

Telecommuting Agreements: Key Drafting Considerations

A Practical Guidance® Practice Note by
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This practice note addresses the purposes for entering into telecommuting agreements (also known as teleworking and remote working agreements), the essential components of effective telecommuting agreements, and practical drafting suggestions and tips.

The ongoing novel coronavirus (COVID-19) pandemic, and the shelter in place orders resulting therefrom, have forced numerous employers throughout the United States to implement or expand telecommuting programs. Such programs generally permit employees to “work from home,” subject to certain terms and conditions set forth in a telecommuting policy and in a written telecommuting agreement between the employer and the telecommuting employee.

A telecommuting agreement is meant to supplement, not replace, an existing employment agreement, though it will often include, and nearly always reference, terms and conditions from the employment agreement, such as restrictions on sharing confidential information,

compensation arrangements, and termination. Telecommuting agreements will also typically reference and incorporate an employer’s existing internal policies and protocols. However, because the nature of remote work (i.e., work performed outside the office) creates a unique set of risks from an employer’s perspective, a telecommuting agreement serves a separate and distinct purpose from a general employment agreement. Therefore, employment counsel must prepare an unambiguous and comprehensive telecommuting agreement with the same care as it would with a standard employment agreement.

As set forth below, this practice note discusses:

- The Purposes of a Telecommuting Agreement
- The Form of a Telecommuting Agreement
- Essential Components of a Telecommuting Agreement

For practical guidance on navigating the various legal and practical issues facing employers with respect to telecommuting, see [Telecommuting Employees: Best Practices Checklist](#). For information on telecommuting policies, see [Telecommuting Policies: Key Drafting Tips](#). For an annotated telecommuting policy, see [Telecommuting Policy](#). For an annotated telecommuting agreement, see [Telecommuting Agreement](#).

For information on the COVID-19 offerings in Practical Guidance, including Labor & Employment and telecommuting issues, see [Coronavirus \(COVID-19\) Resource Kit](#). For vital guidance as employers prepare to reopen offices and resume operations, see [Coronavirus \(COVID-19\) Resource Kit: Return to Work](#).

For tracking of key federal, state, and local Labor & Employment legal developments that may impact this content, see [Labor & Employment Key Legal Development Tracker](#).

The Purposes of a Telecommuting Agreement

From an employer's perspective, a telecommuting agreement serves two primary purposes:

- It establishes the expectations and requirements for employees who are working remotely—temporarily or permanently—due to the ongoing COVID-19 pandemic, a reasonable accommodation for a disability under the Americans with Disabilities Act (ADA), or otherwise.
- It addresses employment issues of concern that are heightened due to a telecommuting arrangement, thereby mitigating the employer's risk.

The Form of a Telecommuting Agreement

A telecommuting agreement generally refers to a written agreement addressing the terms and conditions of the telecommuting arrangement. As a best practice, a telecommuting agreement should be reduced to writing, particularly if any terms vary from an employer's standard employment agreement/offer letter and/or its internal policies.

Essential Components of a Telecommuting Agreement

Introduction and Definitions

Preamble

A telecommuting agreement should include a preamble that:

- Defines the term "telecommuting" (or "teleworking")
- Explains the purpose of a telecommuting arrangement from both the employer's and employee's perspectives – and–
- Makes clear that implementation of a telecommuting program, including employee eligibility and duration, is in the employer's discretion

Telecommuting Agreement Should Not Contain Specific Eligibility Requirements

Form telecommuting agreements should not include specific eligibility requirements (e.g., certain performance ratings, productivity metrics, etc.) because there may be employees who do not meet the generally applicable criteria but who are nevertheless provided a telecommuting arrangement as a reasonable accommodation under the ADA or state and local laws.

Telecommuting Agreement Is Terminable by the Employer

In addition, the introduction should indicate that the telecommuting agreement is terminable by the employer for any reason, including violation of the terms of the agreement, with the caveat that a decision to terminate a telecommuting agreement or program will be made on a case-by-case basis and will consider the employee's personal circumstances.

Keep in mind, however, that the ADA generally precludes an employer from simply terminating a telecommuting arrangement provided as a reasonable accommodation absent proof that:

- The remote worker cannot now perform the essential functions of his or her job while teleworking –or–
- Continuing the telecommuting arrangement now amounts to an undue hardship to the employer

See, e.g., *Brunckhorst v. City of Oak Park Heights*, 914 F.3d 1177, 1182 (8th Cir. 2019); *Morris-Huse v. Geico*, 748 Fed. Appx. 264, 267 (11th Cir. 2018). Indeed, the Eighth Circuit in *Brunckhorst* rejected the employee's argument that he should be permitted to work from home because it was easier for him after sustaining leg and foot injuries limiting his mobility, stating that the employee's preference isn't a required accommodation under federal and state disability law. *Brunckhorst*, 914 F.3d at 1182–83.

These showings will be particularly difficult to make where the employee was previously performing his or her job functions while teleworking. It should also be noted that under the ADA, the employer is required to engage in a good faith "interactive process" with the employee before it may terminate a telecommuting agreement or remove any reasonable accommodation. *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015).

For information on accommodating a disability, see [Accommodating a Disability under the Americans with Disabilities Act Checklist](#). For guidance on drafting disability and reasonable accommodation policies, see [Disability and Reasonable Accommodation Policies: Key Drafting Tips](#). For non-jurisdictional annotated disability and reasonable accommodation policies, see [Disability and Reasonable Accommodation Policy](#) and [Disability Accommodations Policy \(with Acknowledgment\)](#). For state-specific disability accommodations policies, see [Discrimination, Harassment, and Retaliation State Expert Forms and Checklists Chart](#). For state-specific practice notes on disability law, see [Discrimination, Harassment, and Retaliation State Practice Notes Chart](#).

For additional guidance regarding the ADA generally, see [Americans with Disabilities Act: Guidance for Employers](#). For more information on ADA and disability management, see the [ADA and Disability Management](#) page.

Employee's Employment Remains At-Will

Finally, the telecommuting agreement should state that it is not a commitment by the employer to employ the teleworker for a specific duration and that the employee's employment remains at-will.

For state laws about employment-at-will, see [At-Will Employment and Exceptions State Law Survey](#). For more practical guidance on state employment laws that may constitute exceptions to at-will employment, see [Off-Duty Conduct and Lawful Activities Discrimination State Law Survey](#), [Discrimination, Harassment, and Retaliation State Practice Notes Chart](#), [Attendance, Leaves, and Disabilities State Practice Notes Chart](#), and [Whistleblowing State and Federal Practice Notes Chart](#). For federal exceptions to at-will employment, see [At-Will Employment Issues \(Federal Law\)](#).

Job Duties

This portion of the agreement should state that the telecommuter's job duties and job description will be the same as if the employee was working in the office, except that the employee may be required to provide periodic written status reports to his or her supervisor and make periodic trips to the office to attend department meetings or repair equipment, when necessary. Note, of course, this may not be feasible for an employee who is telecommuting as a reasonable accommodation.

Telecommuter Should Be Treated the Same as Similarly Situated Employees

It is important to convey that the telecommuter will be treated the same as similarly situated colleagues and will not be assigned more work, or have essential functions removed, solely by virtue of his or her telecommuting status. This is particularly the case where a telecommuting arrangement is provided as a reasonable accommodation under the ADA, as arbitrarily increasing the telecommuter's workload or hours could give rise to a retaliation claim under the ADA.

COVID-19 Issue

Keep in mind that requiring a telecommuter to periodically report to the office may be unenforceable during the COVID-19 pandemic in states with stay at home orders

and/or legislation limiting in office work to a select group of "critical" or "essential" staff.

For more guidance on a wide variety of COVID-19 legal issues, see [Coronavirus \(COVID-19\) Resource Kit](#). For a resource kit focused on employees returning to work and broken up by key employment law topics, see [Coronavirus \(COVID-19\) Resource Kit: Return to Work](#). For tracking of key federal, state, and local COVID-19-related Labor & Employment legal developments, see [Coronavirus \(COVID-19\) Federal and State Employment Law Tracker](#). Also see state and federal COVID-19 legislative, regulatory, and executive order updates from State Net, which are available [here](#).

For more articles on COVID-19 and the workplace by Castle Publications, as published on Practical Guidance, see [Returning to Work during and after COVID-19](#), [CDC Guidance and the Return to Work during COVID-19](#), [Wage and Hour Obligations for California Employers during COVID-19](#), [Wage and Hour Obligations for New York Employers during COVID-19](#), and [Leaves of Absence under Federal Law before and after the Families First Coronavirus Response Act \(FFCRA\)](#).

Minimum Productivity Standards

While not required, employers may want to affirmatively state that employees must meet minimum telecommuting productivity standards to maintain their telecommuting status so there are no disputes down the line regarding expectations. To avoid customizing the telecommuting agreement for each telecommuting arrangement, employers can simply refer to productivity standards set by the employee's manager (or otherwise applicable supervisor) rather than enumerating each such standard in the telecommuting agreement itself.

Work Schedule

Because telecommuters—by definition—work remotely, there is no way to manage their work in person, including their work hours. Consequently, a telecommuting agreement should reference a telecommuting work schedule and indicate that changes to that schedule are at the discretion of management. To ensure that the telecommuting arrangement serves the employer, especially when the telecommuter is part of a larger team or collaborative effort, the telecommuting agreement should state the specific hours the telecommuter must be available, which should align with the employer's hours of operation. Depending on the nature of the employer and the employee's job responsibilities, the employer

may want to offer its employees a flexible schedule. Such flexible schedules may be even more important during the COVID-19 pandemic given the problems many employees face with childcare options. For more information on flexible schedules and an annotated flex policy, see [Flexible Work Schedule Policy](#).

Avoid Wage and Hour Claims for Meal and Rest Break Violations

To avoid potential wage and hour claims for meal and rest break violations, the telecommuting agreement should state, at a minimum, that the employee is entitled to and expected to take their uninterrupted meal and rest periods in accordance with federal and state law.

While federal law does not require employers to provide meal or other break periods for their employees, employers who choose to provide such breaks must compensate nonexempt employees for short, non-meal rest periods (lasting 20 minutes or less) but not for bona fide meal periods of 30 minutes or more where no work is performed. See, e.g., [United States Department of Labor, elaws – FLSA Hours Worked Advisor: Meal Periods and Rest Breaks](#).

Note that some states do require unpaid or paid rest breaks and/or meal breaks, in which case state law will supersede the FLSA. In California, for example, Labor Code Section 226.7 requires employers to pay an extra hour of pay each day in which they fail to provide a meal or rest period, whether the employee works in office or remotely. The U.S. Department of Labor (DOL) maintains a chart outlining the minimum length of meal period required under state law, available [here](#).

Employers with an employee handbook or manual addressing meal and rest breaks can incorporate that policy by referencing it in the telecommuting agreement. Likewise, employers with a unionized workforce can reference applicable collective bargaining agreements regarding work time, meal periods, and rest periods.

For guidance on drafting rest break and meal period policies, see [Rest Break and Meal Period Policies \(Including Break Time for Nursing Mothers\): Key Drafting Tips](#). For an annotated meal, rest, and lactation break policy, see [Meal, Rest, and Lactation Break Policy](#). For state law on meal periods and rest breaks, see [Meal Period and Rest Break State Law Survey](#). For more information on state law requirements on meal periods and rest breaks (and lactation breaks), see the “Compensable Time” column of [Wage and Hour State Practice Notes Chart](#) or the “Wage and Hour” topic in the Practical Guidance Labor & Employment State

Law Comparison Tool. For state-specific meal and rest break policies and lactation break policies, see the “Break Policies and Agreements” column of [Wage and Hour State Expert Forms Chart](#).

Timekeeping and Overtime

Two other key components of the telecommuting agreement are timekeeping and overtime. Because there is no manager present to witness a telecommuter punch in and out, and nonexempt employees must be compensated for all work performed, including work not requested but “suffered or permitted” to be performed, it is critical that the telecommuting agreement unequivocally commit the telecommuter to adhere to the employer’s policies on timekeeping, including using specific timekeeping software to accurately and contemporaneously record all hours worked.

For overtime requirements under the FLSA, see [Overtime Requirements for Hourly Non-Exempt Employees under the FLSA](#). For information on state overtime wage laws, see the Wage and Hour Requirements column of the [Wage and Hour State Practice Notes Chart](#).

Mitigate Risk of Nonexempt Employees Performing Tasks before or after Regular Work Hours

To mitigate the risk of nonexempt teleworkers performing unauthorized work before or after their regularly scheduled hours, which may be more likely to occur when employees work from home, the telecommuting agreement should state that all overtime must be approved in advance by the employee’s manager (or other relevant supervisor), and that working overtime without such approval could result in disciplinary measures.

FLSA Overtime Requirements

Importantly, the Fair Labor Standards Act (FLSA) overtime requirement “may not be waived by agreement between the employer and employees” and “[a]n announcement by the employer that no overtime work will be permitted, or that overtime work will not be compensated unless authorized in advance, also will not impair the employee’s right to compensation for compensable overtime hours that are worked,” [U.S. Department of Labor Wage and Hour Division, Fact Sheet #23: Overtime Pay Requirements of the FLSA](#) (revised October 2019). In light of this guidance, employers will have the practical burden of taking steps to ensure that their employees do not work overtime.

For overtime requirements under the FLSA, see [Overtime Requirements for Hourly Non-Exempt Employees under the FLSA](#).

Develop an Overtime Policy

Nevertheless, adopting a policy prohibiting unauthorized overtime and imposing discipline for violations can help establish that the overtime was not “suffered or permitted” to be performed, particularly in a case of multiple policy infractions.

For guidance on overtime pay policies, see [Overtime Pay Policies: Key Drafting Tips](#). For an annotated overtime pay policy, see [Overtime Policy](#).

Workspace

When employees work remotely, absent contractual provisions setting particular standards, the employer has no control over the employee’s workplace. Addressing workplace health and safety issues and storage of confidential information and other information security issues in the telecommuting agreement serves both the employee and the employer.

OSHA Requirements

The Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 651 et seq., requires covered employers to provide a workplace free from recognized, serious hazards, record work-related injuries and illnesses, and comply with OSHA standards and regulations. Unlike an ordinary workplace, the DOL does not conduct inspections of employees’ home offices and will not hold employers liable for employees’ home offices. See [OSHA Instruction, Directive Number CPL 2-0.125, “Home-Based Worksites”](#) (Feb. 25, 2000). The only exception to this “hands-off” policy is for home-based worksites where more than standard clerical office work is performed, such as home manufacturing operations. *Id.*

However, OSHA reporting requirements may still apply to remote workers. Specifically, certain employers may be required to record any work-related injuries and illnesses experienced by telecommuting employees. In the context of telework, an injury is work-related “if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting.” DOL, [OSHA Standard Interpretations, “Determining work-relatedness for injuries in the home when telecommuting”](#) (Mar. 30, 2009). Accordingly, the telecommuting agreement should require employees to report any work-related injuries to the appropriate contact at the employer and allow the employer to visit the workspace to investigate the injury.

For more guidance on key OSH Act legal issues, [OSHA Act Requirements, Inspections, Citations, and Defenses](#).

Workers’ Compensation Issues

Separate and apart from OSHA considerations, an unsafe teleworking workspace could lead to on-the-job injuries and occupational illnesses, thereby implicating workers’ compensation liability. While workers’ compensation benefits vary from state to state, generally covered employees can receive workers’ compensation for injuries or occupational illnesses that arise out of and in the course of employment. See, e.g., N.Y. Workers’ Comp. Law §§ 2(7), 2(15), 3(2-30) (covering “accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom,” or for occupational diseases, which are diseases “resulting from the nature of employment and contracted therein”).

While this area of law is still nascent, several cases have credited the possibility of workers’ compensation covering an injury sustained by a telecommuter in his or her home. See, e.g., *Wait v. Travelers Indem. Co. of Illinois*, 240 S.W.3d 220, 226–30 (Tenn. 2007) (injury sustained by telecommuter while she was on a work break in the kitchen occurred within the course of her employment, though, in this particular case, did not arise out of her employment because they were caused by a third-party assault); *Sedgwick CMS v. Valcourt-Williams*, 21 So. 3d 1133 (Fla. App. Ct. 2019) (telecommuting employee injured tripping over her dog while reaching for a dish in her kitchen met the “course and scope of employment” element of a workers’ compensation claim but not the “arising out of” employment element).

For information on workers’ compensation, see [Workers’ Compensation for Private Employers](#). For information on all states’ and Washington, D.C.’s workers’ compensation laws, see [Workers’ Compensation State Practice Notes Chart](#).

Establish a Separate, Designated Work Area as Remote Work Location

If the aforementioned cases are any indication, it will generally be difficult for remote employees to establish the causation element (i.e., that their injury and arose out of their employment). Even so, the best practice is to require telecommuters to establish a separate, designated work area at their home/remote work location that is conducive to productivity and quality of work.

Moreover, the telecommuting agreement should delineate the applicable safety standards (e.g., safe exit paths from

the work area, adequate first aid supplies within reach, accessible fire extinguisher, adequate air quality and ventilation, etc.) and instruct telecommuters to discontinue work whenever the workspace creates or presents a dangerous condition, find an alternate workspace, and notify their employer.

For absolute clarity, the telecommuting agreement can even disclaim liability for loss, destruction or injury to the telecommuter that may occur when the employee is operating outside the course and scope of employment, as well as injuries to other persons on the telecommuter's premises.

Access, Use, and Storage of Confidential Information

Although unrelated to workplace safety, this section of the telecommuting agreement is functionally the appropriate place to address access, use, and storage of confidential information. To protect trade secrets and other confidential information, employers should instruct telecommuters to:

- Work in a private area at home where third parties cannot view their work
- Lock their workstation when not in use
- Follow all instructions of the employer's IT department, including secure remote access procedures, such as VPN, updating their computer software when prompted, and turn off Siri, Alexa, and other similar products when working on confidential matters

Additional security measures can be reserved for the dedicated section on confidentiality and security.

For guidance on cybersecurity measures to protect employers' confidential information and trade secrets, see [Cybersecurity Measures to Protect Employers' Confidential Information and Trade Secrets](#). For information on the use of restrictive covenants to protect trade secrets and confidential information generally, see the Restrictive Covenants practice notes page. For additional practice notes concerning trade secrets, see the Protecting Trade Secrets practice note page. For information on state laws on protecting trade secrets and confidential information, see [Non-competes and Trade Secret Protection State Practice Notes Chart](#). Also see [Non-competes and Trade Secret Protection State Expert Forms Chart](#). For more information on dealing with trade secrets and confidential information protection upon termination, see [Trade Secrets and Confidential Information Protection upon Termination Checklist](#). For more information on protecting confidential information at hiring, see [Trade Secrets and Confidential Information Protection upon Termination Checklist](#).

Compensation

The telecommuting policy should make clear that a telecommuter's compensation, overtime eligibility, and any fringe benefits will be the same as if he or she were an on-site employee. This is required for a teleworking arrangement provided as a reasonable accommodation under the ADA and good practice regardless.

Equipment and Supplies

Here the employer should identify the specific equipment the employer will provide the employee (e.g., computer, keyboard, monitor, printer) and indicate that the employer reserves all property rights in the provided equipment.

The agreement should also set forth the terms and conditions of equipment use, including the employee's obligation to:

- Use the equipment at home in accordance with applicable instructions for business purposes only
- Refrain from installing software or hardware without permission
- Refrain from copying any software or data onto external drives
- Assume liability for any loss of or damage to the equipment beyond normal wear and tear
- Notify the company of equipment failure
- Contact the employer's IT department for technical support –and–
- Return the equipment in its original form upon demand or upon the employee's termination

For drafting communications system, email, network, and internet policies, see [Communications System, E-mail, Network, and Internet Policies: Key Drafting Tips](#). For a sample annotated communications systems policy, see [Communications Systems, E-mail, Networks, and Internet Policy Acknowledgment](#). For guidance on drafting computer, mobile phone, and other electronic device policies, see [Computer, Mobile Phone, and Other Electronic Device Policies: Key Drafting Tips](#). For a sample annotated electronic device policy, see [Computers, Mobile Phones, and Other Electronic Devices Policy](#).

Confidentiality and Security

In this section, the telecommuting agreement should define the term "Confidential Information," and state that confidential information is the property of the employer and that its unauthorized disclosure is prohibited.

For guidance on drafting confidential and proprietary information policies, see [Confidential and Proprietary Information Policies: Key Drafting Tips](#). For an annotated confidential and proprietary information policy, see [Confidential and Proprietary Information Policy](#).

Enumerate Specific Security Measures in the Telecommuting Agreement

To ensure that telecommuters adequately safeguard confidential information, the telecommuting agreement should enumerate the specific security measures expected of telecommuters. For example, by signing the telecommuting agreement, the telecommuter should agree to:

- Never leave his or her password where someone could easily find it
- Never leave confidential information on his or her computer screen where it can be viewed by others –and–
- Never print confidential information unless the benefit substantially outweighs the risk

The agreement should also indicate the consequence for violating the company's security rules (i.e., disciplinary action up to and including termination of employment).

Expense Reimbursement

To work remotely, telecommuters need electricity, internet, and in some cases, a telephone line for business use. The telecommuting agreement should state which business expenses will be covered by the employer, which must be assumed by the employee, and how charges will be handled (e.g., billed directly to the employee and submitted for reimbursement to the employer, billed directly to the employer, etc.).

Keep in mind that you may be legally required to reimburse employees for telecommuting expenses. While there is no federal law requiring employers to reimburse telecommuters for expenses from working from home, employers need to ensure that failure to reimburse such expenses does not reduce a nonexempt employee's hourly rate below the minimum wage. See DOL, [COVID-19 and the Fair Labor Standards Act Questions and Answers](#).

Among other things, the policy should set forth what expenses are reimbursable as necessary business expenses and allow employees to request reimbursement for other expenses they reasonably believe are necessary to properly do their work.

For a multistate survey summarizing state laws requiring employers to reimburse employees for business-related

expenses, see [Expense Reimbursement Requirements State Law Survey](#). For guidance on drafting an expense policy, see [Expense Policies \(Including Business, Travel, and Entertainment\): Key Drafting Tips](#). For annotated expense policy, see [Expenses Policy](#).

Case Law

In addition, the ADA may require an employer to reimburse a teleworker for telecommuting expenses (e.g., devices, internet service, data usage, etc.) where a telecommuting arrangement is provided as a reasonable accommodation. The case law on this issue has been mixed thus far. Compare *McEnroe v. Microsoft Corp.*, 2010 U.S. Dist. LEXIS 122477, at *7 (E.D. Wash. Nov. 18, 2010) (telecommuter's personal expenses, such as sewer bills or home cleaning services, not reimbursable under the ADA) and *Dage v. Leavitt*, 2007 U.S. Dist. LEXIS 925, at *25 (D.D.C. Jan. 9, 2007) (rejecting contention that the ADA required the employer to provide a telecommuter with a new computer for his home office) with *Smith v. Bell Atlantic*, 2003 Mass. Super. LEXIS 99, at *18 (Mass Sup. Ct. March 4, 2003) (telecommuting arrangement inadequate accommodation where employee denied adequate office, technical assistance, and computer access).

State Statutes

Certain states, including California, obligate employers to reimburse employees for all necessary expenditures. See Cal. Lab. Code § 2802(a) (“An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.”).

Under the old normal, pre-COVID-19 pandemic, courts in California generally found that expenses resulting from remote working were not “necessary expenditures” because telecommuting was not mandatory. Rather, it was a voluntary, optional choice by employees who still had the option of working in the employer's office and use the employer's equipment and supplies. See, e.g., *Novak v. Boeing Co.*, 2011 U.S. Dist. LEXIS 83031, at *9 (C.D. Cal. July 20, 2011) (holding that expenses associated with working out of a home office were not “necessary” expenses as a matter of law where participation in the work-at-home was optional, the employer “ma[de] physical workspaces with computers, phones, and other necessary equipment available at its offices to employees so that they [did] not have to work remotely,” and even approved virtual workers sometimes split time between working from

home and working in Boeing's offices); *Lawson v. PPG Architectural Finishes, Inc.*, 2019 U.S. Dist. LEXIS 128155, at *22-24 (C.D. Cal. June 21, 2019) (dismissing claim for reimbursement of internet costs where remote employee received company-owned mobile hot spot). By contrast, in *Aguilar v. Zep Inc.*, 2014 U.S. Dist. LEXIS 120315, at *55-56 (N.D. Cal. Aug. 27, 2014), a cleaning supplies sales company expected sales employees who worked from home to call customers and place web-based sales orders. Accordingly, the court required reimbursement for personal cell phone and internet expenses.

Given that remote working is generally not voluntary during the new normal of COVID-19, employers should be expected to reimburse some or all of the cost of data plans, devices (such as laptops, tablets, and fax machines), and internet service.

Illinois and several other states also require reimbursement of expenses incurred by remote workers. See 820 ILCS 115/9.5 ("An employer shall reimburse an employee for all necessary expenditures or losses incurred by the employee within the employee's scope of employment and directly related to services performed for the employer[.]"). For a survey of the various state laws requiring employee reimbursement, see [Expense Reimbursement Requirements State Law Survey](#).

Family or Medical or Personal Leaves

To avoid noncompliance with the ADA and state and federal laws granting part-time and full-time employees certain paid/unpaid leave, the telecommuting agreement should state that telecommuters continue to be subject to and eligible for paid time off (PTO)/vacation or other paid or unpaid leave in accordance with any applicable collective bargaining agreement, the employer's policies, or the law. However, the agreement can require telecommuters to follow any company policies on the process for using leave, such as requirements of advance notice, medical certification, or verification of the need for leave.

For information on PTO, sick leave, and vacation issues, see [Paid Time Off \(PTO\) Policies: Key Drafting Tips](#), [Sick Leave Policies: Key Drafting Tips](#), [Vacation Policies: Key Drafting Tips](#), and [Paid Sick Leave Policies Checklist \(Best Drafting Practices for Employers\)](#). For more information on state vacation pay/PTO laws, see [Paid Vacation and PTO State Law Survey](#) and the Pay Timing, Frequency, and Deductions column of [Wage and Hour State Practice Notes Chart](#). For state paid sick leave laws, see [Paid Sick Leave State and Local Law Survey \(Private Employers\)](#). For additional information on the FMLA, see [FMLA Leave: Guidance for Employers and Employees](#), the Family and Medical Leave

practice note page, and the Family and Medical Leave forms page. For information on state family and medical leave laws, see the Family, Medical, Sick, Pregnancy, and Military Leave column of [Attendance, Leaves, and Disabilities State Practice Notes Chart](#).

Dependent Care

To ensure that telecommuting arrangements are used properly, the telecommuting agreement should state that telecommuting is not a substitute for dependent care and that absent extraordinary circumstances (e.g., the current COVID-19 pandemic), the telecommuter must arrange for child or senior care.

Key Considerations When Dealing with Telecommuting Workers Who Work from Home in Different States Than the Employer

Income Tax

Since telecommuters may reside in jurisdictions where an employer does not maintain an office and does not pay taxes—particularly during the duration of the COVID-19 pandemic—the telecommuting agreement should place responsibility for determining any income tax implications for remote work with the employee and refrain from providing the telecommuter with tax guidance. With that said, employers should be aware that different states have taken different positions with respect to their sourcing rules (i.e., determining the source of a sale for purposes of determining what rates and rules apply for tax purposes). Some states have announced that current rules remain intact while others have stated that employee withholding practices must be altered. For example, New Jersey and South Carolina do not require employers to withhold state income taxes for employees temporarily teleworking within their boundaries. See *Telecommuter COVID-19 Employer and Employee FAQ*, N.J. Treasury (May 27, 2020); *SC Information Letter #20-11*, South Carolina Dep't of Revenue (May 15, 2020). In contrast, Illinois will treat income from a nonresident employee working in Illinois in excess of 30 days as Illinois-sourced, with the exception of employees performing disaster or emergency-related services there. *Illinois Register, Rules of Governmental Agencies*, Vol. 44, Issue 26, Pages 10,831-11,131 (June 26, 2020).

Corporate Tax

Additionally, employers should consider any corporate tax liability in allowing telecommuters in states where the employer does not maintain a physical office. Specifically, when employees work remotely on behalf of out-of-state employers, it may create a taxable nexus for the employer in that state. In good news for employers, a

few key states, including New Jersey, Pennsylvania, and Maryland, as well as D.C., have issued guidance indicating that the physical presence of temporary workers within the state due solely to COVID-19 will not trigger a nexus for corporate tax purposes. See D.C. OTR, Tax Notice 2020-05, Apr. 10, 2020; Mass. DOR. TIR 20-10, July 21, 2020; MD Admin. Release No. 2, Sept. 1, 2009; Comptroller of MD, Tax Alert 5-04-20; N.J. Div. of Tax Telecommuter COVID-19 Employer and Employee FAQ; PA Dept. of Rev. Find Answers, Answer ID 3738, Apr. 3, 2020. However, a significant number of states have yet to issue their official position on this important question. During the COVID-19 pandemic, employers should therefore determine in which states their remote workforce reside and monitor corporate tax developments in those jurisdictions.

For more information, see [Remote Working Implicates State Payroll Tax, Corporate Income/Franchise Tax Nexus Concerns](#).

Local Labor Laws

Employers should also be mindful that a remote workforce, even if temporary, may trigger additional workers' compensation and unemployment insurance obligations. Generally, workers' compensation and unemployment insurance schemes look to where the employee is performing services. This is yet another reason for employers to track the whereabouts of remote workers during the COVID-19 pandemic.

For key steps to adopt when advising private employers on common workers' compensation legal issues, see [Workers' Compensation for Private Employers](#); for guidance on how COVID-19 affects workers' compensation claims now, and in the future, see [Workers' Compensation: Key COVID-19 Issues](#). For a chart listing all the practice notes that discuss state workers' compensation laws and that are included in Practical Guidance's Labor & Employment practice area, see [Workers' Compensation State Practice Notes Chart](#).

For guidance on former employees' eligibility for unemployment insurance and the process for employers to challenge that eligibility, see [Unemployment Insurance Benefits: Former Employee Eligibility and How to Challenge It](#).

Miscellaneous Provisions

Finally, in this section, the employer should include any other terms and conditions that do not fall neatly into the above categories, such as:

- The governing law
- Forum selection (and/or arbitration clause)
- Who is authorized to sign the agreement –and–
- The agreement's effect on prior or written agreements concerning telecommuting

Note that even though the telecommuting agreement is not intended to, and should not, replace an existing employment agreement, it is important that these miscellaneous provisions are drafted to be consistent with the similar provisions in the employment agreement. For example, both agreements should be governed by the same state's laws. Having the employment agreement and telecommuting agreement governed by two different states' laws will likely sow confusion and unnecessarily increase costs in the event of an employment related dispute.

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Jeffrey Ruzal is a Member of the Firm in the Employment, Labor & Workforce Management practice of Epstein Becker Green. He leads the firm's hospitality service team and represents clients in such diverse industries as hospitality, financial services, retail, health care, and technology.

Mr. Ruzal advises employers in all aspects of the employment relationship, from pre-employment and hiring to terminations and post-employment restrictions; provides regulatory advice and conducts labor and employment due diligence in connection with significant M&A deals; conducts audits of employers' policies and procedures to determine compliance with applicable federal, state, and local laws; and counsels employers with respect to federal and state wage and hour compliance, including exempt employee and independent contractor classification audits, compensation reviews, and non-exempt recordkeeping practices.

Mr. Ruzal has been interviewed and quoted by *NPR News*, *Law360*, *Bloomberg BNA Daily Labor Report*, and the Society for Human Resource Management. He has also written numerous articles on significant employment law issues that have been included in, among other leading publications, *Law360*, *Thomson Reuters Practical Law*, and *Bender's Labor & Employment Bulletin*. Mr. Ruzal frequently speaks at national conferences and webinars on a variety of employment law topics.

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Carly Baratt is an Associate in the Employment, Labor & Workforce Management and Litigation & Business Disputes practices, in the New York office of Epstein Becker Green. Ms. Baratt was selected by her peers for inclusion in *The Best Lawyers in America*®: "Ones to Watch" (2021) in the field of Litigation – Labor and Employment.

Her pro bono practice has included securing asylum status for a Malaysian refugee, obtaining a favorable settlement for an artist in a breach of contract action in New York Supreme Court, and defending an elderly tenant in an eviction proceeding.

Before joining Epstein Becker Green, Ms. Baratt was a Senior Litigation Associate in the Government Enforcement and Business Securities Litigation Practice Groups of an international law firm. While at law school, Ms. Baratt received CALI "Excellence for the Future Awards" in Employment Discrimination and Health Care Law.

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