



FYI

Telecommuting - Overview

BENEFITS

Revised: August 2018

Summary:

Telecommuting can be an effective way to retain top employees, and recruit the best applicants for a job. However, it can also expose the employer to potential legal liability, especially if done improperly. This material explains some of the risks and offers suggestions on how to conduct a successful telecommuting relationship with employees.

For additional resources, please see page 15

Important Notice:

The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice. If the reader has a specific need or problem, the services of a competent professional should be sought to address the particular situation.

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TELECOMMUTING: AN INTRODUCTION

Telecommuting, or telework, is a work arrangement by which an employee performs job duties from an alternate location that is outside the traditional workplace. In this summary, the terms “telecommuting” and “telework” will be used interchangeably.

Most commonly, a telecommuting employee performs work from his or her residence, but other alternatives do exist. Some employers create office space or teleworking centers where employees perform their job duties, much as they would from a home office. This arrangement may allow the employer to attract workers from more widespread geographic locations or may solve a lack of space at the main work site.

For example, an employee might perform work from an alternate location on an irregular basis, or on a scheduled basis that may involve telecommuting one workday a month, every workday of the month, or something in between. Accordingly, the guidance contained in this outline applies not only to employers who allow full-time telecommuting, but also to those employers whose telecommuting programs contemplate a variety of arrangements.

THE SURGE IN TELECOMMUTING

TECHNOLOGY

This growing trend is fueled in part by changes in technology. The growing capabilities of technology allow people to quickly and easily communicate by electronic means. Meetings can readily be conducted by telephone or video conferencing. Documents can be sent electronically in a matter of seconds. Employees can be contacted wherever they are through the use of computers or other mobile devices. Technology is also more affordable and accessible than ever before. For example, desktop and laptop computers, printers, software, cellular telephones, fax machines, scanners, copiers, and personal digital assistants like Blackberry and iPhone can all be purchased for in-home use.

In short, no matter where we are, technology allows us to send or receive information, access information from the Internet, and create documents and other work products with ease.

BENEFIT TO EMPLOYEES

Clearly, the Top 100 companies view telecommuting as a desired benefit to offer to employees. Why? As a generalization, “quality of life” is a growing mantra of American employees. On this issue, telecommuting benefits employees in a number of ways:

- Greater balance between work/family/personal issues.
- Greater personal flexibility.
- Freedom from the stress of traffic.
- More personal time due to decreased commuting time.
- Reduced personal expenses (e.g., fuel and work attire).

- Reduced risk of exposure from potential illness.

BENEFIT FOR EMPLOYERS

Employers, too, may benefit from allowing some form of telework within their organizations:

- Improved job performance.
- Greater job satisfaction.
- Equal or greater productivity of employees.
- Ability to seek employees from a larger pool of talent.
- Improved ability to attract and retain workers.
- Ability to adapt quickly for alternative work methods due to pandemic or other catastrophic issue.
- Contribution to environmental conservation.
- Reduced office space and overhead costs.
- Possible state tax incentives.

POTENTIAL DRAWBACKS

As one might expect, there are also some drawbacks for both employer and employee when entering into a telework relationship. For the employee, such drawbacks include:

- Less social interaction with other workers due to greater independence.
- Fewer opportunities to be mentored by other workers or to share ideas.
- Employees who are considering whether to telecommute might be invited to contact current teleworkers to become fully informed of the pros and cons. Of course, regular staff meetings or social events that bring the teleworkers into contact with other employees may serve to lessen potential drawbacks. Still, teleworkers should be apprised of the downside of telecommuting before deciding to proceed.

For the employer, telecommuting raises many legal and practical issues which are discussed in the following section.

TELECOMMUTING: POTENTIAL TROUBLE SPOTS

PLANNING FOR PITFALLS

When a company creates a telework relationship with an employee, an employer must be aware of the potential for trouble. This section is an overview of practical and legal issues that an employer must effectively navigate. Because telecommuting continues to be an emerging topic, there is not an abundance of legal authority specifically addressing telework situations.

INSURANCE COVERAGE

Employers should confirm that its insurance policies cover the employee's remote location before entering into a telecommuting arrangement. The employer's property (e.g., files, equipment, and sample products) may be kept in the teleworker's home. However, homeowner policies may not cover employer-provided home office equipment or employer property. In addition to property damage coverage, the employer should also inquire about its insurance coverage for comprehensive general liability and errors and omissions. Workers' compensation liability will be discussed in more detail below, but it bears mentioning here for insurance purposes. An employer should check with its workers' compensation carrier regarding insurance coverage.

CONFIDENTIALITY CONCERNS

By design, telecommuters often access their employer's computer networks from home and retain files or other company information in their home offices. Employers do not have complete control over remote premises. If an employer is concerned about confidentiality or protection of trade secrets, employers might wish to require teleworkers to follow certain security measures when working from home, such as using file cabinets with locks, setting up confidential password systems, following log-in and log-out computer protocols, and limiting access to the work area by non-employees.

Employers might also consider the use of a confidentiality agreement that can be specially drafted to address the teleworking arrangement. For example, a special provision of this type of agreement might address what property the employee is required to return upon separation from employment and may even provide for reasonable enforcement measures or liquidated damages in the event the employee improperly retains the employer's property.

EMPLOYEE OR INDEPENDENT CONTRACTOR?

Employers should avoid mistaking employees for independent contractors simply because the employee does not report to the office in the same manner as other employees. Generally, an independent contractor is free from close control and supervision over day-to-day work, and this fact may mislead some employers into thinking teleworkers must be independent contractors too. Independent contractors are not employees of the employer, but telecommuters are. An independent contractor often operates her own business, can perform jobs for multiple companies, and is free to perform the work how and when she sees fit. The company purchases the independent contractor's end product, not the right to directly manage her time and efforts.

By contrast, a telecommuter is still managed by, and subject to, the direction of his employer. The fact that she may perform her work from an alternate location does not make her an independent contractor. Employers often use independent contractors to avoid payment of benefits, payroll taxes, overtime compensation, and workers' compensation insurance, in addition to limiting their liability under federal employment discrimination statutes. While an employer may decide whether to make telecommuters eligible for many voluntary employer-provided benefits, the use of telecommuters is not a means to avoid payment of payroll taxes, overtime compensation, workers' compensation insurance, or unemployment compensation

insurance. Likewise, as employees, teleworkers are still covered by applicable anti-discrimination laws.

OCCUPATIONAL SAFETY AND HEALTH ACT (OSH ACT)

The OSH Act requires employers to eliminate recognized workplace hazards. As telecommuters do not work at the employer's work site, unique questions are raised with respect to health and safety compliance.

Home Offices - An employee's home office is not subject to the same rules as the traditional workplace under the OSH Act. An employer is not expected to inspect home offices for hazards and is not liable under the Act for accidents that occur in a home office. Likewise, an employee's house or furnishings are not subject to the Act and the federal Occupational Safety and Health Administration (OSHA) does not inspect home offices.

Home-based Manufacturing - If an employee performs manufacturing work at home, however, employers have greater responsibility for worker safety. Employers are responsible for home work site hazards caused by chemicals, materials, or equipment that the employer provides or requires to be used in the employee's home for manufacturing work. If an employee performs manufacturing work at home, OSHA may inspect the home work site if it receives a complaint or referral indicating that a safety risk exists. If OSHA performs an inspection, the inspection will be limited to the employee's work activities. The law does not apply to other areas of the employee's home or furnishings.

In 2000, Charles Jeffress, Assistant Secretary of OSHA, clarified the following before a Senate subcommittee:

- The OSH Act does not apply to an employee's house or furnishings.
- OSHA will not hold employers liable for work activities in employees' home offices.
- OSHA does not expect employers to inspect home offices.
- OSHA does not, and will not, inspect home offices.
- Employers who because of their size or industry are required to keep records of work-related injury and illness are still required to keep such records regardless of where the injury or illness occurs.
- Where work other than office work is performed at home, such as manufacturing operations, employers are responsible for hazardous materials, equipment, or work processes which they provide or require to be used in the home.
- OSHA will only conduct inspections of hazardous home workplaces, such as home manufacturing, when OSHA receives a complaint or referral.

AMERICANS WITH DISABILITIES ACT (ADA)

The ADA requires employers to engage in an interactive process with an otherwise qualified disabled employee to determine appropriate reasonable accommodations for the disability. An employer is not required to offer an accommodation that eliminates the essential functions of a job, or one that does not enable the employee to adequately perform the essential functions.

Further, an employer is not required to accommodate a disabled employee (or applicant) if the employer demonstrates that the proposed accommodation would impose an undue hardship on its operations.

There may be situations where a disabled employee requests a telecommuting arrangement as a reasonable accommodation. The U.S. Equal Employment Opportunity Commission (EEOC) has issued guidance on “work at home” or “telework” as a reasonable accommodation. According to the EEOC, allowing an employee to work at home can be a reasonable accommodation if an employee’s disability prevents him or her from successfully performing the job at the work site and if the job or parts of the job can be performed at home without significant difficulty or expense. If the essential functions of the employee’s job require his or her presence in the workplace, you do not have to eliminate those functions and let the employee work from home. However, if some of the essential functions can be performed at home, it may be a reasonable accommodation to set a part-time work-at-home arrangement.

When considering whether telecommuting is a reasonable accommodation for a disabled employee, the employer must consider the employee’s particular job assignment and whether the essential functions can, in fact, be performed at home. Keep in mind that employers are not required to grant employees with a disability any accommodation they request; they are only required to provide a reasonable accommodation. Please refer to the EEOC fact sheet at the end of these materials.

FAIR LABOR STANDARDS ACT (FLSA)

Under the FLSA, “employ” is defined as “to suffer or permit to work.” Teleworkers are employed under this definition regardless of where they perform the work. A covered employer is generally required to pay its employees for hours worked, regardless of whether the employer has rules prohibiting additional work. Thus, allowing nonexempt employees (who are therefore eligible for overtime pay) to telework raises special issues for employers. An employer may be able to set up a system to receive daily time reports or some means of logging time worked. However, if the employer does not have a means of tracking the nonexempt employee’s hours, the employee is free to submit her own account of “hours worked,” and the employer is obligated to pay. This is true even if the employer instructed the employee not to work beyond a set number of hours. The employer’s recourse is to implement a policy stating that nonexempt employees may not work unscheduled or overtime hours without express permission of a supervisor and to discipline employees, including teleworkers, who fail to follow the policy. Discipline, including possible revocation of the teleworking privilege, is the proper way to handle this potential trouble spot as opposed to a refusal to pay the claimed wages.

Exempt telecommuters do not pose the same “hours worked” problem described above. However, employers should remember that under the FLSA, an exempt employee’s salary must not be “subject to reduction because of variations in the quality or quantity of the work performed.” 29 CFR § 541.118. When exempt employees are allowed to telecommute, the employer should not impose time-tracking mechanisms for the purpose of adjusting the worker’s salary. If the employer develops concerns about the quality or quantity of the employee’s work, the employer should take corrective or disciplinary action instead of docking salary in violation of FLSA.

CIVIL RIGHTS DISCRIMINATION

Employers should have a fair and objective process for deciding which jobs and which employees will be considered for a telecommuting arrangement. Most employers cannot guarantee a telecommuting option for all employees, but rather can only make telework available on a case-by-case basis, taking into account the full spectrum of its operational needs. Despite this, if one employee is allowed to telecommute and another is not, the situation is ripe for a claim of discrimination.

Employers can seek to avoid discrimination claims by creating a clear policy that sets forth the parameters of the telework program. Such a policy will make it clear that telecommuting is not an employee benefit for all employees, but rather, an alternate method of meeting the company's needs.

To be in the best possible position to defend itself against an adverse employment action, the employer must point to its established telework guidelines and explain how its guidelines were legitimately applied to the particular employee. Finally, employers must document the reasons for a particular telecommuting decision and retain this documentation.

Once a telecommuting decision is made, management should clearly communicate with the employee about how the decision was made, what factors were considered, and why the employee was, or was not, selected. Further, the employee should be informed that the employer may alter or revoke the telework option in the future if the employee's performance is not acceptable, if operational needs change, or if the company simply decides to discontinue the telecommuting program altogether. In the absence of this explanation, an employee who is not allowed to telecommute, or whose telecommuting arrangement is revoked, may mistakenly infer that he is the victim of discrimination based on some protected classification, such as his age, sex, or disability. A sound policy, combined with clear and effective communication, will go a long way to prevent this potential side effect of a telework program.

WORKERS' COMPENSATION LIABILITY

Many states, Colorado included, hold employers liable for a worker's injury when the injury arises out of the course and scope of employment. Liability is not determined based on the location of the injury, so the fact that an injury occurs off the employer's premises does not shield an employer from liability. The difficulty of workers' compensation issues in the context of telework lies in the absence of witnesses to a teleworker's injury. This may lead to a greater potential for fraudulent claims and a greater difficulty investigating such claims or exposing them as false. In addition, the fact that the employee works in a remote location may decrease the chances that an employer will be aware of a legitimate injury from the start, thus increasing potential costs to treat the injury later. While telecommuters should be notified of the same injury reporting requirements as other employees, the fact that such workers do not work at the employer's location does raise special issues. As mentioned before, a prudent employer should speak to its workers' compensation carrier about coverage issues. Finally, the employer should inform the employee that she will be required to cooperate with any workers' compensation investigation, even if it means the insurance investigator will need to see the site of the injury, which may well be the employee's personal residence. The determination of whether an injury is covered by workers' compensation will hinge on the particular facts of the situation and will be assessed by your workers' compensation carrier.

PRIVACY ISSUES

Because of the employer-employee relationship, an employer may need to search, inspect, or monitor the employee's work site or use of equipment from time to time. This can raise special problems, for example, where the employee uses a personal computer for both telecommuting and private purposes. The employer must be wary of creating an invasion of privacy claim by overreaching into private areas of the computer use. To protect itself, the employer must disclose the company's intentions regarding possible inspection or monitoring and obtain written consent from the teleworker, such as in the form of a Telecommuting Agreement. In addition, the employer should generally refrain from accessing private areas of the teleworker's affairs and structure any monitoring or inspection such that its business purposes are met with the least possible intrusion.

NEGLIGENCE LIABILITY FOR INJURY TO NON-EMPLOYEES

An employer may want to consider whether a potential telecommuter will need to host guests at the alternate work site as part of his job duties. If so, the employer will not be in a good position to assess the safety, not to mention the professional appearance, of the work site. Depending on the laws of the state where the injury occurs, the employer may be held liable for an injury to the employee's business guest. The employer might be able to troubleshoot this situation by requiring the teleworker to schedule business meetings at the traditional work site. If the employee's work is such that he hosts business guests quite frequently, the employer may wish to limit his teleworking privileges accordingly, or not grant them at all.

THE NATIONAL LABOR RELATIONS ACT (NLRA)

Under the NLRA, employees have the protected right to engage in concerted activities for the purpose of collective bargaining or for other mutual aid or protection. Employees are generally free to engage in such protected, concerted activity on company property during non-working time. The National Labor Relations Board (NLRB) has held employer policies and practices unlawful if they unreasonably interfere with employees' rights to act in a concerted fashion. Because telecommuting is such an emerging topic, the NLRB has not yet specifically addressed what, if any, restrictions on the manner in which telecommuters can communicate with other workers.

The foregoing concern is most applicable to the telecommuter who rarely or never reports to the employer's work site and is therefore limited in his ability to communicate in person with his colleagues. However, many teleworkers report to the work site for meetings or only telecommute on a part-time basis. Such workers might be more appropriately prevented from using company resources to communicate with co-workers for their own purposes. Should you have any questions or concerns about this issue, please contact the Labor Relations Department.

UNEMPLOYMENT INSURANCE AND INCOME TAXES

This area of the law is developing, state specific, and potentially tricky. A Florida teleworker was disappointed to learn that she could not receive unemployment benefits from New York, where she had been hired and the employer was located. The court held that unemployment benefits should be linked to the state in which an interstate telecommuter is physically present.

However, since unemployment compensation systems vary by state, employees might still be awarded compensation from the employer's state in different circumstances.

In some states, employees may have to pay income taxes both in the state in which they reside and work as a telecommuter, as well as the state where the employer is located. This may make telecommuting less appealing for some employees. Telework advocates are challenging this practice as a disincentive for such work arrangements.

TELECOMMUTING: TIPS FOR SUCCESS

To avoid or diminish many of the troubles identified in the prior sections, an employer should implement a telecommuting guideline and perhaps enter into telecommuting agreements with those employees who are allowed to telework.

Checklist for Suggested Components of an Employer's Telecommuting Guidelines or Policy:

- Explanation that the employer offers telecommuting to employees on a case-by-case basis, after considering numerous factors, including but not limited to:
- The particular job requirements.
- Whether personal interaction is required for the position.
- The type of equipment the employee would need in order to telecommute.
- Whether the employee's telecommuting would pose special financial issues or technical challenges for the employer.
- Any special recruiting or retention issues faced by the employer.
- Any confidentiality concerns.
- Any applicable laws or regulations.
- The effect on the overall operation of business if the employee is not physically present in the workplace.
- The need for direct supervision of the particular job.
- The employee's demonstrated abilities and total work history (e.g., self-motivation, organizational skills, dependability, performance or discipline history, and work evaluations).
- Statement that telecommuters may be required to sign a Telecommuting Agreement.

Checklist for Telecommuting Agreement

- Disclaimer that the employment relationship remains at-will.
- Statement that the Telecommuting Agreement does not guarantee employment for any specific period of time.
- Disclaimer that the telecommuting arrangement is subject to modification or elimination by the employer.

- Limitations on personal use of employer-provided equipment.
- Limitations on access to employer property or equipment by non-employees.
- Confidentiality provision relating to any company records or files, including electronic information.
- Limitations on nonexempt employees work hours and procedure for having overtime hours authorized by supervision.
- Reference to any procedures relating to recording and submitting work hours.
- Clause specifying when and how on-the-job injuries (and injuries to visitors) must be reported.
- Authority for employer to inspect telecommuting workspace and employer property wherever stored.
- Telecommuter's responsibility, if any, for equipment, maintenance, and repairs.
- Telecommuter's responsibility, if any, for provision of insurance on equipment or work areas.
- Provisions relating to job description and functions.
- Clause governing how equipment expenses, technical support, training, mail, or other expenses will be handled.
- Description of equipment telecommuter must provide vs. equipment employer will provide.
- Provision for return of company property upon separation with damages for wrongful conversion.
- Agreement by employee that he or she will fully cooperate with any investigation required by a state or federal agency or the employer's insurance carrier even if cooperation requires home inspection by the agency or insurance carrier.

CONCLUSION

Telecommuting can benefit both employer and employee, and when properly structured, can be a harmonious relationship. However, prior to entering into any relationship, it is prudent to consider the pros and cons, to communicate expectations and terms clearly, and to make sure that legal and insurance issues are considered in advance. A sample agreement is available in our FYI library and will require customization based on your organization's unique needs. It should be considered a sample only. Before implementing, seek assistance from a competent professional.

THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
[HTTP://WWW.EEOC.GOV/FACTS/TELEWORK.HTML](http://www.eeoc.gov/facts/telework.html)

WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION

NOTICE CONCERNING THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008

The Americans with Disabilities Act (ADA) Amendments Act of 2008 was signed into law on September 25, 2008 and becomes effective January 1, 2009. Because this law makes several significant changes, including changes to the definition of the term "disability," the EEOC will be evaluating the impact of these changes on this document and other publications. See the list of specific changes to the ADA made by the ADA Amendments Act.

Many employers have discovered the benefits of allowing employees to work at home through telework (also known as telecommuting) programs. Telework has allowed employers to attract and retain valuable workers by boosting employee morale and productivity. Technological advancements have also helped increase telework options. President George W. Bush's New Freedom Initiative emphasizes the important role telework can have for expanding employment opportunities for persons with disabilities.

In its 1999 Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (revised 10/17/02), the Equal Employment Opportunity Commission said that allowing an individual with a disability to work at home may be a form of reasonable accommodation. The Americans with Disabilities Act (ADA) requires employers with 15 or more employees to provide reasonable accommodation for qualified applicants and employees with disabilities. Reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job, or gain equal access to the benefits and privileges of a job. The ADA does not require an employer to provide a specific accommodation if it causes undue hardship, i.e., significant difficulty or expense.

Not all persons with disabilities need - or want - to work at home. And not all jobs can be performed at home. But, allowing an employee to work at home may be a reasonable accommodation where the person's disability prevents successfully performing the job on-site and the job, or parts of the job, can be performed at home without causing significant difficulty or expense.

This fact sheet explains the ways that employers may use existing telework programs or allow an individual to work at home as a reasonable accommodation.

DOES THE ADA REQUIRE EMPLOYERS TO HAVE TELEWORK PROGRAMS?

No. The ADA does not require an employer to offer a telework program to all employees. However, if an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program.

In addition, the ADA's reasonable accommodation obligation, which includes modifying workplace policies, might require an employer to waive certain eligibility requirements or otherwise modify its telework program for someone with a disability who needs to work at home. For example, an employer may generally require that employees work at least one year before they are eligible to participate in a telework program. If a new employee needs to work at home because of a disability, and the job can be performed at home, then an employer may have to waive its one-year rule for this individual.

MAY PERMITTING AN EMPLOYEE TO WORK AT HOME BE A REASONABLE ACCOMMODATION, EVEN IF THE EMPLOYER HAS NO TELEWORK PROGRAM?

Yes. Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework. However, an employer is not obligated to adopt an employee's preferred or requested accommodation and may instead offer alternate accommodations as long as they would be effective. (See Question 6.)

HOW SHOULD AN EMPLOYER DETERMINE WHETHER SOMEONE MAY NEED TO WORK AT HOME AS A REASONABLE ACCOMMODATION?

This determination should be made through a flexible "interactive process" between the employer and the individual. The process begins with a request. An individual must first inform the employer that s/he has a medical condition that requires some change in the way a job is performed. The individual does not need to use special words, such as "ADA" or "reasonable accommodation" to make this request, but must let the employer know that a medical condition interferes with his/her ability to do the job.

Then, the employer and the individual need to discuss the person's request so that the employer understands why the disability might necessitate the individual working at home. The individual must explain what limitations from the disability make it difficult to do the job in the workplace, and how the job could still be performed from the employee's home. The employer may request information about the individual's medical condition (including reasonable documentation) if it is unclear whether it is a "disability" as defined by the ADA. The employer and employee may wish to discuss other types of accommodations that would allow the person to remain full-time in the workplace. However, in some situations, working at home may be the only effective option for an employee with a disability.

HOW SHOULD AN EMPLOYER DETERMINE WHETHER A PARTICULAR JOB CAN BE PERFORMED AT HOME?

An employer and employee first need to identify and review all of the essential job functions. The essential functions or duties are those tasks that are fundamental to performing a specific job. An employer does not have to remove any essential job duties to permit an employee to work at home. However, it may need to reassign some minor job duties or marginal functions (i.e., those that are not essential to the successful performance of a job) if they cannot be performed outside the workplace and they are the only obstacle to permitting an employee to work at home. If a marginal function needs to be reassigned, an employer may substitute another minor task that the employee with a disability could perform at home in order to keep employee workloads evenly distributed.

After determining what functions are essential, the employer and the individual with a disability should determine whether some or all of the functions can be performed at home. For some jobs, the essential duties can only be performed in the workplace. For example, food servers, cashiers, and truck drivers cannot perform their essential duties from home. But, in many other jobs some or all of the duties can be performed at home.

Several factors should be considered in determining the feasibility of working at home, including the employer's ability to supervise the employee adequately and whether any duties require use

of certain equipment or tools that cannot be replicated at home. Other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace. An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.

If the employer determines that some job duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs. For example, an employee may need to meet face-to-face with clients as part of a job, but other tasks may involve reviewing documents and writing reports. Clearly, the meetings must be done in the workplace, but the employee may be able to review documents and write reports from home.

HOW FREQUENTLY MAY SOMEONE WITH A DISABILITY WORK AT HOME AS A REASONABLE ACCOMMODATION?

An employee may work at home only to the extent that his/her disability necessitates it. For some people, that may mean one day a week, two half-days, or every day for a particular period of time (e.g., for three months while an employee recovers from treatment or surgery related to a disability). In other instances, the nature of a disability may make it difficult to predict precisely when it will be necessary for an employee to work at home. For example, sometimes the effects of a disability become particularly severe on a periodic but irregular basis. When these flare-ups occur, they sometimes prevent an individual from getting to the workplace. In these instances, an employee might need to work at home on an "as needed" basis, if this can be done without undue hardship.

As part of the interactive process, the employer should discuss with the individual whether the disability necessitates working at home full-time or part-time. (A few individuals may only be able to perform their jobs successfully by working at home full time.) If the disability necessitates working at home part-time, then the employer and employee should develop a schedule that meets both of their needs. Both the employer and the employee should be flexible in working out a schedule so that work is done in a timely way, since an employer does not have to lower production standards for individuals with disabilities who are working at home. The employer and employee also need to discuss how the employee will be supervised.

MAY AN EMPLOYER MAKE ACCOMMODATIONS THAT ENABLE AN EMPLOYEE TO WORK FULL-TIME IN THE WORKPLACE RATHER THAN GRANTING A REQUEST TO WORK AT HOME?

Yes, the employer may select any effective accommodation, even if it is not the one preferred by the employee. Reasonable accommodations include adjustments or changes to the workplace, such as: providing devices or modifying equipment, making workplaces accessible (e.g., installing a ramp), restructuring jobs, modifying work schedules and policies, and providing qualified readers or sign language interpreters. An employer can provide any of these types of reasonable accommodations, or a combination of them, to permit an employee to remain in the workplace. For example, an employee with a disability who needs to use paratransit asks to work at home because the paratransit schedule does not permit the employee to arrive before 10:00

a.m., two hours after the normal starting time. An employer may allow the employee to begin his or her eight-hour shift at 10:00 a.m., rather than granting the request to work at home, if this would work with the paratransit schedule.

HOW CAN EMPLOYERS AND INDIVIDUALS WITH DISABILITIES LEARN MORE ABOUT REASONABLE ACCOMMODATION, INCLUDING WORKING AT HOME?

Employers and individuals with disabilities wishing to learn more about working at home as a reasonable accommodation can contact the EEOC at (202) 663-4691 (voice) and (202) 663-7026 (TTY). General information about reasonable accommodation can be found on EEOC's website, www.eeoc.gov/policy/guidance.html (Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act; revised 10/17/02). This website also provides guidance on many other aspects of the ADA.

The government-funded Job Accommodation Network (JAN) is a free service that offers employers and individuals ideas about effective accommodations. The counselors perform individualized searches for workplace accommodations based on a job's functional requirements, the functional limitations of the individual, environmental factors, and other pertinent information. JAN can be reached at 1-800-526-7234 (voice or TDD); or at www.jan.wvu.edu/soar.

Additional Resources on this Subject

A. SEMINARS

Compensation Administration I: Base Pay Design and Development

B. REFERENCE MATERIAL

FYI Staffing: Alternative Work Arrangements
FYI Independent Contractors: Overview
Employee Handbook Planning Guide

C. EMPLOYERS COUNCIL SERVICES

Telecommuting Arrangement Drafting

SAMPLE

SAMPLE TELECOMMUTING AGREEMENT ("AGREEMENT")

BETWEEN

ACME COMPANY ("EMPLOYER")

AND

JOHN DOE ("EMPLOYEE")

THIS AGREEMENT is entered into by the Employer and Employee effective _____ (date). Both parties acknowledge that sufficient consideration exists for this Agreement in the form of mutual gain and benefit.

THEREFORE, the parties agree as follows:

1) Scope of Agreement

The Employee agrees to perform services for Employer as a telecommuter. As a telecommuter, the Employee will perform his or her job duties from a remote office located in the Employee's personal residence.

The Employee agrees that this Agreement addresses only the terms and conditions of the telecommuting work arrangement. The Employee remains subject to the terms and conditions of employment pursuant to the Employer's policies, job descriptions, procedures, guidelines, and instruction. The Employee's salary, pension, and benefits are not affected by the telecommuting work arrangement, except as follows:

The Employee will not be eligible for a car allowance or cellular telephone.

The Employee agrees that notwithstanding the telecommuting work plan, the Employer may from time to time require the Employee's presence at the Employer's main work site for work-related purposes.

2) At-will Employment

The parties agree that nothing in this agreement alters the at-will nature of employment. Either the employee or management has the right to terminate employment at any time for any reason. The Employee understands and agrees that this Agreement does not guarantee employment for any period of time.

3) Modification or Termination of Telecommuting Work Plan

The Employee understands that the telecommuting arrangement is allowed at the discretion of the Employer. The Employer may modify or cease the telecommuting work plan upon verbal or written notice to the Employee. The Employer will not be liable for costs, damages, or losses

resulting from the cessation of the telecommuting arrangement. The Employee may seek modification or termination of the telecommuting arrangement by making a written request to the Employer.

Should either party wish to modify the telecommuting arrangement, the Employer reserves the right to determine what modifications, if any, will be made to the work arrangement. If either party wishes to discontinue the telecommuting arrangement, the Employer will determine what other job assignment, if any, is available for the Employee at that time.

4) Equipment, Supplies, and Resources

The Employer agrees to provide the following for the Employee's use while telecommuting under this Agreement:

- Desktop computer and printer.
- Necessary software and network access.
- Office supplies, including mail supplies and postage.
- Cellular telephone.

The Employer may modify its provision of equipment, supplies, or resources upon notice to the Employee. The Employee agrees that the equipment, supplies, and resources are provided for use by the Employee only and only for business purposes. The Employee will follow any and all instructions related to the use of the foregoing equipment, supplies, and resources.

The Employee will provide all other resources necessary to the telecommuting work site, including but not limited to: furniture, file cabinet(s) with locking mechanisms, utilities, and telephone lines.

The Employee will immediately report any damage to, or malfunction of, company property to the Employer. The Employer will, at its discretion, undertake routine maintenance of the equipment and resources it provides to the Employee. However, the Employee will be responsible for the damage to, or loss of, Employer property. If at any time the Employer demands return of any Employer property, and such property is not returned, the Employee agrees to be financially liable for the replacement value or fair market value of such property, whichever is higher.

5) Safety and Injury

The Employee agrees to maintain the telecommuting work site in a safe condition, free from hazards and other dangers to the Employee or any other person. The Employee will immediately report any personal injury, or injury to any other person, to the Employer when such injury occurs during working hours or involves any Employer property.

The Employee agrees to be liable for injuries to third persons and/or members of Employee's family on Employee's premises. Employee agrees to indemnify and hold harmless the Employer from any and all claims, demands, or liability resulting from, or arising in connection with, any injury or harm to persons, or damage to property, caused directly or indirectly, by the Employee's willful misconduct or negligence.

6) Confidentiality

The Employee agrees to follow all security measures to protect any company records or files, including electronic information. The Employee will follow company procedures related to computer use and network access and will store company records, files, or other data in a locked file cabinet. The Employee will not allow anyone other than the Employee to have access to any information related to the Employer's business, including access to Employer property.

7) Work Hours

The Employee's hours of work are Monday through Friday, 8:00 a.m. to 5:00 p.m., with a one-hour unpaid rest or meal period during these hours. The Employee will report worked time to the Employer consistent with the Employer's instructions. The Employee will not perform work outside of the hours specified above without express, prior approval from his supervisor.

8) On-site Visits

The Employee understands that for business purposes, the Employer may conduct on-site visits of the Employee's home work site. The Employee will cooperate with any such visits. At the request of the Employer, the Employee will also fully cooperate with any on-site visit by a third party, including but not limited to any a state or federal agency or the Employer's insurance carrier. When possible, the Employer will try to provide advance notice to the Employee of any on-site visits.

9) Governing Law

Colorado law will govern the interpretation of this Agreement.

10) Severability

If any of the provisions of this Agreement are found to be unreasonable, unenforceable, or otherwise invalid, the rest of the Agreement will remain in full force and effect.

11) Entire Agreement

This Agreement represents the entire telecommuting agreement between the parties. The Employee is not relying on any verbal or unwritten statement in entering into this Agreement.

12) Modification and Waiver

The terms of this Agreement cannot be modified or waived without a written agreement signed by both parties. The Employer's waiver of the breach of any provision will not be construed as a waiver of any subsequent breach.

Employer's Signature

Date

I affirm by my signature below that I have read this Agreement and understand its subject matter. I affirm that I was given the opportunity to have this Agreement reviewed by my own legal counsel prior to entering into it.

Employee's Signature

Date