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How Flexible Are You? Stretching the Boundaries with a Remote Workforce

By Laura Hayward and Brian Morris

Yahoo! CEO Marissa Mayer's recent decision to ban telecommuting has highlighted the issue of how employers of all sizes respond to technological changes that are redefining the workplace.

In addition to the savings of decreased overhead (in the form of office space, equipment, or otherwise), telecommuting may provide other tangible benefits. Indeed, recent studies suggest that telecommuting may increase employee satisfaction,¹ decrease turnover (and consequently, recruiting and new employee training costs),² and decrease absenteeism.³ It can also reduce an employer's "carbon footprint" by eliminating the energy consumption associated with traveling to the workplace. However, these technological changes also impact how supervisors and subordinates interact, and the human component may lag behind technological advances. A recent MIT study, for instance, found that supervisors often look more favorably upon employees who put in "face time."⁴

From the startup employer to the multinational corporation, the potential to telecommute creates new compliance challenges. For employers that decide not to offer telecommuting, working from home might remain a "reasonable accommodation" under state and federal disability laws that these employers must still consider. Employers offering telecommuting should ensure that their confidential data and intellectual property remain uncompromised. Monitoring the "work time" of telecommuting employees, especially for those paid on an hourly basis, creates its own set of difficulties. These are but a few of the issues that employers will wrestle with in adapting to technological innovation that allows employees to work from anywhere in the world. Proactively maintaining and periodically updating alternative working arrangement or telecommuting policies is essential to realizing the benefits, and avoiding the pitfalls, of the changing workplace.

1 Nicholas Bloom, James Liang, John Roberts, and Zhichun Jenny Ying, [Does Working From Home Work? Evidence From A Chinese Experiment](#), Stanford University, Feb. 22, 2013.

2 *Id.*

3 Peter J. Mateyka and Melanie A. Rapino, United States Census Bureau, P70-132, [Home-Based Workers in the United States: 2010](#) (Oct. 2012).

4 Kimberly Elsbach and Daniel Cable, [Why Showing Your Face at Work Matters](#), MIT Sloan Management Review (Summer 2012).

Telecommuting and the American Workplace

The relationship of the employee to the physical workplace is rapidly changing. The U.S. Census Bureau reports that in 2010 13.4 million American workers worked from home at least 1 day per week.⁵ This is up approximately 18 percent from 2005 (despite a two percent drop in the number of individuals employed) and constitutes nearly 10 percent of the American workforce.⁶ Moreover, home-based work for those employed in engineering, the computer industry, and science increased by 69% from 2000 to 2010.⁷ The western United States has the highest percentage of home-based workers (11.4 percent), perhaps partially due to its burgeoning startup culture.

In industries where telecommuting is common, permitting employees to work remotely may become a competitive necessity. In other industries, it may be a way to gain a competitive advantage. Either way, human resources staff and legal counsel should carefully manage the transition and day-to-day implementation of remote working arrangements.

Legal Complications

Work "Away from Work" and Equal Employment Opportunity

Not all workplaces are well-suited to work-from-home arrangements. The technological ability to work remotely, however, may create obligations under the Americans with Disabilities Act and related state laws; namely, "work from home" can in some circumstances arguably constitute a reasonable accommodation.⁸ The Equal Employment Opportunity Commission adopts this position and contends that work from home/telecommuting arrangements may be a reasonable accommodation even if working remotely is not available to other employees.⁹ Employers that wish to have a general policy against telecommuting should keep in mind their potential obligations under state and federal disability laws. Moreover, they should be aware that entering into remote working arrangements with some employees may make denying such benefits to disabled employees more difficult.

Many employers offer telecommuting on an informal basis, but the absence of a formal policy can expose employers to potential discrimination lawsuits. Disparate use of managerial discretion in this regard may form the basis of disparate treatment or disparate impact allegations. Employers that maintain and evenly apply telecommuting policies are better positioned to avoid such claims.

Protecting Company Data

Telecommuting can exacerbate the challenges employers face with respect to protecting sensitive data. For example, some employers permit remote employees to access and create confidential information on their personal devices. By doing so, employers are less able to ensure disgruntled employees do not retain and disseminate confidential or trade secret information post-termination. In addition, consumer electronic devices generally lack the security necessary to protect against malicious hacking. The legal framework surrounding employee privacy and employer access to dual-use employee-owned electronic devices is complicated, and warrants attention should an employer allow employees to work on personal devices.

Employers whose business requires that they maintain strict privacy controls and/or whose primary asset is intellectual property should consider policies requiring the use of company-owned equipment when accessing or creating sensitive information. Employers should also have established procedures for the return of company property upon termination of employment. Such policies can curb ex-employees' retention of private information, and the inadvertent disclosure to third parties (such as spouses and housemates) who may share devices.

5 Neil Shah, *More Americans Working Remotely*, The Wall Street Journal, March 5, 2013, available at <http://online.wsj.com>.

6 Peter J. Mateyka and Melanie A. Rapino, United States Census Bureau, P70-132, *Home-Based Workers in the United States: 2010* (Oct. 2012).

7 *Id.*

8 See *Nixon-Tinkelman v. N.Y.C. Dep't of Health & Mental Hygiene*, 434 Fed. App'x 17 (2d Cir. 2011) (remanding to the district court to consider, *inter alia*, whether working from home is a reasonable accommodation).

9 Equal Employment Opportunity Commission, [Work At Home/Telework as a Reasonable Accommodation](#).

Wage and Hour Compliance

A recent study found that employees who work from home add an average of 5 to 7 hours of productive time, often in addition to their standard workweek.¹⁰ While remote employees' willingness to work hours beyond the standard 40-hour workweek makes telecommuting an attractive option for some employers, it comes with potential wage and hour complications.

The inability to monitor remote employees' schedules makes it more difficult to prohibit off-the-clock work and to ensure compliance with overtime regulations for non-exempt workers. In some states, employees are entitled to overtime for hours worked in excess of 8 hours in a day and/or for working seven consecutive days. Thus, employers should remain diligent in monitoring remote employees' schedules and working hours. In addition to overtime, employers should be aware of all applicable meal and rest break regulations and recordkeeping requirements in all jurisdictions in which they operate. The reality is that remote working arrangements require engaged human resources staff to closely monitor wage and hour compliance.

Is Telecommuting Right for Your Business?

Whether telecommuting and other flexible arrangements are good for a particular workplace is contextual. Employers considering these options should take heed of Yahoo!'s experience. Some news sources are reporting that Yahoo!'s decision to end telecommuting came after examining VPN logs which showed that many remote employees were not signing in.¹¹ This shows that employers should not fall into an "out of sight, out of mind" mentality for both business and legal reasons. Moreover, the backlash against Mayer suggests that it is difficult to undo a corporate culture accustomed to flexibility and minimal oversight of its working arrangements. This, in turn, highlights the importance of being compliance-minded from the outset. Startups and growing companies are uniquely situated to mold a culture that helps remote employees remain productive even as they grow in size, and are accustomed to working with a compliance-minded management team.

Next Steps

This article discusses only a few of the many challenges created by the remote workplace. To capture the maximum benefits of a well-functioning remote workforce, employers should consider other issues, such as workers' compensation, occupational safety and health, and state taxation. Thus, employers of all size can benefit from conferring with experienced employment counsel to evaluate their existing remote working arrangements, or to implement new ones. In addition, employers informally offering remote work options should create formal written policies.

Proactive employers will be well-positioned to adapt to the workplace of tomorrow—where boundaries are not defined by the traditional walls of an office.

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¹⁰ Marcy C. Noonan and Jennifer L. Glass, *The hard truth about telecommuting*, Monthly Labor Review (June 2002).

¹¹ Brett Molina, *Report: VPN logs led to Yahoo telecommute*, USA Today, March 6, 2013.