

Telecommuting: Employers Should Minimize Risk

by Shellie Deffendall Kyle

Although figures vary, it seems generally accepted that well over twenty million Americans avoid traffic and lunchroom gossip several days a week, opting instead to work from home. Armed with a computer, phone, and fax, those employees find there's no need to be at the office to complete their work and their employers agree. Indeed, many employers find that telecommuting employees are happier and significantly more productive.

While the benefits of telecommuting are clear and convincing, employers should be aware of the liability these arrangements may pose. Just as with any employee who travels for work or runs workplace-related errands, telecommuters are protected by, and subject to, labor and employment laws, including the antidiscrimination provisions of Title VII, the Fair Labor Standards Act ("FLSA"), state worker's compensation laws, and the Occupational Safety and Health Act (and state equivalents).

For example, a telecommuting employee who receives unwelcome sexually explicit or harassing e-mails from a supervisor may have a sexual harassment claim regardless of where the employee sits when she reads them. Conversely, a supervisor who sends unwelcome sexually harassing e-mails when working from home can still cause liability to the company. As another example, under the FLSA, an employer may not refuse to pay a nonexempt employee for overtime worked on the grounds that work was performed at home. Employers must comply with the FLSA without regard to an employee's place of work. This means that employers must be careful to collect accurate data from nonexempt telecommuters regarding the number of hours worked at home.

In Indiana, employees are entitled to worker's comp benefits for accidental injuries "arising out of and in the course of employment." There is no requirement that the employee be located on the employer's premises to be compensated for an injury. Although this calls to mind concerns of back injuries from midnight tumbles over toys and down stairs being turned in as worker's comp injuries, employers can take steps to protect themselves from this type of fraudulent claim just as they protect themselves from other forms of worker's comp fraud.

When OSHA issued an advisory letter in 1999 explaining the application of OSHA regulations to home offices, the response was immediate and amalgamated objection. OSHA's response to the uproar was just as swift as it withdrew the advisory letter and reversed its position, reportedly within 48 hours of first reports in the mainstream press. At the time, Charles Jeffress, assistant secretary of labor, said that "OSHA does not and will not inspect home offices." Of employers, he said that "OSHA does not expect employers to inspect home offices."

While OSHA has stated that it will not become involved in regulating safety in home settings (nor, presumably, the hotel rooms of traveling employees), the statute does not

preclude such regulation. In keeping with its purpose, OSHA officials have indicated that the agency will inspect home offices in the case of serious injury or death, especially if manufacturing work is conducted at home. It is unlikely that much manufacturing work is being conducted at home. But if an employer is considering allowing it, it would need to take a much closer look at safety conditions than it would for administrative or other work that is conducted primarily on a computer.

Telecommuting also raises other legal issues, such as use of employer-owned equipment and the storage of the employer's proprietary information at home offices. These circumstances may require review of employer and employee insurance policies to confirm whether such equipment is covered in case of loss. Likewise, confidentiality and noncompete agreements should be used to protect information kept by the employee at his home office.

Employers can minimize risks by using a telecommuting agreement and/or adding a telecommuting policy to its employee handbook, including terms such as the following:

- Agreement by the employee to keep a safe, hazard free working environment and ensure the home office complies with employer safety policies.
- Statement that safety hazards at the home office site may result in suspension or termination of the telecommuting arrangement.
- Acknowledgment by the employee that he received a safety assessment checklist to ensure that the home working environment is safe or that the employee completed and submitted to the employer such a checklist.
- Agreement by nonexempt employees to work no more than forty hours per week without the express permission of a supervisor and to keep accurate time records.
- Statement of nondiscriminatory standards for selection of those eligible for a telecommuting arrangement to protect employers from claims that telecommuting was denied to particular employees for discriminatory reasons.
- Agreement by the employee to promptly report any accidents that occur while the employee is working at home.
- Specific guidelines regarding reimbursement for expenses related to the home office, *e.g.*, business calls and office supplies, along with statement that the employer will not be responsible for home maintenance or other incidental costs associated with the home office.
- Acknowledgement that the telecommuting agreement can be ended at any time by the employer, at its sole discretion.
- Agreement by the employee to protect any employer-provided equipment against damage (and possibly use the same for employer purposes only) and immediately return any such equipment upon termination or request of the employer.
- Agreement by the employee to return all of employer's confidential information upon demand, or destroy the same upon termination of employment.
- Statement that telecommuting employees are responsible for addressing and resolving any tax questions related to use of a home office.

Every employer who has employees performing work at a home office or elsewhere,

during or after normal business hours, should be aware of the legal issues raised and consider using an appropriate policy or agreement. This way, the risks are minimized and both employees and employers can take advantage of the benefits of telecommuting.

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