

# Telework continuation: Legal and fair policies

Telework has become ubiquitous during the national COVID-19 emergency. Now the question is should employers continue to offer telework opportunities. If so, which employees will telework and which will not? You need legal and fair policies so you don't run afoul of discrimination and wage and hour laws. And you need to rework your handbook and related policy manuals.

This sudden experiment in working from home may have shown that large-scale telework is effective, efficient and saves money. Plus, the workplace has dramatically changed. There will be new rules that require social distancing, redesigned and more private offices and frequent sanitation. Employees will have to report any signs of illness and you will have to screen them. And it's quite possible that quite a few of your employees are anxious about returning to work. They may prefer the current telework arrangements, especially after schools reopen, over coming back to a redesigned, socially distanced office.

If all this seems daunting, it may be time to reconsider the office. On the other hand, if you conclude the forced telework program was a failure, you'll need a plan to stop. And there's a third option - a reduced workweek with telework and office time.

## Twitter and Facebook lead the way in designing the post-COVID workplace

Twitter has long allowed many employees to telework. When COVID-19 hit, they were one of the first tech giants to shift every employee possible into telework. That's quite a contrast with their earlier workplace policies, which focused on in-person, campus-based collaborative workplaces. Think open offices, unlimited snacks and ping pong tables - not exactly the best set-up for a socially distanced workplace.

Then, in mid-May, Twitter CEO Jack Dorsey told employees that those who chose to would be allowed to telework permanently. Other big tech companies, including Facebook and Google, had also sent their workers home to telework.

Facebook has also announced that it will continue to allow many of those new teleworkers to keep working from home. CEO Mark Zuckerberg expects about half of his workforce will telework once the pandemic is over. Effective immediately, the company will give every new hire who can telework the opportunity to do so permanently. The company did warn, however, that it might adjust salaries based on telework. However, that may come with a downside for those who so choose. Salaries may be adjusted based on location, presumably to account for lower or higher costs of living.

## Picking who teleworks

Before reopening, employers should audit the success or failure of telework during the pandemic. You'll be able to determine what positions are best suited to telework based on factors like productivity and project completion. This necessarily requires assessing each teleworking employee, too.

Once you have the data, pick which positions are eligible for regular telework. Then rank each employee in each position by performance. That will give you an idea of which employees are likely to succeed at telework over the long haul. You can then decide which employees will be offered long-term telework and who'll have to go

back to the office.

But what if your telework experiment was a great success? You may decide that you won't be bringing back those positions at all. If that's the case, you face hard decisions on whether you discharge the low performers or offer a second-chance.

One word of warning is in order. When you rank employees, make sure you're not illegally discriminating. More on that below.

## **Handbook revisions**

Your handbook will need a section on telework that spells out the rules and requirements. Employers should use this opportunity to assess their telework results. If you had a policy in place before the abrupt arrival of mass telework, modify it to reflect experience. If you didn't, create one now. It should include the following:

- A list of all positions eligible for continued telework. You should have a good idea of exactly what jobs were performed well after performing reviews and analyzing productivity. The sudden experiment in telework should give you good answers.
- A statement that telework is at the discretion of the employer and that continued telework is not guaranteed.
- A policy that clarifies that telework is contingent on hitting productivity and other goals and that not all will qualify.
- A copy of your standard telework agreement that includes all parameters. This should include work hours expected, equipment required, who provides it and provided and reimbursement for job-related expenses.
- A clear policy on time-tracking. This should require that the employee track all hours worked and that he or she understands this will be audited. Explain you will use special software to track hours.
- A policy that calls for a regular review of the telework agreement to see if it is successful.
- A non-discrimination policy that includes an ADA statement on telework as a reasonable accommodation.

## **Telework and reduced workweeks**

As reopening accelerates, employers have to adapt the physical workplace to accommodate restrictions. This may mean reconfiguring office spaces to provide more distance. It may mean staggering shifts even for office workers so that social distance can be maintained. For some facilities, this may be physically impossible. If that's the case, there's another option that combines maintaining some level of telework and reducing the workweek.

Reducing the workweek allows fewer workers in the same facility at the same time. If workers only have to be present in the physical facility 4 or fewer days, you stretch newly reconfigured spaces. That, along with designating certain days as telework days can help make social distancing and building capacity standards.

## **Ending telework**

Not every employee will succeed at telework. Some employers may find that the office setting is crucial to how they do business. Either way, you will need a plan to transition back to the office. How you do that depends on what states you operate in and what your physical workplace looks like. You will also have to consider the impact on disabled workers.

In addition, when you reopen, consider whether your building may be toxic. One major concern is over shut-down ventilation systems, which may be vulnerable to Legionnaires' and other diseases.

For details on both issues, please see our earlier articles on reopening in general and reopening and the ADA.

## **Telework, the ADA, the FMLA and discrimination**

Telework employees cannot be singled out for transitioning back to the office because they are disabled. Nor can employers use past FMLA leave of any kind as a factor in the decision. In addition, disabled employees must also be offered telework as a reasonable accommodation if their disability warrants.

### **ADA and telework**

The ADA does not require an employer to offer a telework program to all employees. Nor does it require employers to offer telework at all. But if an employer offers telework, it cannot discriminate. Disabled workers are entitled to an equal opportunity to telework. Employers have to engage in the interactive accommodations process to determine whether the employee's essential functions can be done from home. Of course, if the disabled workers already teleworked during the pandemic, it's already clear the accommodation can work. Employers should expect that even if they want all workers back onsite, some disabled workers will ask to continue. The EEOC has also long taken the position that employers may have to modify telework rules as part of accommodations.

### **FMLA and EFMLA and telework**

The FMLA was amended during the pandemic emergency to provide partially paid leave for parents. If an employee's child's school, daycare or camp was closed due to COVID-19, workers are eligible for paid time off. They can take complete leave or - with the employer's consent - intermittently. You cannot consider past or future usage to deny telework continuation. The same holds true for regular FMLA usage. If you know that a current teleworker will request intermittent paid EFMLA over the summer, that can't factor in. Remember that unpaid FMLA leave must be offered on an intermittent basis if the employee needs it. EFMLA, on the other hand, requires the employer's consent.

### **Telework discrimination**

After you have reviewed performance and made your telework continuation lists, self-audit for potential discrimination. Could a plaintiff's lawyer look at who got to continue and who didn't and spot a pattern? Were more women cut? Have records to show why. For example, it may be that one sex preferred to continue. Were some races disproportionately offered telework over others? Document specific, objective reasons for each offer. Did you cut pay for those who chose to continue telework? Better back that up with a solid, business-related reason like lower cost for the employee due to location.

## **Final considerations**

As you plan the "new normal" remember that all the rules from the "old normal" still apply. And remember that there are also new rules, varying by state. But rest assured that making changes in good faith, fairly and legally, you won't lose a legal challenge.