

# COVID-19 Deep Dive Series:

## Practical and Legal Considerations for Long Term Employee Telecommuting

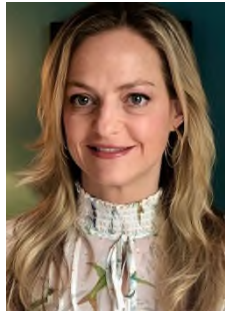
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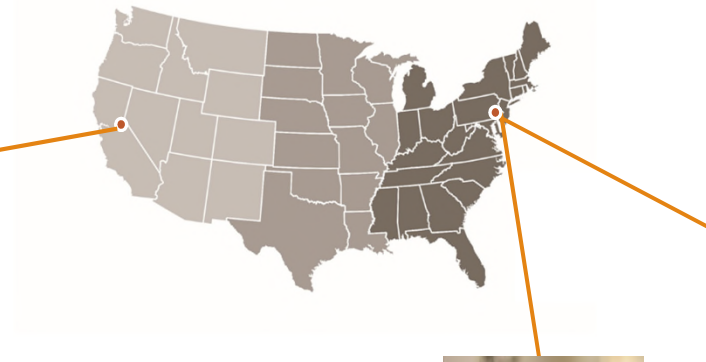


# Presenters on Today's Webinar

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**San Francisco**  
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# Overview of Webinar Topics

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## The Future of Remote Work

- Practical Considerations
  - Training, onboarding, integrating and managing a remote workforce
- Employment Law Issues
  - Wage and hour, reasonable accommodations, FMLA, OSHA and more
- Technology
  - Privacy and technology, confidentiality, protecting company assets and more

# Pre-COVID Remote Workforce

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- 5 million employees (3.6% of the U.S. employee workforce) worked at home half-time or more  
[Global Workplace Analytics' analysis of 2018 American Community Service (ACS) data]
- Regular work-at-home had grown 173% since 2005, 11% faster than the rest of the workforce (which grew 15%) and nearly 47x faster than the self-employed population (which grew by 4%)  
[Global Workplace Analytics' analysis of 2018 ACS data]
- 43% of employees worked remotely with some frequency  
[Gallup State of the American Workplace 2016]
- 56% of employees had a job where at least some of what they do could be done remotely  
[Global Workplace Analytics]

# Today's Remote Workforce

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- Most business operations have shifted to working from home during the COVID-19 pandemic
- Remote work skyrocketed as many workers across the country were compelled to stay home
- Studies suggest that about half of employed adults are currently working from home



# Today's Remote Workforce

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- Growing trends show that many companies will continue to allow employees to work from home even after the pandemic
  - Companies like Twitter, Square, Facebook, and Shopify have announced plans to allow some employees to telework permanently
- Studies estimate that 37% of jobs in the US can be performed entirely at home
- Many employees may request to continue working from home as reasonable accommodations or out of fear of infection

*“Our best estimate is that 25-30% of the workforce will be working from home multiple days a week by the end of 2021.”*

- Kate Lister,  
President of Global  
Workplace Analytics

A man in a dark suit stands with his hands on his hips, looking at a large, dark, circular hole in a grey floor. The floor is covered with many smaller, similar holes, some of which are cracked. The scene is dimly lit, creating a somber and cautionary atmosphere.

## Practical Considerations

# Have a Policy

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- Develop a written remote work policy with an acknowledgment page for employees to sign
- Establish criteria for eligibility for remote work
- Establish performance and conduct expectations
- Outline technology and security requirements
- Remind employees that all policies apply in the remote environment



# Picking The Team

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- Is the work to be performed well-suited to remote work?
- Is the candidate well-suited to remote work?
- Watch out for possible discriminatory practices in selecting employees for remote work.
- Consider preparing objective performance standards to determine eligibility.
- Document reasons for decisions to allow or not allow telecommuting as to particular candidates.
- If attendance record is a criteria for eligibility, be sensitive to absences resulting from alleged disability.

# Remote Onboarding

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- Appropriate and adequate technology is key
  - Develop a process for distributing hardware and helping employees set up shop
- Convert existing onboarding procedures to a virtual platform
  - Many payroll services also online platforms for onboarding new employees remotely
  - Set up a process for new hire paperwork to be completed online securely
  - Plan ahead for I-9 compliance and pre-employment tests
- Integrating a new hire remotely
  - Requires more planning and effort
  - Use face to face methods of communication
  - Remember the human factor

# Remote Training

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- Appropriate and adequate technology is key (déjà vu)
- For routine training, consider creating training modules for efficiency
- For job-specific training, use video conferencing platforms
- Interactive training is critical as a learning method for remote employees – utilize technology like video, chat, polling/voting, games, infographics, etc.
- Create a system for tracking employee training (LMS)

# Managing and Integrating a Remote Workforce

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# Managing and Integrating a Remote Workforce

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- Common issues for remote employees
  - Sense of isolation
  - Lack of coworker relationships
  - Burnout due to constant access to work
  - Blurred lines between work and home
  - More distractions (pets, kids, laundry)
  - Perception of less opportunity to advance within the organization
  - Possible increase in mental health issues
  - Loss of or change in organizational culture

# Integration

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- Remote work creates the danger of the development of an isolationist culture
- Solution: Effective and regular communication
- Develop multiple modes of real-time communication, such as conference calls, webinars, instant messaging, and social media platforms for businesses (e.g., Slack, Basecamp, MS Teams), and effectively use them
- Establish regular communication events, like weekly conference calls

# Integration

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- Create opportunities for remote workers to have non-work conversations (the virtual water cooler)
- Managers should have some form of communication with a remote employee at least once per work day
- Recognize the achievements of remote employees to the same extent as office-based employees
- Clearly define the roles of all members of the team and communicate that to the team

# Effective Management

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- Train managers on how to effectively manage remote employees
- Ensure that policies and procedures support remote work arrangements
- Assign work appropriately among remote and office-based staff
- Communication is key
- Empower and trust employees to balance priorities
- Apply rules even-handedly and hold all employees to same standards



# Effective Management

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- The performance management and disciplinary processes apply in a remote work environment
- “Out of sight” should not mean “out of mind” – address performance and discipline issues promptly
- Issue disciplinary documents to remote employees as you would for office-based employees, but remember the human factor
- Conduct performance evaluations and assess employee performance as you would for office-based employees



**Employment Law Issues**

# Employer Actions During COVID-19

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- Employers have employed a variety of tactics to cope with the impact of COVID-19 on the workplace:
  - Reductions in days or hours of work
  - Reassignments to lower-paying positions
  - Pay reductions for exempt and nonexempt employees
  - Salary deferrals
  - Suspension or elimination of pay increase or bonus programs
  - Conversion of exempt employees from their salaried positions to hourly positions with a corresponding reduction of hours

# Exempt/Non-Exempt Issues

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- **Exempt employees**

- Are entitled to their full salary when they work any work during a week even if they do not work the entire week because the employer failed to provide work.
- Reduction of hours: An employer can reduce an exempt employee's hours provided the reduction does not take the employee below the minimum salary level threshold for the exemption.
- Warning: Be careful of changing an exempt employee's duties as work slows down or when other employees are furloughed – it may alter their exempt status.

# Exempt/Non-Exempt Issues - (cont'd)

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- **Non-Exempt Employees**

- No exceptions to the FLSA just because employee works remotely. must be paid for all hours worked.
- Record Keeping: must accurately record all hours worked.
- Risk of liability for unapproved overtime, even if the employer's policy forbids overtime without permission.



## Exempt/Non-Exempt Issues - (cont'd)

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### • **Non-Exempt Employees**

- Set Expectations
  - Establish specific workday
  - No off-the-clock work
- Watch out for emails/calls outside of working hours
- Consider requiring log-off during meal periods, particularly if required by state law.
- Consider monitoring time via login/logoff times, required emails to supervisor, time management software, etc.
- Consider whether travel time is compensable – routine visits to main office likely are not compensable.

# Reasonable Accommodations

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- The Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations to qualified individuals with a disability.
- EEOC Guidance: “not all persons with disabilities need – or want – to work from home. And not all jobs can be performed at home. But, allowing an employee to work at home may be a reasonable accommodation if 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.”



# Reasonable Accommodations - (cont'd)

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## ESSENTIAL VS. NON-ESSENTIAL JOB DUTIES – THEN AND NOW

- Has your industry shifted?
- Has the focus of your business shifted?
- Have the essential functions of a job changed?
  - Physical requirements (*e.g.* teleworking)
  - Reallocate some previously essential job duties
  - Eliminate previously essential job duties
- Does your business still intend to rely upon pre-Coronavirus essential functions?





# Reasonable Accommodations - (cont'd)

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- Significant shift of most business operations to remote work during the pandemic takes away many of these concerns. Now employers should be evaluating:
  - Is regular attendance an essential job function? For which roles?
  - What is the impact of state/local laws for employers with a national operations?
  - Does the employee's reason matter going forward?
  - How to achieve consistency under anti-discrimination laws while complying with interactive process?

# Employee Concerns

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## Can Employees Insist on Working Remotely?

- No, there is no requirement that employers allow remote work.
  - Remote work as a reasonable accommodation?
  - Disability that places employee at greater risk from COVID-19
  - Preexisting mental health conditions

[https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)

- Fear of contracting COVID-19 is not a “serious health condition.” But, a serious health condition may include:
  - A serious illness caused by COVID-19
  - Pre-existing physical conditions exacerbated by Covid-19
  - Anxiety or other legitimate mental health conditions could qualify as a serious health condition

# Managing Your Workforce: Mental/Emotional Disabilities

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- Non-physical disabilities traditionally have been challenging for employers to accommodate.
- The following accommodation requests are likely on the horizon:
  - Employees are anxious/nervous about returning to office environment
  - Employees are fearful of contracting COVID-19 in the office and passing to others at home
  - Employees are concerned that office environment will trigger pre-existing mental disabilities – is there a difference between the employee’s own condition and an emotional disability for their spouse, parent, child?



# A New Class: Vulnerable Workers?

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## Federal Guidance on Opening Up America Again:

- Strongly consider **SPECIAL ACCOMMODATIONS** for personnel who are members of a **VULNERABLE POPULATION**.
- CDC has identified the following as members of the Vulnerable Population
  - Employees 65 or Older
  - Employees with Compromised Immune Systems
  - Employees with Serious Chronic Health Conditions
- EEOC <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

# Accommodation Best Practices

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- Do not wait until operations re-open. Review current employee accommodations and begin assessing whether/how those accommodations can be presented when employees return to office environment;
- Ensure managers/supervisors know to send employees to HR for interactive process;
- Consider placing an end date on accommodation and/or approving on a temporary basis;
- Stay in communication with employees who requested accommodations pre-COVID and during-COVID to get those requests resolved proactively.



# OSHA Considerations

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- An employer should make clear that it has a right of access and may conduct routine inspections to ensure safety of workplace.
- OSHA (and related state statutes) require employers to maintain a workplace that is free of hazards that are likely to cause serious harm or injury to its employees – and OSHA has taken the position that this can include home-based worksites.
- OSHA does not conduct routine inspections in private homes.

# FMLA Considerations

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- To be eligible for FMLA leave, an employee must work at a location where the employer employs 50 or more employees within 75 miles.
- According to DOL's FMLA regulations, "employees who work at home, as under the concept of flexiplace or telecommuting," are deemed employed at the worksite to which they report and from which assignments are made. 29 C.F.R. § 825.111.
- The telecommuting employee's residence is not a worksite.

# Best Practices to Avoid Discrimination and Retaliation Claims

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1. Train managers on permissible subjects for job interviews – it will be hard to avoid discussion of COVID-19 and that will lead down a dangerous path.
2. Any and all testing or medical inquiries should be done in accordance with ADA and applicable state guidelines, be job related and applied consistently. Create a written policy with guidelines and protocols for managers to apply.
3. No good deed goes unpunished – Don't presume an older or disabled person does not want a job or an assignment (like traveling).
4. Be open to reasonable accommodation requests - religion, disability, pregnancy. Document discussions!
5. Wherever possible, base policies on CDC and government recommendations or guidelines, and be ready to change policies if recommendations or situation on the ground changes. Be open and flexible to requests regarding vulnerable individuals, even if not disabled.





## Technology and Data Security

# Data Security Concerns In a Work-From-Home Environment

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- Computer Security
- Internet of Things / Connected Devices
- Mobile Devices
- Phishing/Hacking
- Wi-Fi Security / Public Access
- Lost/Stolen Devices
- Web Security
- Safe and Secure Storage /Disposal

# Technology and Data Security

## Why This Matters

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- Cyber attacks are increasing
  - Considered a top-5 risk to global stability
- Phishing attacks have gotten more robust and creative
  - Top cause of data loss
  - Facebook and Google - \$100m in fake invoice scam
  - FACC - \$61m lost, company sued CEO and CFO for “failing to set up adequate security”
- Hacking attacks
  - 7 of 10 organizations have seen hacking attempts
  - Grubman Shire Meiselas & Sacks – 756gb data theft - \$21m ransom demanded
  - Not limited to companies with data typically considered “sensitive”
- Lost and Stolen Devices
  - \$3.44m cost per year to companies
- Departing employee data theft
- The likelihood of each of these risks increases substantially when employees work remotely

# Technology and Data Security

## Trade Secret Protection

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- Uniform Trade Secrets Act
  - Defines a "Trade secret" as information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
    - (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
    - **(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.**
- The “efforts” that will be considered “reasonable” to protect a trade secret can vary depending on the sensitivity and value of the information at issue and the conditions of the working environment
- A policy alone is likely insufficient
- Past data security problems left uncorrected may be an issue

# Securing a Home Workspace

## Technical Elements

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- Secure Wi-Fi Connection
  - Avoid use of public Wi-Fi
  - Require password-protected connections
- Secure Server Connections
  - Utilize a VPN (Virtual Private Network) with key generator (hardware-based or virtual)
- Data Storage and Work on Work Devices and Accounts Only
  - Security protocols and monitoring
  - Robust password security
- Data Sharing
  - Use only company approved services – secure email, known storage devices
  - No texting
- Physical Security / Theft Prevention and Remediation
  - Remote access and wiping
  - Consider a USB Data Blocker

# Securing a Home Workspace Policy and Practice

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- Review existing data security, remote access and BYOD policies internally
  - Consider developing and implementing a specific data security policy governing work-from-home and remote work
- Review policies with employees and provide training
  - Anti-phishing training is critical
  - How to spot a potential breach
  - Password and device security
- Review existing employee confidentiality agreements
  - If employees do not have these agreements, consider requiring one as a condition of working remotely
- Involve IT personnel to spot problem areas/employees
- Keep track of all company-owned devices and personally-owned devices with access

# Questions?

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