

# THE RECORDER

## ESSENTIAL CALIFORNIA LEGAL CONTENT

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## Cybercommuting for Employers

*Companies that permit employees to work from home must make sure they are complying with relevant California laws, explains Lisa Lawson of Pennington Lawson.*

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There are few employment law topics that have generated more heated debate recently than the concept of work-life balance, and how employees and companies should go about achieving it. Yahoo Inc.'s recent announcement that it intended to end all work-from-home arrangements drew widespread scorn, with some critics labeling the move regressive and anti-woman. At the same time, new studies are emerging that claim employees who take advantage of flexible work arrangements, including telecommuting, experience a "flexibility stigma" which results in lower wages, fewer promotions and harsher performance evaluations.

Despite these recent developments, telecommuting — or, more accurately, cybercommuting — is on the rise in corporate America. Employers are increasingly turning to cybercommuting programs as a means of attracting and retaining talent while cutting costs. In creating a cybercommuting program, employers need to be mindful of a whole host of laws that affect the remote worker.

### **Wage and Hour Laws**

Compliance with wage-and-hour laws is probably the biggest challenge for employers with remote workers. For nonexempt employees, employers must still comply with laws that require them to maintain accurate time records and fully compensate employees for all hours worked. Employers also must still provide those employees with meal and rest periods pursuant to state law.

Because it is difficult to monitor the hours worked by employees who are not physically present, employers may find themselves on the hook for more overtime than expected, or may find they are paying for hours not actually being worked. To avoid these time-tracking problems, some employers require nonexempt employees

to log in and log out using time-keeping software when they are working remotely. Unfortunately, such software is only as accurate as the user controlling it. At a minimum, employers should clearly explain their expectations regarding the hours and schedule to be worked by the nonexempt remote worker, and should require employees to certify the accuracy of their weekly time cards. Employers also should apprise supervisors that emails they receive from nonexempt employees outside of their set schedule may indicate that the remote employee is working, and should be compensated for, hours beyond those that are recorded.

While cybercommuting poses fewer wage-and-hour problems for the exempt employee, employers need to be aware that, in some cases, remote work may undermine an employee's exempt status. Each of the "white collar" exemptions in California (aside from the outside sales exemption) requires employees to exercise independent judgment and discretion on a regular basis. At the heart of this requirement is the notion that exempt employees must make creative decisions about important matters. Some studies claim that while remote workers are more productive, they tend to be less innovative. Employers need to be careful that the duties for remote exempt employees do not shift to task-oriented work that requires little creative, decision-making authority. In addition, for exempt executive employees, employers need to be mindful that such employees must still "customarily and regularly" direct the work of two or more full-time employees. It may be more difficult to establish those supervisory duties when employees work remotely.

Expense reimbursement laws present additional problems for both exempt and nonexempt remote workers. Labor Code §2802(a) requires employers to reimburse employees for expenses necessarily incurred in connection with their work. Does that mean an employer must pay for the cybercommuter's home computer and home office utilities? Not necessarily, according to one recent federal district court case. In *Novak v. Boeing*, 2011 WL 9160940 (C.D. Cal. July 20, 2011), the court found employees participating in an entirely voluntary work-from-home program were not entitled to reimbursement for certain home office expenses because the expenses were not "necessarily incurred" in connection with work. Instead, the court characterized the expenses as "optional expenses accepted by employees" who chose to work from home. The limits of *Novak* remain to be tested.

Compensation and expense reimbursement associated with travel time also pose problems for both the exempt and nonexempt cybercommuter. Generally, travel to and from the employee's primary work site (i.e., "ordinary commute time") is not compensable, and the mileage associated with it need not be reimbursed. When an employee works entirely from home but is required to attend occasional meetings at the office, the question arises as to whether travel to the office becomes compensable because the employee's "ordinary commute time" is now the minute it takes to walk from the bedroom to the study. There is no definitive answer to this question in California. However, if occasional office meetings are part of a remote worker's job, it makes sense that occasional travel to and from the office should be

considered part of the employee's noncompensable "ordinary commute" if the employee is advised of this occasional commuting requirement ahead of time.

### **Discrimination Laws**

Discrimination statutes also affect the remote worker. Employers should assume that the ability to work remotely is an employment benefit that cannot be awarded or denied in a discriminatory fashion. To avoid claims that protected classes of employees are being treated unfavorably, employers should ensure that the criteria used to select employees for a cybercommuting program are business related. Employers also should regularly review selection decisions for consistency with the policy and fairness.

One thorny question that frequently arises under the Fair Employment and Housing Act and Americans with Disabilities Act is whether an employer must allow disabled employees to cybercommute as a reasonable accommodation. Equal Employment Opportunity Commission regulations specifically identify working from home as an example of a potential reasonable accommodation. In California, whether cybercommuting should be offered as a reasonable accommodation will depend on the facts. Central to the inquiry is whether on-site/in-office attendance is an "essential function" of the job. As noted by the court in [\*Samper v. Providence St. Vincent Med. Ctr.\*](#), 675 F.3d 1233 (9th Cir. 2011), if a job requires on-site teamwork, face-to-face interaction or working with equipment that can only be found in the office, working from home generally is not a reasonable accommodation.

Employers need to be careful in assessing whether a particular job actually "requires" on-site attendance, recognizing that their subjective decision may be second-guessed by a jury if litigation ensues. Also, blind adherence to a companywide prohibition against cybercommuting (like Yahoo's) may be of questionable value in the face of a request for reasonable accommodation.

### **Family Medical Leave**

Employers with cybercommuting programs also need to be aware of how state and federal family leave laws affect requests to work from home. Under the Family and Medical Leave Act and California Family Rights Act, covered employers must provide eligible employees with up to 12 weeks of unpaid leave per year to care for a "serious health condition" of the employee or certain family members. Under both laws, employers are prohibited from interfering with or denying the leave. Employers can get into trouble when they try to convince employees to cybercommute in lieu of taking family medical leave; such actions could be construed as unlawful interference with family leave rights.

## **Workplace Safety and Injury Laws**

Cal-OSHA and workers' compensation laws also pose novel problems for employers with cybercommuting programs. While home offices generally escape scrutiny under federal OSHA standards, the same is not true under state law. Indeed, the agency that enforces Cal-OSHA regulations has taken the position that the portion of the home office where work is carried out must be in compliance with state workplace safety standards. Similarly, workers' compensation laws cover injuries "arising out of and occurring within the course and scope of employment," regardless of where the injury occurred. Thus, under both laws, employers bear some responsibility for the safety of work conducted remotely even though they do not have effective control over the safety of the home office environment. Employers should provide remote workers with Cal-OSHA safety checklists and training (especially regarding ergonomics) and remind employees of their obligations to report work-related injuries.

## **Elements of a Successful Cybercommuting Program**

Successful cybercommuting programs not only comply with the above laws but have two other important components: a written policy and a written cybercommuting agreement between the employer and employee.

The cybercommuting policy should, at a minimum:

- Articulate the purpose of the program and the philosophy behind it.
- Explain that the program is voluntary and at the discretion of the employer. As noted in Novak, the voluntary nature of a work-from-home program may be critical if employers do not plan to reimburse employees for home-office expenses.
- Identify the types of positions that are eligible for the program. Generally, the types of jobs that fare well under cybercommuting programs are those that involve independent work and limited face-to-face interaction, and that result in specific, measurable work product.
- Identify the types of positions that do not qualify. Not all positions can be performed remotely. Even vocal Yahoo! critic Richard Branson would have to admit that his Virgin airplane mechanics cannot perform their jobs from home. It is far better to set employee expectations about which jobs are eligible before questions arise.
- Describe the eligibility criteria for the positions that are included in the program. Cybercommuting programs should have both objective and subjective eligibility criteria. For example, employers may be wise to limit eligibility to employees who have worked for the company for a certain period of time and who have achieved particular performance ratings on their reviews. Employers also should describe the subjective employee qualities considered in determining admission to the program — e.g., a proven ability to work independently, in-depth job knowledge, dependability,

flexibility, etc. While it is important to have explicit eligibility criteria, employers must recognize that they may have to alter those criteria when cybercommuting is being considered as a potential reasonable accommodation for a disabled employee.

- Outline the general expectations of all cybercommuters regarding key issues such as childcare during work time, recording of hours worked (if applicable), safeguarding of data and confidential information, attendance at office meetings, and regular communication with supervisors.
- Address ownership issues regarding remote equipment. If the employer provides remote workers with computers or other equipment, the policy should explain the company's ownership interest in that equipment, as well as the company's right to inspect it and demand return of it. If employees are expected to own certain basic equipment to be eligible for the program, that equipment should be identified in the policy. The policy also should explain who is responsible for upkeep and troubleshooting of equipment.
- Set forth safety and ergonomic standards and describe the procedures for reporting injuries.
- Identify which cybercommuting expenses will be reimbursed, consistent, of course, with Labor Code section 2802.

To increase the likelihood of a successful cybercommuting experience for both the employee and employer, employees who are allowed to cybercommute should execute a cybercommuting agreement that specifically addresses the policy as it applies to them. The agreement should: (1) include the employee's assent to the terms of the cybercommuting policy; (2) set forth the company's specific expectations regarding how the employee will execute the job remotely; (3) explain how and when the cybercommuting arrangement will be evaluated for success; (4) state what schedule—or "core hours"—the employee is expected to maintain; and (5) define the employee's workspace and include the employee's agreement to maintain the safety of it.

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