

2020 Employment Law Update

Thank you for joining us!



Agenda

- Best Practices for Remote Work
- Diversity, Equity, & Inclusion, 2020 Edition
- Employment in the Time of COVID-19
- Your Questions Answered

Best Practices for Remote Work



Is work from home here to stay?

- Governor's November 15 guidance states that professional services “are required to mandate that employees work from home when possible and close offices to the public if possible.”
- Work from home “strongly encouraged” in Phase 2 and 3 under the Governor's Safe Start Plan
- What's next in the post-Covid era?

Deciding who works from home

- Job position
- High Risk employees *requesting accommodation*
- Other requests for accommodation
- Examine existing policies—do they promote equality, diversity, and inclusion efforts?
- Consider shifts

Managing remote employees—clear expectations

- Schedule modifications
- When employees are expected to be available
- Responsiveness
- Good communication
- Software familiarity and use

Tracking work time

- How will employees track time and record hours worked?
- Expectations about work hours and overtime
- Rest and meal periods



FAB 2020-5: August 2020

- DOL guidance on employer obligations to exercise “reasonable diligence” when tracking working time of remote employees

FAB 2020-5: August 2020

- Employers must pay for all work they know or have reason to believe is being performed, including unauthorized work
- Employers can satisfy their obligation by providing a reasonable procedure for reporting unscheduled work
- Reporting procedures are not reasonable if an employer:
 - Prevents or discourages employees from reporting working time
 - Does not provide proper training on the procedure
 - Requires employees to waive their right to compensation for hours worked
- Employers are not required to take impractical steps to identify unreported work if employees do not use the available reporting procedure and the employer is not otherwise notified of the additional work time

What about flexible schedules?

- Employers must only pay for time when an employee is working
- You do not need to pay for all the time between an employee's first and last principal activities of the workday



What about employee relocations?

1. Know where your employees are located
2. Revisit policies requiring employees to keep the company apprised of any changes to contact information
3. When is a relocation no longer temporary? No bright-line rule



What about workers' compensation?



- Generally, employees are eligible for workers' compensation for injuries that arise out of or in the course of employment
- Keep reporting policies in place

Employee onboarding

- Create opportunities for engagement as much as possible
- Make feedback a priority
- I-9 deferral of physical presence requirements

Performance and employee conduct

- Keep standard procedures in place, if possible
- Careful with apps and programs that take the place of live conversations
- Continue to take complaints seriously

Diversity, Equity, & Inclusion, 2020 Edition

Terminology

Diversity is being invited to the party; inclusion is being asked to dance.

– Vernã Myers

Terminology*

- Diversity:

includes all the ways in which people differ, encompassing the different characteristics that make one individual or group different from another

*definitions courtesy of Fatima Dainkeh, YW Boston

Terminology

- Inclusion:

the act of creating environments in which any individual or group can be and feel welcomed, respected, supported, and valued to fully participate. An inclusive and welcoming climate embraces differences and offers respect in words and actions for all people.

Terminology

- Equity:

the fair treatment, access, opportunity, and advancement for all people, while at the same time striving to identify and eliminate barriers that have prevented the full participation of some groups.

Diversity-Focused Recruitment

- Title VII and WLAD prohibit preferential treatment on the basis of race and sex, including against historically privileged or dominant groups or genders.
- In the private sector, Affirmative Action is only allowed when necessary to correct (demonstrable) historic disparities between the actual workforce and the relevant labor pool.

Diversity-Focused Recruitment

- Target a broad pool of applicants
- Revise job descriptions / announcements
- Evaluate candidates objectively
- Consider and adjust for industry-specific barriers

Culture and Management

- Examine policies for implicit bias or unintended disparate impact
- Be able to identify and avoid tokenism
- Encourage and train managers on best practices for feedback, performance reviews, and mentoring
- Periodic internal reviews of compensation, promotion and leveling for inexplicable disparities between demographic groups
- Train on and enforce EEO and Anti-Discrimination policies

Employment in the Time of COVID-19

Employer considerations during COVID-19

- Government closures
- Safe work plans for work premises
- Health protocols
- Employee illness, family obligations, and return to work
- Layoffs, furloughs, unemployment

Safe Work Plan

Engineering controls:

Who will be in the building/Telework/Staggered schedules

Building and room capacity; shared space restrictions or closures

Reconfigure workspaces, install barriers, direct traffic one-way

Administrative controls:

Logs and health screening

Health management plan/protocols

Revise attendance policy to encourage potentially infectious employees to stay home

Hygiene mandates (hands, masks & other PPE, distancing)

Travel protocols

Limit visitors

Train, educate, remind, enforce

Encouraging Employees to Stay Home

- Remove barriers to staying home if exposed or sick:
 - Paid leave (sick leave, FFCRA, PTO)
 - Remove or limit attendance policy penalties
- Remove barriers to work at home:
 - Flexible scheduling
 - Provide equipment & IT support

Leave Laws for Washington Employees

- FMLA
- PFML
- ADA/WLAD
- Family Care Act
- Paid Sick Leave
- Workers' Comp (IIA)
- FFCRA
- Paid COVID Leave for Agricultural Workers
- Military Family Leave
- USERRA
- Healthy Starts Act
- Pregnancy/Childbirth Recovery Leave
- PTO/Vacation
- Unemployment Insurance

Families First Coronavirus Relief Act (FFCRA)

- COVID-related illness or quarantine and childcare needs caused by COVID school closures
- Does not apply to employers with ≥ 500 employees.
- Small businesses may be exempt from childcare portion, not illness or quarantine portion.
- Codified as expansion of FMLA, but unlike FMLA, partially paid. \$511 or \$200/day maximum depending on reason.
- Expires December 31, 2020. TBD if additional funds or leave allotment is added with new relief legislation.

“High-Risk” Employees

- HRE = as defined by the CDC
- Protections include:
 - Utilize all available options to prevent exposure, including telework, alternate work location, reassignment, trades
 - All HRE to use any available accrued leave or UI at the employee’s option, in any sequence
 - If employee uses up all paid leave options, employer must maintain health insurance benefits until employee is eligible to return to work.
 - Employer may replace HRE with a temp, but must reinstate the HRE when they are eligible to return to work.
 - Retaliation prohibited against employees who exercise rights under the Proclamation

Mask-wearing accommodations

- Engage in the interactive process:
 - Ask questions and offer/suggest alternatives
 - Case-specific inquiry
- An accommodation that poses a direct threat to self or to others is not reasonable
- Respect confidentiality, even if the employee has talked about their condition. Practice your response in the mirror so you are ready for questions.

Layoffs, Furloughs, Hours reductions

- ESD will permit UI eligibility even if employer benefits continue
- Worker is eligible for UI benefits upon hours or income reduction of 25% or more
- Medical plan may have hours minimum for coverage
- Paid Sick Leave bank must be reinstated on rehire after break in service of less than 12 months, credit toward waiting period
- WARN notice or pay in lieu of notice for “mass layoff” or plant closing (employers of ≥ 100)

Your Questions Answered