

# Shifting Gears to a New Normal: The Hybrid Workforce

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# Remote/Hybrid Work Arrangements

- Many employers are considering more permanent remote work arrangements, or a more hybrid remote work model
- Benefits:
  - Flexibility
  - Competitive in marketplace
- Potential disadvantages:
  - Company culture
  - Employee wellbeing and inclusion

# What is Best for my Company?

- Very specific, individualized assessment
- Some considerations:
  - Extent workforce collaborates with others
  - Whether certain employees in certain departments are required to perform work on site (i.e., nature of work directs this)
  - Ask yourself: why does this particular employee need to perform his or her work in the office, rather than remotely?
  - Also ask yourself: am I equipped to handle the challenges of a remote workforce?

# Wage and Hour Issues

- Timekeeping
- Monitoring overtime
- Allowing required break times
- Allowing flexibility in work hours
- On call expectations

# The Transient or Out-of-State Worker

- There is no uniform/nationwide test for residency, so it is important to know where your employees are located while they are performing work and whether your company is now subject to certain state laws.
- Another important consideration is whether any of your employees will perform work out of the country
  - At-will employment
  - Restrictive covenants

# Multi-State Considerations

- Payroll Considerations
  - Information on paystubs and frequency of pay
  - Deduction requirements and limitations
  - Payroll taxes
- Wage and Hour
  - Exempt status and the salary threshold
  - Break times and hour limits
  - Overtime requirements
  - Minimum wage

# Multi-State Considerations, contd.

- Workers' compensation requirements
- Vaccination laws – to the extent your company has a mandatory or incentive-based policy
- Sick leave/PTO/other leave requirements – what is required, and what are the parameters?

# Privacy and Data Security

- Protecting the company's confidential information is essential!
- Some considerations:
  - Update policies to reflect remote working conditions
  - Require employees to use a VPN or other secure service
  - Require employees to encrypt hard drives
  - Consider providing company-owned IT equipment
  - TRAIN employees on these policies



# Best Practice – Create a Policy

- Create a written remote work policy so that requirements and expectations are clear
- Be transparent with employees and disseminate information to them in a clear manner
- Include contact information for questions/accommodations

# What Do I Include In the Policy?

- Establish eligibility:
  - Who is eligible for remote work?
  - Is remote work voluntary, is it provided when requested for particular reasons, is it required for certain positions, or something else?
  - How do employees make the request?
  - Is it permanent or temporary?

# How to Handle Employees Who “Prefer” Remote Work but are Ineligible?

- Employees expected to work in office request full- or part-time remote work.
- No prescribed legal process or framework.
- Employers must create their own.
- Best to have a formal request, review, and approval process involving human resources and supervisor(s).
- Avoid bias or perceptions of bias.

# What Else Do I Include In the Policy?

- Timekeeping requirements
- Self-reporting of location where work is being performed
- Reimbursement for office equipment and supplies
- IT services and Help Desk
- Performance goals/measures

# Remote Work Agreements

- Can be more individualized and used on a per-employee basis
- Shows mutual expectations for remote work
- Be sure to include:
  - The location(s) where the employee may perform work
  - The days on which the employee may be remote
  - Expectations for hours of availability
  - Expectations for performance, and how performance will be measured

# Hiring in a Hybrid Workforce

- Recruiting
  - Consider the opportunity to expand the geographic scope of your workforce
  - Revise job descriptions
- Interviewing
  - Identify and communicate a single point of contact for the candidate
  - Use and test the right tools and videoconferencing software
  - Continue the same skills-based assessment structure
  - Introduce the candidate to the workplace culture

# Hiring in a Hybrid Workforce, contd.

- Onboarding
  - Convert onboarding materials for virtual sharing
  - Consider having employees sign a confidentiality and data security acknowledgement or agreement
  - Virtually introduce employees to the company
  - Set up technology with the employee before the start date
  - Handling of remote I-9s

# Performance Management in a Hybrid Workforce

- Frequent communication between managers and employees
  - Informal feedback and pre-scheduled check ins
  - Goal setting and review
  - Establish clear expectations
- Establish or continue performance evaluations and improvement plans
- Invest in the proper technology
  - Analyze time management and monitoring tools
- Consider non-monetary rewards and recognition



# Investigations in a Hybrid Workforce

## Best Practices

- Protect privacy and maintain confidentiality
- Conduct interviews in a private space
- Use secure videoconferencing software on a secure network
- Do not dispose of any hardcopy investigative documents in the household trash
- Advise witnesses that you do not consent to recording interviews
- Minimize distractions

# Remote Work Accommodation Requests

First ask: Is the request based on a mental or physical disability?

The ADA defines a disability as a physical or mental impairment that substantially limits a major life activity, or a record of such impairment.

# Disability-Based Requests

- Same process as other accommodation requests under the Americans with Disabilities Act (ADA)
- Engage in the interactive process with the employee to determine whether a reasonable accommodation can be made without undue hardship.
- Follow-up questions
- Requests for medical documentation to determine whether the employee has a disability

# Remote Work is Not Automatically a Reasonable Accommodation

Q: When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who asks to continue this arrangement as an accommodation?

A: No, according to the EEOC.

# Key Principles

- Essential functions need not be eliminated.
- Critical question: Is in-person attendance essential to the role?
- Employers need not grant a disabled employee's preferred accommodation.
- Employers may choose an alternative accommodation if it allows the employee to perform the essential functions of the job.

# Alternative Accommodations

## Examples of reasonable accommodations for high-risk employees:

- Wearing a face-covering;
- Increasing space between the employee and others;
- Rearranging or moving work location;
- Staggering shifts; or
- Eliminating inessential job duties.

# Undue Hardship

- Employers are not required to provide an accommodation if it would result in undue hardship.
- “Significant difficulty or expense.”
- Factors:
  - (i) The nature and net cost of the accommodation;
  - (ii) The overall financial resources of the facility or facilities involved;
  - (iii) The overall financial resources and size of the covered entity;
  - (iv) The type of operations of the covered entity; and
  - (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

# Remote Work As Undue Hardship

- Successful track records of remote work could make it difficult to show undue hardship.
- What changed?
- Cost considerations
- Effect on other employees
- Document



# COVID Vaccinations and Remote Work Accommodations

- Situation where employees are unvaccinated and ask to work remotely as a result.
- Is the employee unvaccinated due to:
  - a disability?
  - a sincerely held religious belief, practice, or observance?
  - pregnancy?
- If no, EEOC is silent on accommodation obligations for voluntarily unvaccinated employees.

# COVID Vaccinations and Remote Work Accommodations, contd.

- Only exclude if an unvaccinated employee with a disability would pose a “direct threat” and no other reasonable accommodation available.
- Direct threat means “significant risk of substantial harm to the health or safety of the individual or others.”
- Individualized assessment considering duration of risk, nature and severity of potential harm, likelihood that harm will occur, and imminence of potential harm.

# Preference-Based Remote Work Accommodation Requests

- Employees expected to work in office request full- or part-time remote work.
- Many of the same considerations in deciding to adopt a broader hybrid work model.
- Beware of perceptions of bias.
- Beware of exceptions swallowing the rule.

# Formalizing the Remote-Work Accommodation

- Document expectations similar to hybrid work agreements, specific to the employee and role.
- Involve supervisor(s) and human resources.
- Periodically review.

# QUESTIONS?



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