

Compliance Today – September 2021 How healthcare employers can avoid the legal perils of a remote workforce

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While the number of work-from-home and other remote work relationships has steadily increased over the years, the prevalence of these working relationships was kicked into overdrive early last year when the COVID-19 pandemic forced employers to immediately move their entire workforce to a remote platform. Unlike other service industries, prior to the pandemic, the healthcare industry had not embraced work-from-home and other remote working arrangements due to a variety of concerns; however, since then, all employers, including healthcare employers, have been forced to address these challenges in order to continue operations.

In this article, we will sort through the issues that arise in the healthcare setting when considering work-from-home and other remote work arrangements, including patient privacy issues, wage and hour concerns, and potential issues regarding workplace accommodations. In addition, this article will provide practical guidance regarding an employer's rights and responsibilities governing remote work arrangements.

Patient protected health information

Healthcare employers face unique challenges when employees work remotely. In particular, healthcare employees need to access patients' protected health information (PHI) during the performance of their job duties. Federal, state, and local laws mandate that healthcare providers safeguard PHI from disclosure, including but not limited to the Health Insurance Portability and Accountability Act^[1] and the California Confidentiality of Medical Information Act.^[2] To comply with these legal obligations, healthcare employers must take specific measures to ensure that PHI is maintained as private when employees work remotely. Specifically, healthcare employers should do the following:

- Encrypt home wireless router traffic; properly configure, encrypt, and password-protect personal devices used by employees to access PHI while working from home (this includes firewall and antivirus protection);
- Change default passwords for wireless routers used;
- Encrypt all PHI before transmitting; and
- Require employees use a virtual private network when accessing the company intranet remotely.^[3]

Healthcare employers would also be wise to develop and implement specific policies and procedures prohibiting employees from allowing friends or family from using devices containing PHI and mandating that their employees disconnect from the company network when they are not actively working. In addition, healthcare employers should consider providing employees who work from home and who regularly access PHI with locked

file cabinets to store hard copies of documents containing PHI as well as Health Insurance Portability and Accountability Act compliant shredders so they can destroy PHI once their work is complete.

Wage and hour considerations

Work-from-home arrangements also present unique challenges for healthcare employers when it comes to compliance with California's increasingly complex wage and hour laws. These laws continue to evolve as the California courts respond to more nuanced claims proffered by the plaintiffs' bar, underscoring how important it is that healthcare employers remain current on this area of the law.

Overtime and meal and rest break compliance

While some employees find the flexibility of work from home and other remote work arrangements provide greater work-life balance, others feel that working from home blurs the lines between time spent working and home life, leaving some feeling like they are always on the clock. This is of particular concern for California employers, as California Labor Code section 510 mandates that nonexempt, hourly employees must be paid "one and one-half times the regular rate of pay" for all hours worked over eight hours in a day and double time for all hours worked over 12 hours in a day.^[4] This means that without proper record-keeping and close management of its employees' timesheets, an employer could see significant increases in labor costs as employees spend more time on the clock. In addition, if employers are not vigilant in ensuring that remote employees are recording all time spent working, they could be exposed to substantial liability for unpaid overtime, related penalties, and legal fees to defend myriad wage and hour claims. Moreover, with many employees relocating out of state, employers may find that they need to comply with other legal requirements (such as notice requirements, specific rates of pay mandates, etc.) with which they might not be familiar, specific to the state where employees may now work^[5] even when the employer does not operate business in that state.^[6]

Comprehensive and legally compliant policies are also particularly important for those employers with a large remote workforce. In California, where wage and hour class action lawsuits continue to provide a steady stream of income to plaintiffs' lawyers, employers must ensure that employees are provided an opportunity to take their uninterrupted meal periods^[7] and rest breaks in accordance with California law.^[8] Where a large portion of the workforce works from home, employers may find it more difficult to control whether that opportunity has been provided, especially when employees are communicating almost exclusively through emails or other electronic means. To avoid falling into the trap of assuming that work-from-home arrangements allow employees with the flexibility to take their meal periods and rest breaks whenever they wish to do so, employers would be wise to have written policies and practices whereby they are checking in with the workforce to ensure employees have the opportunity to take and are taking their meal periods and rest breaks in accordance with California law.

Notably, the California legislature is currently considering Assembly Bill (AB) 230 (the Workplace Flexibility Act of 2021) and AB 1028 (the Telework Flexibility Act).^[9] AB 230 would provide employees with the right to request flexible work arrangements for up to 10 hours per week (but do not mandate compliance by the employer), and AB 1028 would allow employers who grant such requests to avoid paying overtime for the ninth and 10th hours of work during a day when the employee works from home. In addition, employees working from home would have greater flexibility to choose when to take their meal periods and rest breaks, without the employer having to incur liability if the employee fails to do so in accordance with California's stringent wage and hour laws. If passed, these bills could provide some relief to healthcare employers who agree to these types of work-from-home arrangements.

Reimbursement issues

The federal Fair Labor Standards Act generally does not require an employer to reimburse employees for remote work expenses, unless the amount of those expenses is such that it effectively causes an employee to be paid less than the minimum wage (and/or overtime compensation) for all hours worked.^[10] By contrast, California (and a few other states) has codified an employer's obligation to reimburse employees for all "necessary" and "reasonable" expenses under Labor Code section 2802.^[11] What this means is not always clear.

For instance, the California Court of Appeal (Second District) held that if an employee is required to use a personal cell phone for business purposes, the employer must reimburse the employee a "reasonable percentage" of the employee's cell phone bill.^[12] This places the onus on employers to determine what is a "reasonable amount" when reimbursing employees for work-related cell phone usage. Employers will need to make the same determination for other personal devices that are used for work purposes when employees work from home, including the use of home internet/Wi-Fi and home office supplies (e.g., printers, paper, printer cartridges) if the employee incurs related expenses in direct consequence of the job duties or in complying with an employer's directions.^[13] When contemplating a reasonable amount for these expenses, employers should consult with employees to ascertain the actual expense and consider providing a monthly stipend in an amount mutually agreed to by the employer and employee. Employers should also have a written policy stating that the employee must seek approval before exceeding the agreed upon amount and setting forth the process for payment in the event the actual expense exceeds the stipend amount.

Accommodation requests for a remote workforce

Federal and state laws mandate that employers engage in the interactive process with employees who request a workplace accommodation due to a disabling medical condition. While an employer need not provide the requested accommodation, employers are required to engage with the employee to determine whether an appropriate accommodation exists—one that takes into consideration the employee's job duties as well as their stated work restrictions. Once an appropriate accommodation has been identified, the employer must provide it to the employee unless the employer can demonstrate that an accommodation would create an "undue burden" (an action requiring "significant difficulty or expense.")^[14]

When do employers have to accommodate remote work?

Since the start of the pandemic, employers have been flooded with requests for "accommodation" by their employees, many of whom are not disabled but have requested work-from-home arrangements due to safety concerns related to the potential transmission of COVID-19 in the workplace. In recently published guidance, the Equal Employment Opportunity Commission has confirmed that employers need not allow employees with no disability-related limitations to work remotely.^[15] Nevertheless, due to the number of federal, state, and local shelter-in-place/quarantine orders that were issued during the pandemic, employers were forced to allow nonessential healthcare employees to work remotely, and now, even as things continue to improve, more and more employees are requesting that they remain remote. Traditionally, employers in the healthcare industry were unable to accommodate these types of requests, noting that working from the jobsite was an essential job function. Now that employees have demonstrated that working remotely is a viable arrangement, even in the healthcare industry (at least for those positions that do not require direct patient contact), it may be more difficult for healthcare employers to show that accommodating a disabled employee's request to work remotely creates an undue burden on the employer. Notably, when reviewing failure to accommodate and/or failure to

engage in the interactive process claims, the California courts^[16] have considered prior work-from-home arrangements in determining whether the employer has met its burden.^[17] Therefore, employers should be mindful of prior work-from-home arrangements when engaging in the interactive process with an employee who has requested a work-from-home arrangement to accommodate an alleged disability, including work-from-home arrangements that were adopted during the COVID-19 pandemic.

Why accommodate remote work arrangements when not required

Several studies have shown that professionally, women and minorities have been disproportionately affected by the COVID-19 pandemic, resulting in an alarming number of women (particularly working mothers and women of color) leaving the workplace due to the stress caused by caring for children who are attending school remotely while balancing work and other family obligations.^[18] This migration of women and minorities from the workplace is especially problematic as studies have shown that ethnically diverse companies are likely to perform 35% better than their counterparts, and gender-diverse companies are likely to perform 15% better than their counterparts.^[19] Several studies further reveal that employees value having the ability to work remotely and that employers who offer these alternative work arrangements have a higher likelihood of attracting a more diverse workforce.^[20] Moreover, recent studies have shown that employees who work from home are more productive than those who work on-site.^[21]

There are other considerations specific to the healthcare setting that may make work-from-home arrangements advisable. During the height of the pandemic, when transmission rates were rapidly accelerating, work-from-home arrangements were advisable in order to reduce the risk of infection for nonessential healthcare personnel and to free up other resources in order to care for the influx of patients suffering from COVID-19. Even when the pandemic subsides, there are other situations where safety concerns may warrant consideration of work-from-home arrangements, including the risks associated with exposure to radiation during cardiovascular and other medical treatments.^[22]

With this in mind, while an employer may not be obligated to consider a remote work request by a nondisabled employee, there are many good business reasons to do so (i.e., provided employer decisions regarding work-from-home arrangements are made on a consistent, nondiscriminatory basis).

Takeaways

- Healthcare employers must take specific measures to ensure that protected health information privacy is maintained when allowing employees to work remotely.
- Employers need to ensure requests to telecommute are handled consistently and will not have a disparate impact on underrepresented groups.
- Employers should have wage and hour policies that capture all time spent working and outline how meal and rest breaks must be taken and recorded.
- Employers should have clear policies whereby employees can notify and submit reimbursement for expenses incurred in relation to work-from-home arrangements as well as consider engaging in an interactive process with employees to provide an appropriate amount for a monthly stipend for work-from-home expenses.
- Employers should look at their telecommuting policies and practices to ensure they foster productivity,

diversity, and inclusion and minimize wage and hour risks.

142 U.S.C. § 1320d-2(d)(2)(A), (B).

2 Cal. Health and Safety Code § 1280.15(i)(2) (2014).

3 “HIPAA Compliance and Working from Home: Specific Rules for Employees,” Compliancy Group, accessed July 8, 2021, <https://bit.ly/3hrbQID>.

4 Cal. Lab. Code § 510 (1999).

5 Lisa Nagele-Piazza, “Which State’s Wage Laws Apply When Workers Temporarily Relocate?” SHRM, November 28, 2017, <https://bit.ly/3r3nrur>.

6 Barrie Gross, “Determining Which Employment Laws Are Applicable to Your Business,” AllBusiness.com, accessed July 8, 2021, <https://bit.ly/3wpzG5t>.

7 Cal. Lab. Code § 512 (2018).

8 Cal. Code Regs. 8 § 11040 (2001).

9 Desiree J. Ho, “Pending California Bills Suggest Trend Towards Flexible Work Arrangements,” *California Labor & Employment Law Blog*, May 6, 2021, <https://bit.ly/3dWLQN5>.

10 29 C.F.R. §§ 531.3(d), 531.36(b).

11 Cal. Labor Code § 2802 (2015).

12 *Cochran v. Schwan’s Home Service, Inc.*, 228 Cal. App. 4th 1137 (Ca. 2014).

13 *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (Cal. 2007).

14 Cal. Government Code § 12926(u).

15 “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” Technical Assistance Questions and Answers, U.S. Equal Employment Opportunity Commission, updated June 28, 2021, <https://bit.ly/2THozYD>.

16 *Henry v. Pro*Act, LLC*, 2014 WL 12567144, at *8 (C.D. Cal. Dec. 30, 2014).

17 *Rezvan v. Philips Elecs. N. Am. Corp.*, 2016 WL 8193160, at *4 (N.D. Cal. Dec. 15, 2016).

18 “Seven charts that show COVID-19’s impact on women’s employment,” McKinsey & Company, March 8, 2021, <https://mck.co/3yzgbcn>.

19 Vivian Hunt, Dennis Layton, and Sara Prince, *Diversity Matters*, McKinsey & Company, February 2, 2015, <https://mck.co/3jSwLQm>.

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21 “Prodoscore Research from March/April 2020: Productivity Has Increased, Led By Remote Workers,” Business Wire, May 19, 2020, <https://bwnews.pr/3k1nmWC>.

22 Siemens Healthineers, “The Case for Remote Work in Health Care,” *Harvard Business Review*, September 8, 2020, <https://bit.ly/3k3jiRb>.

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