

Home is Where the Job Is ... The Pros and Cons of Alternative Work Arrangements for Employers

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Executive Summary: Whether you blame advances in technology or the influx of millennials into the modern workplace, the age of time cards and punch clocks is inching ever closer to extinction. In research recently conducted by ADP, “freedom” was identified as a basic human need, and 81 percent of modern employees felt they should be able to work from anywhere in the world. As a result, employers now find themselves facing the reality of “alternative work arrangements.” As the title implies, alternative work arrangements are those structured outside of the traditional 9-5 office environment. Perhaps the most prevalent alternative work arrangement impacting employers today is remote workplaces. According to a 2016 Gallup poll, at least 43 percent of American workers are working remotely at least part of the time. That number is unlikely to decrease and, accordingly, employers would be wise to determine how best to address this evolution of the modern workplace sooner rather than later. In reality, alternative work arrangements - including allowing employees to work from home - is neither inherently good nor inherently bad. Still, an understanding of the pros and cons of these types of arrangements is imperative to protecting employers and maintaining a happy and productive workforce.

The Pros of Remote Workplaces: Studies have found that allowing employees to work remotely, or telecommuting, results in greater productivity from employees, lower costs for employers, an increased opportunity to find and retain qualified employees, and improved employee health. See *Telecommuting Improves Employee Health, Productivity*, <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/telecommutingimproveshealth%2cproductivity.aspx>. For employees, the ability to work from home presents an opportunity for the ever elusive “work-life balance.” For employers, a study done by the Harvard Business Review confirmed that employees working from home “were not only happier and less likely to quit, but also more productive” than their counterparts working in an office setting. See *To Raise Productivity, Let More Employees Work from Home*, <https://hbr.org/2014/01/to-raise-productivity-let-more-employees-work-from-home>. In addition, allowing employees to work from home decreases the overall need for office space and attendant costs and, as a result, reduces an employer’s overhead.

The Cons of Remote Workplaces: Of course, allowing employees to work from home as an alternative work arrangement is not without its risks. Regardless of whether an employee is physically present in the office each day, employers must still ensure compliance with all the employment laws applicable to their workforce. Some laws, such as the Americans with Disabilities Act (ADA) may require employers to provide a work from home opportunity for certain employees, while laws like the Fair Labor Standards Act (FLSA) and Family and Medical Leave Act (FMLA) become even harder to navigate with remote employees. Add in the fact that injuries sustained by an

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employee while working from home can fall within an employers' workers' compensation coverage, and it becomes easier to see why employers might be hesitant to implement this type of alternative work arrangement.

ADA: Despite this hesitation, an employer may have little choice but to allow an employee to work remotely. In its 1999 *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (revised October 17, 2002), the U.S. Equal Employment Opportunity Commission stated that allowing an employee with a disability to work from home may be a form of reasonable accommodation. The term "may" is important, as courts have held that as a general rule "[r]egular, in-person attendance is an essential function - and a prerequisite to essential functions - of most jobs, especially the interactive ones." See, e.g., *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 762-63 (6th Cir. 2015). Notwithstanding, the Eleventh Circuit reiterated that reasonable accommodations are determined on a case-by-case basis. *Abram v. Fulton County Government*, 598 F. App'x 672, 677 (11th Cir. 2015). Thus, the water remains murky, and employers should be prepared to determine whether allowing an employee to work remotely is, in fact, a reasonable accommodation for a disability based on the essential functions of the employee's position.

FMLA: The FMLA can present difficult situations for employers when addressing remote work arrangements. Remote workplace arrangements make tracking the use of FMLA leave much more difficult, and time spent working from home cannot be counted against an employee's 12 weeks of FMLA leave. In addition, if an employer requires the employee to use paid first, at the onset of the approved FMLA leave, that paid leave cannot be docked for hours worked at home. Accordingly, with remote work arrangements, employers face a much more difficult task of determining hours used for approved FMLA leave and a greater risk of liability under the FMLA.

FLSA: The FLSA also presents risks for employers when employees are utilizing alternative work arrangements such as telecommuting. The FLSA does not specifically address alternative work arrangements and, as such, can be applicable to employees who work primarily from home. See *Flexible Schedules*, <https://www.dol.gov/general/topic/workhours/flexibleschedules>. Without the appropriate technology and defined rules for these employees, tracking an employee's hours can be difficult. This is especially true in situations where an employee alleges he or she has been misclassified as exempt.

Workers' Compensation: Employers may also be on the hook for work injuries sustained by employees while working from home. In 2011, a court in Oregon found that an employee who tripped over her dog while retrieving fabric samples from her garage was entitled to workers' compensation benefits. The holding was based on a finding that the employee was in the process of working for her employer at the time she was injured. The U.S. Department of Labor used a similar standard in providing guidance regarding whether Occupational Safety and Health Administration (OSHA) requirements apply to injuries sustained while working from home. See <https://www.osha.gov/laws-regs/standardinterpretations/2009-03-30>.

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Conclusion: Alternative work arrangements, and more specifically telecommuting arrangements, provide a number of benefits to both employees and employers. However, those benefits come with increased risks under many of the state and federal laws applicable to the employee/employer relationship. Whether such alternative work arrangements are beneficial to your company is a determination that cannot be made in this article. However, one thing is certain - managing these alternative work arrangements requires significant investment by an employer's human resources department and/or legal teams and should not be taken lightly.

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