

## The Remote Workplace: Navigating the New "Office Space"

R.J. (Randy) Stevenson  
Sara A. McCue

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### *Due to the Pandemic . . .*

- Remote work skyrocketed beginning in mid-March of 2020
- What would have been a 10-year evolution happened in about 10 days
- It goes by many names
  - Remote work, telecommuting, telework, virtual work, etc.
- Employees like it

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## Survey Statistics

- During the pandemic, almost 70% of white-collar employees have been working from home
- Post-pandemic, 92% of those employees expect to work from home at least 1 day/week, and 80% expect to work from home at least 3 days/week
- 23% would take a **10% pay cut** to work from home permanently
- Employees are saving \$500/month on average by working remotely (i.e., \$6,000/year)
- 59% are more likely to choose an employer that offers remote work compared to one that does not

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## Options

1. Eliminate remote work and require all employees to return.
2. Allow some employees to continue to work remotely.
3. Allow hybrid schedules, permitting employees to split their workweeks between in-person and remote work.
4. Move to 100% remote work.

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## Practical Considerations

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Return to work as usual?

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Option to work occasionally in yoga pants?

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## Practical Considerations

- What does remote work do to your culture? Will employees believe that remote work decisions are made equitably?
  - Cons
  - Pros

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## Practical Considerations

- Will workplace productivity take a hit?
  - Employers should consider how they will measure productivity
- Does the organization have the technological capacity to handle remote work?
  - Secure remote access
  - Use of personal drives

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## Practical Considerations

- Should the organization have a remote work policy?
  - Yes. It is particularly helpful for employers to develop a clear policy.

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## Practical Considerations

- What should the policy address?
  - To whom a remote work policy applies
  - How to get approval to work remotely and/or change the remote work location
  - Accessibility during work hours
  - Frequency of communication with the employee's manager or supervisor

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## Practical Considerations

- Ins and outs of timekeeping (*i.e.*, clocking in and out of work)
- Prohibition of off-the-clock work/tracking time outside of normal working hours
- Falsification of time records
- Adherence to policies and conduct rules
- The employee's specific job duties, work area, and break times

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## Practical Considerations

- Mandatory reporting of employee injuries and potential privacy, security, or confidentiality breaches
- How to handle business expenses
- The employer's responsibilities
- Privacy protections that apply in the in-person workplace will also apply in the remote workplace (*e.g.*, ADA and HIPAA)

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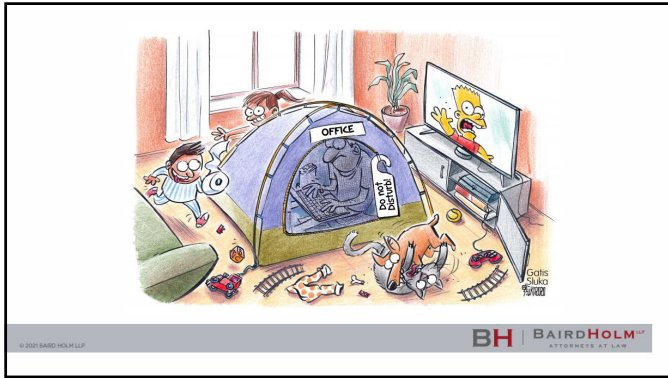
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## OSHA

Occupational Safety and Health Administration  
("OSHA")

- OSHA does not have any regulations regarding telework in home offices
- OSHA recordkeeping not affected by remote work
- "Home-based worksite" versus "home office" distinction

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## OSHA

- Feb. 2000 OSHA Directive for "home offices"
- OSHA will not inspect employees' home offices
- OSHA will not hold employers liable for employees' home offices
- OSHA does not expect employers to inspect the home offices of their employees

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## Best Practices

- Physical security of the workspace
- Extent to which the employer may monitor/inspect the workspace
- Applicability of safety policies (e.g., fire prevention, electrical hazards, ergonomic hazards)
- Home office safety checklist

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## FLSA

DOL Q&A during COVID-19:

Is my employer required to cover any additional expenses that I might incur if I work from home (for example, internet access, computer, additional phone line, increased use of electricity, etc.)?  
(revised 04/26/2021)

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## FLSA

DOL Answer:

An employer may not require an employee to pay for items that are the employer's business expenses if doing so reduces the employee's earnings below the required federal minimum wage or overtime compensation due in any workweek. If the employer provides a computer, for example, the employer may not require the employee to reimburse it for that cost if doing so reduces the employee's earnings below the required federal minimum wage or overtime compensation due in any workweek.

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## FLSA

DOL Question re: COVID-19:

I am teleworking during the COVID-19 pandemic. My employer allows employees flexible hours during the normal workday to take care of personal and family obligations, such as caring for my children while school is closed. If I begin work, take several hours in the middle of the workday to care for my children, and then return to work, what is the proper way to count my compensable hours?

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## FLSA

DOL Answer:

Employers generally must pay employees only for the hours they actually work, whether at home or at the employer's office. Periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for her own purposes are considered "off duty" time and are not hours worked. The employer therefore does not need to count the hours in the middle of the workday that an employee uses to care for children as hours worked.

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## EEO

Equal Employment Opportunity ("EEO")

- General Considerations
  - Do not single out employees.
  - Specify which groups of employee can work remotely.
  - Ensure that managers understand how to handle remote-work requests.
  - Ensure you are following your own guidelines!

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## EEO

- Consider limiting the number of individuals who are responsible for granting telework requests.
- Remember that pregnancy is not, in and of itself, considered a disability. However, a pregnant employee may make a request for accommodation because of a pregnancy-related medical condition.

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## EEO

### Frequently Asked Questions Regarding the Americans with Disabilities Act ("ADA")

*Question 1: Is an employer required to consider a request that an employee be permitted to work remotely as an accommodation for a disability?*

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## EEO

**Answer 1:** Yes, this might constitute a necessary and reasonable accommodation even if other employees are not allowed to telework. An employer should consider this accommodation request like it would any other request for accommodation. Keep in mind that the employer might also offer alternative accommodations.

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## EEO

*Question 2: If the company allows an employee with a disability to work from home as a reasonable accommodation, is the company required to allow all employees to work from home?*

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## EEO

**Answer 2:** No. Employers are not required to provide a telework option for individuals who do not have a disability-based need to work remotely.

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## EEO

Question 3: How do you determine if a job can be performed at home?

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## EEO

**Answer 3:** A review of the request to work from home as an accommodation will require the employer to engage in the interactive process. Employers should review the essential job functions.

During the COVID-19 pandemic, the EEOC found "the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new request in light of this information."

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## EEO

Question 4: The company job description says that attendance in person is an essential function of the job. Can the company deny the employee's request for accommodation?

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## EEO

**Answer 4:** An employer should not deny a request to work at home solely because the job might require some contact and coordination with other employees.

*Bilinsky v. Am. Airlines, Inc.:* "[I]tigators (and courts) in ADA cases would do well to assess what's reasonable under the statute under current technological capabilities, not what was possible years ago."

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## EEO

*Question 5: Can the company allow only partial telework for an employee with a disability-based need?*

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## EEO

**Answer 5:** Yes, if some part of the job requires the employee to be in the office, a part-time telework schedule might be appropriate.

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## EEO

Question 6: *Instead of allowing telework, might the company grant an accommodation that allows an employee with a disability to perform the job in the workplace?*

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## EEO

**Answer 6:** Yes, an employer may grant an alternative accommodation so long as the alternative accommodation is equally effective.

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## Other Considerations

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But wait...there's more!



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### Other Considerations

1. Confidentiality of medical information during remote work
2. Workplace posting requirements
3. Employee benefits (e.g., remote employee coverage by your health insurance and plan)

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### Other Considerations

4. Business expense laws
  - State business expense statutes – three types
    - a. None (e.g., Nebraska)
    - b. Expenses incurred which are authorized by the employer must be reimbursed (e.g., Iowa)
    - c. Employer must pay proportionate share of expenses (e.g., internet and phone), plus "b" above (e.g., California and Illinois)
  - Significance of federal/state minimum wage laws

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## Other Considerations

5. Workers' compensation (e.g., remote worker coverage, coverage in other states)
6. State tax considerations
  - Withholding
  - Unemployment tax
  - Business tax (and registering to do business)

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## Other Considerations

7. Employment laws in other states
  - Hiring laws (e.g., "ban-the-box," background checks, pay history questions)
  - Drug & alcohol testing laws
  - Wage and wage payment laws (e.g., daily overtime premium, pay upon termination)
  - Termination laws (e.g., "at-will" or "cause" state)

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## Questions?

R.J. (Randy) Stevenson  
402.636.8226  
[rstevenson@bairdholm.com](mailto:rstevenson@bairdholm.com)

Sara A. McCue  
402.636.8276  
[smccue@bairdholm.com](mailto:smccue@bairdholm.com)

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