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Blog Post

Across the Digital Divide: Managing Remote Workers

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The explosive growth of teleworking during the COVID-19 pandemic has re-shaped notions about how we work, presenting novel challenges for management. Re-opening business worksites brings new legal and operational challenges in continuing to effectively manage remote workers, while deciding whether, when, and which remote workers should return to the worksite. The new focus on teleworking requires consideration of a host of issues including technology, productivity and communications, cybersecurity, time and recordkeeping, and best practices for avoiding workplace claims.

Technology Considerations

Prior to the pandemic, only an estimated 3-4 percent of Americans worked remotely; in April 2020, some studies indicated as many as half of workers were working remotely. Yet it was not an entirely positive experience. Teleworking presents a number of practical challenges for employers, especially with respect to technology, maintaining employee productivity and continuity of operations, communicating consistently across split workforces (with both in-person and remote employees), and preserving data security.

The rise in teleworking necessitates expanded use of new technologies previously unknown to many workers. For example, until the pandemic, Zoom was
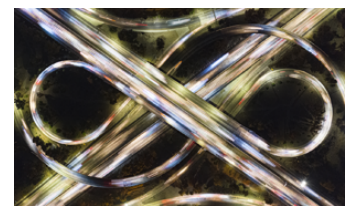
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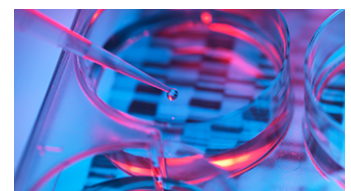## Related Offices

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Review the Table of Contents

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not a household word; even now, many newcomers to the platform still struggle with sharing screens and managing audio and camera time with multiple participants. Employers should not be surprised: one study in February 2020 showed that 87% of executives reported current or anticipated technology skill gaps in their workforces. One takeaway from teleworking in the pandemic: employers should take time now to help employees learn to be more flexible, develop critical thinking skills, find creative approaches, and enhance their technological proficiency.

While employees are enhancing their proficiency, employers should consider enhancing the technology they will rely on going forward. Scientists predict a second COVID-19 wave, and maybe more. Employers should evaluate their technology, equipment, and software now with an eye toward not just current but also future needs.

Employers must keep in mind that some states require that employers reimburse employees for certain expenses incurred working at home. California, for instance, requires employers to reimburse employees for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." Similarly, Illinois requires reimbursement for "all necessary expenditures or losses incurred by the employee within the employee's scope of employment and directly related to services performed for the employer." In the teleworking context, such expenditures may include:

- Cell phones or cell service plans, if the employee is expected to use the phone for work purposes;

- Routers, other connective equipment, or even internet service provider charges incurred to provide the employee sufficient network access to perform his or her duties; or

- Any additional software or other computer applications required for the employee to perform

his or her work.

California and Illinois are not alone; Massachusetts, Montana, and New Hampshire impose similar duties. To avoid unnecessary or unexpected equipment-related expenses, employers should regularly evaluate the capabilities of the technological resources provided to teleworking employees, determine whether any outstanding needs can be met with existing business assets, and strategically allocate those assets in the areas of greatest need.

Productivity and Communication Considerations

To foster continued productivity, employers should consider conducting regular check-ins with teleworking employees to verify they are able to complete their work tasks efficiently and effectively and to address any unresolved issues in the employee's performance. Managers should increase their day-to-day engagement with remote employees; staying connected with remote employees fosters stronger communication, clearer expectations, and ultimately, better work outcomes.

Employers should also take care to ensure communications are consistent across in-person and remote employees, especially during the implementation of a staggered return to work. Such communications may include:

- Providing frequent and consistent updates to all employees, especially remote workers, regarding key business developments or changes in practices or policies; or

- Ensuring remote employees are provided equal notice of any professional opportunities like promotions, incentive programs, events, and the like.

Simply put, employers should strive to ensure all employees are treated equally, regardless

of where or how they are working.

Cybersecurity Considerations

Increasing employees' remote access carries a heightened security risk for sensitive business data. In fact, some security firms have noted a significant increase in cybersecurity threats and scams during the pandemic, including:

- Phishing scams;
- Phony notices from actors posing as venders or government entities asking for sensitive information or demanding payment of outstanding charges;
- Ransomware; and
- Keystroke loggers.

Employers should remain especially mindful of the adequacy of existing security measures and implement additional protections if needed. Virtual Private Networks (VPNs), and other encryption measures allow employees to safely access business files from remote networks. Even simple measures like requiring employees to change their passwords frequently, prohibiting them from "saving" passwords for faster login, or requiring them to use two-factor identification can drastically increase baseline security.

Employers should also provide additional training to verify remote employees in particular understand the types of security threats the business faces and how to recognize them, the security measures available, and the employee's personal role in maintaining the integrity of the business's networks and systems. Increased reliance on video conferencing applications is particularly perilous; many applications lack robust encryption measures, potentially leaving businesses vulnerable to infiltration. And even apart from cyberthreats, some courts have ruled recordings of video meetings may be discoverable in litigation. In light of these and

other issues, employers should convey and enforce heightened standards of professionalism during video meetings that are being recorded.

Timekeeping and Recordkeeping Considerations

Another challenge presented by teleworking is employee compensation. Under the federal wage and hour laws, employers have an obligation to pay employees for all hours worked. Employers must also create and retain records documenting the hours worked by non-exempt employees. Employers must ensure that all non-exempt employees have properly and accurately documented their time spent working—a particular challenge with respect to remote employees.

Employers should have clear policies prohibiting employees from working off the clock and a clear mechanism for recording hours worked. Supervisors should monitor employee timekeeping carefully. If a supervisor notes that a non-exempt employee is checking email after hours, the supervisor should immediately put a stop to it. Employees should be reminded that while they will be paid for such time, they may be disciplined up to and including termination for engaging in unapproved, after-hours work – and employers should follow through.

Supervisors must also monitor for productivity, and if there are issues with getting work completed in the normal time frame, identify the reasons and try to find a solution. Those who are not productive remotely may be far more productive at the worksite; regular communication and good recordkeeping will help employers decide who can and should remain remote workers.

Avoiding Discrimination Claims

Employers should also take special care in selecting which employees physically return to work, and which employees may continue or resume their

work remotely. For instance, some states' COVID-19 related orders either expressly prohibit or strongly discourage employers from requiring "vulnerable" employees – typically defined as those above a certain age, those with certain health conditions, etc. – from returning to in-person work.

For example, Colorado's latest "Safer at Home" public health order states, "Vulnerable Individuals cannot be compelled to work for any business or government function, including a Critical Business or Critical Government Function, during the pendency of this pandemic emergency." The order defines "Vulnerable Individuals" as individuals (1) aged 65 and older; (2) with chronic lung disease or moderate to severe asthma; (3) with severe heart conditions; (4) who are immunocompromised; (5) who are pregnant; and (6) who have been designated "high risk" by a healthcare provider.

Similarly, Indiana's "Roadmap to Reopen" executive order urges "People at high risk of severe illness from COVID-19, including those 65 and above and those who are sick or have underlying medical issues ... to stay in their residences to the extent possible, except as necessary to seek medical care." The order also confers authority upon the Indiana Occupational Health and Safety Administration "to take all available administrative and enforcement actions against businesses or entities failing to comply with workplace safety conditions." Thus, to the greatest extent possible, employers should consider allowing such employees to work remotely.

Similarly, the federal Americans with Disabilities Act (ADA) mandates employers provide reasonable accommodations to employees with qualifying disabilities, so long as the accommodations do not impose an undue hardship on the employer. In the COVID-19 context, employers may be required to allow employees with qualifying conditions to continue or resume working remotely, if doing so would enable the employee to perform his or her essential job functions without under hardship.

Depending on the employee's condition, he or she may require additional accommodations apart from teleworking, or accommodations that are different from those they needed prior to the pandemic. Of course, such determinations will require a case-by-case analysis, and employers should engage in the interactive process with qualified employees to determine whether there is a reasonable accommodation that would allow the employee to perform the essential functions of the job.

Employers must also be mindful even if they are concerned that an employee whom the CDC identifies as at "higher risk for severe illness" if he or she gets COVID-19 would be jeopardized by returning to the workplace, the ADA does not allow the employer to exclude the employee – or take any other adverse action – solely on that basis. Recent issued guidance from the Equal Employment Opportunity Commission (EEOC) makes clear that such an employee can only be barred from the workplace if his/her disability poses a "direct threat" to his/her health that cannot be eliminated or reduced by reasonable accommodation. Accordingly, the employer must conduct an individualized assessment of particular employee, the risk of exposure, the job duties, the location, and other relevant factors to determine whether the risk of harm to the employee posed by his returning can be mitigated by a reasonable accommodation.

Employers will likely see an appreciable increase in employees requesting teleworking arrangements even as business reopen their worksites. If they have not done so already, employers should adopt a clear, written teleworking policy that explicitly emphasizes its temporary nature. Employers may also consider entering into "teleworking agreements" with employees in order to set clear expectations.

Finally, in adjusting teleworking policies or selecting the employees required to return to a physical work location, employers should ensure those decisions are not influenced by an employee's status as a

member of a protected classes like race, gender, or age. Employers should also be cognizant of recent changes to federal and state law which confer new protections for workers who are unable to work or telework due to the closure or unavailability of schools and daycare providers as a result of the pandemic. Such employees may have new leave rights under the Families First Coronavirus Act if employed by covered employers.

Conclusion

State and local orders governing the return to work are evolving on an ongoing, near-daily basis. Akerman continues to monitor these and other COVID-19 developments as they impact the workplace and will provide frequent updates on those developments. When you are ready to begin conversations about phasing out remote working and transitioning your workforce back to regular operations, check our Return to Work Resource Guide and contact your Akerman attorney.