

Telecommuting – The Rules, Dos and Don'ts and a Sample Policy

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Topics Include

- Telecommuting Pros and Cons
- Legal Risks of Telecommuting
- Reasonable Accommodation
- Telecommuting Policy

What is Telecommuting? *Definition, Pros and Cons*



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What is Telecommuting?

Telecommuting (also known as working from home, or e-commuting) is a work arrangement in which the employee works outside the office, often working from home or a location close to home (including coffee shops, libraries, and various other locations).



What is Telecommuting?

Rather than traveling to the office, the employee “travels” via telecommunication links, keeping in touch with coworkers and employers via telephone and email.



What is Telecommuting?

The worker may occasionally enter the office to attend meetings and touch base with the employer. However, with many options for distance conferencing, there may be no need to visit the office.



Who Telecommutes?

FlexJobs and Global Workplace Analytics have released a report on telecommuting in the United States (2017 State of Telecommuting in the U.S. Employee Workforce):



Who Telecommutes?

- About 3.9 million U.S. employees, or 2.9% of the total U.S. workforce, work from home at least half of the time.
- There has been a 115% percent increase in telecommuting between 2005 - 2015 (3.9 million employees in 2015, up from 1.8 million in 2005).
- The average telecommuter is 46 years of age or older, and 50% of telecommuters are 45 or older.



Who Telecommutes?

- Approximately 53% have at least a bachelor's degree, compared to 37% of non-telecommuters.
- The average annual income of telecommuters is \$4000 per year higher than those who work on-site.



Who Telecommutes?

- About the same number of women and men telecommute.
- Full-time employees are four times more likely to have the option to work at home than part-time employees.
- 40% more U.S. employers offered flexible workplace options in 2017 than did in 2010.



Advantages of Telecommuting

No Commuting

Depending on your current commute, this can save you anywhere from minutes to hours every day, which you can spend doing things you enjoy, like sleeping, spending more time with your kids or spouse, going to the dog park, or any other activity you'd like to have more time for.



Advantages of Telecommuting

Increased Independence

Working from home puts the onus on you to complete your work without constant reminders, which some people absolutely love. No office politics, no boss breathing down your neck, no distracting coworkers — telecommuting can be glorious. And yet, it's very easy to get distracted by things in your home — television, laundry, a comfy bed for napping — some days these seem like a much better alternative to actually doing work. Having a high degree of self-control and self-discipline is essential to being a productive telecommuter.



Advantages of Telecommuting

Increased Savings

Most people who work from home have very little need for professional clothing, which not having to buy can save lots of money every year.

Other things you'll find less need for:

- Gas or public transit passes for commuting
- Lunches out
- Dry cleaning
- Child care (depending on your situation)

And most people who work from home are able to save on their taxes each year because of the tax-deductible expenses associated with working from home.



Advantages of Telecommuting

More Flexibility

Again, this depends on the type of job you'll have at home, but many work-from-home jobs allow for a flexible schedule, so if you need to go grocery shopping or do a load of laundry in the middle of the day, it's simple: you can. Or, if you're a morning person or a night owl, you can adjust your work schedule accordingly.



Advantages of Telecommuting

Fewer sick days

Working in a traditional office exposes you to many people's germs, but if you work from home, you have less exposure to people, and therefore, to their germs. Also, if you're feeling under the weather, it's much easier to pamper yourself and still get some work done when you're at home, meaning you'll probably take fewer sick days.



Disadvantages of Telecommuting

Decreased human interaction

If you're the sort of person who thrives on interactions with other people, working from home can feel isolating. It's possible to remedy this feeling with e-mail, phone calls, instant messaging, and video conferencing, but it's no substitute for face-to-face interaction. Some telecommuters find that working from a coffee shop or library satisfies their people fix, but others prefer the office environment to solitude. A coworking space might solve this problem by allowing you to telecommute AND work from an office setting.





Disadvantages of Telecommuting

Blurring Work and Personal Life

When you work from home, you can't always shut out your personal life while you're working, or turn off your work life while you're "off the clock." Having a separate work space from the rest of your home can help, but some people find it difficult to stop working when they know it's only a few feet away.



Disadvantages of Telecommuting

Difficulty Demonstrating Workload

If you're a telecommuter working for a company with a traditional office, your office-bound coworkers might perceive you as doing less work simply because you're at home. It's important to showcase your workload to demonstrate to managers and coworkers that you are accomplishing as much, if not more, as you would if you were in a cubicle down the hall.

Managing the Legal Risks of Telecommuting



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Managing the Legal Risks of Telecommuting

With rapidly increasing advancements in technology, more and more employees have the capability and desire to work remotely from their homes, and employers are having to grapple with the issues raised by having employees who telecommute.



Managing the Legal Risks of Telecommuting

Setting aside the issues of deciding whether a given employer should allow its employees to telecommute or which employees or positions are good candidates for a telecommuting relationship, there are several different areas of the law that impact an employer's ability to manage the telecommuting relationship.



Managing the Legal Risks of Telecommuting

A good telecommuting agreement should take into account and address the following issues...



Managing the Legal Risks of Telecommuting

Employment Relationship

As a threshold matter, the telecommuting agreement should expressly state that it is not an employment agreement and does not alter in any way the at-will nature of the employment relationship between the employer and the telecommuting employee.



Managing the Legal Risks of Telecommuting

Employment Relationship

The agreement should reiterate that the telecommuting employee – even though she is working from home – is still subject to all of the employer’s policies, procedures, rules and regulations.



Managing the Legal Risks of Telecommuting

Employment Relationship

The duration of the telecommuting arrangement should be set forth in the agreement, noting that the agreement is not to be construed as a contract for employment for a period of time.



Managing the Legal Risks of Telecommuting

Employment Relationship

The employer should reserve the right to revoke the employee's right to work from home at any time and for any reason.



Managing the Legal Risks of Telecommuting

Hours Of Work And Overtime

The telecommuting agreement should address hours of work and the employees will be expected to record their time.



Managing the Legal Risks of Telecommuting

Hours Of Work And Overtime

For employees that are exempt from overtime under the federal Fair Labor Standards Act (FLSA), the agreement should establish the hours during which the employee will normally be expected to perform her work and be available by phone and email.



Managing the Legal Risks of Telecommuting

Hours Of Work And Overtime

The agreement can specifically state the phone number at which the employee will be available and with what frequency she will be expected to check phone messages if away from the home worksite or otherwise engaged.



Managing the Legal Risks of Telecommuting

Hours Of Work And Overtime

If the telecommuting employee is not exempt from federal overtime requirements under the FLSA, the employer must take steps to ensure that it will comply with the recordkeeping requirements for non-exempt employees and pay such employees for all hours worked, including overtime.



Managing the Legal Risks of Telecommuting

Hours Of Work And Overtime

When an employee telecommutes, it is difficult to keep track of the hours worked by the employee, and thus monitor overtime, because the employee is not physically present in the workplace.



Managing the Legal Risks of Telecommuting

Hours Of Work And Overtime

If a non-exempt employee telecommutes and his or her hours of work are not properly recorded, this could lead to underpayment of wages and overtime liability. Therefore, non-exempt employees should be instructed to keep meticulous time records, filling out timesheets or using an electronic system for recording their time.



Managing the Legal Risks of Telecommuting

Hours Of Work And Overtime

The telecommuting agreement should also set forth the number of hours the non-exempt employee is expected to work each week and state clearly that additional time or overtime will not be permitted without prior authorization.



Managing the Legal Risks of Telecommuting

Hours Of Work And Overtime

If the number of hours that the non-exempt employee is expected to work will fluctuate based on business needs, or if the hours worked by the employee are sporadic, the employer can establish in the telecommuting agreement a fixed number of hours of work for which the employee will normally be paid.



Managing the Legal Risks of Telecommuting

Hours Of Work And Overtime

There is an infrequently-cited Department of Labor regulation (found at 29 C.F.R. §785.23), which states that, because it is “difficult to determine the exact hours worked” by employees who are “working from home,” the DOL will accept “any reasonable agreement between the employer and the employee that takes into consideration all of the pertinent facts” regarding the number of work hours for which the employee will be paid.



Managing the Legal Risks of Telecommuting

Class Action Considerations

Given the rapid increase in collective or class actions, especially under federal and state wage hour laws, employers should, to the extent possible, make sure that each telecommuting employee has a separate, individualized agreement.



Managing the Legal Risks of Telecommuting

Class Action Considerations

If all of an employer's telecommuting agreements with its employees are identical, and an employee brings suit on behalf of herself and other similarly situated employees alleging, for example that the employer failed to record work hours properly or pay for all hours worked, it will be much easier for the employee's lawyer to argue that a class of all non-exempt telecommuting employees should be certified if they all signed the same agreement.



Managing the Legal Risks of Telecommuting

OSHA

The federal Occupational Safety and Health Act (OSHA) mandates that employers maintain a safe workplace for employees, including those who work from home. OSHA mandates that employers are required to take reasonable steps to prevent foreseeable hazards in the workplace.



Managing the Legal Risks of Telecommuting

OSHA

An employer generally does not have the right to access its employees' homes, so it is important that the employer reserve the right to do so in the telecommuting agreement by specifically allowing for inspections of the employee's home worksite for purposes of establishing compliance with OSHA standards.



Managing the Legal Risks of Telecommuting

OSHA

The employer should also require that the employee represent in the agreement that she will keep the work area in her home safe and healthy in compliance with OSHA standards.



Managing the Legal Risks of Telecommuting

Workers' Compensation

Although the case law is underdeveloped in this area, employers should assume that the same workers' compensation rules apply, whether the employee works in an office or works from home. Thus, the employer should address in the telecommuting agreement the possibility of a workplace injury.



Managing the Legal Risks of Telecommuting

Workers' Compensation

The agreement should designate a specific area of the employee's house in which the employee will perform work. This area should be clearly defined and set apart from the rest of the employee's house to help ensure that covered injuries can be distinguished from those that are not covered.



Managing the Legal Risks of Telecommuting

Workers' Compensation

The telecommuting agreement should also state that the same injury reporting rules that apply in the office also apply at the home worksite. In addition to reserving the right to inspect the employee's home worksite for safety on a periodic basis, the telecommuting agreement should also allow the employer to have immediate access to the employee's home work area following the report of any injury.



Managing the Legal Risks of Telecommuting

Workers' Compensation

The agreement should also allocate responsibility for providing coverage for injuries to third parties sustained at the employee's home.



Managing the Legal Risks of Telecommuting

Confidential And Proprietary Information

An employer's confidential and proprietary information can lose its trade secret status if the employer does not take affirmative steps to protect and ensure the confidentiality of such data.



Managing the Legal Risks of Telecommuting

Confidential And Proprietary Information

Thus, the telecommuting agreement should describe the at-home security measures that the employee will take to secure company information and prevent unauthorized access to company information and systems.



Managing the Legal Risks of Telecommuting

Confidential And Proprietary Information

The employee agreement should represent in the telecommuting that she will take all necessary precautions to secure proprietary, confidential and privileged information of the employer.



Managing the Legal Risks of Telecommuting

Zoning And Taxes

The telecommuting agreement should provide that it is the telecommuting employee's responsibility to ensure that she is in compliance with local zoning ordinances. Some local ordinances restrict the ability of individuals to conduct business in their homes, and in those cases, where working from home is permitted, certain taxes may apply.



Managing the Legal Risks of Telecommuting

Zoning And Taxes

The telecommuting agreement should reflect the parties' understanding with regard to payment and withholding of applicable taxes.



Managing the Legal Risks of Telecommuting

Company Property

The telecommuting agreement should also set forth what equipment or property the employer will provide to the employee in connection with the telecommuting arrangement and provide for its return when the telecommuting arrangement terminates.



Managing the Legal Risks of Telecommuting

Company Property

The agreement should also require the employee to ensure that the employee's homeowner's or renters insurance covers such equipment or property.



Managing the Legal Risks of Telecommuting

Conclusion

Telecommuting can be a great benefit to both the employer and the employee. Given the numerous potential pitfalls presented in a telecommuting arrangement, however, employers should be careful to document the respective rights and obligations of the employer and employee in a telecommuting agreement.

Telecommuting Guidelines for Reasonable Workplace Accommodations



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Telecommuting Guidelines for Reasonable Workplace Accommodations

If you have a condition that qualifies under the Americans with Disabilities Act (ADA), your employer may be required to allow telecommuting as a reasonable accommodation for your disability.

In order to qualify under ADA telecommuting guidelines...



Telecommuting Guidelines for Reasonable Workplace Accommodations

- The employer must be covered by the ADA (applies to all public employers and private employers with 15 or more employees);
- You must be a qualified employee, meaning you meet the minimum job requirements;
- You must be disabled, as defined by the ADA;
- Telecommuting must not be an undue burden on the employer.



Qualifying Disability

The ADA states that a qualifying disability must be a physical or mental impairment that substantially limits a major life activity. Persons who have a record of such an impairment also qualify. A major life activity is defined as seeing, hearing, breathing, walking, performing manual tasks, or caring for oneself.



Qualifying Disability

An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but an individual with a minor, non-chronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered. The ADA was recently expanded to essentially make it easier to qualify for a disability under the law.



Qualifying Disability

For more information on what qualifies as a disability, visit the Equal Employment Opportunity Commission (EEOC).

Having a history of such an impairment also qualifies, so recovery from cancer or mental illness counts as a disability under the ADA.



Reasonable Accommodation

Assuming your condition qualifies as a disability under the ADA, the employer is required to make a reasonable accommodation to work around your disability. Employers are not, however, required to make accommodations that impose an undue burden on the employer. Telecommuting is one way in which employers provide reasonable accommodation to qualifying employees.



Reasonable Accommodation

Telecommuting guidelines should be discussed between employee and employer. Employers are not required to allow telecommuting as an accommodation if major functions of the job cannot be performed at home. However, relatively minor duties can be shifted to other employees or rearranged so that the disabled employee can handle those duties on certain days or at time when the employee is better able to carry them out.

Telecommuting Policy



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Telecommuting Policy

Objective

[Company Name] considers telecommuting to be a viable alternative work arrangement in cases where individual, job and supervisor characteristics are best suited to such an arrangement. Telecommuting allows employees to work at home, on the road or in a satellite location for all or part of their regular workweek. Telecommuting is a voluntary work alternative that may be appropriate for some employees and some jobs. It is not an entitlement, it is not a company-wide benefit, and it in no way changes the terms and conditions of employment with [Company Name].



Telecommuting Policy

Procedure

1. Either an employee or a supervisor can suggest telecommuting as a possible work arrangement.



Telecommuting Policy

2. Telecommuting can be informal, such as working from home for a short-term project or on the road during business travel, or formal, as described below. Other informal, short-term arrangements may be made for employees on family or medical leave, to the extent practical for the employee and the organization and with the consent of the employee's health care provider, if appropriate. All informal telecommuting arrangements are made on a case-by-case basis, focusing first on the business needs of the organization. Such informal arrangements are not the focus of this policy.



Telecommuting Policy

3. Individuals requesting formal telecommuting arrangements must have been employed with [Company Name] for a minimum of 12 months of continuous, regular employment and must have exhibited above-average performance, in accordance with the company's performance appraisal process.



Telecommuting Policy

4. Any telecommuting arrangement made will be on a trial basis for the first three months, and may be discontinued, at will, at any time at the request of either the telecommuter or the organization.



Telecommuting Policy

5. [Company Name] will determine, with information supplied by the employee and the supervisor, the appropriate equipment needs (including hardware, software, modems, phone and data lines, facsimile equipment or software, and photocopiers) for each telecommuting arrangement on a case-by-case basis. The human resource and information system departments will serve as resources in this matter. (cont.)



Telecommuting Policy

5. (continued) Equipment supplied by the organization will be maintained by the organization. Equipment supplied by the employee, if deemed appropriate by the organization, will be maintained by the employee. [Company Name] accepts no responsibility for damage or repairs to employee-owned equipment. [Company Name] reserves the right to make determinations as to appropriate equipment, subject to change at any time. Equipment supplied by the organization is to be used for business purposes only. (cont.)



Telecommuting Policy

5. (continued) The telecommuter should sign an inventory of all office property and agrees to take appropriate action to protect the items from damage or theft. Upon termination of employment all company property will be returned to the company, unless other arrangements have been made.



Telecommuting Policy

6. Consistent with the organization's expectations of information security for employees working at the office, telecommuting employees will be expected to ensure the protection of proprietary company and customer information accessible from their home office. Steps include use of locked file cabinets and desks, regular password maintenance, and any other steps appropriate for the job and the environment.



Telecommuting Policy

7. The employee will establish an appropriate work environment within his or her home for work purposes. [Company Name] will not be responsible for costs associated with initial setup of the employee's home office such as remodeling, furniture or lighting, nor for repairs or modifications to the home office space. Employees will be offered appropriate assistance in setting up a work station designed for safe, comfortable work.



Telecommuting Policy

8. After equipment has been delivered, a designated representative of [Company Name] will visit the employee's home worksite to inspect for possible work hazards and suggest modifications. Repeat inspections will occur on an as-needed basis. Injuries sustained by the employee while at his or her home work location and in conjunction with his or her regular work duties are normally covered by the company's workers' compensation policy. (cont.)



Telecommuting Policy

8. (continued) Telecommuting employees are responsible for notifying the employer of such injuries in accordance with company workers' compensation procedures. The employee is liable for any injuries sustained by visitors to his or her worksite.



Telecommuting Policy

9. [Company Name] will supply the employee with appropriate office supplies (pens, paper, etc.) for successful completion of job responsibilities. [Company Name] will also reimburse the employee for all other business-related expenses such as phone calls and shipping costs that are reasonably incurred in accordance with job responsibilities.



Telecommuting Policy

10. The employee and manager will agree on the number of days of telecommuting allowed each week, the work schedule the employee will customarily maintain, and the manner and frequency of communication. The employee agrees to be accessible by phone or modem within a reasonable time period during the agreed-on work schedule.



Telecommuting Policy

11. Telecommuting employees who are not exempt from the overtime requirements of the Fair Labor Standards Act will be required to record all hours worked in a manner designated by the organization. Telecommuting employees will be held to a higher standard of compliance than office-based employees due to the nature of the work arrangement. Hours worked in excess of those specified per day and per workweek, in accordance with state and federal requirements, will require the advance approval of the supervisor. Failure to comply with this requirement can result in the immediate cessation of the telecommuting agreement.



Telecommuting Policy

12. Before entering into any telecommuting agreement, the employee and manager, with the assistance of the human resource department, will evaluate the suitability of such an arrangement paying particular attention to the following areas:



Telecommuting Policy

12. a. Employee suitability. The employee and manager will assess the needs and work habits of the employee, compared to traits customarily recognized as appropriate for successful telecommuters.



Telecommuting Policy

12. b. Job responsibilities. The employee and manager will discuss the job responsibilities and determine if the job is appropriate for a telecommuting arrangement.



Telecommuting Policy

- 12. c. Equipment needs, workspace design considerations and scheduling issues.



Telecommuting Policy

12. d. Tax and other legal implications for the business use of the employee's home based on Internal Revenue Service (IRS) and state and local government restrictions. Responsibility for fulfilling all obligations in this area rests solely with the employee.



Telecommuting Policy

13. If the employee and manager agree, and the human resource department concurs, a draft telecommuting agreement will be prepared and signed by all parties, and a three-month trial period will commence.



Telecommuting Policy

14. Evaluation of telecommuter performance during the trial period will include daily interaction by phone and email between the employee and the manager, and weekly face-to-face meetings to discuss work progress and problems. At the conclusion of the trial period the employee and manager will each complete an evaluation of the arrangement and make recommendations for continuance or modifications. (cont.)



Telecommuting Policy

14. (continued) Evaluation of telecommuter performance beyond the trial period will be consistent with that received by employees working at the office in both content and frequency but will focus on work output and completion of objectives rather than on time-based performance.



Telecommuting Policy

15. An appropriate level of communication between the telecommuter and supervisor will be agreed to as part of the discussion process and will be more formal during the trial period. After conclusion of the trial period, the manager and telecommuter will communicate at a level consistent with employees working at the office or in a manner and frequency that seems appropriate for the job and the individuals involved.



Telecommuting Policy

16. Telecommuting is not designed to be a replacement for appropriate child care. Although an individual employee's schedule may be modified to accommodate child care needs, the focus of the arrangement must remain on job performance and meeting business demands. Prospective telecommuters are encouraged to discuss expectations of telecommuting with family members prior to entering into a trial period.





Telecommuting Policy

17. Employees entering into a telecommuting agreement may be required to forfeit use of a personal office or workstation in favor of a shared arrangement to maximize organization office space needs.



Telecommuting Policy

18. In certain limited circumstances, [Company Name] may contract with an office space provider to meet the needs of employees who wish to telecommute but who do not have appropriate home office space, or for groups of employees whose proximity to the organization and to each other makes such an arrangement feasible.



Telecommuting Policy

19. The availability of telecommuting as a flexible work arrangement for employees of [Company Name] can be discontinued at any time at the discretion of the employer. Every effort will be made to provide 30 days' notice of such a change to accommodate commuting, child care and other problems that may arise from such a change. There may be instances, however, when no notice is possible.



Questions?

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