

Employee Zooming While Driving, Drinking, and Other Problems with Your Remote Work Policy: Critical Now More Than Ever

Association of Chief Human Resources Officers/Equal Employment Officers (ACHRO/EEO) 2023 Fall Institute | 10/18/2023
Presented By: Charo Albarrán, Sokha Song, Alexis Carter, Amy Brandt, Partner

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Eligibility Factors

- Exempt vs. non-exempt positions
 - Both exempt & non-exempt employees can telecommute/work remotely
 - FLSA considerations for non-exempt employees
 - Overtime
 - Tracking hours
- Represented vs. non-represented
 - Eligibility for remote work may be a subject of labor negotiations
 - Discuss with legal counsel
- Teleworking not logical for all positions
- Work must be conducive to remote work
 - Maintenance aide vs. IT tech
 - Administrative assistant vs. analyst
- Review essential functions

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Eligibility Factors

- Post public health emergency
- Written policies and agreements
- Departments and duties
- Years of service
 - Post probationary period
 - After minimum number of years of service
- Clean performance record
 - Set performance standards before employee can be considered eligible for remote work
 - For example:
 - 1 or 2 cycles of satisfactory performance/meets expectations; or
 - 1 cycle of exceeds expectations

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Telework Policies and Agreements

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Telework Policies and Agreements

	Policy (Uniform and Generally Applicable)	Agreement (Specific to Individual)
Teleworking	Management Control Eligibility Qualifications Duties and Responsibilities Expectations Prohibitions	Management Control Term Work Schedule Execution Recordkeeping
Reimbursable Expenses	Eligibility (Mandatory v. Voluntary) Covered Expenses Reimbursement Percentage	Specific Covered Expenses Execution Recordkeeping

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- ### Key Components of Teleworking Policies
- Preserve management rights concerning policy
 - Establish employee eligibility and qualifications
 - Uniform and standard eligibility criteria
 - Impact on operations
 - Need for in-person interaction with coworkers and members of the public
 - Need for direct supervision
 - Length of service
 - Performance
 - Qualified classifications
 - Qualified remote work location
 - Maintenance of normal employee job duties and responsibility
 - Timekeeping
 - Reporting
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- ### Key Components of Teleworking Policies
- Prohibitions
 - "Off the clock" work
 - Overtime unless following policy
 - Term
 - Limited term
 - Extension only by written agreement
 - Work schedule
 - Health and safety of the remote workplace
 - Acknowledgement and agreement to comply with policy
 - Attendance, overtime, safety, etc.
 - Signatures of employee and agency
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Teleworking as an Accommodation

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Teleworking as an Accommodation – Overview

- Teleworking may constitute a reasonable accommodation
 - ADA and FEHA
 - Eligibility and qualifications
 - Interactive process
 - Reasonableness of accommodation
 - Undue Hardship
 - E.g., Unreasonable safety risk; essential job functions

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Teleworking as an Accommodation – COVID-19-Related Accommodations

- During COVID-19
 - COVID-19 as a disability
 - Telecommuting as common accommodation sought by individuals at increased risk of serious COVID-19 illness
 - Risk may not qualify as disability under FEHA or ADA
 - May be non-protected “accommodation” sought by individuals who refuse vaccination under a mandatory vaccination policy
 - In addition to ADA, may apply to individuals under Title VII of the Civil Rights Act and the Food, Drug & Cosmetic Act
 - Direct threat standard
 - Potential Insubordination

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Teleworking as an Accommodation – Accommodations After COVID-19

- **After COVID-19**
 - Availability of telework as an accommodation
 - Changed undue hardship calculus
 - Public agencies now have technology in place to make teleworking easier

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Teleworking as an Accommodation – Case Study

Joan is a Facilities Contract Manager for Sunshine CCD. Her job duties require her to regularly visit District project sites to monitor contractor work. Joan suffers from severe pain related to arthritis. She has made repeated requests to work from home on the days she experiences severe pain. HR has denied her request for this accommodation, stating that her job as a Facilities Contract Manager requires regular onsite attendance. Joan points out that the District previously allowed Joan to work remotely for 4 months during the Stay-at-Home orders without any issues.

How does Joan’s previous period of telework impact her request for an accommodation?

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Setting Expectations

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Setting Expectations for All Employees

- Job duties and expectations apply to all employees
- Standards expected of employees should:
 - Reflect actual job duties
 - Measure necessary skills for the position
 - Be consistently applied regardless of where the employee works
 - Be identified at the outset of employment
- Communicate expectation that job standards continue to apply to teleworking employees at outset of teleworking arrangement

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Setting Expectations for All Employees

- Quality of work, including accuracy
- Expectations regarding the following:
 - Meeting deadlines
 - Communicating with supervisors
 - Tangible goals of assignment
 - Work product
- Increase electronic, phone, and video communications – make it the norm

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Discipline

- Discipline when necessary
- Face-to-face meetings if possible
- Document disciplinary action
- Implement progressive discipline if possible
- Give the employee the opportunity to respond
- If employee is represented, ensure employee made aware of right to include representative in meeting

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Discipline

- As an alternative or in addition to discipline, where appropriate, consider the following for employees who telework:
 - Rescind the telecommuting/remove work agreement
 - Modify the arrangement
 - Limit the amount of time an employee can telecommute/work remotely
 - Establish a set time frame for remote work

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Legal Issues Arising from Telework

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Legal Issues Arising from Teleworking

- Remote and hybrid work issues in lawsuits
- FLSA Issues
- Workers' Compensation: "Workplace" injuries
- Reimbursement for teleworking expenses
- Principal place of business

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Legal Issues: Remote and Hybrid Work in Lawsuits

- Discrimination claims
 - Is denial of a remote work arrangement an adverse employment action?
- Failure to accommodate a disability claims
 - Is remote work a better accommodation than a leave of absence?

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Legal Issues: FLSA

- Clocking in & out
- Overtime
- Use of electronic devices “after-hours”
- Meal and rest breaks (provided per contract)

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Legal Issues: FLSA

- Accurate timekeeping for non-exempt employees
 - Telework schedule agreements
 - Ensure employees have access to and training on electronic timekeeping
 - Enforce existing policies regarding:
 - Overtime and approval of overtime
 - Off the clock work
 - Timekeeping
 - Uniformly enforce applicable policies for employees and supervisors
 - Maintain records related to enforcement

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Legal Issues: FLSA

- “On-duty” time outside of normal business hours is compensable even if “off the clock”
- Responding to emails from home on a personal device can constitute a form of “remote work”
- Considerations for “after-hours” remote work
 - FLSA, overtime pay
 - California Public Records Act disclosure
 - Workers’ Compensation
- Factors for determining whether an employee is “on-duty”:
 - Geographic restrictions on movement;
 - Required response time;
 - Nature of employment; and
 - Extent to which work impacts personal activities.

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Compensation While Teleworking

- Employer’s knowledge of employee’s work
 - To establish a prima facie case for a wage claim, the employee or group of employees must establish that the employer knew or had reason to know of work performed by employee(s)
 - Actual knowledge
 - Constructive knowledge
 - An employee can establish that the employer had constructive knowledge of work performed by various means, including:
 - Employee responding to emails earlier in the morning and late in the evening
 - Employee reported time not corresponding to volume of work performed
- Prevention of work not desired to be performed

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Legal Issues: Workers’ Compensation and “Workplace” Injuries

- Remote work spaces must be conducive to working
 - May be part of eligibility determination
 - Establish a dedicated workspace
 - Provide and enforce safety checklists
- Workers’ compensation statute covers all employees, including teleworking employees
 - Injuries occurring at home may still be compensable if they arise out of and in the course of employment
- Seek advice and counsel from workers’ compensation legal counsel

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Legal Issues: Electronic Communications & Privacy

- California Electronic Communications Privacy Act (Penal Code sections 1546, et seq.)
 - Limits a government entity from being able to search or access information on an electronic device (e.g., smartphone, computer) or electronic information on a network (e.g., email) without a search warrant or court order
 - However, if the government agency is the owner of the device, it does not need to get permission to conduct the search

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Legal Issues: Electronic Communications & Privacy

- Communications as Public Records
 - Emails and text messages sent by public officials on their personal accounts that involve official business are “public records” that must be disclosed under the California Public Records Act subject to any exceptions
 - Whether or not sent from personal devices or accounts

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Legal Issues: Reimbursement for Teleworking Expenses

- Labor Code Section 2802, subdivision (a):
“An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer”
- Employer that directs employees to telework may be required to reimburse employees
 - For personal equipment, must pay a reasonable percentage of bill in relation to their business use
 - Distinguish voluntary programs
- Teleworking expenses that are arguably reimbursable if Section 2802 applies:
 - Internet
 - Video conferencing equipment
 - Ergonomics
 - Utilities

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Legal Issues: Reimbursement for Teleworking Expenses

- Provide notice and opportunity to negotiate reimbursements as part of teleworking policy or be prepared to respond to requests for reimbursement
 - Distinguish between mandatory teleworking and circumstances under which teleworking may be a statewide interest and voluntary teleworking
- Negotiate “reasonable percentage” of covered expenses to reimburse where required

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Legal Issues: Principal Place of Business

- When does a remote employee’s residence become a “principal place of business”?
 - IRC Section 280A
 - 1) Used exclusively on a regular basis as the principal place of business
 - 2) A place where patients, clients, or customers meet or deal with the taxpayer in the normal course of business
 - Amount of time used for business is a factor
 - Employees who work from home more than 50% of the time with no more than 35 trips per year

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Best Practices

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Best Practices

- Draft telework policies and telework agreement
- Determine employee eligibility for telework
- Set standards and communicate expectations
- Establish and enforce hours tracking system
- Communicate privacy expectations
- Enforce safety standards
- Consider equipment & expenses
- Safeguard information & data
- Specify choice of law in collective bargaining agreements

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Best Practices

- Written remote work agreement should include:
 - Alternative work location
 - Schedule
 - Certification of safety standards
 - Employee's contact information
 - District & employee provided equipment
 - Privacy expectations
 - Reimbursable expenses
 - Duration of agreement
 - Notice of rescission for poor performance

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Best Practices

- Set standards and communicate expectations:
 - Employee subject to the same job responsibilities & standards as all other employees
 - Employee should be available & accessible via phone & email during scheduled hours
 - Working remotely is not a substitute for child or dependent care
 - Employees should understand communications made while working remotely may still be subject to disclosure

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Best Practices

- Enforce safety standards:
 - Consider requiring photograph of alternative work location
 - Require address & description of workplace
 - Provide a safety checklist
 - Consider a safety compliance inspection

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Best Practices

- Safeguard information & data:
 - Require protection software
 - Use a secure server
 - Apply agency policies
 - Information security
 - Software licensing
 - Internet access
 - Data privacy
 - Daily uploads

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Questions?

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Thank You!

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