

# Addressing the Legal Risks Associated with Telecommuting Employees

C. Clayton Gill

ISB Employment and Labor Law Section

September 28, 2016

MOFFATT  
THOMAS

[www.moffatt.com](http://www.moffatt.com)

# C. CLAYTON GILL

Clay Gill is a member of the Board of Directors of the Idaho law firm, Moffatt Thomas. Clay takes on each of his client's issues as if they were his own. His passion and creativity distinguish him from most lawyers.

On the litigation front, he excels at trial strategy. His business and financial background makes him a strong candidate for all commercial litigation matters. On the transactional front, his experience in corporate formation, corporate governance, commercial contracts, employment law, and insurance makes him an ideal candidate for small or medium sized companies looking for an outside general counsel.



MOFFATT  
THOMAS

# Telecommuting on the Rise

- The number of employers offering telework has risen from 20% in 1996 to 60% in 2016.
  - Source: SHRM
- 95% of employers say the ability to telework has a significant positive impact on employee retention.
  - Source: Global Workplace Analytics
- Younger generation considers work/life balance and flexibility as one of the most important factors in considering job offers.

# Objectives

- The primary objectives of my presentation on telecommuting are to:
  - Help you identify the types of positions best suited for telecommuting.
  - Help you identify the characteristics of an employee who can be a successful telecommuter.
  - Define best practices for addressing the laws that pertain to telecommuters.

# Positions Suitable for Telecommuting

- Not all positions are suitable for telecommuting.
  - You must consider whether the job purpose and respective duties are location-specific. For example, “receptionist” and “production manager” are two job positions that are not suitable for telecommuting because the essential functions of their jobs require them to be on-site.
  - Positions where the majority of the work involves the electronic transmission of information or documents may be suitable for telecommuting, when company or client privacy or confidentiality are not at risk (i.e., cyber security risks and IP theft risks can be adequately protected).

# Positions Suitable for Telecommuting (cont'd)

- Other characteristics that make a position suitable for telecommuting include minimal supervision requirements or limited face-to-face contact with customers or clients.
- There may be situations such as light-duty assignments, ADA or religious accommodation requests when telecommuting should be considered.
- Job descriptions should be drafted to help you identify the positions that are best suited for telecommuting and to help you minimize your exposure to federal and state anti-discrimination laws (i.e., the similarly situated employee risk).

Note: A position's suitability does not guarantee that the employee is suitable for telecommuting (Homer Simpson).

# Characteristics of a Successful Telecommuter

- Employees who are eligible and make the best telecommuters possess the following characteristics:
  - Organized.
  - Excellent time management skills.
  - Self-motivated/self-starter.
  - Strong written and verbal communication skills.
  - Works well with limited supervision.
  - Self-disciplined.
  - Strong performance record and job knowledge.
  - Strong technological skills.



# Laws That Apply to Telecommuters

- FLSA - Wage and Hour Compliance
- OSHA - Workplace Safety
- WC - Workers' Compensation
- ADA - Americans with Disabilities Act
- FMLA - Family Medical Leave Act
- Federal and State Anti-Discrimination Laws
- Contract Law (Cybersecurity and IP)
- General Tort Liability
- Conflicts of Law Risks



# FLSA

- Under FLSA, “hours worked” include all the time during which an employee is required or allowed to perform work for an employer, regardless of where the work is done – whether on the employer’s premises, at a designated workplace, at home, or at some other location.
- It is your obligation to exercise control and see that work is not performed if you do not want it to be performed. You cannot accept the benefits of an employee’s work without considering the time spent to be hours worked. Merely having a policy against such work is not enough. You have the power to enforce the rule and must make every effort to do so.

# FLSA (cont'd)

- Some of the challenging wage and hour compliance issues when managing nonexempt telecommuters include:
  - Overtime.
  - Reporting and monitoring of hours.
  - “Working off the clock.”
  - Pre-approval of overtime.

# FLSA (cont'd)

## Reporting and Monitoring of Hours

- The FLSA requires employers to keep accurate records of all hours worked.
- Require your nonexempt telecommuters to contemporaneously record the hours they work to ensure that they are paid for all hours worked and to verify the actual hours worked against their scheduled and approved hours.
- Have supervisor review time records on a regular basis to ensure accuracy of records.
- Consider requiring nonexempt telecommuters to check into and out of your computer system on a daily basis. Doing so can activate a computer-generated log, which can be used for timekeeping, monitoring and confirmation of days and hours worked. But it can work against you if employees do not log out at the end of the day.

# FLSA (cont'd)

“**Working off the clock**” occurs when a nonexempt employee works after either signing or clocking out for the day.

- Can result in working extra hours beyond the employee’s scheduled or approved hours and lead to potential overtime situations.
- Can easily happen when nonexempt telecommuters check their work e-mail or use company-supplied smart phones after hours.
- Nonexempt telecommuters should be advised, in writing, that working off the clock is not acceptable and telecommuters who engage in this practice may have their telecommuting privileges revoked and be subject to other disciplinary action, including termination of employment.

# FLSA (cont'd)

## Pre-approval of Overtime

- Require telecommuters to inform their supervisor of a potential need to work over their approved schedule that could result in overtime as soon as practical, but no later than \_\_\_ before the overtime hours are incurred, unless otherwise requested by their supervisor.
- Train supervisors to monitor hours reported by telecommuters and regularly communicate with telecommuters on what is in the hopper as they approach the end of the workweek.
- Supervisors should work closely with telecommuters on what projects they are working on, deadlines, and anticipated time to complete assignments.

# FLSA (cont'd)

## Portal-to-Portal Issues

- If telecommuters have regularly scheduled times when they must be on-site (e.g., delivering work product or for training sessions), probably not compensable.

# OSHA

- OSHA is a federal law that requires employers to provide workplaces free from known hazards.
- Recording workplace injuries, including those from home offices, applies to telecommuters.
- OSHA does not expect employers to inspect the home offices of their telecommuters.
- OSHA has indicated that it will not inspect a home office unless the employee is subjected to physical harm or conditions that pose an imminent danger.

# Workers' Compensation

- Workers' Compensation ("WC") is a medical payment and wage replacement benefit law that provides employees compensation when they sustain an injury or develop an illness during the course of employment. Determining whether a telecommuter's injuries or illness are covered under WC is challenging. Information about whether the injury was sustained in the course of and arising out of the telecommuter's job with the company or, instead, occurred while the telecommuter was on a personal break at home must be taken into account.
- Your policies should require your employees to report immediately to their supervisor any injury or illness, including slips or falls, they consider work-related, regardless of whether it occurred on your premises or in the telecommuter's home office.
- Supervisors should report these injuries to HR as soon as practical but no later than 24 hours after being notified by the telecommuter.
- It is not the supervisor's or HR's role to determine whether the injury or illness is job-related. This decision is made by your WC carrier.



# ADA

- The Americans with Disabilities Act (“ADA”) requires employers with 15 or more employees to provide reasonable accommodations for employees with disabilities.
- A “reasonable accommodation” is any change in the work environment or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job, or gain equal access to the benefits and privileges of a job. The ADA does not require an employer to provide a specific accommodation if it causes undue hardship, i.e., significant difficulty or expense.
- Telecommuting may be considered a reasonable accommodation under the ADA.

# ADA (cont'd)

- The ADA does not require employers to provide telecommuting as an accommodation, but only to consider telecommuting as a reasonable accommodation when appropriate.
- When considering telecommuting as a reasonable accommodation, think about: (i) the nature of the work to be performed; and (ii) the employee's ability to do their job without constant supervision.
- EEOC Guidance "Work At Home/Telework as a Reasonable Accommodation" (<https://www.dol.gov/whd/regs/compliance/whdfs28.htm>).

# FMLA

The FMLA applies to telecommuters; however, the office in their home is not considered a worksite.

- FMLA regulations: “An employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made.” 29 C.F.R. § 825.111.
- See DOL Fact Sheet #28 for summary of employers and employees covered by FMLA (<https://www.dol.gov/whd/regs/compliance/whdfs28.htm>).

## FMLA (cont'd)

- Telecommuting is not an option when employees are incapacitated with a “serious health condition” and are on approved leave until released by their treating physician.
- Telecommuting is not a substitute for child care when the family member is not covered under the FMLA.
- Intermittent leave should be carefully addressed and documented with telecommuting employees who qualify for FMLA leave.

# Federal and State Anti-Discrimination Laws

- Disparate treatment – make sure you consistently apply your telecommunications policies to similarly situated employees, i.e., those employees whose job responsibilities and circumstances are similar.
- Disparate impact – make sure your telecommuting policies and practices do not disproportionately impact a protected class (e.g., access to training opportunities and promotions).
- Religious accommodations – if employees need to be at the worksite on particular days or times, make sure this is discussed in interview and included in job description.

# Contract Law

- Cybersecurity
  - Do your vendor contracts require you to comply with certain cybersecurity standards and, if so, are your telecommuters in compliance?
- Intellectual Property
  - All employees, especially telecommuters, should sign confidentiality and IP assignment agreements.
  - Block telecommuters' access to information in your network that they do not need to do their job.
  - Require telecommuters to use company-provided equipment, restrict their ability to use it for personal use, and require them to return it upon termination of employment without copying, deleting or altering information stored on the company-owned device.

# Conflicts of Law Risks

- Employment laws of jurisdiction where employee regularly performs his or her job duties will most likely apply.
- Use choice of law provisions to provide certainty in contractual agreements with telecommuting employees (e.g., confidentiality agreements and restrictive covenants).

# Tort Law

- Make sure your business insurance covers risks associated with third parties (vendors, customers, contractors, candidates for employment) visiting the homes of your telecommuters for work-related reasons.



# Summary – Tips for Managing Legal Risks Associated with Telecommuters

- Establish a written telecommuting policy that identifies your selection criteria (positions that are suitable and characteristics that employee must demonstrate to be considered) and the rules applicable to telecommuters.
- Use job descriptions to identify positions that are best suited for telecommuting.
- Recognize that wage and hour issues, employee safety, workers' compensation, FMLA and ADA compliance may be slightly different when managing telecommuters.
- Train supervisors on how best to manage overtime and working off the clock risks.
- Make sure policies are consistently enforced to avoid discrimination claims.
- Involve IT Department to protect against cybersecurity and IP risks.
- Make sure you have appropriate insurance coverages in place to address tort liability risks.

For more information or questions,  
please contact:

*C. Clayton Gill*

MOFFATT THOMAS

101 S. Capitol Blvd., 10<sup>th</sup> Floor  
Boise, ID 83702

*ccg@moffatt.com*

*208-345-2000*

*1-800-422-2889*

*www.moffatt.com*