

U.S. Department of Labor Issues New Employer Guidance Related to Teleworking

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New Jersey Governor Phil Murphy's Executive Order 107 provides, among other things, that all businesses and non-profits must accommodate their workforce, wherever practicable, for telework or work-from-home arrangements through the use of technology that equips the individual to access necessary materials.

The U.S. Department of Labor (DOL) recently issued new guidance regarding teleworking in response to the reality that teleworking can be an effective defense against the spread of the COVID-19 virus. Given that teleworking may remain the status quo for many businesses for at least the near future, the following DOL guidance will assist employers in offering teleworking arrangements that are compliant with the Fair Labor Standards Act (FLSA):

Teleworking Generally Should Not Affect Salaries of Employees Exempt from the FLSA, But May Impact Employees Who Are Not Exempt from the FLSA:

- Teleworking should not affect the salaries of employees who are exempt from the FLSA. In most situations, these employees must receive their full salary in any week in which they perform any work.
- Teleworking employees who are not exempt from the FLSA generally must be paid at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. If teleworking results in less hours for an employee, the employer only needs to pay for the hours worked.

DOL Encourages Alternative Arrangements for Employees Who Cannot Telework:

- If employees are unable to work from home, the DOL encourages employers to consider additional options to promote social distancing, such as staggered work shifts.

- Employers generally are required to pay employees not exempt from the FLSA only for the hours they actually work, whether it is in the office or at home.

Reimbursement of Business Expenses Associated with Teleworking Under Certain Circumstances

- Teleworking may require additional costs (i.e., internet access, computer, additional phone line, increased use of electricity) that may be considered business expenses of an employer. If an employer covers these business expenses for the employee, the employer may require employees covered by the FLSA to pay or reimburse the employer for such business expenses only if the reimbursement or payment does not reduce the employees' earnings below the required minimum wage or overtime compensation.
- Reimbursement of such teleworking business expenses is prohibited if teleworking is being offered to a qualified individual with a disability as a reasonable accommodation under the Americans With Disabilities Act.

The Department of Labor's Occupational Safety and Health Administration (OSHA) Does Not Regulate Teleworking in Home Offices

- In February 2000, OSHA issued a directive indicating that it would not conduct inspections of employees' home offices, would not hold employers liable for employees' home offices, and would not expect employers to inspect the home offices of their employees.
- Employers who are required to maintain records of work-related injuries and illnesses must continue to maintain records for such injuries and illnesses occurring in a home office.

Suggested Best Practices for Employers

- Confirm with your insurance carriers that teleworking is covered under company policies, such as workers' compensation and general liability policies.
- Create a comprehensive telecommuting policy that clearly addresses issues such as productivity standards, working hours, office expenses, and methods of communication with your managers and co-workers.
- Establish a system for accurately tracking the number of hours worked by employees covered under the FLSA. Employees should understand how to accurately track their breaks and mealtimes.
- Apply the same overtime policies to telework that apply to work in the office, and ensure that employees understand that there is no change to these policies. For example, if there is a pre-approval system for overtime, employees should abide by that system even if working from home. Keep in mind that any work performed outside of regular hours, such as checking emails, is considered overtime. Managers should try to avoid emailing employees who are eligible for overtime outside of regular working hours.
- Establish trust and good communication with your employees. Set clear goals and expectations for your employees to ensure productivity and resist the urge to micromanage.
- Ensure that teleworking employees have access to IT support services in the event of technological issues.

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