

TOPIC:

TELECOMMUTING: FROM HERE TO THERE; FROM THERE TO HERE, LEGAL ISSUES TO BEWARE

INTRODUCTION:

Telecommuting, or performing work for one's employer from home or a remote location, is becoming an increasingly acceptable employment model. High-speed internet connections, sophisticated hand-held devices, and innovative telecommunications equipment routinely facilitate both official and unofficial telework. In 2008, approximately 17.2 million Americans were telecommuters who worked remotely at least one day per month ("telecommuters") [\[1\]](#). Many employees who are not currently telecommuters report that they have job-related tasks and functions that they could perform from home or remotely [\[2\]](#). And recently, Congress, in what appears to be a reaction to the record-setting Washington D.C. snowstorms that shut down the federal government this past February, acted on legislation that would permit more federal workers to telecommute [\[3\]](#). If this urgency portends a trend, colleges and universities may want to acquaint themselves with the legal issues involved in offering this type of alternative employment arrangement to their faculty and administrative staff.

Federal employment laws, such as, the Fair Labor Standards Act ("FLSA"), the Americans with Disabilities Act ("ADA"); the Family Medical Leave Act ("FMLA"); the Occupational Safety Health Act ("OSHA"); and anti-discrimination laws, as well as state income tax laws affect an institution's implementation of a telecommuting program because employers must still comply with these laws with respect to all workers, including telecommuters. Additionally, institutions must develop telecommuting policies that comply with other applicable laws and institutional or governing board policies [\[4\]](#). This Note discusses the legal and policy issues associated with developing and implementing a comprehensive telecommuting program.

DISCUSSION:

Legal Issues

Fair Labor Standards Act of 1938

The Fair Labor Standards Act ("FLSA") establishes minimum wage, overtime pay, recordkeeping, and child labor standards [\[5\]](#). Some employees, such as executive, administrative, and professional employees are exempt from the FLSA overtime pay requirements (i.e. "exempt" employees). Others, such as those paid on the basis of an hourly wage are not exempt (i.e. "non-exempt" employees). Employers must compensate non-exempt employees at the rate of one and one-half times their regular rate for all of their overtime hours [\[6\]](#).

Non-exempt Employees

Telecommuting agreements should specify the employees' assigned work shifts/hours. But keeping accurate track of non-exempt employee work hours and recording them properly can make telecommuting by non-exempt employees administratively impractical. At a minimum, institutions should include a statement in their telecommuting policy requiring departments to implement procedures that document telecommuters' work hours [7]. Institutions should consider using software that monitors the log-on and log-off times of the non-exempt telecommuter's electronic equipment use. Two other methods of complying with FLSA record-keeping requirements and avoiding the costs associated with unauthorized overtime are establishing policies that require telecommuters to submit daily timesheets and prohibiting overtime work without receiving prior written approval from their supervisors. Alternatively, academic institutions can avoid the overtime compensation mandates of the FLSA by simply deciding that non-exempt employees are ineligible to work as telecommuters.

Exempt Employees

Salaried employees, such as executive, administrative or professional employees who are exempt from the FLSA's overtime pay requirements, are better suited for telework because they are neither subject to the FLSA's rigid timekeeping requirements, nor require close supervision [8]. Since their "exempt" status depends on their exercise of discretion and independent judgment, employers must ensure that their duties remain goal and business oriented, even when performed remotely, and that they do not shift to task oriented work requiring little decision-making authority. An inadvertent change in job duties such as this can interfere with the employee's FLSA exempt status classification. Employers must also ensure that exempt managerial employees working remotely do not lose their supervisory roles, "regularly directing the work of two or more employees" [9]. Institutions are responsible for maintaining clear lines of communication and traditional supervision between executive employees and their subordinates, regardless of the physical location of employees. As such, telecommuting policies should include supervisory employees' standards for managing regular communication and oversight of subordinates, including periodic meetings (via teleconference or in person), method of assigning and monitoring tasks, and completion of personnel evaluations.

Compensation for Time Spent Traveling To and From Campus

Generally speaking, the time that an employee spends commuting to and from work is not compensable as work time under FLSA rules [10]. But the Portal-to-Portal Act, permits employers to make certain travel time or activities compensable by contract [11], custom or practice that are not included in the worker's "principle" activity [12]. Therefore, the non-exempt employee's telecommuting agreement should address whether commuting between the employee's off-campus worksite and campus for official business purposes or any non-principle activities are compensable.

Americans With Disabilities Act of 1990

The ADA prohibits employees from discriminating against individuals with physical and/or mental disabilities [13]. Employers must reasonably accommodate the known "physical or mental limitations" of a qualified person with a disability unless the accommodation imposes an undue hardship on the institution's operations [14]. Although the ADA and implementing regulations do not expressly provide that an employer must offer telecommuting as a form of reasonable accommodation, the EEOC considers it a reasonable accommodation [15], and at least one U.S. Circuit Court of Appeals Court has held that employers may have to permit work-at-home arrangements as an accommodation, provided that the essential functions for the position can be performed at home and that institutional policies are implemented outlining where the work is performed. Even though telecommuting is not a required form of ADA accommodation, courts may be inclined to view it favorably as a form of reasonable accommodation [16]. But courts are split on whether physical presence in a traditional office setting is "an essential function of a job" for ADA purposes [17].

Therefore, colleges should assess telecommuting requests as a form of ADA accommodation, first, on the basis of whether the duties of the particular job can be adequately performed remotely, and second, on the basis of whether it has accommodated other disabled employees using telecommuting. Employers using telecommuting as a form of ADA accommodation must provide these employees with appropriate disability accommodations (e.g., appropriate equipment, modified work schedule, etc.) in their off-campus/home office that is consistent with accommodations that would be provided to the employee in a traditional office.

Family Medical Leave Act of 1993

The FMLA [18] requires institutions to provide twelve (12) weeks of job protected leave to eligible employees for qualified health reasons, such as the birth or adoption of a child, the need to care for designated family members, or a personal serious health condition [19]. Institutional telecommuting policies must adhere to the FMLA and state that FMLA eligibility, applies equally to telecommuting employees [20]

Telecommuting employees cannot perform work in their off-campus offices during periods of FMLA leave. Therefore, institutions must train managers to neither request, nor expect, telecommuters to perform work-related duties during FMLA leave.

Workplace Safety: Occupational Safety and Health Act and Workers' Compensation Laws

Occupational Safety and Health Act of 1970

OSHA [21] also applies to telecommuters [22]. Although OSHA governs work environment health and safety, the U.S. Department of Labor ("DOL") does not hold employers liable for home office safety or expect employers to inspect home offices. Nor will DOL inspect home offices, unless it receives notice of a health standard, safety or other violation that threatens physical harm or imminent danger [23]. However, DOL will enforce all other employer OSHA compliance obligations with respect to telecommuters. These include the employer's responsibility for home worksite hazards caused by materials, equipment, or work processes that the employer provides or requires the telecommuter to use at his home office, as well as keeping records of work-related injuries and illnesses that take place at home offices.

In order to avoid potential OSHA liability, college administrators need to develop procedures for exercising reasonable diligence to ensure off-campus worksite OSHA compliance. And they need to include references to OSHA compliance mandates in their institution's telecommuting policies and employment agreements. For example, telecommuting policies and agreements might state that a telecommuters' home office must have ergonomically correct furniture, proper lighting, and an appropriate ventilation system. Telecommuting agreements should clearly describe the area of the home that is considered the employee's home-based office and stipulate that the employer has the right to inspect the designated office area, including access to or from the office, upon reasonable notice.

Additionally, institutions should provide telecommuting employees with the following written material: (1) a home office safety checklist that compiles with OSHA regulations; (2) a procedure and/or forms to report safety or hazard conditions at their home office; (3) instructions explaining how to set up and correctly operate equipment provided by the institution; and (4) a copy of the federal or state OSHA compliance poster. Institutions should provide training to employee telecommuters regarding workplace safety at remote worksites. Telecommuters should also be required to conduct and document periodic safety inspections of their home worksite consistent with safety reviews of campus worksites. Finally, because the safety procedures at off-campus facilities cannot be monitored efficaciously, institutions should exercise caution when authorizing certain inherently hazardous home-based worksites such as experimental laboratories, art/dance studios, machine/welding shops, and assembly facilities.

Insurance

Telecommuting agreements should state whether telecommuters are authorized to permit third parties to enter the telecommuter's remote worksite in order to conduct official business and, if so, whether the institution's general commercial liability insurance policy covers third parties for injuries caused by hazards located there.

Workers' Compensation Laws

Institutions' telecommuting employees are covered by workers' compensation laws for work-related injuries, wherever sustained, provided the injury occurs in the course and scope of employment [24]. Most states' workers' compensation laws do not distinguish between workers injured on-site and those injured while working at an authorized remote location. Therefore, workers' compensation laws do not provide guidance on how to determine whether a telecommuter's injury occurred while working or while engaged in an unrelated personal activity.

Courts analyzing workers' compensation lawsuits rely on case law to determine when a telecommuting injury is the employer's responsibility. Cases often turn on whether the institution required the employee to perform work at home and whether the injury was related to the employment because it emanated from an inherent work-related danger, risk, or safety matter. As a general rule, if an injury occurs while the employee is conducting work for the benefit of his employer and the employer required the employee to work at home, the injury is covered under workers' compensation insurance. Consequently, the majority of work injuries sustained by a telecommuting employee will be covered by workers' compensation. Similarly, telecommuters injured while traveling between their home offices and campus may qualify for worker's compensation benefits. However, if there is no causal connection between the injury and the employment or if the injury did not originate from a specific danger or risk related to the employment, the telecommuter may be denied these benefits [25].

A carefully drafted telecommuting policy can sometimes prevent disputes regarding workers' compensation coverage. An institution's telecommuting agreement should address parties' intentions and responsibilities regarding the following subjects: (1) specific work hours; (2) telecommuting conduct (e.g., the activities that constitute work duties); (3) break periods; (4) non-employee visitations; (5) designation of a specified area as a home worksite/office; (6) maintenance of a safe work area; and (7) determination of whether and leaving the home office constitutes work duties premises (for example, picking up paper for the institution's printer).

Discrimination Laws: Title VII, Title VI, and Title IX

The employment anti-discrimination provisions of Titles VI and VII of the Civil Rights Act of 1964, as well as Title IX of the Educational Amendments of 1972 apply to all employees including telecommuters. Additionally, institutions must comply with the ADA and safeguard against patterns or practices that potentially discriminate against persons with disabilities. (See Section B, *supra*) Therefore, telecommuters must be treated in the same non-discriminatory manner as traditional employees. Employers should take appropriate steps to avoid creating the impression that members of protected classes are being denied the opportunity to telecommute by selecting telecommuters based on established criteria applied in a uniform and well-documented manner, particularly when considering any subjective criteria such as job performance, work habits, etc.

In making decisions about which positions are appropriate to designate or approve for telecommuting, institutions should thoroughly analyze the duties of positions and the manner by which the employee's work is performed. Generally, the types of positions appropriate for telecommuting are those that:

- require independent work,
- require limited face-to-face interaction,
- result in specific, measurable work products,

- permit performance to be monitored by output,
- require limited campus contact or physical presence to perform effectively, and
- do not involve inherently dangerous tasks or use of hazardous materials.

State Income Taxes

State income tax rules can sometimes affect the efficacy of telecommuting. Depending on the states involved, employees telecommuting across state lines may have their income taxed twice, once by their employer's state and again, by the state where they reside. While states differ in their tax treatment of such income, most apply a "physical presence" test. This test apportions income based on the number of days a taxpayer physically works in each state. New York, however, applies a "convenience of the employer test," which provides that 100% of income earned by a nonresident working for a New York employer is taxable by New York State, unless the work performed outside of New York on which the income is earned is performed outside New York for the employer's convenience, rather than for the employee's [\[26\]](#).

Because the states where telecommuters live can also tax their residents on the income they earn while working from home, telecommuters risk double taxation of their income. To protect employees from double taxation, some home states give telecommuters a credit for taxes they pay the employer's state on their home state wages. But even this approach can disadvantage the telecommuter if the employer's state has a higher tax rate than the telecommuter's home state.

Legislative solutions to this problem have been introduced in Congress several times but have never made it out of committee. The most recent attempt was the Telecommuter Tax Fairness Act of 2009 which would have remedied the perceived inequity of the New York tax [\[27\]](#).

Consequently, prior to permitting an employee to telecommute across state lines, employers should check both of the relevant states' tax laws. Otherwise, the cost of telecommuting may outweigh the potential benefits for both employers, who may have take on the administrative responsibility of adjusting withholding rates for out-of-state telecommuters, and employees, who may be subject to double taxation.

Policy Issues

Academic Institution Telecommuting Policies

Policy Standards

Prior to implementing a telecommuting policy, an academic institution should analyze its institutional workforce and environment to determine whether telecommuting is necessary and/or desirable. If yes, then the appropriate administrators who will implement the telecommuting policy must obtain human resources leadership, expertise and assistance from computer information technology staff, and legal counsel, as well as approval for developing the policy from the institution's senior management and/or Board. While acknowledging and understanding that a level of flexibility based upon institutional needs is necessary, the following matters should, at a minimum, be addressed in telecommuting policies:

- Definition of telecommuting – including, the purpose of telecommuting at the institution, the goals and objectives for telework programs, philosophy of telecommuting, and the benefits for both employees and the institution;
- Designation of the categories of eligible employees, including staff, faculty, and graduate assistants, if applicable;
- Eligibility requirements;
- Identification and procurement of required telecommunications technology;

- Employee union matters;
- Federal law compliance – FMLA, FLSA, ADA, Title VII;
- State workers' compensation law compliance;
- Methods to safeguard the security of institutional data – including, but not limited to, intellectual property, proprietary information, confidential personnel information, FERPA protected student records, and attorney-client communications;
- Institutional general liability insurance coverage of remote worksites;
- Stipulation that all equipment shall be provided and owned by the institution and that telecommunications devices will be connected exclusively to institution's campus network to maintain data security;
- Requirement that all employee telecommuters execute a telecommuting agreement.

Telecommuting Agreement

Once an institution has a telecommunications policy in place that requires telecommuting employees to execute a telecommuting agreement prior to commencing telework, the agreement should, at a minimum, address the following terms and conditions:

- Term/duration (temporary or permanent)
- Location of off-campus office (home based or alternate worksite)
- Designation of an area of employee's home that will serve as the remote worksite
- Frequency of telework, including specification of required dates and/or events necessitating the employee's presence on campus
- Work hours/shift
- Reporting use of personal leave (e.g., vacation or sick)
- Compensation and benefits
- Compensation of non-exempt employees for time spent traveling between a home office and campus, if applicable
- Compensation for travel expenses, if any (e.g., mileage reimbursement)
- Adherence to FLSA time-keeping regulations
- Equipment ownership
- Technology (e.g., compatibility with employee's home telecommunications devices and connectivity to institution's network)
- Workers' compensation coverage
- Adherence to OSHA/safety standards
- Employee's homeowners' insurance coverage
- Taxes
- Local ordinances at the employee telecommuter's off-campus worksite
- Safeguarding institutional files/data (e.g., prohibition against taking restricted access/sensitive material home and requirement to lock file cabinets containing institutional data)
- Expenses (e.g., stipulation of whether the employee or employer will bear costs associated with operation of an off-campus office)
- Requirement that employee notify the institution of any change in status that prevents him telecommuting
- Requirement that employee is not permitted to perform child care, adult care, or similar personal duties during work hours
- Standards regarding communication with supervisor and/or colleagues and periodic review of work performance
- Requirement that telecommuter must adhere to all applicable laws, regulations, and institutional policies at on-campus and remote offices

Best Practices

Finally, the following are some suggested best practices for implementing and managing a telecommuting program:

- In so far as possible, limit telecommuting to exempt employees because it can be hard to control the number of hours worked by non-exempt employees.
- To the extent that your institution allows non-exempt employees to telecommute, communicate regularly and consistently about work hours and prohibit overtime work without prior written approval.
- Take steps to ensure that exempt workers maintain their managerial responsibilities, so that they don't lose their exempt status.
- Limit the work location of telecommuters contractually to comply with OSHA and workers compensation considerations, including designating a particular area of the telecommuter's home as his OSHA compliant workspace; specifying work hours; and permitting, upon reasonable notice, employer inspection of the employee's workplace.
- Consider seriously disabled employees telecommuting requests and evaluate whether the work can be performed remotely before rejecting "reasonable accommodation" requests.
- Stress, as a matter of policy, that telecommuting is a privilege, not a right, and develop uniformly applied, well-documented selection criteria, based on objective, business-based and non-discriminatory standards.
- Use standardized application procedures and make sure your telecommuting agreements state that telecommuting is a job assignment, rather than a benefit, that in no way alters the "at-will" employment relationship.
- And, last, but not least, retain the employer's discretion to discontinue the arrangement.

CONCLUSION:

Implementation of telecommuting policies under which employee telecommuters may work remotely should be considered by administrators at academic institutions seeking to recruit and retain a geographically diverse workforce; accommodate the need for employee flexibility; demonstrate the practical and effective use of technology in non-academic operations of the institution; and increase the telecommunications skills of all employees. Due to the varied legal and policy issues associated with telecommuting, administrators should permit employees to telework on a temporary or permanent basis only if an institutional telecommuting policy has been drafted and implemented in consultation with legal counsel; human resources administrators; and computer information technology professionals. Employee telecommuters working under an effective and thorough institutional telecommuting policy that is compliant with federal and state employment laws generally offer institutions the same productivity levels, service, and work output as employees working in traditional on-campus offices.

FOOTNOTES:

FN1. [World at Work Telework Trendlines](#), 2009.

FN2. Matthews & Williams, *Telework Adoption and Energy Use in Buildings and Transport Sectors in the*

United States and Japan, 2005.

FN3. See [H.R. 1722](#). See also, '[Telework Cuts Federal Government's Losses during D.C. Area Snowstorms](#)'. Federal Diary. Washington Post.com. March 25, 2010.

FN4. The Tennessee Board of Regents, which serves as the statutorily created governing board of forty-five public postsecondary institutions in Tennessee, adopted a telecommuting policy in 2008. [Tennessee Board of Regents Policy No. 5:01:01:20, Telecommuting](#) (December 4, 2008).

FN5. See [29 U.S.C. § 201, et seq.](#) (2009).

FN6. "Overtime" hours are those worked in excess of forty (40) in a particular week.

FN7. See [Tennessee Board of Regents Policy No. 5:01:01:20, Section IV. 3., Telecommuting](#).

FN8. The FLSA provides that exempt employees are executive and managerial employees who customarily and regularly exercise discretion and independent judgment in their work. See [29 U.S.C. §213](#) (2009).

FN9. See [29 C.F.R. § 541.104](#) (2009).

FN10. See [29 C.F.R. §785.35](#) (2009).

FN11. The Portal-to-Portal Act also allows certain activities to be made compensable by custom or practice. 29 U.S.C. § 251-262 and [29 CFR 785](#).

FN12. *Id.*

FN13. See 42 U.S.C. §§ [12111](#), [12112](#).

FN14. *Id.*

FN15. See EEOC: [Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act](#) (2002) and [EEOC Fact Sheet: Work At Home/Telework as a Reasonable Accommodation](#), (2003).

FN16. See *Id.*, at # 34.

FN17. See [Rauen v. U.S. Tobacco Mfg. Ltd. Partnership](#), 319 F.3d 891 (7th Cir. 2003) (holding an employer did not discriminate under the ADA by denying a software engineer's request for a home office, as a requested disability accommodation, because the employee's job required teamwork and coordination required being in the workplace and, therefore, she was unable to perform the essential functions of her job remotely. But see [Humphrey v. Memorial Hospital](#), 239 F.3d 1128 (9th Cir. 2001) (relying on EEOC Guidance to hold that permitting telework was a reasonable accommodation for a records keeper because physical attendance at the office was not an essential function of her position to complete required job duties).

FN18. See [29 U.S.C. § 2601, et seq.](#)

FN19. Employees are eligible for FMLA leave if: (1) they have been employed by the same employer for at

least one year; (2) worked for a minimum of 1,250 hours for that employer during the twelve (12) months immediately preceding the family medical leave period; and (3) their employer employs at least at least fifty (50) other employees within a seventy-five (75) mile radius of the employee's worksite. See [29 U.S.C. § 2611](#).

FN20. For FMLA purposes, a telecommuter's "worksites" is ordinarily the site to which he reports or, if none, the location from which his work is assigned.

FN21. [29 U.S.C. § 651, et seq.](#)

FN22. See [29 U.S.C. § 651, et seq.](#) OSHA requires employers to provide employment and a place of employment that are free from recognized, serious hazards, and to comply with OSHA standards and regulations.

FN23. [Id. at §§ IV. and X.](#) The OSHA directive distinguishes between traditional "white collar" home offices and manufacturing home-based worksites, such as assembly facilities and facilities with heavy or dangerous machinery. The latter types of home-based worksites receive heightened scrutiny and may prompt on site investigation by OSHA. Therefore, academic institutions are advised to analyze the nature of a telecommuter employee's off-site work as it may require the implementation of more stringent OSHA compliance standards if it is inherently dangerous.

FN24. [29 U.S.C. §651, et. seq.](#)

FN25. See [Wait v. Travelers Indemnity Company of Illinois](#), 240 S.W.3d 220 (Tenn. 2007) (holding that a telecommuter was ineligible for workers' compensation benefits after a neighbor assaulted her while she was preparing lunch in her home (where she had an employer-approved office). The court reasoned that, although her personal lunch break was within the course of employment since personal breaks are a reasonable part of an employee's work duties, a compensable injury may only arise out of employment if it emanates from a peculiar danger or risk inherent to the nature of the employment. In this case the requisite causal connection between the injury and the employment was absent because the assault was in no way connected to the employment.

FN26. Proving that a telecommuter needs to telecommute is very difficult. (See [Zelinsky v. Tax Appeals Tribunal of New York](#), (Nov. 24, 2003). New York taxes 100% of the out-of-state telecommuting employee's income, even if the telecommuter only comes into the state for work occasionally. The "convenience" rule has raised constitutional concerns. In *Zelinsky*, the plaintiff, a Cardozo Law School professor, argued that New York violated the Due Process Clause by exercising its tax authority outside New York and that it further violated the Commerce Clause by subjecting him to the risk of double taxation by not allowing fair apportionment of income taxes between New York and his resident state, Connecticut. The Supreme Court denied cert. on *Zelinsky's* constitutional challenge, thus allowing the rule to stand. See [Zelinsky v. Tax App. Tribunal of NY, et. al \(cert denied\)](#). The rule was subsequently applied in the case of [Matter or Huckaby v. Tax Appeals Tribunal of New York](#), 829 N.E. 2d 276 (N.Y. 2005), in which Huckaby, a computer programmer, telecommuting from his Tennessee home to an organization located in Queens, New York, was unsuccessful in arguing that the convenience rule violated his due process and equal protection rights. *Id.*

FN27. Specifically, the [Telecommuter Tax Fairness Act of 2009](#) would have prohibited a state from imposing an income tax on the compensation of a nonresident individual for any period in which such individual is not physically present in or working in such state or from deeming such nonresident individual to be present in or working in such state on the grounds that:

(1) such individual is present at or working at home for convenience; or

(2) such individual's work at home fails any convenience of the employer test or any similar test.

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RESOURCES:

EEOC Resources:

- [Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act \(2002\)](#)
- [Fact Sheet: Work At Home/Telework as a Reasonable Accommodation \(2003\)](#)

NACUA Resources:

- [Legal Issues in Telecommuting](#), Melissa A. Burke, NACUA March CLE (2006)

Telecommuting Policies and Procedures:

- [University of California, Berkeley](#)
- [Rutgers](#)
- [Indiana University](#)
- [Columbia University](#)
- [Tennessee Board of Regents Policy No. 5:01:01:20, Telecommuting](#) (December 4, 2008)
- Stanford University, [Sample Telecommuting Agreement](#)

Additional Resources:

General

- EDUCAUSE: [28 Resources](#)
- The Law of Telecommuting, (2001) and Supplement (2004) Nicole Belson Goluboff, ALI-ABA.

Taxation Across State Lines

- [H.R.2600: Telecommuter Fairness Act of 2009](#)

- [2009 State Legislation Related to Telecommuting and Alternative Work Schedules](#)

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