

Flexible Work Arrangements in a Post-COVID Environment

Schools are not obligated to automatically renew telework accommodations, but they must engage in an interactive process.



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In response to shutdowns and general safety precautions, most schools last spring shifted quickly to working in a virtual environment. Everyone learned just how much they could accomplish from home. With the availability of vaccines and lifted restrictions, independent schools have largely returned to in-person operations. Some employees, however, may request to continue remote or flexible work arrangements for various reasons.

While not ideal for most positions, telework, hybrid or flexible work arrangements may be beneficial as recruitment or retention tools in some situations, and temporary telework might be a reasonable accommodation or allow an employee in quarantine to continue performing job duties. Before implementing more permanent telework arrangements, schools should consider the following potential legal issues.

ADA ACCOMMODATION REQUESTS

Prior to the pandemic, telework was not widely available as part of a reasonable accommodation for independent school employees. Now that schools and employees have demonstrated what can be accomplished remotely, some may wonder whether they must allow employees to work from home as a reasonable accommodation as the school returns to in-person program delivery.

Consider this example. A teacher with a medical condition that made her high risk for COVID-19 complications was provided an accommodation to teach from home during the 2020–2021 school year. She has requested a continuation of such accommodation into the 2021–2022 school year because she is medically advised not to get the vaccine. Under the Americans with Disabilities Act (ADA), schools are generally required to provide a reasonable accommodation to a disabled employee as long as it does not cause an undue hardship on the school. But does a reasonable accommodation provided once remain reasonable forever?

The Equal Employment Opportunity Commission (EEOC) recently explained that “the fact that an employer temporarily excused performance of one or more essential

functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job’s essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship.”

Thus, an employee is not automatically entitled to continue telework in the 2021–2022 school year just because they successfully worked remotely in the past year. This is especially true if the school has otherwise returned to in-person operations and students are on campus and no longer virtual. Instead, schools should engage in a flexible, cooperative and interactive process going forward if this issue does arise.

When faced with any request for a new or continued accommodation, the school may

- Ask questions to determine whether the condition is a disability;
- Discuss with the employee how the requested accommodation would assist them or allow them to perform essential job functions;
- Explore alternative accommodations that may effectively meet their needs; and
- Request medical documentation if needed.

The school may then consider whether the accommodation would create an undue hardship on the school and, if yes, possibly offer alternate accommodations.

FLSA CONSIDERATIONS

Under the Fair Labor Standards Act (FLSA), employers are required to maintain an accurate record of hours worked for non-exempt employees, including hours worked at home. Rules regarding minimum wage and overtime for hours worked beyond 40 in a workweek also apply to non-exempt employees working remotely. A remote environment makes proper supervision and monitoring of overtime, break time and total hours worked challenging.

Allowing a non-exempt employee to work remotely would require clearly defined parameters about availability and expectations regarding

scheduling. For example, if a non-exempt employee is relieved from their work duties for long enough to allow them to use the time effectively for their own purposes, that time is considered “off duty” and should not count as compensable hours worked.

For exempt employees, a school must generally pay their full salary in any week in which they perform any work, subject to certain very limited exceptions. There may be, however, times when a telework arrangement involves a change to the job duties and overall responsibilities of a position. For example, a position may go from full-time to part-time. Can a school adjust an employee’s pay accordingly?

In general, an employer may prospectively reduce the amount regularly paid to an employee based on changes to duties, responsibilities or other economic reasons. For exempt employees, however, any such reduction must be predetermined rather than an after-the-fact deduction from salary based on hours worked or quality of work on a week-to-week basis, and must not go below the applicable salary level. It is wise to reflect the change in duties and responsibilities in an updated job description, and document changes in salary in the employee’s employment letter.

A successful remote work arrangement will often require an employee to invest resources in equipment and other business expenses. Under the FLSA, a school may be required to compensate their employees for telework-related expenses, such as internet access or a computer, if those business expenses would reduce an employee’s pay below minimum wage.

OUT-OF-STATE WORK

When an employee is working in another state, the school may be considered “doing business” in that jurisdiction. Depending on the jurisdiction, a remote worker based in another state may trigger certain tax implications and reporting obligations. A school may need to consider issues such as which state’s income tax to withhold for a given employee. During the pandemic, some states issued guidance that the presence of remote employees in the state due to pandemic contingencies would not alone cause out-of-state taxpayers to trigger tax obligations in the state. However, that guidance may revert to pre-pandemic practices in coming months.

PRACTICAL TIPS

Any flexible or remote work policy should clearly establish the expectations for such an arrangement, including some of the following key provisions:

- Establish which employees are eligible for flexible or remote work schedules. This may depend on the employee’s core job responsibilities and different rules may apply based on job category. For example, it is reasonable to establish a general rule that classroom teachers are not eligible, even as a medical accommodation, to work remotely while students are back to in-person learning, while an administrative employee might be eligible, depending on the job duties and responsibilities.
- Outline the process to request remote work.
- Clarify that regular school policies, including conduct rules, apply.
- Explain policies regarding equipment and reimbursement for expenses.
- Ensure the safety and security of confidential or proprietary information.

Schools may enter a flexible work agreement with individual employees to establish expectations upfront. An agreement should do the following:

- Establish hours of work or core hours when the employee is expected to work and will be available.
- For non-exempt employees, establish a way of recording hours worked.
- Set expectations about work environment, including whether the employee may work from out of state on more than a temporary basis.
- Set forth any change in compensation.
- Update the job description if the arrangement is ongoing rather than temporary. **N**

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