

Labor Law Bulletin

Labor and employment law trends
of interest to our clients and other friends

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EMERGENCY PREPAREDNESS INCLUDES CONSIDERATION OF A WORK-AT-HOME POLICY

In the event of avian flu or other health crisis, employers likely will face mass absenteeism of employees who become ill or must care for family members or friends or choose not to come to work for fear of becoming contaminated through exposure to other people. Employers may be able to mitigate the adverse effect of widespread absenteeism by allowing employees who are well enough to work from home. A telecommuting or work-at-home policy raises a number of legal issues that ought to be considered now before an employer is inundated with requests from employees who want to work from home and maintain a salary stream during a health or other crisis.

Key Issues with Any Telecommuting Policy

Any telecommuting policy must address several issues: the job functions that can be performed at home; the employees who are eligible; the factors to be considered in deciding an employee's request; the length of time the employee may telecommute; how often the employee must report to the employer's work site; responsibility for the employer's computer and other property; allocation of expenses for phone bills, power bills and computer access; how to track and report work hours and availability; and how the employee is evaluated and held accountable. Keep in mind that determinations on these issues may have unintended implications. For example, an employer who allows a job function to be indefinitely and permanently performed at home is effectively conceding that on-site attendance is not an essential requirement for that job. An employer will have a hard time later asserting that it is necessary for the job to be performed on-site as a reason for declining a disabled employee's accommodation request to telecommute.

FLSA Issues

The Fair Labor Standards Act and similar state laws require employers to pay "non-exempt" employees a minimum wage and overtime for hours worked over 40 in a workweek. These requirements apply just as much to employees who work at home as to those who work on-site. Unsupervised and distracted at home, employees who work at home may find it difficult to maintain accurate time records. And, because the employee may be the only one who knows when he is working, the employer will be forced practically and legally to take his employee's word on the amount of hours worked.

Employers may be able to impose some control. They can set standard hours when an employee should and should not be working. Employees should be required to keep and submit daily or weekly computer-generated or handwritten time records. For employees who use computers, employers can match work hour submissions with log-in and log-off times. Employers can counsel and even discipline employees who submit hours outside their prescribed schedule. However, employers are required by law to pay employees for all time and overtime

hours claimed to be worked, even if it is not authorized, unless the employer can show that the hours were not worked.

Another significant issue affects exempt employees. Employers need not pay exempt employees by the hour or for overtime. The general rule is that the compensation of exempt employees cannot be docked based on the quantity or quality of their work. As exceptions to this rule, exempt employees need not be paid if they take off a full day for personal reasons, or if they have exhausted all paid sick days. However, they must be paid their full salary if they perform any services during the course of a day. Thus, an exempt employee who logs in to his e-mail for 15 minutes during the day may be entitled to be paid for the entire day.

Other legal issues arise when determining whether to pay at-home non-exempt employees for “on-call” and travel time. Generally, employers are not required to pay employees who are on-call unless their activities are substantially restricted due to the conditions of their on-call status. Thus an employer may have to compensate employees who are restricted to their house, or who must be able to get to work within a relatively short time if called. There are special rules for non-exempt employees who travel from home to customers or other work sites depending on their normal practice, if the trip is out of town and overnight and other facts.

Intellectual Property Issues

Although computer use at work may not be much different from computer use at home, the absence of supervision at home does present greater risk to employers that confidential information and trade secrets may be lost or misappropriated. Confidentiality agreements are critical to the protection of such information, but lax restrictions and protections erode the enforceability of such agreements. Employers should work with their IT staff to develop creative and proactive measures to protect and monitor the confidentiality of off-site information.

To help employers plan for and deal with legal issues that may arise, Vedder Price has formed a Pandemic Preparedness Task Force. If you would like more information, feel free to contact Chuck Wolf (312/609-7888), Peter Kelly (312/609-7875), Christopher Nybo (312/609-7729) or any other Vedder Price attorney with whom you have worked.

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