

# How to legally manage remote employees

Managing remote employees creates many unique challenges and opportunities. Employers may see increased productivity and reduced costs when they allow a remote work option. But they need to set telecommuting rules to clarify management and employee expectations. Without clear rules, working from home may reduce rather than enhance productivity. Plus, creating a telecommute option opens the door to Americans with Disability Act (ADA) accommodation requests to work at home. Allowing remote work during a Family and Medical Leave Act (FMLA) leave requires careful management. Remote employees also need training in time-keeping and safety and accident prevention.

**Productivity and lower costs:** Remote employees working from home may benefit employers by lowering costs and increasing productivity. Potentially savings include:

- Real estate acquisition or rent – employees largely absorb cost;
- Lower utility costs and property taxes due to fewer physical locations for employers to manage;
- Less maintenance, wear and tear on employer-owned or leased facilities;
- Fewer or no parking facilities;
- Lower support staffing costs;
- Lower or no relocation costs on hire or promotion; and
- Lower recruiting and retention costs as employers reach a larger potential applicant pool located anywhere.

According to a recent [Stanford study](#) of 500 remote employees, allowing telecommuting as an option made workers more productive. Productivity rose a full day per week, workers took fewer breaks and sick days and attrition went down 50%.

## Who telecommutes?

Exact remote employee figures are difficult to come by. Various surveys put the number of employees working at least one day a week from home at 24%. The Census Bureau's time use survey concluded that's the percentage of private-sector employees who teleworked at least some of the time in 2018. According to the Office of Personnel Management, 43 percent of federal civil servants were eligible for remote work in 2017. That's about 903,000 federal workers.

- Forty percent more U.S. employers offered flexible workplace options than they did five years ago. 7% make it available to most of their employees.
- Larger companies are most likely to offer telecommuting options to most of their employees.
- Full-time employees are four times more likely to have work-at-home options than part-time workers. A typical telecommuter is college-educated, 45 years old or older, and earns an annual salary of \$58,000 while working for a company with more than 100 employees.

**Source:** [Telecommuting Trend Data](#), GlobalWorkplaceAnalytics.com 2018

## Setting remote work rules

To make telecommuting work, employers must set rules. The rules should be the same for remote employees and office employees. Set reasonable and realistic productivity goals for both employee groups. Handle attendance, discipline and discharge identically.

First, determine which employees are most likely to succeed working away from an office setting.

- It's best to start with present performance levels. An employee who isn't a high performer already may not be the best candidate.
- Does the worker need careful supervision and management? That can be a big problem.
- Those considered for remote work should also already be disciplined and organized.
- Decide whether remote employees will work away from the office every day, most days or occasionally.

Second, list minimum physical requirement for teleworking. These should include:

- Quiet place in the home – specify whether a separate office or multi-use space;
- State whether a co-working space is an option. These are spaces dedicated to freelancers and telecommuters, often providing desk or office space, meeting rooms and Internet access. National chains providing co-work space include [Regus](#) and [WeWork](#) but there are also numerous independent locations.
- Cafes, libraries and bookstores are other potential locations, though less reliable and less secure telecommuting options.

Third, set the rules for the remote workday:

- Will there be set office hours? When does work start and end? Can remote employees split their day?
- What about face-to-face time? How often will remote employees come to the office? Who pays if the office is not within normal commuting distances?

Fourth, how will the technology needed to work from home be handled?

- Will you set technology needs and standards? What type of Internet connection and speed will the remote employee need? Who provides tech support and manages repairs and troubleshooting?
- What technology will managers and supervisors need to track time, projects and productivity? And how will they handle time-keeping and overtime for remote employees who are not exempt?

Fifth, set rules for childcare and pets. Here are some suggested approaches:

- **Infants and toddlers:** New parents sometimes think they can work and handle new family members. Best bet is to nix this from the beginning – it's not realistic. Require childcare arrangements during core hours.
- **School age children:** Institute core hours that match school hours and allow earlier/later work to make up for hourly remote employees. For exempt remote employees, more flexibility may be OK – if you see projects and goals being met.
- **Pets:** As with children, set reasonable pet rules for the telecommuting employee. For example, if the employee will participate remotely in meetings, make sure that pets won't interfere.

## Remote work as a reasonable accommodation

Disabled employees under ADA are entitled to reasonable accommodations in order to perform the essential functions of their jobs. This can include schedule changes, time off, job modifications and use of assistive technology. It can also include the option of telecommuting as a reasonable accommodation. The EEOC has extensive guidance on when working from home is a reasonable accommodation. Here's what it says:

## **Does the ADA require employers to have telework programs?**

No. The ADA does not require an employer to offer a telework program to all employees. If an employer offers telework, it must allow employees with disabilities an equal opportunity to participate. It must also modify telecommute rules for disabled workers. For example, an employer's telecommute rules says employees must work for the company for a year before telecommuting. If a new employee needs to work at home because of a disability the employer should waive the one-year requirement.

## **What if the employer has no telework program?**

You may have to entertain a request for a telecommute option even if no other employees telework. But you can also offer other reasonable accommodations if those will work. Make that discussion part of the interactive accommodations process.

## **How frequently may someone with a disability work at home as a reasonable accommodation?**

That depends on the disability. In some cases, the disabled employee may have to always telecommute. In other cases, he or she may only need to work at home during flare-ups or recovery from surgery or treatments.

Yes, the employer may select any effective accommodation, even if it is not the one preferred by the employee. Reasonable accommodations include adjustments or changes to the workplace, such as: providing devices or modifying equipment, making

## **Remote employees and the FMLA**

Employees who are eligible for FMLA leave for other than their own illness sometimes ask to work from home. For example, an employee with an ill child or declining parent may think working from home is a good solution. It may be under some circumstances. Just make sure that the employee understands the rules for childcare and setting work hours. Of course, if the employee accepts the arrangement, he or she would only be using FMLA hours when NOT telecommuting. You will have to adjust your record-keeping to properly count FMLA leave and regular hours worked.

If you allow part-time remote employment, there's a potential FMLA trap for employers. Part-time workers often aren't eligible for FMLA leave since they may work fewer than 30 hours per week. Make sure you somehow track hours that the part-time remote worker puts in so you know when they become eligible. Most part-time remote workers are likely hourly and you'd track time using computer log-in or some other accurate method.

What about intermittent leave? Eligible workers can take FMLA leave on an intermittent basis for their own serious health condition. You will have to clarify for remote employees how they will handle their own flareups. As with caring for family members while telecommuting, you will have to track carefully what hours are FMLA leave and what hours are regular worktime.

## **Remote employees and wage and hour laws**

The most difficult aspect of managing remote employees may be wage and hour laws. The Fair Labor Standards Act (FLSA) sets minimum wage and dictates who is eligible for overtime for hours worked over 40 per week. The FLSA applies to all remote employees the same way it applies to on-site employees. And employers are responsible for tracking hours worked accurately whether workers telecommute or not.

As a practical matter, if your telecommuter is an hourly employee, it's harder to track her time. How you track time is up to you. Some employers use a simple employee log. This is the riskiest approach. Others use a

computer log. Still others use specialized software. Make absolutely sure that whatever tracking system you use accounts for all hours worked. Other potential wage and hour problems with remote employees include:

- “Commuting” to office for a meeting. Ordinarily, commute time is unpaid – but may not be the case for remote employees since they are already at work and traveling to a different work location;
- Overtime – Beware surprise overtime claims for extra hours worked that you weren’t aware of. You may want to add restrictions to remote computer access based on agreed-upon work hours.
- Mealtime breaks – make sure they’re taken and no work is done. This is especially crucial in states like California where breaks are highly regulated. You may want to send break reminders or block remote access.

Beware the temptation to classify remote employees as independent contractors or reclassifying as exempt in order to avoid tracking time. All exempt workers need to fit into one of FLSA’s exempt categories based on each test. Working from home does not confer automatic exempt status. Only truly independent contractors can be classified as independent contractors. You cannot simply announce a teleworker is a “freelancer.” Most telecommute positions aren’t amenable to conversion – especially if they were hourly positions. If you are considering creating freelance telecommuters, consult counsel.

## **Remote employees and workplace safety**

Telecommuting does not automatically exempt employers from workplace health and safety rules. Before instituting remote employment, employers should:

- Check with workers’ compensation carrier to see if they require an inspection of the home workplace or reclassification to a different category of employee for coverage and premiums;
- Be aware of potential ‘workplace’ dangers in the home including ergonomics, safety traps like spills down stairs, lack of fire protection, tripping over pets during work.