

# TELECOMMUTING IN THE DIGITAL AGE: THE BENEFITS, POTENTIAL PITFALLS AND BEST PRACTICES

32<sup>nd</sup> Annual Labor & Employment Conference

Connie M. Cessante

(313) 965-8329

[ccessante@clarkhill.com](mailto:ccessante@clarkhill.com)

[clarkhill.com](http://clarkhill.com)

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# OVERVIEW

- Benefits of Telecommuting
- Pitfalls of Telecommuting
- Points to Consider When Implementing a Telecommuting Arrangement
- Unauthorized Off-the-Clock Work
- Telecommuting as a Reasonable Accommodation
- Best Practices

# BENEFITS OF TELECOMMUTING

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# BENEFITS OF TELECOMMUTING

- Increased productivity
  - Less interruptions
- Higher employee morale
  - Improved employee attraction
  - Reduced turnover
  - Greater ability to balance work and personal obligations
- Eco-friendly
  - Less commute time and energy
- Reduced costs for overhead
  - Less brick and mortar space
  - Less spent in utilities
  - Less spent on parking spaces

# PITFALLS OF TELECOMMUTING

CLARK HILL

---

# PITFALLS OF TELECOMMUTING

- Lower productivity
- Reduced or limited ability to monitor performance
- Resentment of telecommuters by non-telecommuters
- Lack of face-to-face communication
- Inaccessibility during normal business hours
- Data security and confidentiality concerns
- Potential liability for at-home workplace injuries

# POINTS TO CONSIDER WHEN IMPLEMENTING A TELECOMMUTING ARRANGEMENT

CLARK HILL

---

# CONTENT OF A TELECOMMUTING POLICY

- Telecommuting is a company option, or otherwise at discretion of company
- Ability of company to revoke permission at any time
- Those who have previously been provided telecommuting options are not guaranteed telecommuting approval in the future
- Requirements for the option
  - Good standing will be determined at the sole discretion of the company
  - The arrangement continues to meet the needs of the company
- Evaluate employee eligibility on a case-by-case basis
  - Ensure consistency to avoid disparate treatment and disparate impact claims



---

# CONTENT OF A TELECOMMUTING POLICY

- Employees are still required to
  - Follow policies and procedures
    - Including policies re: security and confidentiality for all computers, data and information, and any other information handled in the course of work
  - Maintain performance expectations
  - Care for company-provided equipment
- Company not liable for taxes and insurance on the home and non-work related injuries
- Company can be liable for work-related injuries and safety
- Consider using a telecommuting agreement – in addition to your telecommuting policy

---

# COMPLIANCE WITH POLICIES AND PERFORMANCE

- Employees must maintain the expected quantity and quality of work
- Remote work is not a substitute for child care or other dependent care
- Must still use PTO for time off
- Consider trial period
  - Select a reasonable time through which company can assess whether the arrangement is working for the company and the employee

---

# CARE FOR COMPANY PROVIDED EQUIPMENT

- Employees are responsible for the safety and security of company equipment, software, data, supplies, and furniture
- Any equipment such as computers, printers, and software provided on loan by the company remain the property of company, and must be returned upon termination of the telecommuting arrangement
  - Include language about normal wear and tear and the condition the property must be returned in
- Employees are responsible for maintaining and repairing employee-owned telecommuting equipment

---

# LIABILITY

- Employees will be solely responsible for any loss or damages occurring in their home office. The cost of any insurance shall be paid by employees
- Company assumes no liability for injuries occurring in an employee's home outside of work hours or outside the scope of the employee's work
- Employees are solely responsible for tax or other legal implications for the business use of their home, such as improper deductions made
  - See IRS Publication 587 (2015), Business Use of Your Home
- Company is not responsible for paying the telecommuting employee's home insurance, utilities or taxes

---

# PERSONAL EXPENSES OF EMPLOYEE

- Company will not pay personal expenses of the employee, such as
  - Private equipment
  - Travel to or parking at company on non-commuting days
  - Home utility costs

---

# WORK-RELATED INJURIES & SAFETY

- Must home offices must comply with all building codes and health and safety requirements
- Must home offices be free of hazardous materials
- Should company retain ability to verify that the home office satisfies health and safety requirements
- Telecommuter work-related injuries incurred while telecommuting are covered by worker's compensation law
- Employees must notify their employer immediately and complete all necessary and/or management requested documents regarding the injury

---

# PROTECTION OF PROPRIETARY AND CONFIDENTIAL INFORMATION

- Must follow company's policies regarding the maintenance of data security
- Only the telecommuting employee is permitted to access company-furnished equipment and materials upon which company confidential information is transmitted and stored
- Confidential electronic communications should be clearly marked "confidential" or "proprietary information"
- Strictly follow password protection
- Employees must strictly follow company policies and procedures relating to confidential and/or proprietary information

# UNAUTHORIZED “OFF-THE-CLOCK” WORK

CLARK HILL



---

# NON-EXEMPT EMPLOYEES WHO TELECOMMUTE

Employees working more could be a problem!

- If non-exempt telecommuting employees work after work hours, the company could face legal consequences for non-payment including overtime
- Legal action under federal and state wage and hour laws filed on behalf of the employees for unpaid compensation including work done after hours on their employer-provided devices

---

# FAIR LABOR STANDARDS ACT (FLSA) BASICS

- FLSA is the federal law which sets minimum wage, overtime, equal pay, recordkeeping, and youth employment standards
- The FLSA requires that all **non-exempt employees** in the United States be paid at least the federal minimum wage for all **hours worked** and overtime pay at one-and-one-half times the regular rate of pay for all hours worked over 40 hours in a workweek
  - *Note:* Public sector employers can offer compensatory time off in lieu of overtime

*\*Reminder: Always check to see if any applicable state or local law provides more generous employee rights than the FLSA*

---

## “HOURS WORKED” GENERALLY

- “Hours worked” has been generally understood to include
  - Time an employee must be on duty, on the employer’s premises or at any other prescribed place of work
  - Any additional time the employee is **allowed** (i.e., **suffered** or **permitted**) to work (even if not requested by the employer)

---

## “OFF THE CLOCK WORK” GENERAL RULE

- Whether an employer must compensate employees for work performed outside of regular working hours and outside of the office (“off-the-clock” work) is a very fact intensive inquiry
- However, case law generally requires an employer pay an employee for time “off the clock” if
  1. The employee **performed “work”**
  2. For more than a ***de minimis*** amount of time
  3. The employer **knew or had reason to know** about the work

---

# EMPLOYER POLICIES FOR REPORTING OVERTIME

- Establish and publish a reasonable process for an employee to report all work time
  - Do not discourage reporting off the clock and/or overtime hours
  - Do not prevent employees from reporting overtime
  - Act promptly when notified of an employee's unreported work

---

## **NONEXEMPT EMPLOYEE WORK FROM HOME HYPO**

Eastern Airlines recently decided to allow its customer service representatives (paid a \$21,000/yr salary) to work from home by forwarding customer calls to the employees' landline or cell phone and providing them an Eastern laptop computer. In the past, Eastern strictly enforced its no overtime policy by locking representatives out of their computers and disabling their phones at the end of their shifts; re-activating them at the start of their shifts the next workday. Additionally, Eastern would require employees to go to the lunchroom to take their 30-minute unpaid lunch.

Stacy, an Eastern representative, decided to take advantage of the work from home offering. Stacy was scheduled to work from 8:30 AM-5:00 PM Monday-Friday.

Over the next few weeks Stacy worked her normal schedule, but at least three times a week Stacy would have to work through lunch (Stacy would mute her phone and take bites of her lunch while the customer spoke) due to heavy call volume.

During that same time, Eastern locked Stacy out of the network and stopped forwarding calls to her at the end of her shift.

---

# NONEXEMPT EMPLOYEE WORK FROM HOME HYPO

Does Eastern owe Stacy overtime pay when she worked from home?

- A. No, because Stacy was a salaried employee
- B. No, because Eastern enforced its no overtime policy by only allowing Stacy to receive customer calls and e-mails during her regularly scheduled work hours
- C. Yes, because Stacy worked through lunch

---

## ADVICE TO EMPLOYERS

- Employers must pay nonexempt employees for all hours worked, even unauthorized overtime
- Employers should define standards about when and under what conditions work is permitted away from the workplace
- Employers should ensure that nonexempt employees accurately and completely record all hours worked
- Employers may (and should) discipline employees for unauthorized working time
- Be mindful of nonexempt employees' use of smartphones and other technology to work from home and outside scheduled work hours



# TELECOMMUTING AS A REASONABLE ACCOMMODATION

CLARK HILL

---

# OVERVIEW OF THE AMERICANS WITH DISABILITIES ACT, AS AMENDED

- The ADA is an anti-discrimination statute prohibiting discrimination
  - In hiring, firing, advancement, training, compensation, and other terms and conditions of employment
  - By employers
  - Against “qualified individuals with a disability”
- The ADA **requires accommodations** to qualified individuals with a disability **to allow the performance of essential job functions**
- A “qualified individual with a disability” is a person with a disability who, with or without an accommodation, can perform the essential functions of the job

---

# REASONABLE ACCOMMODATIONS

- Do **not** include
  - Changing the essence of the job
  - Removing essential functions
  - Creating a new position
  - Bumping another employee
  - Requiring others to work harder or do essential functions
  - Requiring a change in performance standards
  - Hiring an assistant
  - Removing a supervisor

---

# REASONABLE ACCOMMODATIONS

- Include
  - Modifying non-core job duties
  - Acquiring or modifying job-specific equipment
  - Changing some policies
  - Reassignment to a vacant equivalent position, or lower paid position if none is available
  - More frequent breaks
  - Allowing others to perform some work functions
- **BUT IS TELECOMMUTING A REASONABLE ACCOMMODATION?**
  - **Depends!**
  - Does it allow the disabled employee to perform the essential functions of the position without undue hardship to the company?

---

## 6TH CIRCUIT – *EEOC V. FORD MOTOR CO.*

- Employee with IBS requested to work from home; request denied
  - Ford alleged the position was highly interactive
  - Job duties to purchase and resell steel to parts suppliers for manufacturing and supplying vehicle parts to Ford’s plants
- Court found
  - Ford’s denial of employee’s telecommuting request did not violate ADA
- As a general rule, “an employee who does not come to work cannot perform any of his job functions, essential or otherwise”
- Court relied on Ford’s judgment and job description when finding that predictable attendance was an essential function of the job
- Employee could not perform the job duties well under this arrangement

---

## 7TH CIRCUIT – *FISHER V. VIZIONCORE, INC.*

- Employee, hired for an accountant position, had debilitating pain from a car accident. Missed work four times in first 10 days
  - Company advertised ability to work from home 1-2 days per week
- Employee Handbook stated regular attendance was essential and a necessary condition of employment; absences required call to manager before start time
- Telecommuting policy required: (1) management approval at least one week in advance and (2) resolution of security matter for proprietary financial information before linking of home computer to company network
- Employee sought an open-ended schedule with privileges to miss workdays frequently **without notice** and to telecommute **without manager approval**
- Court found employee’s request unreasonable
  - “Courts endorse the right of employers to control when employees can telecommute”

---

## 9TH CIRCUIT – *HUMPHREY V. MEM’L HOSPS. ASS’N*

- Employee with obsessive compulsive disorder (OCD) worked as a medical transcriptionist
- She requested a work-at-home position to accommodate her OCD. The request was denied due to prior disciplinary warnings for tardiness and absenteeism
  - The company did not suggest any alternative accommodation
- Court found
  - A jury could find that the accommodation would have enabled employee to perform her essential functions
  - “Working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer”
  - Physical attendance at the office was not an essential job function here
  - In fact, company permitted some of its medical transcriptionists to work at home

---

## 10TH CIRCUIT – *VALDEZ V. MCGILL*

- Company terminated the employee (a warehouse supervisor with cancer) when he could not return to work after he exhausted his medical leave
  - Employee argued he could have performed the essential functions of his job if allowed to work from home
- Court held working from home was unreasonable for this position
  - “[F]or most jobs, ‘physical attendance in the workplace is an essential function’”
- He would have to delegate several aspects of his job to others. At home, he could not
  - Perform quarterly or random inventory counts
  - Interact with customers who came to the warehouse
  - Confirm whether his employees had completed their work
- Employers are not required to reallocate essential employee duties



---

## 11TH CIRCUIT – *ABRAM V. FULTON COUNTY GOVT.*

- Employee, a front desk receptionist with lupus, requested to telecommute. The request was denied.
- The company stated physical presence was an essential element of the job. Employee disagreed
- Court held that telecommuting for this position was unreasonable
  - Even though the company allowed other employees to telework, it had never allowed front desk receptionist to do so
  - The company did not have a practice of hiring temporary workers to cover the front desk
  - Employee's own evidence showed that she was physically present at the front multiple hours a day
  - Weight was given to the company's judgment about the essential functions of Employee's position

---

## **D.C. CIRCUIT – *WOODRUFF V. PETERS***

- Employee, a team leader at the company, was allowed to telecommute for several months due to a work injury
- New management revoked his right to telecommute and denied him the accommodation
- Factors to consider
  - Other employees permitted to telecommute – even in similar positions
    - Hard to argue undue hardship
  - Telecommuting policy allowed employees to telecommute up to 5 days per week
    - Hard to argue inability to perform essential functions
  - Employee testimony stated that most of his team was self-directed
- Court found that the accommodation could be reasonable and that a jury should decide

---

## **BOTTOM LINE ON TELEWORK AS AN ACCOMMODATION**

- Consider whether the employee can telecommute and still perform the essential functions of his or her job
- It can be a reasonable accommodation so long as essential duties can still be performed

# BEST PRACTICES

Guidance Regarding Working Outside the  
Traditional Office Setting in the Digital Age

CLARK HILL

---

# BEST PRACTICES

- Have a clear telecommuting policy and consider a telecommuting agreement
- State essential functions of a position on job descriptions
- Be consistent in how telecommuting is allowed (i.e. for what positions)
- If telecommuting won't work for the position, document why and engage in the interactive process to come up with an alternative for the employee
- Don't have to provide the employee's requested accommodation – just one that allows the employee to perform the essential functions of the job
- Document all efforts made in the interactive process

---

# QUESTIONS?



**Connie M. Cessante**

(313) 965-8329

[ccessante@clarkhill.com](mailto:ccessante@clarkhill.com)

# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

CLARK HILL