

April 24, 2020

COVID-19 Daily Briefing Recap

Making Remote Work Work: Practical Tips and Legal Considerations

Please note that the following is a recap of our COVID-19 Daily Briefing from April 24, 2020. Due to the rapidly evolving nature of the pandemic, we recommend that you consult the most up to date materials possible. Visit Jackson Lewis P.C.'s [COVID-19 resource page](#) for updates on workplace impacts and [sign up here](#) to receive invitations to future daily COVID-19 webinar briefings and email updates on ongoing legal and workplace health challenges.

Is Remote Work Appropriate for the Job?

Employers should perform individual job-position analyses that address the following questions:

- Which core job functions can be performed remotely?
- Is necessary equipment and technology available?
 - If not, can the necessary tools be made available at a non-prohibitive cost?
- Can confidentiality and security of company and client information be assured?
- Will an employee's remote work affect co-workers' ability to perform their jobs?
 - Can all necessary resources and documents be accessed remotely?
- Do job descriptions need to be changed temporarily?

Must I Grant Employee Requests to Work Remotely?

Employers need to engage employees in dialogue around the following questions:

- Are there childcare issues or other family obligations?
 - If so, the employee may qualify for leave under the FFCRA.
 - Intermittent leave under FFCRA is acceptable by agreement between the employee *and* employer.

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- Does the employee have general fear or anxiety related to exposure to COVID-19 absent a pre-existing mental illness/disorder such as anxiety or PTSD?
 - Are the employee's concerns reasonable?
 - What safety protocols are in place?
 - Are social distancing and/or face coverings practical?
 - There is no requirement to accommodate an employee's generalized fear. However, given the unprecedented nature of the pandemic, you may want to be more flexible in allowing short-term remote work:
 - If so, ensure that you treat all employees consistently.

EEOC Guidance on the ADA and Remote Work

When presented with a remote work request based on an employee's underlying risk factors or preexisting medical or mental health conditions, employers must engage in interactive dialogue:

- Verify that the employee has a disability that requires an accommodation:
 - Healthcare provider certifications can be difficult to obtain during the current crisis, so employers should be open to alternative ways to substantiate accommodation requests, including:
 - Prescription records
 - Health insurance records
- Employers are encouraged to provide accommodation on an interim or trial basis, but consider:
 - The effectiveness of the arrangement, for both employer and employee, should be reviewed after a specified period of time.
 - Because some employees may want to continue working remotely beyond the duration of the crisis, it is important to define the interim nature of the accommodation.
 - A formal contract is not required, but employers should describe the nature and duration of the agreement in a memo or email.
- The EEOC's guidance is available here: <https://www.eeoc.gov/facts/telework.html>.
 - Reasonableness of remote work accommodations will depend on the facts of each specific case.
 - Remote work is more likely to be viewed as a reasonable accommodation if it is for a limited time.
 - Accommodations can be denied if they impose an undue hardship on employers; impact on revenue is relevant.

Remote Work Agreements

Agreements with all employees should include:

- A written description of the basis for remote work, with the following potential disclaimers:
 - The arrangement is temporary or on a trial basis due to the pandemic.
 - Where appropriate, you may want to specify that the employee is not performing all essential functions due to the pandemic:
 - Documentation will help post-crisis when you want employees to return to the workplace.

- The arrangement may be revoked at the employer's discretion.
- Employer's expectations regarding work hours, availability and performance.

How To Manage Remote Worker Productivity

- Provide reasonable and well-defined performance expectations in writing:
 - Identify work hours.
 - Emphasize compliance with time recording and reporting procedures:
 - Non-exempt employees must track hours so that overtime can be monitored and paid.
 - Identify measurable productivity goals, deadlines, and priorities.
 - Schedule regular meetings to keep everyone connected.
 - Consider requiring employees to track their activities.
 - Consider policies defining appropriate attire for video conferences.
- Maintain a regular performance management process:
 - If disciplinary issues arise, deal with them.
 - Consider quarterly check-ins and annual or biannual reviews conducted by phone or video.
 - Provide for electronic exchange of performance reviews.
- Given the circumstances, be flexible.

What if I have more questions?

As issues and concerns around COVID-19 unfold daily, employers must prepare to address the threat as it relates to the health and safety of their workforce. Keep up to date with [Jackson Lewis' latest available information and resources](#).

If you have any questions, please contact the Jackson Lewis attorneys with whom you regularly work.