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Client Alert: Employer Considerations for Remote Workers During and After COVID-19

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Many employers found themselves supporting a remote workforce during the COVID-19 pandemic as they adapted quickly to stay-at-home orders and social distancing guidelines. As employers contemplate and implement a return-to-“normal” operations, many employers are grappling with the questions of how much of their workforce should be able to continue working remotely, and for how long. Other employers are considering whether permanent work-from-home status for some or all of their employees should be the “new normal.” While there are no one-size-fits-all answers to those questions, the following considerations will help employers fashion work-from-home policies and procedures that ensure compliance with applicable laws for remote workers now and on a move-forward basis.

Be Mindful of Applicable Leave and Discrimination Laws in Evaluating Work-from-Home Requests

When considering whether to allow, or continue to allow, employees to work remotely, employers need to be mindful of several potentially applicable laws. Under the recently-enacted Families First Coronavirus Response Act, certain employees may qualify for paid leave if they are not permitted to telework. Similarly, employees suffering from a disability may be entitled to an accommodation in the form of remote work under the Americans with Disabilities Act and applicable state and local laws. And, more generally, employers who allow some but not all of their employees to work remotely—whether as a result of COVID-19 or for other reasons—need to be sensitive to the potential for claims under Title VII of the Civil Rights Act of 1964, which can arise from perceived discriminatory application of decisions regarding who is and is not permitted to work from home. In an effort to avoid these potential claims, employers should make decisions about who can work from home on a department or position basis, rather than on an individual employee basis, and document the reasons for any such decisions.

Fair Labor Standards Act Compliance

The federal Fair Labor Standards (FLSA) Act requires that non-exempt employees be compensated for all hours worked at a rate not less than the applicable minimum wage and that they receive overtime pay (at 1.5x their regular rate) for all hours worked in excess of 40 per workweek. Non-exempt employees who are

working remotely are no exception to the foregoing, so it is imperative that employers have a written timekeeping policy which: i) requires non-exempt workers to maintain and submit an accurate record of all hours worked; ii) prohibits any “off-the-clock” work; iii) requires written authorization before incurring any overtime; and iv) provides that by submitting time records to the employer, the employee is affirming that such records are accurate and reflect all hours worked. Similarly, since it may be more difficult for employers to monitor remote workers, the employer should also have a written policy prohibiting employees from doing non-company work during the employee’s agreed-upon “working hours.”

IT and Data Security

Employers should ensure that remote workers understand that they remain bound by all company policies applicable to the on-site workforce, including all information technology and data security policies. In addition, remote workers should also be specifically subject to policies which ensure: i) usage of only designated high security devices to transport information (i.e., company-issued laptops/computers, or encrypted portable devices, such as flash drives or external hard drives); ii) protection of company data from theft, loss, or unauthorized access during transit and at the remote work location; iii) approved firewalls and anti-virus software are installed on all laptops/computers and are updated regularly; iv) flash drives or other portable drives must be encrypted and scanned for viruses before use for uploading or downloading data; v) sensitive information must not be printed at the remote work location without prior knowledge or approval of the supervisor and such information, if printed, must be shredded upon conclusion of use; vi) all work must be saved and backed up according to company procedures; vii) the company’s network is not accessed from the remote work location or other locations unless with advance approval and for approved purposes; and viii) laptops/computers and any remote access tools/portals are properly logged out of and/or shut down when the employee is away from the device or it is not in use. Employers will likely also want to increase their monitoring of remote employees’ digital activity; accordingly, employers should update their IT policies to ensure that the employer has express permission to monitor/review anything the employee sends, receives, or creates through employer-owned equipment and networks and that the employee waives any right of privacy in same.

Preserving Confidential Information, Documents, and Intellectual Property

Although many employers require employees to execute a confidentiality agreement as part of their standard onboarding process, the risk of employee misuse of confidential information and documents is, for many employers, largely mitigated by the fact that employees spend their working time in the employer’s workspace—where oversight and the securing of sensitive information is largely in the employer’s control. When employees work remotely, however, it is imperative that employers have written policies which describe how company documents and information accessed or stored outside the office are to be handled, and consider having employees execute a confidentiality agreement (which may also contain other restrictive covenants, such as non-solicitation and/or non-competition) to ensure, among other things, protection of confidential information and documents via an enforceable contract. Employers should refer to our recently-published Client Alert: Protecting Intellectual Property in Remote-Based Work Settings for more information on this topic.

Workers’ Compensation

An employee injury or illness is compensable under workers’ compensation if it arises out of and in the course of employment, regardless of the location the injury occurs—even if the employee is working from home. Thus, employers’ remote work policies should include provisions which: i) establish guidelines for a home office, such as a designated work area, and provide training related to workstation setup and safety measures, including ergonomics; ii) require employer approval of the employee’s home workstation once set

up; iii) set fixed work hours and meal and rest periods for remote workers, which can help establish whether an injury was “in the course of” employment; and iv) disclaim liability for any injury or damage to the employee’s family members, home, or third parties who may visit the employee’s remote worksite. Additionally, employers should check with their workers compensation, employment practices liability, and general liability insurance carriers about any potential issues arising from employees working remotely, including whether each employee’s working location needs to be disclosed.

Additional Considerations

Work-from-home policies should address the extent to which the employer will provide or reimburse the employee for the equipment and/or furniture that an employee will use to work remotely, being mindful to avoid any deductions from an employee’s pay (whether directly or indirectly, to the extent such costs are to be borne by the employee); this may result in compensation below the applicable minimum wage or any contractually agreed payment amount, thus potentially giving rise to an FLSA claim for any costs charged to or incurred by the employee for their work-from-home setup. Employees should also be guided in best practices for communicating effectively and maintaining appropriate standards of professionalism while working remotely. Employers should also clearly define what deliverables and/or productivity level is required, as it is more difficult to monitor employees’ performance remotely. Further, employers must clearly define hours of work and expectations for timely responding to emails, returning phone calls, and the like. Finally, employers will want to make clear that the employee may be required to return to the office periodically or upon request when needed and that any decision to allow remote work ultimately remains in the employer’s absolute discretion and may be subject to change at any time.

If you have questions about your remote workforce, or if you need assistance in developing or revising your company’s remote work policies, please contact Brad deBeaubien at bdebeaubien@shumaker.com or 813.221.7425, Jan Pietruszka at jpietruszka@shumaker.com or 813.227.2245, Jason Collier at jcollier@shumaker.com or 941.364.2791, Mechelle Zarou at mzarou@shumaker.com or 419.321.1460, or Derick Thurman at ftthurman@shumaker.com or 704.945.2154.

For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 Client Resource & Return-to- Work Guide at shumaker.com. To receive the latest news and updates regarding COVID-19 straight to your inbox, sign up [here](#).