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Hybrid and Remote Work – Is it Here to Stay?

How to manage the challenges of a hybrid/remote work environment

The 2023 Employment Law Update

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Agenda for this session

- Policies
- Legal Issues to Consider
- Reasonable Accommodations
- Performance Management
- Mentoring
- Collaboration
- Challenges ahead

Recent headlines in the news!

News Headlines

- Farmers Insurance – flip-flopped and new CEO announced required return to the office just this week (employee complains “I sold my house!”)
- Twitter – Elon Musk required most employees to return to office
- Amazon – many employees at HQ ordered to return 3 days per week in May
- Lyft – told employees to return to office this spring
- Some NY law firms telling employees they have to work in office at least 4 days per week
- EEs are Unhappy Campers!



Current Policies

- What is your company's current policy on remote and hybrid work?
- How did your company get to where it is today?

What is your current policy on hybrid/remote work?

- Have a policy!
- Explain reason for your policy
- To whom does the policy apply?
- Are there different rules/policy for different types of workers?
- Communicate clearly the rules/expectations about hybrid/remote work
- Will you allow variances from your policy? (And if so, what is process for variance and what are the standards for approval?)
- Time zone differences?
- Technology/security requirements/office supplies/maintenance
- Performance expectations

Legal Issues to Consider



Legal Issues to Consider

- Does it make a difference whether the employee is fully remote vs. hybrid?
- How do you decide which state's laws are applicable in a fully remote and/or hybrid environment? (Example – FMLA, assigned as home base, where is work assigned, or where person reports)
- Another example – most favorable to employee
- How will you approach these issues at your company?

Legal Issues to Consider

Just a sampling of issues

Expanded protected classes for anti-discrimination

Leave laws (paid and unpaid)

Releases/severance agreements

Drug and alcohol testing

Payroll taxes

Registration/licensed to do business

Worker's compensation

Unemployment

Wage and hour laws/minimum wage/exemptions

Non-compete agreements

Pay equity

Pay transparency in employee recruiting

Earnings statements

Notice and posting requirements

Ban the Box/background checks

Vacation/PTO payout upon termination

State law mini-WARN Acts

And many more...



Reasonable Accommodation of Disabilities

- Does it matter whether fully remote vs. hybrid?
- How do you show undue hardship?
- How will your company address these issues?

Accommodation Requests to Continue to Work Remotely

Accommodation Requests To Continue Remote Work

- Rebecca has been successfully working from home since March 15, 2020. The company has announced that all remaining remote work employees will be required to return to the workplace in 1 month. Rebecca has informed HR that she has breast cancer, and her radiation treatments make her immunosuppressed. Her radiation therapy ends in 6 months. Rebecca has requested that she be permitted to continue working remotely until her radiation treatments are completed.
- What issues should we consider?



Why Does the Employee Want to Continue to Work from Home?

Need to consider

ADA

PDA

**State Pregnancy
Accommodation
Laws
(PWFA 6.27.23)**

**Title VII
(Religion)**

If employee's request potentially triggers the legal obligation to engage in the interactive process or the obligation to provide a reasonable accommodation ...

What types of things can you ask?

Remember – job related and consistent with business necessity

- Has this condition ever interfered with EE's ability to perform EE's job or access a benefit of employment? If so, please explain when and how.
- If this condition has not previously impacted EE's ability to perform the job, but you believe it will now, please explain the basis for this conclusion.
- Is EE able to come into the workplace for meetings as needed when planned in advance?
- Is EE able to come into the workplace and work a planned in advance schedule? If not, which essential job functions is EE unable to perform at work and why?
- If EE is unable to perform the essential functions of the job at work, explain how WFH enables EE to perform these same functions at home and how long WFH will be needed.

What types of things can you ask?

Job related and consistent with business necessity

- Are there any accommodations (other than WFH) which would enable EE to safely and satisfactorily perform the essential functions of the job?
- In your opinion, what, if any, adverse effects might EE experience if EE were unable to WFH? Please explain the basis for this conclusion.
- In your opinion, is it possible for EE to work in the workplace on a trial basis? If not, please explain the basis for this conclusion.
- If your answer to the above question was “no,” is there any accommodation that could be provided that would allow EE to work in the workplace?
- Did you receive and review EE’s written job description? If you didn’t receive the job description, please let us know and we’ll provide a copy to you.

Commuting

Commuting

- Michael is a CSR. Shortly after he was hired, he requested a change to a shift that would not require him to drive in the dark because he has cataracts that cause night glare and blurriness, making it difficult for him to drive at night. Michael lives 45 miles from work and his commute takes about an hour. Michael and his doctor have said he can perform the essential functions of his job and that his limitation is limited to night driving. The VP of Customer Service asked for guidance on how to handle Michael's request.
- What issues should we consider?



Commuting

- The EEOC is currently litigating whether an employer has the obligation to accommodate an employee whose disability limits their ability to commute to and from work in the 7th Circuit.
- According to the EEOC: An employer that requires an employee to perform his work at a specific worksite cannot claim that an accommodation that allows him to access the facility (*i.e.*, travel safely to and from that worksite) isn't a potential accommodation under the ADA. This is true even if the employee can perform all the essential functions of the job when the employee is at work.
- There is a circuit split on this issue.
 - Duty to accommodate: 2nd, 3rd and 9th Circuits
 - No duty to accommodate: 1st (in a pre-ADAAA case), 6th and 10th Circuits



Performance Management

- How do you assess employee performance in a remote/hybrid setting?
- Harder to measure?
- How do you deal with employee improvement, evaluation, and discipline in this setting?

Performance Management

- Job Description – explain what essential job duties are
- Set clear expectations for what you expect from EE
- Establish way to measure performance – objective as possible
- Provide manager/supervisor feedback and evaluations
- Regular check ins with employees – whether remote or in person if hybrid (conduct by videoconference if remote)
- Performance improvement plan (PIP) when necessary

Performance Management

- Rules of Conduct (anything different for when remote)
- Appearance/dress
- Mobile device usage – at home on video, or just at home
- Conduct while on videoconference?
- EE behavior – anything different for remote?



Mentoring

- How can a company and its managers effectively mentor employees in a remote/hybrid environment?
- How do you effectively orient and onboard new hires?



Collaboration

- What can an employer do to facilitate and encourage collaboration between and among employees and teams of employees? (especially where team is mixed remote and in person)
- What ideas/concepts have you found that work well at your company?



Challenges ahead

- What/how do you decide is best policy for your company?
- How does that affect recruitment and retention?
- Clarity of policy and expectations for hybrid/remote work – this is key
- Need to be flexible and adapt as time goes on and circumstances change

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Questions?

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Thank you.