HOME ALONE:
LEGAL ISSUES WHEN EMPLOYEES WORK FROM HOME/TELECOMMUTE

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Overview

• Applicable laws
  – Americans with Disabilities Act (ADA)
  – Family and Medical Leave Act (FMLA)
  – Fair Labor Standards Act (FLSA)
  – Occupational Safety and Health Act (OSH Act)
  – Worker’s Comp statutes

• Practical considerations
  – WFH policy
  – Info security
  – WFH agreement
  – Other
ADA

- Prohibits discrimination against qualified individual with disability
  - Amended in 2009 to broaden definition of “disability”
- Requires providing reasonable accommodation to QIWD
  - Unless doing so would impose undue hardship
  - Accommodation = any change in work environment (or in way things are usually done) that enables QIWD to perform essential functions of position
  - Undue hardship = significant difficulty or expense
    - Financial resources of employer may be considered
Reasonable Accommodation?

Maybe

• Telecommuting may be reasonable accommodation if essential functions of job can be done at home

• Factors:
  – Is request to work from home temporary or part-time?
  – Can employee WFH independently without direct supervision?
  – Does job require face-to-face interaction with:
    • Co-workers, customers, patients, others?
  – Can needed communications be done by phone or computer?
  – Can needed documents, tools, etc. be accessed at home?
  – Does job description address this?
Reasonable Accommodation?

Maybe

• **Examples:**
  – Many office positions

• **Employer must allow unless:**
  – Another less burdensome accommodation would be equally effective
  – Working from home would cause undue hardship
Reasonable Accommodation?

No

• WFH **not** reasonable accommodation if essential functions of position cannot be performed at home

• Examples:
  – Some office positions
  – Auto mechanic
  – Grocery store cashier
  – Doctor
Ford Case

_EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015) (en banc)_

- Resale steel buyer for Ford
  - Intermediary between steel suppliers and parts manufacturers
  - Often had to respond to emergency supply issues and meet with suppliers at job sites
- Suffered from irritable bowel syndrome
- Ford allowed her to telecommute on flex schedule for trial period
  - Was unable to establish regular work hours and missed deadlines
Ford Case

• She asked to work remotely up to 4 days per week as reasonable accommodation
• Ford said no because position involved teamwork and client interaction
  – Suggested alternative accommodations, like moving her cube closer to restroom or seeking another job within company
• She said no and filed charge with EEOC
  – Placed on PIP and terminated
  – Filed another charge
Ford Case

- EEOC filed suit on employee’s behalf
- District Court granted Ford’s motion for summary judgment
- Sixth Circuit panel reversed, agreeing with employee that essential functions could be performed at home given advances in teleconferencing technologies
- Sixth Circuit *en banc* vacated panel’s decision, agreeing with Ford that position required regular attendance
EEOC Guidance

• Enforcement Guidance: “Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act”
  – Mainly 46 Q&A

• Fact Sheet: “Work At Home/Telework as a Reasonable Accommodation”
  – 7 Q&A
  – [https://www.eeoc.gov/facts/telework.html](https://www.eeoc.gov/facts/telework.html)
Winning on Reasonable Accommodation

• Update job descriptions
  – Is physical attendance essential function?
  – Consider if remote work has been approved for others in same or similar job

• If employee asks for accommodation, engage in interactive process
Winning on Reasonable Accommodation

• Document company’s good faith efforts to engage with employee and try to find solution
  – Ford met with employee several times, identified alternative accommodations, and attempted to engage in additional discussion even after its alternative accommodations were rejected

• Discipline carefully
  – Look out for retaliation claims
FMLA Eligibility

• Eligible employees
  – 1 year of employment, 1,250 hours of service, at worksite with 50 or more employees within 75-mile radius
  – Hours WFH count toward 1,250 requirement
  – Employee in home office considered part of worksite to which he/she reports and from which he/she receives assignments
    • Entitled to FMLA leave if office to which he/she reports meets 50-or-more employee threshold
    • Points to importance of updating organizational charts so it’s clear who reports where
Examples

• ABC Company employs 49 workers in Columbia and John, who works from home in Raleigh and gets his assignments from Columbia
  – John’s worksite is Columbia
  – The employees in Columbia and John are entitled to FMLA leave (if they meet the 1 year of employment and 1,250 hours of service requirements)
Examples

- XYZ Company employs 39 workers in Charleston, 10 in Charlotte, and Sue, who works from home in Rock Hill and gets her assignments from Charlotte
  - Sue’s worksite is Rock Hill
  - No one is entitled to FMLA leave
FMLA Management

• FMLA provides up to 12 weeks of unpaid leave for serious health condition of self, spouse, child, or parent; birth and care of newborn; or adoption of child
  – Employee requesting FMLA leave may be offered opportunity to telecommute, but can’t be required to WFH as substitute for FMLA leave
  – Hours WFH may not be charged against 12-week FMLA entitlement
• Minimum wage
• Overtime pay for hours worked over 40 in a workweek
• Exemptions
  – Executive, administrative, and professional
  – Some computer employees
  – Highly compensated employee
  – Outside sales
• Youth employment restrictions
• Recordkeeping requirements
  – Tracking hours of non-exempt employees, including WFH employees
Tips
Reducing Risk of OT with WFH Non-Exempt Employees

• Set specific work schedule and hours
• Require non-exempt employees to record all hours worked
• Require advance written authorization for overtime
• Prohibit working off-the-clock (including checking e-mail), under-reporting hours, or over-reporting hours
OSH Act

• Under “general duty clause,” employers have duty to provide safe workplace for employees
  – But OSHA’s position is GDC does not apply to home offices and agency does not expect employers to inspect them
Still, per OSHA Instruction, employers are "responsible for hazards caused by materials, equipment or work processes that the employer provides or requires to be used in an employee's home”

– Can provide checklist to educate employees about general home office safety best practices
  • Furniture and equipment
  • Electrical
  • Fire
  • Indoor air quality
  • Slips and falls
OSH Act

• Many employers with more than 10 employees are required to keep a record of serious work-related injuries and illnesses
  – Minor injuries requiring first aid only do not need to be recorded

• Make sure WFH employees know to report work-related injuries and illnesses that occur
Worker’s Comp

• Any injury “arising out of” and “in the course and scope of employment” is likely to be covered under worker’s comp

• Work-related injuries can take place in home office or traveling to and from home

• Make sure worker’s comp insurance policy covers injuries in home office
  – Homeowner’s policy may not cover work-related losses
WFH Policy Considerations

• Is job right for telecommuting?
  – Can productivity be measured and monitored remotely?
  – Is work based more on information than interaction?

• Is employee right for telecommuting?
  – Length of time with employer
  – Good performer
  – No disciplinary action
Info Security Considerations

• Important because confidential info can lose trade secret status unless affirmative steps taken to keep it secret

• Examples of affirmative steps:
  – NDA
  – Computer use and confidential info policies
  – Document signed by employee acknowledging employer’s right to access and search computers and mobile devices used for work, regardless of where located
  – Training
  – Labels
  – Password protection
  – Lock and key
WFH Agreement Considerations

• Not contract of employment
  – Employment remains at-will
• Agreement can be terminated or amended at any time
• Hours when employee will work and be available by phone or e-mail
• May specify quantifiable performance metrics
  – So not relying on honor system alone
• Some face-to-face meetings in office may be mandatory
WFH Agreement Considerations

• Designate workspace in home to be office
• Agree to keep area in safe condition, free of hazards
• Report all work-related injuries within 24 hours
• Employer can inspect home office to investigate any work-related injury
• No meeting third parties at home office
• Business use of company equipment
• Return of equipment when WFH arrangement ends
Additional Considerations

• Do local zoning ordinances and HOA rules allow home office?
• Coordinate with worker’s comp, P&C, and CGL insurance carriers
• If WFH employee is out-of-state, company may need to qualify to do business there
  – Also may need to withhold taxes in both states
  – And may create income tax and sales tax withholding obligations
Additional Considerations

• Employment law posters
  – Not required in home office, but employers responsible for making sure WFH employees have access to them
  – Consider posting on company intranet and/or sending copies to telecommuters