March 16, 2020

IN THE HR TRENCHES—An employer’s guide to telecommuting: A primer on coping with the new normal

By Dr. Jim Castagnera, Esq.

Introduction

James Baldwin once wrote, “Be careful what you set your heart upon—for it will surely be yours.” A recent Gallup poll revealed that 37 percent of Americans claimed they would change employers in order to work at least part-time from their homes. Half of all Millennials revealed they’d jump jobs, if they could work from home. Well, here in mid-March, most of them have gotten their wish.

As a new workweek dawned on Monday morning, March 16th, here were some stunning observations:

• Nearly all of America’s 30 largest school districts are closed. A total of 33 states have closed all their public schools. Most are shuttered for the remainder of the month with high hopes of reopening in April. But no one knows whether this will be able to happen. Meanwhile, the ripple effects are nothing less than remarkable. Not only must teachers and administrators struggle to provide instruction, they must also provide the meals on which millions of K-12 children rely. Many parents are forced to stay home with the kids, as daycare centers follow suit.

• Hundreds of higher education institutions and systems are taking advantage of previously scheduled spring breaks, typically extending them from the usual week to two weeks or even more. Many schools already have robust online-education programs to which they can shift in-person instruction, whether the faculty like it or not. A number of universities and community colleges have already committed to keeping all instruction as distance learning for the remainder of their spring semesters.
• On Wall Street, some financial firms are experimenting with employee rotation. Giant JPMorgan Chase has implemented a staggered work-at-home scheme under which half the workforce will work from home for the week, while the other half will come in; next week they’ll trade off. That’s only if nothing changes. Other banks, such as Berenberg Capital Markets, have already bitten the bullet and told employees to work from home at least for the next two weeks.

• Even government services are heading for home in some locales. Cuyahoga County, home turf to Cleveland, Ohio, has instituted a triage model: Those who can do their jobs from home should do so; those who can’t should come to work; those who can’t do either should start using vacation, sick leave, and comp time.

Although no one can say for sure how many Americans are either working from home or are forced to stay home without the ability to perform their jobs, it’s certain the numbers are already in the millions. And those numbers can be expected to climb exponentially, before they plateau and start to decrease at some now-unknown future time.

In this unprecedented moment in history, here’s what you need to know.

**HUMAN RESOURCES ISSUES**

• Can I require my employees to work from home?

Yes, if it is possible for your business, you have every right to order all or a part of your workforce to telecommute. The trick is not to be discriminatory. For example, you shouldn’t order only your older workers to work remotely on the assumption that they are more susceptible to contracting the virus. Such an order could expose you to liability under the Americans with Disabilities Act and/or the Age Discrimination in Employment Act. The same may be said of employees with known compromises to their immune systems.

• May I require symptomatic employees to go home?

The answer, again, is yes. If an employee is displaying symptoms—coughing, fever, shortness of breath—you can order that employee to leave the workplace. You can also conduct temperature checks to detect fever. You can do that even if the employee has no sick leave or vacation time and won’t be getting paid. However, again, you can’t selectively send an employee home, who is asymptomatic, because you have reason to believe, based on age or medical condition, the employee is at a higher risk of catching COVID-19. That most likely will violate the “regarded as” prong of the test for disability discrimination under the ADA. On the other hand, as evidence mounts that asymptomatic people are spreading the disease, sending home an employee who reports infected family members, is probably a legal, even advisable, move.
• If I require my employees to work from home, must I accommodate their disabilities?

Yes, employees with disabilities must be provided with reasonable accommodations that will enable them to perform the essential functions of their jobs from their homes or other remote sites. Just as in the workplace, a request for such an accommodation triggers the obligation to conduct a dialog to identify what reasonable accommodations will work. Remember, the accommodation may be different from what was provided to that employee at their regular jobsite. But you aren’t legally obliged to provide the exact accommodation the employee asks for, provided you provide a “reasonable” alternative.

• What if an older employee or one with a disability asks to work from home, even though you haven’t initiated a telecommuting program for everyone?

Such a request raises difficult legal issues:

• Under OSHA, employees are entitled to refuse to perform work that they reasonably believe poses a risk to their health or safety.

• Under the ADA, the request triggers the requirement to discuss whether working from home might be a reasonable accommodation of the employee’s disability.

The courts and agencies no doubt will answer these questions in the wake of the current emergency. For now, most experts are recommending that employers err on the side of compassion and leniency, when faced with such requests, as far as possible.

• What if an employee requests time off to care for a sick family member or for children sent home from school?

This question raises even tougher legal issues. An employee, who must care for a sick family member, most likely will fall under the protection of the federal Family and Medical Leave Act. This means the employee may be entitled to as much as 12 weeks of unpaid leave. However, the FMLA doesn’t provide for leave to provide daycare for children sent home due to the sweeping school closures noted in the Introduction. Where does that leave us?

• First, check state and local laws and ordinances to ascertain if they permit leave—whether paid or unpaid—to care for the kids, even though they may be perfectly healthy. Pay close attention to emergency federal legislation, which is currently moving through Congress and that may impact leave rights and responsibilities.

• Second, try to create a telecommuting arrangement that enables the parenting employee to work from home during the duration of the school closing. If the employee is non-exempt, you may require that the employee drop to part-time, of course keeping accurate time sheets.
• If that won’t work, consider whether you will allow the worker to use vacation time, accrued sick leave, or at least to take an unpaid leave, lack of legal compulsion notwithstanding.

• **Must I negotiate with my union before instituting a telecommuting program?**

If your organization is in the private sector, the National Labor Relations Act requires collective bargaining over wages, hours, and other terms and conditions of employment. Obviously, telecommuting is a term or condition of employment. However, your inquiry doesn’t stop there.

Your primary guidance should come from your collective bargaining agreement(s). Start with the management right(s) clauses. Go next to any additional provisos dealing with emergency situations. It may be that you already enjoy the contractual right to institute a telecommuting program.

The other side of the coin is if a group of your employees—whether unionized or not—demands the right to work from home. Section 7 of the NRA protects employees who engage in “concerted activity” for their mutual well-being. Don’t fall into the trap of committing an unfair labor practice by disciplining employees who have banded together and approached management with such demands. Even if their demands don’t rise to the level of reasonable health and safety concerns under OSHA, as noted earlier, they may fall under the “protected, concerted activity” umbrella of Section 7.

**PAYROLL ISSUES**

HR is not the only function with a role to play, as the CFO and the payroll function will have their own serious concerns as you launch your telecommuting tactics to cope with COVID-19.

• **How do we compensate our telecommuting employees?**

The federal Fair Labor Standards Act, as well as state wage-hour and wage payment laws, provide the answers to this threshold payroll question.

Under the FLSA, exempt employees must be paid at least the minimum salary required by the January 1, 2020, amendments to the FLSA regulations: $684 per week. This means that, if hard economic times—and we predict the times will only get harder before they get better—demand that your exempt employees endure a salary cut while working remotely, you must not cut those salaries below the mandatory weekly minimum.

With regard to non-exempt, i.e., hourly workers, you have to pay the minimum wage—$7.25 per hour under federal law, but most likely higher under state wage and hour laws in some or all of your relevant jurisdictions. Telecommuting may create some tricky circumstances for the payroll department to track. Assume your offices are in New York City, but many of your employees commute every day from their homes in Connecticut and New Jersey. While they are working from home, the minimum wage and overtime requirements of their home-states’ statutes
and regs will rule. (And, just by the way, that will be true for salaried, exempt employees, if their home states have higher minimum salary requirement than the new federal minimum.)

Recordkeeping requirements, always a must where non-exempt employees are concerned, take on even greater importance due to these potential cross-border variations in minimum wages and, possibly, overtime rules.

- **Will payroll taxes and deductions be affected by telecommuting?**

This is more of a state-law issue than a federal one. Taking New York as an example, case law in the Empire State includes some decisions to the effect that employees living out of state—e.g., in the “bedroom communities” of Connecticut—may be subjected to payroll and income taxes for the compensation they receive related to the work they are doing at home. Other state and local jurisdictions may have some of the same rules and regs. Bottom line: it’s crucial that your lawyers and accountants ascertain how withholding requirements will be impacted by scattering your employees to their homes and/or other remote sites. One thing is fairly certain … if your telecommuting plan puts people to work across state lines, this is an issue not to be trifled with.

- **What about workers’ compensation?**

Two issues present themselves here, both basically driven—yet again—by state, rather than federal, law.

First of all, is COVID-19 a workers’ comp-compensable illness? The answer is, if it is contracted in the course of employment, most likely yes. Two additional questions will probably come up. One is the duration of the illness and any long-term effects. A short bout of coronavirus followed by a full recovery is unlikely to implicate your workers’ comp coverage. Permanent respiratory injury might be a different story.

Even if a nexus can’t be created between a COVID-19 infection and the workplace, your short-term disability group insurance may be triggered by the illness. And, if you are in one of the states that now mandate paid disability or sick leave, such laws will almost certainly apply to COVID-19 related illnesses.

The knottiest question of them all is what about the telecommuting employee who contracts coronavirus? Was the illness contracted in the course of employment? And if so, which state’s workers’ comp regime applies? The best we can do here is alert you to the issues. Even extant state regulations and court decisions may end up falling short of clear answers, though cases involving workers injured on the job while working across state lines from their regular places of employment should prove helpful by analogy.

- **How will we handle expenses associated with telecommuting?**

Reasonable accommodations—perhaps special telephonic and/or computer equipment—needed to enable disabled employees to perform the essential functions of their jobs remotely will be on your organization’s nickel. So, what about all the other employees who are telecommuting?
Two obvious options present themselves. One is to provide the necessary computing, communication, and other equipment at the company’s expense. The other is to allow employees to use their own home computers and the like and reimburse them for expenses incurred that can be connected to their work.

Many exempt employees may already be using either employer-provided phones, tablets, and the like for off-site and after-hours work-related activities. If so, this probably means that expense-reporting, as well as data-security, policies and procedures are already in place.

- **What are the tax implications of reimbursing telecommuting employees?**

The other side of the coin is the tax implication for the telecommuting worker. If your company supplies a telecommuting employee with equipment needed to perform his or her job, the value of the equipment can be treated as a tax-free working condition fringe benefit provided that the equipment would qualify for a deduction if purchased by the employee (I.R.C. §132(d)). The same holds true if your company reimburses an employee for the cost of equipment that will be for his or her work at home. However, any reimbursement must be made under an accountable plan that requires the employee to document the expenses and return any unspent amounts (I.R.C. §62(a)(2)(A)).

The amount paid by a telecommuting employee for basic local telephone service with respect to the first telephone line provided to the worker’s residence is treated as a nondeductible personal expense. Therefore, any payments or reimbursements made by your company for primary phone service cannot qualify as working condition fringe benefits and must be included in an employee’s income. However, the costs of secondary business telephone lines, cell phone service, or Internet service can qualify as deductible business expenses and, thus, as excludable working condition fringe benefits … provided that all applicable requirements are met. Reimbursements for long-distance business telephone calls, even if made on a primary personal phone line, can qualify for tax-free treatment as long as they are made under an accountable plan.

If a telecommuting employee already has, or sets up, a home office, your company may help to defray some or all of the costs for utilities and maintenance expenses for the duration of the telecommuting. The tax treatment of such payments will generally depend on whether the employee’s home office now qualifies as a principal place of business. If so, the employee would be eligible for a business expense deduction for the costs associated with the home office. How long the telecommuting goes on—something nobody knows for now—will determine whether this is a worthwhile inquiry.

**CONCLUSION**

As suggested at the start of this article, the Ides of March 2020 mark our entry into a brave new world in which telecommuting has reached a tipping point. No one knows how long the current pandemic crisis will persist, how severe it will become, whether it will abate … and, if it abates, how often and how virulently it will recur. If history is any guide, we might look to the Spanish Flu pandemic of 1918-1920.
While we all hope and pray that that horrible pandemic is not predictive of our fate a century later, we know that the flu died out in the late spring of ’18 only to reemerge in an evolved and far-more-deadly form in August of the same year. It came back again and yet again, until it had infected half the world’s population and killed an estimated 50 million.

Even if we are able to dodge such a deadly bullet in 2020, employees already expressing strong interest in telecommuting will now have gotten a taste of it for themselves. The likelihood of putting this genie back in the bottle, even if COVID-19’s successors are no more virulent than annual influenza, seems slight.

This means that you have another good reason for doing this right the first time: you likely are setting the patterns and making the model for the years—and viral seasons—yet to come.