

Out of Sight, Out of Mind, Into Court

BY DANIEL J. MCCOY

Much has been written in recent years about the benefits and pitfalls associated with employee telecommuting arrangements. Many factors - including technological advances with remote access to company electronic systems, and lengthening commutes - have fueled both the desire by employees to secure part-time or full-time telecommuting arrangements, and the willingness of employers to grant them. In addition, employers are taking a fresh look at telecommuting policies in response to an increased focus on pandemic planning. As a result of these and other factors, telecommuting arrangements have increased substantially throughout the country.

This article focuses on key legal duties triggered by telecommuting arrangements; the significant legal risks triggered by regularly or periodic work at home arrangements; and practical steps employers can take to mitigate these risks.

Wage/Hour Exposure

A prominent legal risk of telecommuting is potential liability for unpaid overtime, meal and rest period compensation.

Under the federal Fair Labor Standards Act (FLSA), employers must pay non-exempt employees straight time compensation for all hours worked (including work during meal and rest periods), and overtime compensation for hours worked in excess of forty per week. State laws impose additional duties in this context, including in California, where employers have an obligation to pay daily overtime for hours worked in excess of eight in a day, in addition to the FLSA's weekly overtime requirement. When employees work but do not receive compensation for overtime hours and missed meals and breaks, they can recover not only the compensation for the hours worked, but interest, penalties and attorney's fees as well.

Supervisors often have great difficulty controlling and tracking the number of overtime and other hours a telecommuting, non-exempt employee works, and ensuring

that such telecommuters take meal and rest breaks. This is true in part because telecommuters often have a difficult time drawing distinctions between working and non-working hours. As a result, supervisors are often confronted with timesheets bearing substantial overtime hours the supervisors were either not aware or did not approve. In general, this problem can be mitigated by a clear written policy requiring non-exempt telecommuters (and all other non-exempt employees) to obtain advance written approval to work overtime, and to take required meal and rest breaks. However, even with such a policy in place, if supervisors are aware that non-exempt telecommuters are working overtime, and/or working through meals and breaks, employers must compensate the employees for those hours worked.

Employers may also mitigate these risks by limiting the number of discretionary telecommuting arrangements for non-exempt employees. However, employers must keep in mind that purportedly exempt telecommuters may be misclassified and therefore eligible for overtime, meal and rest period compensation, as well as penalties, interest and attorney's fees to the extent they pursue claims to recover such compensation. The plaintiffs' bar has pursued class actions related to such claims against numerous industries, including retail, food service, insurance, healthcare and high technology, and purportedly exempt telecommuters are prominent in many such class actions.

In addition to the exempt/non-exempt misclassification risk, employers must also keep in mind that, under California law, and pursuant to a January 1, 2006 amendment to California Labor Code 515.5, employers must ensure that employees classified as exempt pursuant to the state's Computer Professional exemption receive no less than a minimum hourly rate (\$49.77 as of January 1, 2007) for each hour worked, even if paid on a salary basis. Thus, although the amendment expressly granted employers the ability to pay computer professionals on a salary basis (equivalent to the stated hourly rate), it also had the practical effect

of requiring employers to track the hours of such exempt workers if they do not fall within one of the other traditional exemptions from overtime compensation. Needless to say, telecommuting arrangements render this task even more difficult.

Telecommuting as a Reasonable Accommodation of a Disability

Many employers believe they can completely eliminate the legal risks in this area by imposing an outright ban on telecommuting. However, the law does not grant unfettered discretion to impose such a ban.

It is now well settled that, pursuant to the Americans with Disabilities Act (ADA) and analogous state laws, telecommuting may constitute a form of reasonable accommodation of an employee's disability. Indeed, the federal Equal Employment Opportunity Commission (EEOC) promulgated a specific guidance (accessible at <http://www.eeoc.gov/facts/telework.html>) addressing "Work At Home/Telework" as an ADA accommodation. The courts have also generally concluded that telecommuting may constitute a form of reasonable accommodation under the ADA. *See, e.g., Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128 (9th Cir. 2001).

However, employers need not implement a telecommuting arrangement when the disabled employee's presence in the workplace is an essential function of the job. The law does not require employers to ignore or jettison essential functions when considering accommodation requests. Indeed, employers have been generally successful in fending off ADA "failure to accommodate" claims based on telecommuting requests where the employee's regular attendance at work was an essential function of the job.

For example, in *Mason v. Avaya Communications*, 357 F.3d 1114 (10th Cir. 2004), the plaintiff/employee Diane Mason suffered from post-traumatic stress disorder, which was aggravated by a coworker's aggressive behavior. To alleviate her stress, Mason requested that Avaya either re-assign her or the coworker to another location, or permit Mason to work from home. However, Avaya had only one facility in the state, so it could not relocate either employee, and the company concluded that a full-time telecommuting arrangement was not possible because Mason needed on-site supervision and interaction with co-workers to perform her duties. Mason never returned to work, and Avaya eventually terminated her. She later sued Avaya

under the ADA for its alleged failure to accommodate her disability. Affirming a lower court's dismissal of the case, the Tenth Circuit held that Mason's attendance at work was essential to her job, and that her request to telecommute was unreasonable because it would eliminate an essential job function - attendance at the workplace.

The appellate court and EEOC treatment of this area over the last ten years leads to at least two important conclusions. First, in every case where an employer relies upon attendance at work as an essential job function, it must establish as a factual matter that such attendance is indeed essential. A job description or other writing conveying this notion is not controlling. Second, employers should avoid an absolute "no telecommuting" policy or practice, for it is clear that they may be required to consider short or even long-term telecommuting arrangements for disabled employees.

Misuse of Confidential Information

Telecommuting arrangements may increase the risk of improper disclosure or other misuse of company proprietary information.

The proliferation and quality of virtual private networks (VPNs) and other security tools have dramatically improved the ability of telecommuters to securely exchange proprietary information with other employees and business partners. However, the fact remains that employees who work remotely are often using their personal computers to receive and store proprietary information of the company, its employees, and its customers and other business partners. As a result, such information is necessarily more vulnerable to interception and sabotage by hackers, and/or inadvertent loss or destruction by the employee. The temporary loss last year of highly sensitive Veterans data was a sobering example of what can happen when proprietary information "leaves the building."

A further risk related to company proprietary information and telecommuters often emerges upon termination of employment. In the author's experience, telecommuting employees are frequently either uncooperative, or just lazy, regarding the return of proprietary information (whether in hard copy or electronic form) from their homes and other remote locations. This is particularly the case with involuntarily terminated employees. And, employers are often less than diligent about carrying out an effective and complete exit process with telecommuters (if they carry

them out at all). As a result, employers expend excessive resources ensuring that telecommuters have returned company property (laptops, etc.), and returned or deleted all proprietary information from their home systems.

Employers can mitigate these risks in several ways. First, employers can require employees to access proprietary information remotely only when using computing devices that contain sufficient encryption mechanisms and other protections from outside hackers. Second, before terminating a telecommuter, employers should identify the proprietary information and physical equipment the employee possesses (on his or her home computer or otherwise), and be prepared to give specific and clear directions to the employee about how to return or properly delete such information. This is particularly important with employees whose next job will be with a competitor. Third, employers should ensure that supervisors are aware of these issues, and train them to be vigilant about the information and equipment to which their charges have access and control.

Performance Management

Telecommuting arrangements may present performance management challenges for supervisors.

Performance problems are often exacerbated by, or emerge as a result of, an employee working from home. Indeed, performance can be adversely impacted when a telecommuter is distracted by child or elder care obligations or other personal commitments from which employees can more easily shield themselves when performing their job away from home. But even in the absence of such distractions, telecommuting puts a significant strain on an employee's ability to interact with his or her supervisor and co-workers and be fully engaged.

Of course, remote salespersons and other employees who traditionally work remotely often maintain a successful balance in this regard, largely because their jobs are suited to a remote work arrangement. But with other positions where the work is typically performed in the office, telecommuting places burdens on performance management, despite all of the technological advances.

Performance management may appear to be less of a legal risk and more of a business "downside" to a telecommuting arrangement. However, when supervisors observe but do not address performance issues in this context (as in any other context), legal risks emerge. The following is a typical

fact pattern: An employee's performance suffers because of a telecommuting arrangement. The supervisor avoids a direct discussion about the performance shortcomings, and takes a less confrontational and more comfortable route - rather than put the employee on notice of his under-performance and advise him that failure to improve may lead to termination of the telecommuting arrangement (or employment altogether), the supervisor states that the job is one that can no longer be performed remotely (a position typically not supported by the facts). Later, the employee argues that the employer unlawfully discriminated against him when it terminated his employment, and that the supervisor's stated reason for termination was pretextual.

This fact pattern is not unique to telecommuting arrangements, but it illustrates how telecommuting arrangements can and do place increased pressure on supervisors to fairly and directly address performance issues brought on by the remote work arrangement, and what can happen when supervisors unnecessarily manufacture a basis for termination.

Telecommuting arrangements contain many legal pitfalls. However, if employers can manage and mitigate the risks described above, telecommuting can be an effective tool to recruit and retain talented workers and impart other operational benefits.

If you have questions please contact:

Daniel J. McCoy, Partner, Litigation Group
dmccoy@fenwick.com, 650-335-7897

©2007 Fenwick & West LLP. All Rights Reserved.

THIS UPDATE IS INTENDED BY FENWICK & WEST LLP TO SUMMARIZE RECENT DEVELOPMENTS IN THE LAW. IT IS NOT INTENDED, AND SHOULD NOT BE REGARDED, AS LEGAL ADVICE. READERS WHO HAVE PARTICULAR QUESTIONS ABOUT THESE ISSUES SHOULD SEEK ADVICE OF COUNSEL.

This article was first published in *The National Law Journal*, January 2007.