

Remote Work and Return to Office: Legal Challenges and Opportunities

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Timekeeping

Employers have an obligation to track all nonexempt employees' working time. This is especially important for remote employees because their physical presence is not monitored. Staffing firms should have a timekeeping policy in place for their nonexempt internal employees and temporary employees who use timesheets. Any timekeeping policy should

- Require all employees to record all working and nonworking time (including meal and rest breaks)
- Prohibit off-the-clock work
- Require employees to certify that hours are complete and accurate
- Provide a mechanism for time records to be reviewed and approved

Timekeeping—Practical Advice

For temporary employees, the client is responsible for supervising and controlling remote work, including working and nonworking time. Accordingly, any staffing services agreement should



Specify that the client is responsible for reviewing and approving temporary employees' timesheets

State that the client should not require or request off-the-clock work or otherwise unreported time

Business Expenses

i

Determine whether the staffing firm or employee will be responsible for supplying the necessary tools and equipment for remote work—and for temporary employees, whether to seek reimbursement from the client.

ii

Staffing firms may be obligated in certain jurisdictions (e.g., CA, IL) to reimburse employees for associated costs if using personal devices or they supply the equipment.

Business Expenses—Practical Advice

For reimbursable business expenses, staffing firms should consider

- Specifying which expenses are reimbursable (and which are not)
- Using business expense reimbursement forms
- Requiring receipts or other supporting documentation to substantiate the expense
- Establishing procedures for reimbursement—e.g., submitting expenses (and supporting documentation) within a specified time frame
- Setting reasonable cost controls—e.g., requiring advance approval before incurring an expense or series of expenses above a specified amount

Remote Technology Usage

For internal employees, implement protocols to ensure security of staffing firm property, including confidential and proprietary information. Be mindful of information communicated not only on staffing firm devices, but also on personal devices (such as personal laptops, cell phones [texting], etc.). If electronic monitoring is used, consider who owns the device. Also be aware of jurisdiction-specific electronic monitoring laws:

For example, effective May 7, 2022, NY employers engaged in electronic monitoring must give prior written notice upon hiring to NY employees who are subject to electronic monitoring and post the notice in a conspicuous place.

Remote Technology Usage

For temporary employees, ensure that the client is responsible for implementing its own security protocols to ensure that

- i. Temporary employees' use of any electronic communication equipment or software satisfies the client's IT safety and security standards.
- ii. Temporary employees securely and properly maintain and timely return to the client all of its equipment and other property upon termination of the assignment or upon request.

Staffing firms should ensure that it is the client's responsibility to properly supervise, control, and safeguard its processes and systems (and not the staffing firm's).

Remote Technology Usage—Practical Advice

- Determine the scope and methods for monitoring to ensure they are consistent with the business purpose (e.g., security, productivity, etc.).
- Obtain written acknowledgments from employees.
- Ensure compliance with all applicable federal, state, and local laws.

Applicability of Employment Laws

Consider the impact of remote work on the applicability of employment laws. Generally speaking, employees are subject to the law of the state and locality in which they work, which, in the case of telework, may be the law of the state and locality in which they reside or are otherwise performing services.

Such laws include, without limitation, laws regarding hiring requirements, wage and hour laws, leave laws, state-mandated benefit laws, meal and rest break laws, background checking laws, drug testing laws, antidiscrimination and antiharassment laws, trade secret and restrictive covenant laws, privacy laws, recordkeeping laws, and laws mandating the distribution of certain information and notices to employees.

Applicability of Employment Laws

In addition, applicability sometimes depends on whether an employer has a certain number of employees in a particular location. For example:

Under the FMLA, coverage depends on whether an employer has at least 50 employees within a 75-mile radius.

Certain state and local leave laws define coverage based on the number of employees in a certain location (e.g., 20 employees at one work site).

Applicability of Employment Laws—Practical Advice

It is important to consider not only where the staffing firm has offices, or where the client is located, but also where employees are physically located and performing work. Staffing firms should familiarize themselves with the laws of the jurisdictions where their employees are physically working, particularly if they have a number of employees working remotely in a specific jurisdiction.

Telecommuting Policy/Agreements for Internal Employees

Having a written telecommuting policy or agreement helps set expectations regarding telecommuting. Important components include

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| Schedule (e.g., hybrid or fully remote) | Equipment provided for remote work (if any) | Reimbursable business expenses (if any) | At-will employment |
| Duties and responsibilities | Electronic monitoring (if any) | Workplace setup | No tax advice |
| Workplace policies remain in effect | Security of staffing firm property | Allowing for modifications to telecommuting agreement | Workers' compensation generally inapplicable to third parties (e.g., family members) |

Telecommuting Policy/Agreements for Internal Employees—Practical Advice

Whenever implementing a telecommuting policy, consider

- Who is eligible to commute
- Whether to allow only certain job functions to be performed remotely
- The anticipated duration of the telecommuting arrangement
- Whether an employee who is requesting to telecommute previously telecommuted effectively during office closures, government lockdowns, etc.
- Whether telecommuting is being provided as a reasonable accommodation

Telecommuting Policy/Agreements for Temporary Employees

- Likely not necessary
- Client (not staffing firm) responsible for supervising, directing, and controlling remote work
- Client (not staffing firm) responsible for its operations, security, information technology, confidential information, and intellectual property in a remote work environment



Telecommuting Policy/Agreements for Temporary Employees—Practical Advice

It is important that any staffing services agreement carefully delineate the responsibilities of the staffing firm, on the one hand, and the client, on the other hand. The staffing services agreement should spell out which responsibilities the staffing firm is—and perhaps more importantly, is not—responsible for when it comes to temporary employees, including their remote work.

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