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Client Advisory

PRACTICAL TIPS FOR DEALING WITH TELECOMMUTING EMPLOYEES

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As technology advances, the need for traditional office workers to be physically present in the office has decreased substantially. Electronic mail, cellular telephones, personal digital assistants with wireless internet access, fax machines and the like have all given employees more freedom to conduct business from remote locations. The ease with which business can be conducted in this fashion has, quite naturally, resulted in a rise in the number of telecommuters. While telecommuting provides many advantages for both employers and employees, there are also a number of potential pitfalls. This article will highlight some of the legal and practical issues you should consider when presented with a request to allow an employee to telecommute.

Be Prepared

Even if you have not yet been presented with a request to allow an employee to telecommute, you should prepare yourself for the inevitable. There are a number of issues to consider before agreeing to requests to telecommute.

It is best to have a written policy addressing issues such as the specific positions or types of positions for which telecommuting may be available, any conditions employees must meet to telecommute, and minimum requirements for the home office. In addition, try to anticipate what technical support you will need to provide to telecommuters. Telecommuting only works if employees have the proper tools and environment to do their jobs. You need to decide in advance such issues as:

- What types of office furniture, equipment and supplies you will provide;
- Whether you or the employee will be liable for theft or damage;
- Whether to give the employee remote access to your Internet service, e-mail and voice mail systems, or network; and
- What types of security systems you need to safeguard your business.

Comply with Employment Statutes

The main legal issues that relate to telecommuting employees arise under Title VII of the Civil Rights Act of 1964 (Title VII), the Fair Labor Standards Act (FLSA), the Americans with Disabilities Act (ADA), and state workers' compensation laws.

Title VII. Once you have a telecommuting policy in place, you have to apply it fairly and consistently. If you do not, you create the potential for claims that you would not allow an employee to telecommute because of his or her race, sex, etc. That does not mean the policy must be applied in the same fashion for all employees. It is acceptable to have separate written agreements that contain different terms for different telecommuters. Those different terms, however, should be based on objective factors, such as the nature of the work performed.

FLSA. The FLSA requires most employers to pay the minimum wage and to pay overtime (at the rate of time and a half) for hours worked in excess of 40 per week. One frequently overlooked issue is how to compensate full-time telecommuters who occasionally have to come in to the office. Are you required to pay them for the time they spend driving to the office?

The obvious answer is no for exempt employees, but it is not quite as clear for non-exempt employees. In general, you do not need to pay employees for their regular commute to the office. But if an employee's work site is his or her home, the drive to the office is not a regular commute. If the issue is not dealt within your policies, or

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in a specific agreement with the employee, you should probably pay the employee for the drive time unless he or she is at the office for the entire day. In addition, you should require non-exempt employees to track their time worked and submit a weekly timesheet. You should also make it clear that overtime must be approved in advance.

ADA. The ADA may require you to allow a disabled employee to telecommute as a reasonable accommodation. You are not required to allow telecommuting, however, if it prevents the employee from performing the essential functions of the job or causes you undue hardship. The “essential functions” of a job are usually contained within a well prepared job description. Your periodic review of job descriptions should, therefore, be carried out with this in mind.

EEOC guidance. Earlier this year, the Equal Employment Opportunity Commission released a fact sheet for employers that are considering allowing an individual with a disability to work from home as a reasonable accommodation under the ADA. A reasonable accommodation is any change in the work environment, or in the way things are typically done, that allows a disabled individual to perform a job. Not all jobs can be performed from home, but under the right circumstances, allowing an employee to work from home could be one form of reasonable accommodation. This reality makes it even more important for employers to develop a telecommuting policy before the need arises.

Workers compensation. Telecommuters are entitled to workers compensation for on-the-job injuries, just as any other employee. Make sure your workers'-compensation carrier provides coverage for work-related injuries at a telecommuter's home. To protect yourself from excessive claims, require employees to designate one room as their home office, and tell them what hours they are allowed to work. That helps you (and your carrier) decide whether an injury occurred on the job.

Conclusion

Several years ago, the Occupational Safety and Health Administration (OSHA) created an uproar when it said employers are liable for work-related injuries that telecommuters suffer while working at home. OSHA quickly changed course, announcing that it would not hold employers responsible for the workplace safety of telecommuters after all. While the OSHA uproar has faded, there are sure to be other issues involving employees who choose to telecommute. If you are properly prepared to deal with the issues raised by telecommuting, most of the potential problems will be avoided.

If you have any questions regarding this advisory, contact Mark Ventola, a member of Sheehan Phinney Bass + Green's Labor, Employment, and Employee Benefits Group at 617-897-5630 or via e-mail at mventola@sheehan.com.

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