The Legal Implications of Remote Work

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Before we begin, it's important to remember that there are two sides to every issue

New York City (305,000 Employees)	State of California (230,000 Employees)
No Remote Work Policy – Municipal workers began to return to the office as of May 3, to emphasize the importance of in-person delivery of city services.	California intends to make remote work a long-term option post-pandemic for state government workers to support worker retention, climate goals, etc...
"We're going to make it safe, but we need our city workers back in their offices where they can do the most to help their fellow New Yorkers. … It's also going to send a powerful message about this city moving forward." Mayor Bill De Blasio, March 23, 2020, announcing the workers' imminent return.	"Telework is going to be a permanent part of our work lives going forward. It is up to us to capture the broader, longer-term benefits of integrating telework into the way we do our business … in terms of providing more flexibility for employees, reaching out to a larger geographic area for job candidates, consolidating your real estate footprint and reducing carbon emissions." Eraina Ortega, director of California's Human Resources Department, April 7, 2021, affirming commitment to offer long-term remote work.

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Agenda

Key Legal Issues to Consider When Developing a Remote Work Policy

- Eligibility – including EEO and ADA Requirements
- Days and Hours of Work
- Out of State Issues to Watch

Other Important Components of a Policy

- Workplace Rules & Professionalism
- Communication Expectations
- Workplace Safety
- Security/Confidentiality Requirements
- Logistics

Collective Bargaining Notes

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Eligibility Considerations:
"I love all my children equally…" (wink wink)

The questions to be asked in evaluating which employees are eligible:

1. **Is the position suited for remote work?** Employers should make this determination after closely reviewing the identified duties and essential functions. As a rule of thumb, positions that are compatible with remote work are generally those that require independent work performed autonomously.

   - Examples of positions for which remote work may be a good fit: Analyst, computer programmer, legal counsel, engineer, etc.

2. **If the position is suited for remote work, then it needs to be asked if the person is suited for remote work?** Employees selected for remote work are those who are good communicators, are self-directed and are just as effective -- if not more--- working remote then when in the office.

   - **Sample Form:** Considerations for evaluating an employee for remote work

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Is there even an adverse action?
Two examples – the facts matter

NO *Kirton v. Mayorkas*, 2021 WL 981241 (D.D.C. Mar. 16, 2021)	MAYBE *Robinson v. Ergo Solutions*, 257 F. Supp. 3d 47 (2017)
- Policy defines telework as voluntary, not entitlement or benefit - Allowed telework up to 3x/wk. Exceptions had to be justified. - Request to increase telework citing lengthy commute & desire for more family time. - Requests denied pending additional justification. - Employee then moved from Virginia to Florida. - Sought damages for travel expenses and alleged injury to knee resulting from travel.	-15-year employee had been permitted to telework for entire tenure with employer. -Within months of filing sexual harassment claim with EEOC regarding behavior of owner, she was informed she could no longer telework. - No specific reason why going to the office every day would pose a particular hardship. - Jury to determine whether terminating the telework arrangement after 15 years might be sufficiently adverse to deter a reasonable employee from engaging in protected activity

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Eligibility Considerations:
Other considerations which impact employee eligibility

Remote Work as an ADA Accommodation:

- Employee needs to be qualified individual with a disability
- Can't rely on generalized statements (ex. "culture is for everyone to be at office;" unspecified confidentiality claims, etc…) (*Mosby-Meachem,* 782 F.3d 753 (6th Cir. 2018)*)*
- If accommodation isn't working, explore others (*Reed v. City of Vancouver,* 2021 WL 859524*)*

ADA/COVID:

- *Peoples v. Clinical Support Options, Inc.,* 487 F. Supp. 3d 56 (2020)
- What You Should Know About COVID-19 and the ADA, the Rehabilitation Act,and Other EEO Laws | U.S. Equal Employment Opportunity Commission (eeoc.gov)

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Days and Hours of Work
Non-exempt employees

Remember the Fundamentals:

- Overtime: 29 U.S.C. § 207; ORS 653.261
- Rest and meal breaks: OAR 839-020-0050
- Travel time: 5 C.F.R. § 551.401; OAR 839-020-0004(19); OAR 839-020-0045

COVID-19-Specific Resources:

(1) August 2020 US Department of Labor Guidance - Addressed an employer's obligation to track telecommuting employees' hours of work.

(2) December 2020 US Department of Labor Opinion Letter – Compensability of travel time for employees that telework for part of the day.

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Days and Hours of Work
It matters for everyone else too

Employee Accountability
- Set clear expectations
- Treat employees similarly

Your policy at work for you:
- Require prior approval for overtime
- Mandate appropriate breaks and record keeping
- Set expectations for work hours

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Out of State Issues:
Other states' labor and employment laws vary greatly

The BIG Four

1. State and local income taxes in employee's home state (both employer and employee obligations)
2. Workers Compensation
3. Unemployment Insurance
4. Applicability of Paid Leave Laws

… and there are more. Prior to allowing Out-Of-State (OOS) remote work, you need to identify what other labor and employment laws may apply.

Examples: Employer obligation to reimburse for expenses related to remote work; Employee access to personnel files.
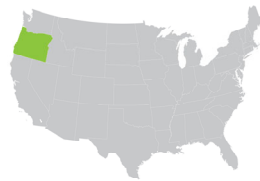
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Out of State Issues:
Liability Considerations

Liability for Tort Claims & Liability Insurance Coverage:

- Oregon Tort Claims Act applies to tort claims brought against your entity which occur in another state.
  - **Example**: City employee who works remote part-time in Washington causes a car accident in Washington while driving a city vehicle, if the injured party brings suit in WA, the OTCA would still apply.
- Liability Coverage Considerations: Note that CIS coverage does not extend to employment claims brought under state laws other than Oregon.
  - **Example:** A retaliation claim under Washington's paid family leave law would not be covered.

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Out of State Issues:
Strategies to complement a remote work policy:

- Insert Forum Selection Clause-type language into Employment Contracts or Offer Letters
- Create Addendum to Employee Handbook to cover additional rights and protections that out-of-state workers may have
- Develop an onboarding checklist for HR staff and hiring managers to use with OOS remote workers
- Consider hiring labor and employment counsel to advise

Don't panic! It's doable and there are sound reasons to allow OOS remote work --- It just requires careful consideration and tracking.

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It's Not a Rule Unless the Policy Says So…
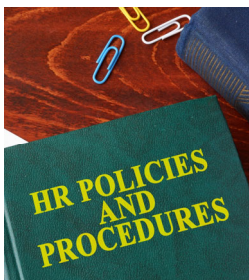
- Make it explicit that all workplace policies apply
- Address professionalism expectations (attire, grooming, distractions)
- Clarify what equipment is required, provided by employer

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Other Policy Considerations

- Communication is key
- Worksite Safety
- Security/Confidentiality protections
- Logistics

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Collective Bargaining

It's an unsettled issue for OR-ERB but need to consider whether a remote work policy may be a change in terms and conditions of employment, which would make it a mandatory subject of bargaining.

✓ **TIP:** Run your policy by your labor partner and then if it triggers a demand to bargain from them, evaluate it.

✓ And remember issues related to remote work may be still be covered by your entity's CBA. (Such as discipline, meals and rest breaks, pay, overtime approval, etc…)

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