

Is It Time for a Reset for Remote Work? Reimagining the Virtual Workplace 2.0 for Manufacturers

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November 2, 2020

Many manufacturing companies are beginning to envision what the workplace will look like in the near future. While some manufacturing work cannot be done remotely because it is impossible or impractical, many companies were able to shift certain types of work to the virtual workplace in response to the COVID-19 pandemic to limit the number of employees within their manufacturing facilities.

For many manufacturers, doing so has not resulted in a loss of productivity and was a surprisingly seamless transition thanks to technology that allows employees to work remotely anywhere and anytime. But the uptick in COVID-19 cases continues to leave many manufacturers in limbo for the imminent future. As a result, manufacturing companies are considering what the new normal will be. This raises a number of questions about the benefits and drawbacks of remote work and the myriad legal considerations.

Pros and Cons for Employers

Many companies have found that productivity and morale have gone up with remote work. Allowing employees to work remotely can result in decreased absenteeism, particularly when employees are quarantining.

Remote work often can be a powerful weapon in the war for talent, particularly where employers can expand their recruiting efforts farther afield. It is no surprise that many employees seek the flexibility of working at home, which allows companies to attract and retain employees. In a study by the [New York Times and Morning Consult](#), “86% said they were satisfied working from home. 47% said they were ‘very satisfied.’” Further, many employers have reduced their footprint, resulting in cost savings in overhead and real estate costs and being more “green.”

However, employee engagement, culture, and connectivity can be a significant challenge in a remote working environment. Indeed, some employers report decreased productivity, a loss of control, less day-to-day communications, and reduced employee morale. Remote work can be particularly challenging for newly hired employees as they have not created internal relationships and networks and have a more difficult time understanding company culture. The cost of implementation to equip employees to work remotely also can be challenging. Finally, there is the potential for legal liability as discussed below.

What About Employees?

The potential benefits for employees are more work-life balance and the elimination of the commute. Some employees find they are more productive from home, with fewer interruptions. Employees also may have savings associated with items like commuting costs and dry-cleaning bills. Allowing employees to work from home also is a “green” option in that it reduces the commute.

Not all employees benefit, though. Some report that the line between work and home blurs and their working hours increase, that distractions (including caregiving) result in decreased productivity, and that they have costs associated with setting up a home office. A significant challenge also can be isolation, less visibility into the organization, fewer mentoring opportunities, and decreased opportunities in general.

Legal Issues Related to a Remote Workplace

While the speed of the COVID-19 pandemic resulted in many employers quickly pivoting to a full or hybrid remote workplace, employers can still proactively anticipate and address the legal issues associated with a virtual workplace when planning for the future.

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Determining what state law applies. Knowing which additional state and local laws apply is critical as employees who work from home for an extensive time likely will be governed by the home state and local employment laws. Along with the legal issues listed below, employers need to navigate withholding tax issues, corporate registrations for business and corporate taxes, workers' compensation and unemployment compensation benefits, paid sick leave, paid family and medical leave, predictive scheduling leave, and leaves of absence.

Avoiding discrimination and harassment claims. When determining who should be allowed to work remotely, employers should analyze what work can be done remotely, as well as what criteria should be applied in determining who can do remote work. Employers may want to consider legitimate business reasons such as performance, reliability, good communication skills, the ability to work independently, and remote access to tools and resources needed to perform the job. Now is also a good time to remind employees about the company's anti-discrimination and anti-harassment policies and that standards of conduct also apply to the remote workplace.

Contract/Misrepresentation claims. Employees should be told in writing that the remote working arrangement is temporary and the employer has the sole discretion to end a remote working arrangement. Doing so can prevent employees from believing that telecommuting is an entitlement and avoid any future miscommunications as to expectations.

Wage and hour issues. The virtual workplace can create some compliance challenges. Employers must ensure compliance with the Fair Labor Standards Act (FLSA) and any state wage laws. For example, a manufacturer should know what state law applies to ensure compliance with wage and hour laws, including meal and break laws and paid time off laws. Employers must ensure that employees are properly classified as exempt or non-exempt, and that non-exempt employees accurately record all hours worked and are paid minimum wage and overtime in compliance with the applicable state law. In a remote environment, it is critical to tell employees that off-the-clock work is strictly prohibited, particularly as many remote workers are reporting that they have difficulty unplugging from work.

Business expenses. In some states, there may be an obligation to pay expenses associated with telecommuting, such as internet and cellphone service. For example, California and Illinois have specific laws. For other jurisdictions that do not, any costs should not reduce employees' compensation below minimum wage. Employers should consider reimbursement for costs related to equipment and service-related costs needed to perform work duties.

Virtual workplace injuries. An in-home workplace injury may be covered by the applicable state workers' compensation law. While this is generally assessed on a case-by-case basis, workers' compensation is more likely to apply if there is a formal telecommuting arrangement versus a mere convenience for the employee. Ideally, employers should require employees to designate a specific area to be a home office and identify regular working hours, require a safe and ergonomic working environment, and require immediate reporting of all accidents and injuries. This will help employers disclaim liability for injuries that occur outside of working hours or outside of the designated home office.

Confidentiality/Data privacy breaches. There are increasing data privacy protections and the consequences for noncompliance are high. Some considerations to think about are physical and technical security for items like confidential paper documents and access to hardware and computer systems, whether electronic monitoring is permissible in the home office state, destruction and shredding of documents or hard drives with confidential or sensitive information, and obtaining the return of company property. Furthermore, it is important to communicate critical reminders for employees, such as being aware of phishing attacks, knowing where to report a data incident, following instructions for system updates and security patches, saving company data only on the network, and not personal devices, not permitting others to access the company's systems, and not sending sensitive corporate data to personal email or cloud accounts.

Occupational Health and Safety Administration (OSHA). OSHA has identified minimizing worker contact through use of remote work and virtual communications as an effective administrative control to reduce the potential for COVID-19 exposure. For remote work, employers have an obligation to correct known health and safety hazards related to the remote work; however, OSHA does not expect employers to inspect employees' homes. Injuries and illnesses occurring in the home and in connection with the remote work may still need to be managed as occupational injuries and illnesses that are subject to OSHA recordkeeping and reporting requirements.

Non-competition, non-solicitation, non-disclosure, and arbitration agreements. State law varies as to the enforceability of agreements. An existing agreement may need to be modified so that it is enforceable under the laws of the state in which the employee is now working. Some tips are to consider governing law provisions that are tied to where the employee works or reports and the geographic scope of a noncompete. The current agreements may need to be adjusted given the realities of which state the employee is working in and that employees may be recruited to work remotely

(thereby rendering a geographic scope clause too narrow).

Americans with Disabilities Act (ADA). The company should view any requests to work remotely due to a medical condition as a request to engage in the interactive process required by the ADA.

Telecommuting may be a reasonable accommodation under the ADA. Employers should engage in the interactive process with employees requesting remote work even if the company does not have a remote work program or if the employee or the job does not meet the employer's criteria for remote work. Another reason to inform employees that remote work is at the employer's discretion is to avoid a future argument that an employee has a permanent accommodation to work from home.

Family and Medical Leave Act (FMLA). Remote employees are entitled to federal and state FMLA rights and should be required to follow established "call in" procedures to notify the company about what time off is covered by the FMLA and any return-to-work protocols (*i.e.*, fitness for duty certificate). Employers should prohibit employees from working from home while on FMLA leave. A remote worker may be deemed to "work" in the physical location to which they report, even if that is different from where they physically work.

Best Practices

A current primary consideration is the potential health risks from COVID-19 in the workplace. In addition, balance the benefits and drawbacks of the virtual workplace, while considering engagement and culture.

Assess which job functions are suited for a virtual workplace. Determine what state laws apply. Adapt current policies and procedures to the virtual workplace. Train employees on appropriate virtual workplace conduct and managers on managing virtually. Establish minimum office and technology requirements for the "virtual office" and manage content in the virtual workplace. Now is a good time to communicate expectations, assess information security risks, ensure that there are systems in place to minimize potential liability.

Each employer's circumstances are different and some employers may need to take additional steps in an evolving environment that includes reopening orders with extensive requirements that create compliance issues that can vary significantly depending on the specific state or local jurisdiction. Jackson Lewis attorneys are closely monitoring updates and changes to legal requirements and guidance and are available to help employers weed through the complexities involved with [state-specific or multistate-compliant plans](#).

If you have questions or need assistance, please reach out to the Jackson Lewis attorney with whom you regularly work, or any member of our [COVID-19 team](#).

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