

What Texas Employers Must Know When Considering Remote Work for Employees, Texas Lawyer, author Angella Myers, Esq., May 18, 2022

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By Angella H. Myers

By now, Texas businesses have likely established policies governing remote work such as: hours of availability, sufficient technology and safe workspaces, no off the clock work, and clear expectations on whether additional duties (childcare, elder care, moonlighting) are allowed. But employers must also consider the small but significant issues to avoid running afoul of state and federal laws to safeguard from liability.

Employers must consider who provides the items required to make remote work possible. Is the company or the employee paying for internet, phone, toner cartridges and other traditional office items? The Fair Labor Standards Act (FLSA) generally does not require an employer reimburse those expenses, but it does require non-exempt employees be paid at least minimum wage (\$7.25), and overtime where applicable. "Employers are required to pay for all hours worked, including work not requested but suffered or permitted, including work from home." See FAB 2020-5 ([dol.gov](https://www.dol.gov)) and 29 C.F.R. Section 785.11-12. If work expenses result in an employee receiving less than minimum wage, an employer could run afoul of the FLSA. See COVID-19 and the Fair Labor Standards Act Questions and Answers | U.S. Department of Labor ([dol.gov](https://www.dol.gov)) Also, if an employee moves away from Texas, it is important to assess that state's law on expenses. Many states require employer reimbursements, especially when remote work is mandatory, including: California, Illinois, and Montana.

Employee residence raises another important issue. While employees may feel free to live wherever they desire now that commuting to an office is not required, employers should be aware of the employment laws of the state its employees reside. As we all know, not all states do business like Texas does business. For instance, in California overtime is calculated on a daily basis, not just weekly. See Overtime ([ca.gov](https://www.ca.gov)). In many states, minimum wage is higher than the Federal and Texas rate of \$7.25. In Colorado, beginning January 2023, a new Family and Medical Leave Insurance Program will require both employers and employees to finance a paid family and medical leave program. See Home | Family and Medical Leave Insurance (colorado.gov).

Employees should request permission to transfer their remote work to a new state prior to moving; or, at minimum, keep their employer updated on any moves across state lines.

Another longstanding responsibility of Texas businesses is ensuring a safe workplace as required by OSHA. While OSHA will not inspect an employee's home or hold employers liable for an employees' home office when it is not a manufacturing related operation, employers still are required to keep records of injuries—including remote work injuries. Telecommuting workers typically are covered under the workers' compensation policies if the injury or illness occurs while an employee is completing a work task during work hours. In most cases, the remote worker must be able to prove they were working (acting in the interest of their employer) at the time of illness or injury. It benefits employers to establish at-home-work-safety rules such as: requiring employees wear proper footwear inside the home, maintaining a well-lit workspace clear of clutter, securing cords and tripping hazards, and forbidding phone calls/video streams while multi-tasking or driving. Further, tips for ergonomic techniques and workplace tools to prevent repetitive motion injuries or back strain should be incorporated. Remote work employees should also be required to immediately report any workplace incidents and submit time stamped photos of the injury and injury site, when possible, for assessment by the insurance carrier. Do not hesitate to contact your workers' compensation carrier or insurance broker for available training seminars, blogs, or ergonomic evaluations that could be used for remote worker training.

It is also critical remote workers do not jeopardize safety measures established to prevent cyberattacks. If there is no policy precluding high risk behaviors (such as use of public Wi-Fi locations as workspaces) a naïve employee could unwittingly jeopardize the company while working at their favorite coffee spot. In addition to written policies, features are available to ward against security breaches like virtual private networks, firewalls, antivirus software, and complex passwords or two factor authentication. Simple, cost-free preventative

measures to share with employees include shutting down computers and Bluetooth functions when not in use, switching off autocomplete, and often clearing mobile web browsers, cookies and cached files.

Importantly, in line with protecting business assets is complying with laws governing business operations. Title VII mandates equal employment opportunities for all persons protected. But not all jobs are the same — some require in-person interaction and new employees may benefit from in-office mentoring with experienced workers to obtain training on processes and learn critical functions. Equal employment opportunity does not mean all employees have to be allowed to work remotely. But it does mean an employer should establish an objective method for assessing remote work requests to protect against unconscious bias, preferential, disparate, or unequal treatment (or claims of same). And employers should not forget that remote work may be a reasonable accommodation for an employee with a disabling condition under the Americans with Disabilities Act.

Finally, all employees — in office or remote—must understand company policies apply equally. Harassment or creation of a hostile work environment via electronic mail, video conferences or otherwise, cannot be tolerated. Communicating what behaviors are unacceptable and how to report offensive actions by coworkers or third parties is key.

Certainly, discussions on whether to work or not to work remotely is a popular topic today. At the outset employees working remotely may seem cost efficient. But failure to address the details of how to correctly implement remote work can result in unexpected business costs in days ahead. As in all elements of business, diligence and thoughtful planning are required for success.

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