

REMOTE WORK AND THE POST-COVID-19 WORKPLACE: SUCCESSFUL HABITS AND PROCESSES FOR WORKING AND MANAGING DURING A PANDEMIC

By: Ronald A. Sollish, Esq.

I. INTRODUCTION

- A. While the COVID pandemic has forced employers to implement remote work, remote work is not going to go away when the COVID pandemic is over.
 - 1. It is projected that 47% of employers plan to let employees work remotely full time moving forward.¹
 - 2. In addition, 82% of business leaders across multiple industries plan to allow employees to work remotely at least some of the time as they reopen closed workplaces.²
 - 3. From an employee perspective, 29% of working professionals say they would quit their jobs if they couldn't continue working remotely.³
 - a. Facebook, Twitter, and Square have said that some employees can work from home permanently, while Google has extended hybrid remote work until at least September 2021 with a plan for flexible work weeks after returning to the office.⁴
- B. Many employers are seeing the benefits of remote work, including cuts in costs and commuting time, while noticing that work can still be achieved through remote work.

II. MONITORING PRODUCTIVITY THROUGH REGULAR COMMUNICATION AND ESTABLISHING EXPECTATIONS

- A. While employees may productively working from home, issues may arise as to how employers monitor and manage such productivity.
- B. Monitoring Employees' Productivity
 - 1. In order to address employee productivity issues, employers must first be able to monitor employees' productivity.

¹ <https://www.shrm.org/hr-today/news/all-things-work/pages/monitoring-remote-workers.aspx>

² *Id.*

³ <https://www.usatoday.com/story/money/2021/01/05/jobs-home-29-professionals-would-quit-if-forced-go-back-office/4142830001/>

⁴ https://www.theverge.com/2020/12/14/22175150/google-return-office-september-flexible-work-week-coronavirus-pandemic-sundar-pichai?fbclid=IwAR0Vi76Z6tppNKvQs5Aw4SDIzi7d_Yzkm4G1hso8czAcb9oyZhoH7K4aGKs

2. Employers have multiple options in monitoring remote employee productivity.
 - a. Employers may create “task lists” for their remote employees.
 - i. These can consist of either tasks an employee should complete and by when. Employers can ask their employees to track and report tasks they are working on and accomplish throughout the day.
 - b. Employers may employ software or technology to track the productivity of remote workers.
 - i. There are a variety of options, including tracking employees’ time⁵, social media site blockers, and keyboard tracking.⁶
 - ii. Workplace monitoring is subject to a variety of federal and state laws regarding when employees have a right to privacy and if and when they must be notified that they're being monitored.
 - (A) From a legal perspective, disclosing surveillance and/or obtaining the employee’s consent to monitoring, depending on the jurisdiction and circumstances, is the smartest tactic. Letting employees know that they will be monitored removes their reasonable expectation of privacy—the element that often forms the basis for invasion-of-privacy lawsuits arising under common law. Having employees’ consent to monitoring presents an even stronger defense to potential claims.
 - iii. Before implementing a tracking program, employers should consider what legitimate business purpose employee monitoring serves and determine whether there is a less invasive option that would achieve the same or similar results.

C. Communication with Employees

1. Remote employees can often feel like they're left out of the loop.
2. Consider scheduling a daily or weekly check-in to see how employees are doing and what support or resources they need to perform their work most effectively and efficiently.

⁵ <https://www.workpuls.com/remote-workers>

⁶ <https://toggl.com/>

3. Remember that communication is a two-way street, and be sure to listen to and address any concerns employees may have.
 4. Be transparent about any areas where the employee is missing the mark, in terms of performance expectations, responsiveness, communication, availability, or engagement.
 5. Recognize that stronger accountability systems may need to be established or modified in the remote work environment. Discuss with employees the importance of maintaining trust in the relationship, and their critical role in the process.
- D. Establishing Performance Measures and Targets and Clearly Conveying Employers' Expectations
1. Clearly communicate your expectations of your employees while they work from home. Employees who understand your expectations, and who receive positive reinforcement will be more motivated to continue meeting and exceeding those expectations.
 2. Establish a Remote Work Policy.
 - a. Terms to consider including in the policy:
 - i. Specific hours of the day when employees are expected to be online or logged in remotely.
 - ii. Expectations for availability and responsiveness, such as specific hours of the day when they should be answering phones and responding promptly to e-mails. Establish a time-frame for how long will it take to get back to customers/co-workers.
 - iii. Requirements for reporting on a regular basis what they have accomplished and what remains outstanding. For non-exempt employees, explain the process for reporting hours worked.
 - iv. How employees will notify supervisors when they will be unavailable and unable to meet these expectations (e.g., out at a doctor's appointment).
 - v. Identify the remote work location to confirm it is safe – free from hazards and other dangers to the employee.
 - vi. Identify needs for equipment and/or technology from the company, including an obligation that the employee maintain the property in a secure place.
 - vii. Confirm that confidentiality expectations may be maintained.
 - b. Employers should have employees sign the policy or a remote work agreement.
 3. Be understanding and know your legal obligations to provide paid leave. You should be mindful that not all employees may have an ideal telecommuting setup while daycares and

schools are closed due to the COVID-19 pandemic. As such, be patient and understanding with your employees. Encourage them to take paid time off if they need it during these times to tend to their other responsibilities.⁷ Paid leave policies may need to be updated based on local, state, and federal requirements.

4. Establish a Video-First Culture

- a. “Video-first” is an organizational communication strategy that places priority on video conferencing tools, as opposed to audio-only conference calls. Whether having a one-on-one meeting or a team meeting, the benefits of video-first practice include:
 - i. Ability to use and observe non-verbal communication.
 - ii. Encourages people to participate in meetings from a professional, quiet location (as opposed to just dialing-in-and-muting while driving in the car).
 - iii. Encourages people to get dressed in the morning and adopt the appropriate mindset of being attentive to professional responsibilities.⁸

E. Tracking Employee Hours

- 1. The Fair Labor Standards Act (“FLSA”) requires that employers track the number of hours of compensable work performed by employees who are teleworking or otherwise working remotely away from any worksite or premises controlled by their employers. The US Department of Labor issued a Field Assistance Bulletin specifically addressing remote work and how employers should be tracking and paying time worked by remote employees.⁹
 - a. If the employer knows or has reason to believe that work is being performed, the time must be paid as hours work.
 - b. Employers should provide a reasonable reporting procedure for employees who work non-scheduled time.
 - c. Employers do not have to pay for work it did not know about and had no reason to know about; they are not required to investigate further to uncover unscheduled hours.¹⁰

⁷ <https://www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/how-to-engage-remote-employees-during-the-coronavirus-pandemic.aspx>

⁸ <https://www.forbes.com/sites/kevinkruse/2020/03/10/managing-remote-employees/?sh=17752de369c3>

⁹ US Department of Labor, FIELD ASSISTANCE BULLETIN No. 2020-5.

¹⁰ *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir. 2011).

- d. Employers must “make every effort” to prevent unwanted work being performed when not recorded.¹¹

III. METHODS FOR KEEPING EMPLOYEES SAFE, MOTIVATED, AND SUPPORTED

A. Ensure that remote employees have a safe working environment.

1. Occupational Safety and Health Act (safe and healthful work conditions).
 - a. Consider whether the remote work environment complies with the safety requirements of OSHA.
 - b. 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.”¹² 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.
 - c. 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.”¹³
 - d. Employers must keep records of injuries in the home office or other remote work location, if they meet the recordability criteria.
2. Workers’ Compensation (workplace injuries).
 - a. 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 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.

B. Encourage Work/Life Balance

¹¹ 29 C.F.R. § 785.13.

¹² 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>).

¹³ *Id.*

1. Remote employees are spending more time working than they did when working in-person.
 - a. The average workday lengthened by 48.5 minutes in the weeks following stay-at-home orders and lockdowns, and the number of meetings increased by 13 percent, a working paper published by the National Bureau of Economic Research showed.¹⁴
 - i. Employees feel more pressure to always be available for work.
 - ii. This has caused a shift in employees' work/life balance.
 2. Remote employees may have difficulty establishing a healthy work/life balance right now because there may not be a physical separation between their workspace and their personal space. Employees may feel like they need to be available for work 24/7, which can lead to unnecessary stress and, eventually, burnout.
 3. Encourage employees to take breaks, which may not come naturally in a home environment.
- C. Keeping Employees Motivated and Supported
1. In measuring motivation, employees who worked remotely were less motivated, and those who had no choice about it were the least motivated of all.¹⁵
 2. Encourage Collaboration.
 - a. Establish regular check-in calls to help your remote workforce feel included, but also encourage the use of platforms for instant messaging and chat that allow informal conversations between colleagues.
 - b. Pick up the phone when you can, especially for situations which might be emotionally charged or stressful.
 3. Empower employees.
 - a. To stay motivated, make sure you continue to empower your team to make decisions, and show them you trust them.
 4. Set a good example.

¹⁴ <https://www.washingtonpost.com/business/2020/08/04/remote-work-longer-days/>

¹⁵ <https://hbr.org/2020/04/how-to-keep-your-team-motivated-remotely>

- a. It's important to communicate your expectations, but the most effective strategy is to show employees what you expect.
5. Consider engaging in culture or brand development activities. During this time when some businesses are shut down, employees may have time to dedicate toward trainings and workshops that reinforce the company's culture, mission, and values. With the current events over the past year, many companies are offering workshops about respectful workplaces, inclusion, unconscious bias, and allyship.

IV. BEST PRACTICES FOR EVALUATING EMPLOYEES, PROVIDING FEEDBACK, AND TAKING DISCIPLINARY ACTION

- A. If there is an issue with an employee's productivity, or other policy violations, or if it is time for a regular performance review, it may be necessary to evaluate, provide feedback, and possibly discipline or terminate a remote employee.
- B. Feedback and constructive criticism are necessary components for managing workflow, employee growth, and satisfaction.
- C. Evaluating Remote Employees
 1. Have employees completed their work thoroughly and in a timely manner while working remotely?
 2. Are there employees who have seemed to adapt well to the change of remote working?
 3. Are there employees who seemed to adapt poorly to the change of remote working?
 4. Have some employees taken advantage of working from home?
- D. Providing Feedback
 1. It's important that employers give positive feedback to employees during this time.
 - a. Recognize that it has been difficult time for employees.
 - b. Recognizing and rewarding employees for their hard work is a key factor in boosting engagement among your telecommuting employees.
 - i. Recognition doesn't need to be formal or grand for it to be effective. For example, a personal thank-you e-mail or message can go a long way in making employees feel valued and engaged while they work from home.
 2. If there is an issue, employers should provide direct and constructive feedback to employees.

- a. Begin the feedback conversation with a check-in. "How are you doing today?" and "What is the most important thing you are working on today?" These questions provide insight into the employee's frame of mind and understanding of priorities.¹⁶
 - i. From here, you can gauge how quickly the feedback you're offering will be acted upon and incorporated.
- b. Lead with appreciation and the desired outcome.
 - i. Very few people like surprises, especially now. When people feel surprised or blindsided by feedback, they are more likely to react defensively and less likely to incorporate your advice. Stating the desired outcome at the beginning of the conversation eliminates the element of surprise, signals the behavior modification you're looking for, and allows you to show appreciation for past contributions.¹⁶
- c. Engage in a conversation with the employee and ask open ended questions.
 - i. It is possible that the employee has COVID related issues that have affected their performance, e.g., children at home, a sick parent, etc.
- d. Be honest if there is a gap between performance and expectations.
 - i. Talk about how and why trust that has been lost, if it reaches that point. Explain what the employee must do to regain that trust.
 - ii. Explain the impact on the team or business, if an employee is not carrying the appropriate weight.
 - iii. Discuss what resources or tools the employee needs to bridge the gap. Establish deadlines for improvement.

E. Taking Disciplinary Action

- 1. If an issue arises and an employer needs to take disciplinary action against an employee:
 - a. Remember that, whether the worker is in the office or working from home, the same rules apply.

¹⁶ <https://www.forbes.com/sites/martifischer/2020/04/07/feedback-practices-for-employees-working-remotely/?sh=552fe9345709>

- b. Having policies and job descriptions in place is important when taking disciplinary action against employees. When issuing disciplinary action, point to the specific policy that the employee has violated or job expectation that has not been met.
- c. When performance issues do arise for remote workers, they should be appropriately discussed and documented in the same manner as for onsite employees. As best you can, make sure the employee understands the series of missteps that are leading to more significant disciplinary action.
- d. Consider meeting in person, or at least with virtual video connection, for disciplinary action.
 - i. Videoconferencing is preferable so that you can see the employee's body language and reactions.
 - ii. Minimize any distractions, if possible.
- e. Have a policy or plan in place for technology and equipment. Partner with IT and other relevant departments to ensure that access to company information can be cut off remotely so that the worker can't delete or copy data after the termination.¹⁷
- f. If terminating an employee remotely, try to have more than one employer representative present during the conversation. If presenting a release agreement, obtain the employee's personal e-mail address to send the document immediately following the conversation.