

HOW TO MAKE REMOTE WORK - WORK

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I. SOCIAL AND LEGAL TRENDS FOR REMOTE WORK ARRANGEMENTS

A. Statistics about employers providing remote work opportunities.

1. 85% of employers participating in IWG survey reported that productivity has increased in their business as a result of greater flexibility.¹
2. In 2018, most employers (56%) were offering remote work, either through a hybrid approach of allowing/requiring it (40%) or by being fully remote (16%).²
3. Most employers use a virtual workforce in some way (63%).³
4. In 2017, the industries which had the greatest number of employees who worked at home on an average day included: (i) management, business, and financial operations; (ii) professional; and (iii) sales.⁴
5. The number of employees working remotely increases with the greater wages/salary earned and with advancement of education.⁵
6. Employers who are offering remote-friendly options see 25% less

¹ *The IWG Global Workspace Survey*, International Workplace Group (available at <http://assets.regus.com/pdfs/iwg-workplace-survey/iwg-workplace-survey-2019.pdf>) ("IWG Global Workspace Survey").

² *Global State of Remote Work*, Owl Labs (available at <https://www.owl-labs.com/state-of-remote-work>) ("Owl Labs Global State of Remote Work").

³ *Is Remote Work Illegal?* by Laurel Farrar, *Forbes* (available at <https://www.forbes.com/sites/laurelfarrar/2019/04/30/is-remote-work-illegal/#3f901e4c4442>).

⁴ Bureau of Labor Statistics, *Employed persons working on main job at home, workplace, and time spent working at each location by class of worker, occupation, and earnings, 2017 annual averages* (available at <https://www.bls.gov/news.release/atus.t07.htm>) ("BLS 2017 Remote Work Report").

⁵ BLS 2017 Remote Work Report. Bureau of Labor Statistics, *Employed persons working at home, workplace, and time spent working at each location by full- and part-time status and sex, jobholding status, and educational attainment, 2017 annual averages* (available at <https://www.bls.gov/news.release/atus.t06.htm>).

turnover.⁶

- B. Statistics about how employees view remote work opportunities.
 - 1. Employees who work from home at least once a month are 24% more likely to feel happy and productive at work.⁷
 - 2. The top three reasons why employees choose to work remotely include increased productivity, removing the commute, and work/life balance.⁸
 - 3. Millennial employees are seeking fulfillment and meaning in their work, which often requires flexibility and work-life balance. This can often be achieved through remote work opportunities. 69% of millennials are reported as willing to trade other work benefits for flexible workspace options.⁹
- C. The national context of cases interpreting remote work arrangements.
 - 1. According to Bloomberg Law, which reviewed court decisions addressing whether employers are required to provide telework as an accommodation to employees with disabilities, the employee won in 30% of the cases and employer won in 70% of the cases.¹⁰
 - a. Generally speaking, the employee won (and was entitled to telework opportunities) when the remote work option was provided to non-disabled employees with the same or similar job, or when the request was for a limited duration and for a partial workweek. The employer won (and was not required to provide telework opportunities) when the request was for

⁶ Owl Labs Global State of Remote Work.

⁷ *Id.*

⁸ *Id.*

⁹ IWG Global Workspace Survey.

¹⁰ *Work at Home Gets Skeptical Eye from Courts as Disability Issue*, Robert Iafolla (available at: <https://news.bloomberglaw.com/daily-labor-report/work-at-home-gets-skeptical-eye-from-courts-as-disability-issue>).

indefinite periods or in some instances when the request was for the entire work week.

D. The global context in terms of legislation promoting flexible working arrangements, according to IWG.¹¹

1. Netherlands: “employees with at least one year of service with an employer with at least 20 employees are entitled to ask for a change, increase or decrease in their working hours as well as the ability to work from another location.”
2. Norway: employees have “the right to flexible working hours if this can be arranged without major inconvenience to the employer.”
3. UK: “all employees that have worked for the same employer for at least 26 weeks may ‘make a statutory application’ for flexible working.”
4. Italy: “establishes the equality of workers performing the same duties even if remotely.”

E. Benefits of remote work.

1. Work/life balance. Time is a busy person’s greatest asset. Remote work takes out the commute and permits them to spend more time finding the balance, while still contributing at work.
2. Increased productivity. Remote work has the potential for increasing productivity, by letting employees work when they are most effective. It also permits employees to work from a place that allows them to get into the “zone.”
3. Increased efficiency for positions that don’t require a full time engagement. Just as companies contract out for legal assistance, so too can they contract with accountants, human resources, CFO, etc. This also has the effect of reducing related business expenses, such as

¹¹ *Id.*

physical office space and other benefits.

4. Retain top talent. Highly qualified workers are available, but not always on the traditional schedule. The most qualified workers also may not be located in the same place as the business.
5. Technology has enabled a virtual workplace. Even without formally adopting a remote work practice, many companies operate with employees working remotely. Think of when employees call in from different locations to participate in a conference call or video conference. Even when employees are in the same office space, they often prefer to pick up the phone, instant message, or use other chat forums.

F. Drawbacks to remote work.

1. Not all work can be performed remotely. Some work requires coordination with others at particular times, interaction in-person, handling specific products, etc.
2. Diminished in-person conversations that may decrease engagement.
3. Lack of structure to regularly promote accountability. Employers need to create alternate mechanisms to establish expectations and monitor performance.
4. Depending on where the remote work is being performed, other distractions may arise, decreasing productivity. The employee will need to manage these distractions, similar to how they manage the distractions at work.
5. Lack of trust factor can create misconceptions of reality. When an employee doesn't answer phone or e-mail remotely, there is a greater tendency to assume that employee is not engaged in work. However, even employees in the office succumb to distracting temptations to surf the web or shop online. Without established or reinforced trust, the remote work relationship may quickly end.

G. General takeaways for employers to consider.

1. Performance management must be conducted in a way that motivates employees, so they see opportunities for advancement on the horizon and meaningful work that is appreciated by others in the present.
2. Creating opportunities for employees to work remotely successfully may not only attract the more skilled workers but also increase retention (thereby reducing the cost of replacing employees), if done in an effective way that is based on a relationship of trust and good communication.
3. A 2000 study found that “those most likely to succeed at working remotely are people who have worked with others at the main worksite before, have similar work styles, like one another, have access to high-end technology that helps them collaborate and are skilled at using that technology.”¹² The researchers concluded that a scenario incorporating all these factors is rare and team relationships are strained because “distance still matters.”
4. Employees do not go to work to get work done.¹³ Rather, they go to work early in the mornings when nobody is there or stay late at night after everybody has left or come in on the weekends. They describe the office as an “interruption factory” where meaningful, creative, and more significant projects often require larger blocks of time that permit the employee to get into “the zone.”

II. STATUTES IMPLICATED BY EMPLOYEE REQUESTS TO WORK REMOTELY

A. Americans with Disabilities Act (reasonable accommodations to qualified persons with disabilities).

1. Employers with 15 or more employees must not discriminate against

¹² <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/drawbacks-to-working-at-home-.aspx>

¹³ *Remote: Office not Required*, Jason Fried and David Heinemeier Hansson.

qualified individuals with disabilities and must provide reasonable accommodations to such individuals, provided it does not impose an undue hardship on the company.

2. A qualified individual with a disability is “a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the ‘essential functions’ of the position with or without reasonable accommodation.”¹⁴
3. A reasonable accommodation is “a modification or an adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of nondisabled employees.”¹⁵
 - a. Examples of reasonable accommodation include “making existing facilities used by employees readily accessible to and usable by an individual with a disability; restructuring a job; modifying work schedules; acquiring or modifying equipment; providing qualified readers or interpreters; or appropriately modifying examinations, training, or other programs.”¹⁶
4. An undue hardship includes “an action requiring significant difficulty or expense’ when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. Where the facility making the accommodation is part of a larger entity,

¹⁴ *The ADA: Questions and Answers*, EEOC (available at: <https://www.eeoc.gov/eeoc/publications/adaqa1.cfm>).

¹⁵ *Id.*

¹⁶ *Id.*

the structure and overall resources of the larger organization would be considered, as well as the financial and administrative relationship of the facility to the larger organization. In general, a larger employer would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer.”¹⁷

- B. Family and Medical Leave Act (12 weeks of unpaid leave to eligible employees for covered reason).
 - 1. Employers with 50 or more employees must provide eligible employees with 12 weeks of unpaid leave for covered reasons, which include the employee’s own serious health condition, in a certain 12-month time period.
 - 2. Eligible employees must have worked for the employer for at least 12 months (not required to be consecutive), worked 1,250 hours in the 12 months prior to the leave, and work at a location where the employer has at least 50 employees in a 75 mile radius.
 - 3. The 12-month time period may be a calendar year, 12 months from the first time the employee takes leave, a fixed year (such as a fiscal year), or a rolling 12-month period measured back from the date of FMLA use.
 - 4. This leave may be taken intermittently or as one continuous period.
 - 5. Employer must provide required notices to employees.
 - a. Notice of Rights & Eligibility
 - b. Certification forms
 - c. Designation Notice
- C. Fair Labor Standards Act (wage and hour).
 - 1. Classification of employees as exempt or non-exempt.

¹⁷ *Id.*

- a. Exempt (requires payment on a salary basis that meets the certain salary threshold, and with the employee having particular job duties that meet exempt classifications such as executive, professional, administrative, etc.). These employees are not entitled to the premium overtime rate for hours worked in excess of 40 in any given work week.
 - b. Anticipated changes with DOL proposed rule will result in an increase in the salary level threshold.
 - c. Non-exempt (employees paid an hourly rate, paid a salary that does not meet the salary threshold, or paid a salary without having the requisite job duties to be exempt). These employees are entitled to overtime pay at a rate of 1.5 times their regular rate for any time worked over 40 hours in a given work week.
 - i. Consider meal and rest periods.
 - ii. Employers are required to track hours worked by non-exempt employees. Employers must pay for each hour worked by non-exempt employee, even if in violation of an overtime policy requiring prior approval from management.
2. Penalties for failure to pay minimum wage and overtime owed includes paying all wages owed for the past two years, plus liquidated damages in the same amount. A willful violation may result in payment of amounts owed going back three years.
- D. Occupational Safety and Health Act (safe and healthful work conditions).
- 1. Consider whether the remote work environment complies with the safety requirements of OSHA.
 - 2. OSHA's published instructions on Home-Based Worksites states that OSHA "will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their

employees.”¹⁸ If OSHA receives a complaint about a home work-site, then OSHA merely informally lets employers know about the complaints but does not conduct inspections unless they receive a complaint that indicates a violation that threatens physical harm, or indicates that an imminent danger exists, including reports of fatalities related to work.

3. According to OSHA, “Employers are responsible in home worksites for hazards caused by materials, equipment, or work processes which the employer provides or requires to be used in an employee's home.”¹⁹
4. Employers must keep records of injuries in the home office or other remote work location, if they meet the recordability criteria.

E. Workers’ Compensation (workplace injuries).

1. If the remote employee is injured in the remote environment, the employee may be entitled to workers’ compensation benefits. Have a conversation with your carrier prior to approving the remote work, to identify the standards required for the remote work space and to confirm whether injuries at the remote work location would be covered under the policy.

F. Health Insurance Portability and Accountability Act

1. Covered entities (*e.g.*, health plans, health care clearinghouses, and any health care provider who transmits health information in electronic form) along with Business Associates (*i.e.*, person or entity performing certain functions or activities that involve use or disclosure of PHI on behalf of or providing services to a covered entity) are obligated to maintain privacy and security of protected health information (PHI).

G. Out-of-State laws.

¹⁸ OSHA Instruction: Home-Based Worksites, U.S. Dept of Labor – Occupational Safety and Health Administration (available at: <https://www.osha.gov/enforcement/directives/cpl-02-00-125>).

¹⁹ *Id.*

1. Foreign Qualification Requirements. Depending on applicable state law, employing a remote worker in another state may mean that the employer is considered as carrying out business in that state and thereby required to apply for foreign qualification as an out-of-state business engaging in business in that state in which the remote employee is working.
2. Income, Sales and Use Tax. When a business has a tax nexus, or presence, in another state outside the one in which it is incorporated, then the employer may be liable for income, sales, and use tax in that other state.
3. Home Occupation Permit. Depending on state and local laws, some zoning laws require permits for remote workers, depending on the circumstances.

III. BEST PRACTICES FOR HOLDING EMPLOYEES ACCOUNTABLE THROUGH REMOTE WORK POLICIES AND AGREEMENTS

- A. Is the employee working in a position that can be successfully performed remotely?
 1. Maintain and regularly update job descriptions.
 2. Consider the amount of interaction and collaboration required.
 - a. If onsite presence, spontaneous conversations and availability for meetings is required as a part of the job, remote work may not be a feasible option.
 - b. Consider whether a portion of the employee's work is independent, in which case such work might actually be productive when at home uninterrupted.
 3. Consider classification and requirements for paying hourly wage.
 - a. Documentation of hours worked.
- B. What resources are necessary to maintain accountability and productivity?

1. Teleconferencing and videoconferencing software, including training on how to use the software.
 2. Require password for logging in to any remote electronic device.
 3. Enable program that allows you to wipe the electronic device remotely, if it is ever lost.
 4. Obtain employee's commitment that the employee will be the only individual using the device and that no other individual shall be permitted to access or otherwise use the electronic device. The employee will also not share the username and password with any other individual.
 5. Consider whether you would like to use remote monitoring software. Again, consider the trust factor and whether this extra monitoring would incentivize the employee or restrict the employee's ability to work freely without the feeling of constantly being monitored.
 6. Consider using a two-factor authentication system. Create an automatic sleep factor after a certain duration of time that automatically locks the computer/device that requires a password to log in for future use.
 7. Consider using screensharing technology.
- C. How will supervisors measure and manage the productivity of the remote worker?
1. Consider the level of trust between the employee, coworkers, and the manager.
 2. If the employee has had a longer tenure with the company and knows the procedures and operations and employees, then it is more likely that coworkers will trust that the remote worker will continue to perform the work and it will be easier to gauge whether the performance has increased or decreased or maintained at the same level.

- D. Does the workplace environment meet safety standards for OSHA and workers' compensation insurance?
- E. Memorialize the arrangement in a remote work agreement, supported by a company policy. Factors to consider include:
 - 1. Establish eligibility requirements for remote work.
 - 2. Confirm the term of remote work, when it will end, and the option to extend or otherwise modify. For example, modifications may be necessary if business needs are not met, there is a change in employment status or job requirements, if employee's performance decreases, or if clients/co-workers provide negative feedback about employee.
 - 3. Identify remote work location, free from distractions and interruptions that may interfere with work, and that is free from hazards and other dangers to employee.
 - 4. Explain the equipment and other technology that will be installed and maintained to ensure appropriate communication and security. Specifically identify any company equipment that is being provided or other technology which must be available at the work site (*e.g.*, computer, tablet, high-speed secured internet, printer, shredder, telephone, etc.).
 - 5. Establish measures that will be taken to maintain security and confidentiality of company information and networks, client/customer information, and any PHI electronically transmitted.
 - 6. Address how expenses will be reimbursed by the employer or assumed by employee, in relation to the supplies, equipment, or technology required to work remotely.
 - 7. Establish expectations for performance, productivity, schedule, and accountability in objective, quantifiable, or otherwise measurable ways.

8. Identify method and responsibility for accurately reporting time worked.
9. Include agreement to monitoring procedures to confirm safe work space, confirm employee is working in compliance with the agreement, and for retrieving company property.
10. Address income tax responsibility.
11. Establish remedies upon breach of remote work arrangement or violation of the policy.