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REMOTE WORKING IN A TIME OF PANDEMIC

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Legal Considerations for Remote Work Arrangements

- Wage & Hour
 - Choice of law
 - Time worked
 - Meal and rest breaks
 - Proper calculation of wages
 - Keeping accurate records of time worked
 - Deductions from salary (exempt employees)
- Expense reimbursement
- OSHA and Workers' Compensation Issues
- ADA and Leave-of-Absence Issues
 - Working from home as a "reasonable accommodation"
- Immigration Compliance
- Other Employment-Related Issues
 - Confidentiality and protecting proprietary information
 - Applying policies in a nondiscriminatory manner

Why Remote Work

- Shelter in Place
 - Essential activities generally excluded
 - Essential businesses generally excluded
 - Minimum necessary business operations generally still allowed
- New Paid Leave Laws
 - Families First Coronavirus Response Act (March 19, 2020)
 - Includes individuals who are not sick and are able to work but:
 - are caring for an individual who is subject to quarantine or
 - needs to care for a son or daughter if the child's school or childcare location has been closed, or if the child's childcare provider is unavailable due to COVID-19
 - States and cities are also beginning to enact or propose similar laws
 - E.g., NY, CA, NJ, San Francisco

Why Remote Work

- Remote Work as ADA Accommodation
 - Even if site is not subject to government limits/closure, certain employees may seek remote working arrangements as a disability accommodation
 - Set expectations for remote working as an accommodation
 - Set duration expectations/limitations
- Voluntary Programs
 - Minimize virus spread
 - Allow employees to care for family
 - Coordinate around closed schools/day care
 - Avoid potential OSHA issues

Example of Shelter in Place Orders

Northern California Shelter in Place Orders

Essential Activities:	<ul style="list-style-type: none"> • Tasks essential to health – visiting doctor, care for pets, supplies needed to work from home • Obtain necessary services or supplies – food, necessary household goods • Engage in outdoor activity – walk, hike, run so long as maintain six foot distance • Perform work providing essential products and services, including minimum basic operations • To care for a family member or pet in another household
Essential Businesses (General):	<p>Essential businesses include:</p> <ul style="list-style-type: none"> • Healthcare operations – providing health services, supplies for health services, veterinary care – construed broadly (this does not include gyms) • Essential infrastructure – construction, airports, water/sewer/gas, trash collection, telecommunications/internet • First Responders – emergency personnel, court and law enforcement • Essential Government Functions – services necessary to ensure the continuing operation of government agencies, for health, safety, and welfare of the public
Essential Business (Misc.):	<p>The order also includes a potpourri list of other essential businesses, generally including:</p> <ul style="list-style-type: none"> • Grocery stores and other stores that sell human and animal food • Food cultivation • Businesses that provide services to the needy • Media – newspapers, tv, radio • Automobile –gas station, auto supply and repair • Banks and financial institutions • Hardware stores • Plumbers, electricians, exterminators and other businesses that provide services necessary to the safety, sanitation, and essential operations of residences • Shipping/mailing • Educational institutions for purposes of providing distance learning • Laundromats / dry cleaners • Restaurants – delivery or take out only • Businesses that supply products needed for people to work at home • Businesses that supply other essential businesses with the support or supplies necessary to operate • Ship or delivery groceries / goods to residences • Airlines, taxis, transport • Home-based care for seniors, adults, children • Residential facilities for seniors, adults, children • Professional services (legal/accounting) if necessary to assist in compliance with legally mandated activities • Childcare – 12 or fewer children, static groups, static care providers
Non-Essential Business:	<p>Allowed to engage in minimum basic operations – Minimum necessary staff (using social distancing) to:</p> <ul style="list-style-type: none"> • Maintain value of inventory, ensure security, process payroll / benefits • Maintain remote work capabilities
Essential Travel:	<p>Allowed to perform essential activities, care for elderly/dependents/vulnerable, travel for meals, to place of residence outside jurisdiction, if required by law enforcement.</p>
Enforcement:	<p>Govt Code 26602, 41601; Health and Safety Code 101029</p>

Eligibility Criteria

- Exempt employees
 - Generally better suited for remote working relationships
 - Less-restrictive recordkeeping requirements
 - Less important to accurately track time worked
- Nonexempt employees
 - Set expectations regarding hours and responsiveness during work times
 - Establish acceptable modes of communication between team members
 - Productivity measurements
 - Institute mechanisms to track time worked
- Performance criteria
 - If offered selectively, consider limiting to those with positive performance record
 - Good standing
 - Above-average performance, initiative, ability to work without supervision
 - No history of performance or disciplinary problems

Eligibility Criteria

- Other Potential Eligibility Criteria:
 - Length of service criteria
 - Productivity measurements
 - Required level of management and/or interaction with other employees
 - Required level of technology support
 - Required movement of records, files, work product, etc.
 - Level of required access to proprietary information and ability to safeguard same from remote work location

Immigration: Form I-9

- Form I-9 Compliance
 - Temporary relief from in-person review for employers taking physical proximity precautions
 - Remote review permitted but in-person review must be completed within 3 days of return
 - Authorized representatives may be a workable solution
 - Anyone can be an authorized representative
 - No special agency appointment needed
 - See [Alerts](#) in the Immigration section on our Resource website

Immigration: Foreign National Workers

- Furloughs, Relocation, Terminations
 - All can have immigration-related consequences
- H-1B, H-1B1, E-3 Nonimmigrants
 - Work from home in same commuting area is possible
 - “No Benching” rule applies to work and wage reductions
 - Termination triggers 60-day grace period provisions
 - Must withdraw petition and offer H-1B return transportation
- L-1 Intracompany Transferee
 - No wage and hour obligations
 - Transfer to another employer is impractical
- Avoid preferential treatment of foreign workers; potentially discriminatory

Productivity and Duration

- Duration
 - Avoid guarantees for duration of pandemic
 - Set periods for reevaluation, based on performance
 - Termination “at will” (or reserve right to transfer to unpaid leave status)
- Productivity
 - Established productivity expectations are key to successful relationship
 - Part-time expectations should be established in advance
 - Targets and goals should be established
 - Ensure that primary duty for exempt employees remains exempt work

Importance of Setting Expectations

- Send communication (or enter into agreement) to clarify remote working expectations and parameters
 - Productivity and compensation expectations
 - Work-hour expectations
 - Break period expectations
 - Recordkeeping expectations
 - Workers' compensation/OSHA issues
 - Protecting proprietary information
 - Expectations as to supplying equipment
 - Expense reimbursement obligations

Issues Related to the Work Area

- The home is the workplace
 - Make sure that the employee understands the necessity to report work-related injuries
 - Limit work area to a designated portion of the home
- Limit third-party access to the workspace
- Provide any necessary supplies and equipment that employees will need while working remotely, including, for example, laptops or computers, monitors, and office supplies
- Consider any ADA accommodations at work that may be needed at home (e.g., ergonomic chair)
- Limit distractions during working times
 - Remote working is not a substitute for dependent care
 - Remote workers should still arrange for childcare or elder care, as necessary, or ensure that another adult is available to attend to these needs while the worker is dedicated to the remote work arrangement

Protecting Proprietary Information

- Determine information system security issues
 - Make sure any remote working agreement or communications address protection of proprietary information
- Remote workers should only maintain access to information on a need-to-know basis (including any hard-copy information brought to their remote worksite)
 - Consider supplying information systems equipment to employee
 - Consider degree to which employee has access to proprietary information
- Ensure employees understand and comply with provisions to secure information, considering others who may also be in the home (roommates, family, visitors)
- Remote workers should be required to take reasonable precautions to protect company equipment from theft, damage, or misuse

Expense Reimbursement Claims: Reason for Remote Work

- Even in states requiring reimbursement, employers likely do not have to reimburse expenses such as internet and phone for employees who **voluntarily** work remotely if they have an option of working at a workspace provided by the employer.
- However, where working remotely is "**strongly encouraged**" it may, depending on the facts of the case, be considered involuntary.
- Some states focus on ensuring that an employer does not benefit from failing to reimburse and/or that employer operating costs are not passed to an employee. As a result, employers *may* have an argument (which is untested) in some jurisdictions that they need not reimburse employees for expenses incurred as a result of **government-mandated** remote working — especially where employers are continuing to pay separately for expenses such as unused office space, electricity, and WiFi.

Federal Expense Reimbursement

- The FLSA does not prohibit employers from requiring an employee to pay the cost of such items.
 - The FLSA does, however, prohibit employers from requiring an employee to pay these costs if doing so would reduce the worker's pay below the statutory minimum wage and overtime rates.
 - Thus, employers must reimburse employees during the workweek in which the expense was incurred if that expense reduced the workers' wages below the statutory minimum during that week.
 - Risk may be low if the employee already has internet before beginning his or her remote work, and thus the employee does not incur any actual costs.
 - However, if an employee is required to purchase internet or incurs additional costs due to remote work, that expense would be considered "required by the employer for the specific job or workplace" and, therefore, if not reimbursed would be an offset against earned wages.
 - Mitigate by offering to pay additional expenses incurred.

California Expense Reimbursement Claims: Types of Expenses

- Must reimburse if activity was within the **course** and **scope** of employment
 - Expenditures must be reasonable and necessary
 - Employer must know or have reason to know that the employee has incurred an expense before the employer's duty to reimburse is triggered
 - An employer can identify in its policy any unnecessary items (i.e., printers or new furniture) and will not be reimbursed, or will not be reimbursed without preapproval

California Expense Reimbursement Claims: Types of Expenses

- Employers should reimburse for all reasonable and necessary out-of-pocket expenses that an employee incurs for the sole benefit of the employer, such as when an employee sends a necessary work-related package via an overnight delivery service.
- For employee expenses that have mixed personal and business use — such as cell phone usage, cell phone repair/purchase, WiFi, and electricity — an employer should reimburse employees for a “reasonable percentage” of such expenses. What is reasonable will depend on the circumstances, such as how much the employee uses the device or service for work as compared to personal use.

California Expense Reimbursement Claims: Reimbursement Amount

- Calculating reimbursement amount: an employer can reimburse a reasonable estimate rather than exact expenses, provided:
 - (1) The employer must provide some method or formula to identify the amount of the expense reimbursement.
 - (2) If this reimbursement is insufficient, the employee must be provided an opportunity to submit an expense reimbursement request with supporting documentation showing why the reimbursement is inadequate.
- California employers are required to reimburse an employee for some amount of reasonable and necessary expenses even where an employee may arguably incur no additional out-of-pocket expense, such as where the employee already has a phone with an unlimited data plan.

Issues Relating to Work Hours

- Establish expected work hours
- Establish when workday will start and when it will end
- Establish expected number of work hours per day and week, and require written approval to vary hours
- Establish policy for hours varying from expected work hours
- Establish mechanisms to ensure that employees are actively working (including regular responsive communications with team members)

Issues Relating to Work Hours

- Legal Issues
 - Time spent determining and/or receiving assignments
 - Time spent on preliminary and postliminary activities
 - Waiting for work and on-call time (29 C.F.R. § 785.17)
 - “Reporting” to work, when work isn’t available to perform (including “calling in”)
 - Remote meetings and training (29 C.F.R. § 785.27-31)
 - Attendance outside employee’s regular work hours
 - Attendance voluntary
 - Course, lecture, training not directly related to employee’s job
 - Employee performs no productive work during attendance

Break Periods

- Meal and rest breaks
 - No federal requirements except breaks of less than 20 minutes must be paid
 - State-specific statutory requirements
 - Minors more likely to have meal and rest requirements
 - Regardless of state statutory requirement, handbook, policies, and practice may establish meal and rest period requirements
 - Review meal and rest period policy applicability to remote workers
 - Policy and agreement should set firm break period requirements and expectations

Compensation Issues

Exempt Employees

- White-collar exemptions
 - Must be paid on a salary basis (*but* consider one-time salary reduction, down to as low as permitted threshold, particularly if work expected to change during remote working period)
 - Deductions from salary permitted only for limited reasons
 - Exempt employees working part time must still receive minimum salary for exemption
- Commissioned employees (inside sales)
 - Proper tracking of work time is required
 - Meal and rest breaks required in some states
 - Must ensure 1.5x minimum wage for all hours worked
- Outside sales
 - Proper assessment of time spent away from home “selling”
 - Proper assessment of whether employee “sells”

Compensation Issues

Nonexempt Employees

- Employees paid on an hourly basis
 - Proper computation of hours worked
 - Awareness of applicable state law
 - Proper computation of the “Regular Rate”
 - Remuneration less excludables divided by hours worked
 - Excludables under 29 C.F.R. § 778.200 (29 U.S.C. 207(e))
- Inclusion of nondiscretionary bonuses and other incentive compensation in “Regular Rate”
- Inclusion of prizes and bonuses in “Regular Rate”
- Exclusion of reimbursed business expenses

Compensation Issues Nonexempt Employees

- Piece-rate compensation
 - Hours worked must be accurately recorded
 - Proper calculation of the “Regular Rate”
 - Proper calculation of hours worked (including nonproductive time, travel time, etc.)
 - Minimum wage must be paid for all hours worked
 - Overtime must be paid for all compensable overtime hours at 1.5 times the Regular Rate
- Consider potential state based requirements (such as reporting time and split shift premiums)

Compensation Issues

Nonexempt Employees

- Commission- or incentive-based compensation
 - Hours worked must be accurately recorded, including any work performed on “off hours”
 - Frequency of pay dates
 - Proper calculation of the “Regular Rate” (including additional incentive/hazard pay)
 - Proper calculation of hours worked (including nonproductive time, etc.)
 - Minimum wage must be paid for all hours worked during a pay period
 - Overtime must be paid for all compensable overtime hours at 1.5 times the Regular Rate

“Absences” of Remote Workers

- Sick Time
 - Remote workers should still indicate if they are unavailable due to preventive or actual care of themselves or other individual
 - Notice should be provided in advance, when possible, to avoid performance management concerns
 - Time should be allocated from available sick-time banks (under the new federal law, the employee gets to choose what “bank” to take the leave from – the employer’s or that provided by federal law)
- Vacation
 - Remote workers should obtain advance approval from their managers before taking a vacation day
 - Such days should be limited to available vacation banks
- If remote workers have not been approved for sick or vacation time, then they should be held accountable for performing their jobs during normal working hours, and timely responding to team member or managerial communications

Recordkeeping

- Accurately tracking hours worked
 - Litigation risk mitigation requires accurate tracking of hours worked
 - Clear policies
 - Agreement and policy should address and provide for accurate tracking of hours worked
 - Institutional systems to ensure proper tracking of hours worked
 - Daily and weekly follow-up regarding time submissions
 - Accurate tracking of meal and rest breaks

Best Practices

- Clear policy addressing remote working issues
- Provide manager training (how best to manage remote workforce)
- Clear communications or agreements should establish
 - Eligibility and duration
 - Ensure eligibility established on a nondiscriminatory basis
 - Consider trial periods
 - Employment remains “at will”
 - Productivity standards
 - Compensation arrangements
 - Expected work schedule
 - Expectations regarding active communications and responsiveness
 - Responsibility for equipment
 - Expenses
 - Meal and rest breaks
 - Timekeeping requirements and obligations
 - Expectations regarding protection of intellectual property

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MARCH 25 - PAID SICK LEAVE AND TEMPORARY PAID FAMILY AND MEDICAL LEAVE MANDATES DUE TO COVID-19

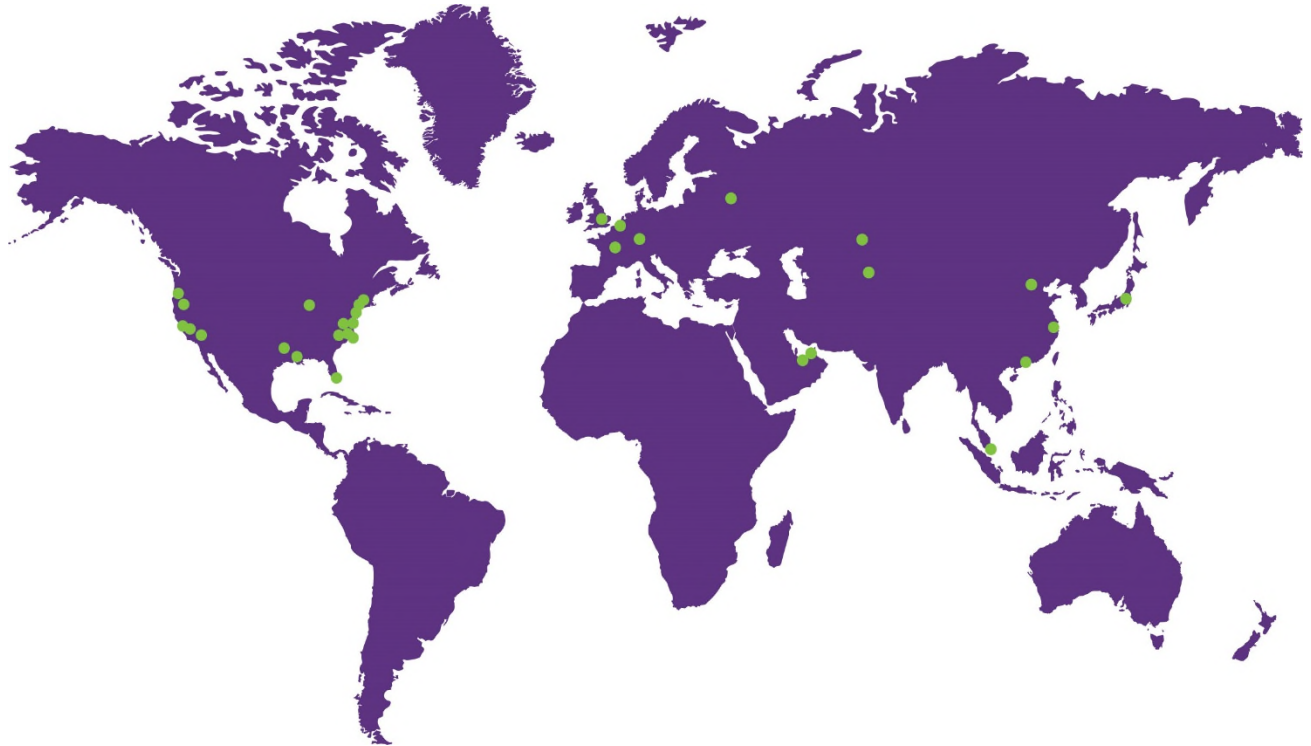
MARCH 26 - COVID-19 AND LABOR LAW: WHAT EMPLOYEE ACTIONS ARE "PROTECTED," UNION BARGAINING ISSUES, THE NLRB, AND MORE

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