site workforce to permanently remote positions post-COVID 19.”³

Remote working was not well managed by businesses before COVID-19. An early 2020 survey of American workers found that “while 78% of companies allow some form of remote work, only 20% of survey respondents work at a company with a formal remote work policy.”⁴ In light of the current expanded use of remote working, and the likely longevity of this model, it is imperative that businesses without remote work policies create and implement effective policies to govern and encourage mutually beneficial use of this emerging trend in the workplace.⁵

Best-practice remote work policies should address three primary areas: the HR aspects of remote working; the protection of company (and client) data; and, the social challenges presented by the inherent isolation of teleworking.

HR Issues

As with all work policies, remote working policies must be nondiscriminatory both in construction and application. For example, such policies should have a legitimate, nondiscriminatory reason if some employees are allowed to work remotely, while others are not. Further, such policies should delineate whether telework arrangements are temporary, due to the extraordinary circumstances posed by the current public health crisis, or a permanent part of the “new normal” workplace.

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² Emily Bary, “Zoom, Microsoft Teams usage are rocketing during coronavirus pandemic, new data show,” Marketwatch (April 1, 2020) (<https://www.marketwatch.com/story/zoom-microsoft-cloud-usage-are-rocketing-during-coronavirus-pandemic-new-data-show-2020-03-30>). Although such expanded use is not limited to remote workers, “new data points...bear out that digital tools like Zoom Video Communications Inc.’s teleconferencing software and Microsoft Corp.’s collaboration offerings are seeing spikes in usage as the COVID-19 pandemic keeps workers housebound.”

³ “Gartner CFO Survey Reveals 74% Intend to Shift Some Employees to Remote Work Permanently” (April 3, 2020) (<https://www.gartner.com/en/newsroom/press-releases/2020-04-03-gartner-cfo-surey-reveals-74-percent-of-organizations-to-shift-some-employees-to-remote-work-permanently2>).

⁴ Zach Capers, “A Remote Work Policy Is Crucial—Here’s What You Need to Know,” getapp.com (March 20, 2020) (<https://www.getapp.com/resources/remote-work-policy/>).

⁵ “A Guide to Create a Telecommuting Policy During the Coronavirus,” PayChex Worx (April 16, 2020) (<https://www.paychex.com/articles/human-resources/making-the-case-for-telecommuting>). “Failure to have a policy can lead to employee confusion over schedules, potential feelings of resentment, or missed project deadlines, at a minimum.”

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Such policies also raise specific issues.⁶ Eligibility is the threshold issue—which employees can participate. Employers should “[d]etermine what positions are eligible to work remotely, and state them in [the] policy.”⁷ Privacy is another such issue. Monitoring of work email systems by employers is generally permitted, even during remote works, as long as there is a valid business purpose for monitoring and the subject employees do not have any reasonable expectation of privacy in using the employer’s system (which any good policy would dispel).⁸ Employers should ensure that any inconsistency between new polices and existing company policies are resolved in the new policies.⁹

Yet another issue is timekeeping. Time worked includes seemingly insignificant tasks such as responding to phone calls and emails, no matter the time of day. Thus, employers can and should require both exempt and nonexempt employees to report and/or record their remote working time¹⁰ so that and such employees will be paid for all time worked when working from home, including overtime, the same as if they were working at the office. Nonexempt employees are required to be paid for all time worked, but employers may restrict or prohibit employees from working overtime through effective policies. Such policies should communicate to employees how to manage and track their time and ensure that the time is entered into the employer’s timekeeping system on a regular basis.

Also through effective policies, employers should follow and enforce applicable meal and rest break requirements for nonexempt employees when they are working from home, including the recording of unpaid meal breaks. Importantly, some state laws may require that employees be relieved of all work related duties during meal and rest breaks when working from home, including responding to emails and taking calls. The policies should remind employees of their right to take off-duty meal and rest breaks when working from home.

Reimbursement of certain expenses should also be covered in the remote working policies. Under certain states’ laws, employees working remotely may be entitled to reimbursement for a pro rata portion of their cell phone and internet service bills that is attributable to work use.

Safety is also an important issue to be addressed. Employees should maintain their home workspace in a safe manner, free from safety hazards. Employers may consider providing each teleworker with a safety checklist that must be completed on a routine basis. Importantly, injuries sustained by the employee in a home office location and in conjunction with the employee’s regular work duties are normally covered by the employer’s compensation policy.

⁶ Michael Bernick, “Remote Work and Best Practices: The Coronavirus Workplace Series,” Forbes (March 16, 2020) (<https://www.forbes.com/sites/michaelbernick/2020/03/16/remote-work-and-best-practices-the-coronavirus-workplace-series/#9d594b9769c3>).

⁷ Rich Henson, “Drafting a remote work policy: 5 legal pitfalls to watch for,” HRMorning (March 18, 2020) (<https://www.hrmorning.com/articles/drafting-remote-work-policy-5-legal-pitfalls/>).

⁸ Katie Loehrke, “The right way to monitor employee emails,” The Business Journals (December 9, 2015) (<https://www.bizjournals.com/bizjournals/how-to/human-resources/2015/12/the-right-way-to-monitor-employee-emails.html>). “Privacy rights usually come down to whether an individual has a reasonable expectation of privacy in a certain situation and the extent to which the employer has a legitimate business interest. The federal Stored Communications Act (SCA) is relatively clear on company email. An employee’s privacy is not protected, but it’s still not a bad idea for employers to make clear in their policies that company email could be subject to monitoring.”

⁹ Jeffrey H. Ruzal & Carly Baratt, “Telecommuting Employees: Best Practices Checklist,” Lexis Practice Advisor Journal (April 9, 2020) (<https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/telecommuting-employees-best-practices-checklist>).

¹⁰ Jeffrey H. Ruzal & Carly Baratt.

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Data Security

Data security in a decentralized remote working model is paramount. Remote employees are obligated to protect proprietary company and customer information accessible from their remote home office. Effective policies should reflect this and reiterate the Employer’s expectations regarding information security for employees working at the office.¹¹ Such prophylactic measures include regular password maintenance for remote devices, and increasing home network security to prevent unauthorized access. Practical network security measures include: prohibiting use of public Wi-Fi to conduct confidential business; requiring use of network encryption; disabling remote access to obscure broadcast home network name; and, most importantly, requiring that remote employee’s router software is up to date. Specifically, the use of anti-virus protection programs should be required to prevent hackers from accessing the hardware and data.

Finally, create a culture of data protection. Effective policies should mirror and reiterate the concepts and language of a well-crafted confidentiality and non-disclosure agreement, and those agreements should expressly include remote working obligations.

Social Issues

Because remote working changes the social interaction between managers and employees, it is very important to address social issues in the policies.¹² Communication is key. Employers should establish rules of engagement: “[r]emote work becomes more efficient and satisfying when managers set expectations for the frequency, means, and ideal timing of communications for their teams.”¹³ Successful remote policies establish a daily, or even more frequent, call between managers and remote employees. “The important feature is that the calls are regular and predictable, and that they are a forum in which employees know that they can consult with [the subject manager], and that their concerns and questions will be heard.”¹⁴

Relying on email alone is very likely not a sustainable practice for managing remote workers. Remote workers “benefit from having a ‘richer’ technology, such as video conferencing, that gives participants many of the visual cues that they would have if they were face-to-face.”¹⁵ Video conferencing has numerous advantages over email and/or conference call, “[v]isual cues allow for increased ‘mutual knowledge’ about coworkers and also help reduce the sense of isolation among teams.”¹⁶

Employers subsidizing the cost of remote working can also enhance the remote working experience. Employers may also choose for employee relations purposes to reimburse cell phone and internet costs attributable to work use when employees work from home.¹⁷

¹¹ Jeffrey H. Ruzal & Carly Baratt.

¹² Steve Bates, “Keep Remote Workers from Feeling Left Out,” Society for Human Resource Management (June 19, 2013) (<https://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/KeepRemoteWorkersfromFeelingLeftOut.aspx>).

¹³ Barbara Zepp Larson, Susan R Vroman, Erin E. Makarius, “A Guide to Managing Your (Newly) Remote Workers,” Harvard Business Review Digital Article (March 18, 2020) (<https://hbsp.harvard.edu/product/H05HON-PDF-ENG?itemFindingMethod=Catalog>).

¹⁴ Zepp.

¹⁵ Zepp.

¹⁶ Zepp. However, circumstances at times may dictate that a quick collaboration is more important than visual detail. “For these situations, provide mobile-enabled individual messaging functionality (like Slack, Zoom, Microsoft Teams, etc.) which can be used for simpler, less formal conversations, as well as time-sensitive communication.”

¹⁷ “Telecommuting Policy and Procedure,” Society for Human Resource Management (https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/telecommuting_policy.aspx).

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Finally, “one of the most essential steps a manager can take is to structure ways for employees to interact socially (that is, have informal conversations about non-work topics) while working remotely.”¹⁸

An easy way to “establish some basic social interaction is to leave some time at the beginning of team calls just for non-work items (e.g., “We’re going to spend the first few minutes just catching up with each other. How was your weekend?”).”¹⁹

Other means of creating such social interaction may include “virtual pizza parties (in which pizza is delivered to all team members at the time of a videoconference), or virtual office parties (in which party “care packages” can be sent in advance to be opened and enjoyed simultaneously).”²⁰ Although these types of events may feel artificial or forced, “experienced managers of remote workers (and the workers themselves) report that virtual events help reduce feelings of isolation, promoting a sense of belonging.”²¹

Implementing the Policy

Employers choosing to move forward with a more permanent telework culture, whether as a temporary or permanent policy, should utilize the following steps to implement the policy. First, set clear expectations. “It is essential for employees to fully understand what is expected of them” while working remotely.²² Accordingly, effective policies should outline what work is expected to be completed on a daily or weekly basis. As noted above, “communications between employees and managers is critical for productivity.”²³ Second, experienced professionals can guide executives and managers to formulate and implement an effect policy.²⁴ Third, formalize the policy in writing.²⁵ Finally, communicate, communicate, and communicate. In addition to promulgating a policy through a handbook or other written policy, “consider providing ongoing updates via company newsletters, regular email updates, a message from the CEO, and wherever else employees are informed about company business.”²⁶

¹⁸ Zepp. “This is true for all remote workers, but particularly so for workers who have been abruptly transitioned out of the office.” See also Bates.

¹⁹ Zepp.

²⁰ Zepp.

²¹ Zepp.

²² PayChex.

²³ PayChex.

²⁴ PayChex.

²⁵ PayChex.

²⁶ PayChex.

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About Timothy J. Szuhaj, ESQ.: Timothy J. Szuhaj is a member of the firm and serves as the co-chair of the Staffing team. As part of the team, Tim counsels staffing industry clients with respect to growth strategies, succession planning, mergers and acquisitions, compensation strategies, plans and policies, risk management and indemnity issues, operational issues, goodwill protection and competition issues and, the structure and content of client and business-critical contracts. Tim is a frequent contributor to legal and business publications and lectures across the country on emerging issues impacting the Staffing Industry.

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