Setting remote work rules for hourly employees

Telework used to be reserved largely for professionals and highly skilled workers. These workers didn't need strict supervision. They were self-directed and thrived working their own hours with minimal interference. Sure, face-to-face meetings and business travel were part of their jobs. But the vast majority of their work could be performed from anywhere, anytime.

Enter COVID-19 and state-mandated shutdowns. Suddenly, more jobs *had to* be performed from home. The alternative was to shut down completely. In the year since the pandemic claimed its first victims, millions of hourly workers have had to work remotely. They joined their exempt co-workers. Now, the question is whether to continue the telework experiment or bring those workers back.

Increasingly, employers are opting for continued telework, especially for employees whose productivity hasn't suffered or has even improved. Employers must figure out how to continue to offer telework to two distinct groups of workers — exempt and hourly. The options for each differ significantly. This article focuses on nonexempt or hourly teleworkers.

Time tracking and supervision

The Fair Labor Standards Act (FLSA) sets the rules for keeping track of time. In particular, hourly employees must be paid for all time spent working for their employer. The FLSA requires employers to keep careful records

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to assure workers are paid for all time worked. When workers are in an office, that's relatively easy. Hourly workers clock in and begin work. Then they clock out at the end of the day and for meal breaks in-between.

But when those same hourly workers telecommute, tracking time becomes much more difficult. What if the employee steps away from his desk to put in a load of laundry and fold the dry clothes? Will you end up paying for that time when it's longer than the brief 10-15 minute paid breaks you allow? That loading and sorting time can add up.

Conversely, what happens if your hourly teleworker finishes a task after she's signed off for the day? That counts as paid time under the FLSA, but you won't be capturing it. Suppose you fire the worker for any reason. She may strike back with an FLSA wage and hour lawsuit that you would be hard-pressed to defend. After all, the Department of Labor (DOL) says it's your responsibility to track time. There is no permanent exception for hourly teleworkers even though DOL was lenient early on.

Independent contractor status is not the answer

One temptation to simplify managing remote workers is to convert them to independent contractor status. After all, independent contractors track their own time, handle their own tax withholding, and pay for their own equipment. Shifting to that model also buys you work assignment flexibility and freedom from providing expensive benefits like health insurance.

For exempt teleworkers, the conversion from employee to independent contractor is relatively easy. Exempt positions by definition involve employees who exercise independence and judgment. Those characteristics also help define what is an independent contractor. Because exempt teleworkers don't need a lot of direct supervision, converting them into independent contractors makes sense. The more control you relinquish over the day-to-day telework, the better. All that's left is to make sure the contracted teleworker is truly free from the usual employee constraints. Concentrate on making assignments. Set deadlines but leave the actual execution to the teleworker. And encourage taking on assignments from others, too. That will make it easier to prove later that she was engaged in a for-profit business.

For hourly workers, the conversion is difficult if not impossible. The same factors that tilt the scale towards contractor status tilt it the other way for an hourly teleworker. The exercise of independence and judgment isn't part of the job. Hourly teleworkers are more likely task-oriented. They make or take calls from home rather than a call center cubicle. Each task is assigned. If there's any decision-making involved, it's limited by established guidelines or standards. Nor does the hourly teleworker choose when and how to complete tasks. Finally, it's highly unlikely the employee will take on work from other entities unless it's outside a set schedule. He or she is simply not engaged in a for-profit business. Instead, there's a trade of labor for hourly pay. Making this teleworker an independent contractor is asking for legal trouble down the line.

Hybrid model

For hourly teleworkers, the best option may be a hybrid plan. This is an increasingly popular solution. Advantages include more supervision than pure telework and an opportunity to compare productivity in two settings. By splitting time between an office and telework, the employer can best use limited space and maintain social distancing. Workspaces can be appropriately separated. Staggered daily schedules allow for proper cleaning without impacting productivity. All this will help employers comply with local, state, and federal pandemic safety rules. Plus, if you've given up some office space over the last year, a hybrid plan controls cost.

Hourly teleworkers might work from home several days per week. Other days, they would report to the office. There, they could receive the week's assignments, engage in training, or work under direct supervision. This allows managers to gauge how well the telework arrangement is working.

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Of course, you will have to make certain that you're tracking time at home and at the office. In an FAQ issued early in the pandemic, the DOL said employers had to pay for time they knew the employee worked. The advice said to use reasonable time-reporting procedures and compensating hourly teleworkers for all reported hours. Compare time records for work performed in the office and at home to see whether you're capturing time worked. The office time gives you a barometer of how long tasks should take. If tasks are taking longer at home, the employer can inquire as to why.

Comparing production at home and at the office may be a guide for adjusting employee schedules to achieve maximum efficiency. Employers will still have to balance safety concerns such as allowing time for office cleaning and maintaining social distancing.

A hybrid work policy

Employers should develop a hybrid work policy covering all aspects of the arrangement. In reality a hybrid work policy is just a modification of a telework policy. The rules should keep the employer from discriminating, but still be flexible enough to allow the employer to adapt.

For example, employers cannot play favorites when scheduling under the hybrid model. Doing so could lead to discrimination charges. Before embarking on a hybrid approach, develop rules governing:

- Which jobs are appropriate for hybrid scheduling
- How much time employees should work at the office
- A non-exhaustive list of reasons for adjusting schedules

The hybrid model may be the wave of the future or simply a transitional phase. Either way, employers must manage the change in a way that promotes productivity and limits liability.

Additional Resource: How to approach pay differences for employees doing remote work.

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