

The **LEXIS PRACTICE ADVISOR** Journal™

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EMPLOYERS CONFRONTING THEIR OBLIGATIONS AS CORONAVIRUS SPREADS

**COVID-19
Claims Impact
Entire Insurance
Coverage Spectrum**

**Diagnosing and
Treating Coronavirus
Risks in M&A**

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CORONAVIRUS

Special Edition 2020

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Jeffrey H. Ruzal and Carly Baratt EPSTEIN BECKER & GREEN, P.C.

Telecommuting Employees: Best Practices Checklist

With the advent of sophisticated workplace information technology that allows employees to connect to a company's computer network from their homes with little more than a laptop and an internet hookup, telecommuting or teleworking has become a common phenomenon across various industries. Moreover, telecommuting and work-from-home arrangements are increasing exponentially during the novel coronavirus (COVID-19) pandemic as a way of protecting employees and customers from exposure. This checklist provides practical guidance on navigating the various legal and practical issues facing employers with respect to telecommuting, from responding to one-off employee requests to telework, to deploying a formal telecommuting policy, to devising a way to effectively train and monitor remote employees.

Telecommuting as a Reasonable Accommodation under the Americans with Disabilities Act (ADA)

Carefully consider whether the employer is required to offer a telecommuting arrangement as a reasonable accommodation in accordance with the ADA.

What Is a Reasonable Accommodation under the ADA?

The ADA prohibits discrimination against individuals with disabilities and guarantees that such individuals have the same opportunities as the rest of the general public. Title I of the ADA requires an employer to provide "reasonable accommodation" to qualified individuals with disabilities and creates a cause of action for failure to accommodate.¹

In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.² In recent years, plaintiffs have argued that telecommuting is a reasonable accommodation within the meaning of the ADA.

Assess Whether Telecommuting Is a Reasonable Accommodation

When assessing whether telecommuting is a reasonable accommodation, consider the following:

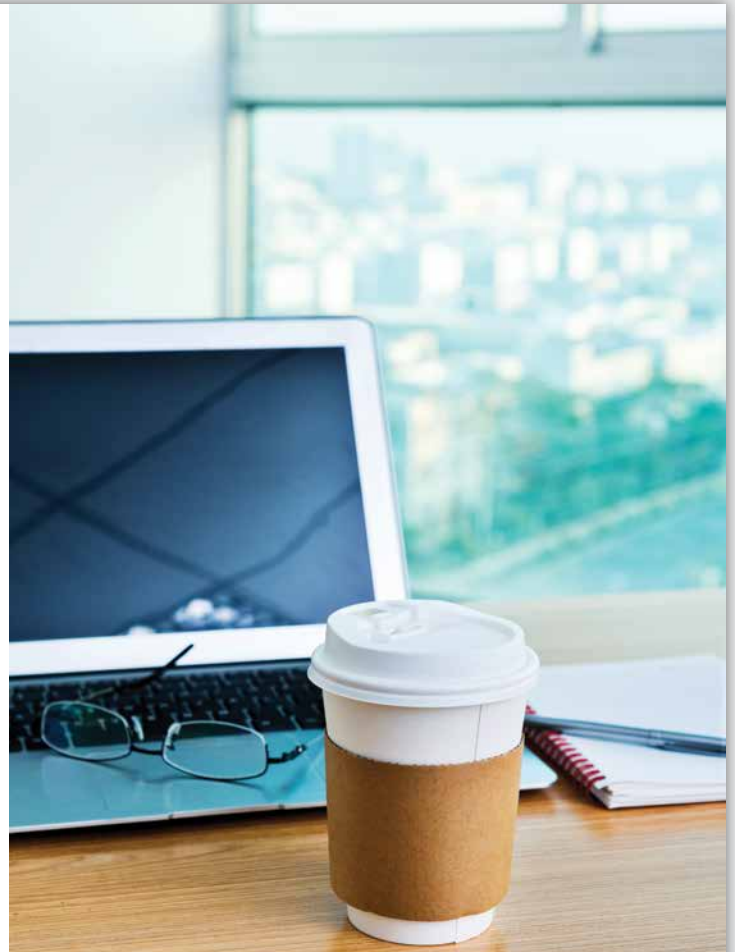
- ✓ **Official telework program is not needed.** Permitting an employee to telecommute can be a reasonable accommodation even if there is no official telework program.³
- ✓ **Disability causes substantial limitations.** Telecommuting may be required if an employee's disability causes substantial limitations on standing, sitting, etc., that interfere with commuting.
- ✓ **Assess on an individual, case-by-case basis.** Employers must assess requests to work at home on an individual, case-by-case basis by engaging in an "interactive process" with the at-issue employees. Employers should request and carefully review information from employees to decide whether they can perform all of the essential job functions outside the workplace.⁴

1. 42 U.S.C.S. § 12112(b)(5)(A). 2. 29 C.F.R. § 1630.2(o). 3. See [Work at Home/Telework as a Reasonable Accommodation](#). 4. See [Morris-Huse v. Geico](#), 2018 U.S. Dist. LEXIS 14284, at *25 (M.D. Fla. Jan. 30, 2018) ("No bright-line test has been established for determining whether physical presence is an essential function of a job, or whether telecommuting is a reasonable accommodation."); [Solomon v. Vilsack](#), 763 F.3d 1, 10 (D.C. Cir. 2014) ("Determining whether a particular type of accommodation is reasonable is commonly a contextual and fact-specific inquiry.")

Before deciding, employers should assess the following factors:

- ✓ Can the employer adequately supervise the employee remotely?
- ✓ Do the employee's duties require access to equipment or tools that are not available outside the workplace?
- ✓ Is face-to-face interaction and coordination of work with other employees needed?
- ✓ Is in-person interaction with outside colleagues, clients, or customers necessary?⁵
- ✓ Does the employee need immediate access to documents or other information located only at work?⁶
- ✓ Are coworkers with similar roles and responsibilities allowed to telecommute?⁷
- ✓ Has the employee in question teleworked during core business hours in the past "without any attendance issues or decline in work product"? ⁸
- ✓ Does an accurate, up-to-date job description list in-person presence as an essential function?⁹

Remember, even if the employer concludes that some job duties must be performed on-site, the employer must still consider whether the employee can work part-time at home and part-time in the workplace.



Telecommuting Issues under the Fair Labor Standards Act (FLSA)

FLSA Overview

At its core, the Fair Labor Standards Act (FLSA)¹⁰ requires employers to pay nonexempt employees (1) at least minimum wage for all work performed and (2) at least one-half times an employee's regular rate of pay for hours worked over 40 in a week (i.e., "overtime hours"). Complicating matters, the FLSA requires an employer to compensate an employee not only for work that the employee has expressly directed, but also for work not requested but "suffered or permitted" to be performed.¹¹

This includes situations where an employee works overtime without permission but the employer "knows or has reason to believe" the employee is continuing to work.¹²

Telecommuting is often viewed as problematic because it can be difficult for an employer to monitor telecommuters' hours when they are working off-site. But, FLSA compliance and telecommuting arrangements are not mutually exclusive.

5. See [Hall v. Verizon N.Y.](#), 2017 U.S. Dist. LEXIS 122729, at *12-13 (S.D.N.Y. July 26, 2017) (finding physical presence of employee was essential function of job where employee conceded that she attended regular, in-person client meetings). 6. See, e.g., [Sampers v. Providence St. Vincent Med. Ctr.](#), 675 F.3d 1233, 1238-39 (9th Cir. 2012) (neonatal nurse who provided direct patient care); [E.F.O.C. v. Yellow Freight Sys., Inc.](#), 253 F.3d 943, 949 (7th Cir. 2001) (forklift operator); [Hypes v. First Commerce Corp.](#), 134 F.3d 721, 726 (5th Cir. 1998) (loan review analyst who used confidential documents that could not leave the office); [Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal.](#), 31 F.3d 209, 213 (4th Cir. 1994) (teacher). 7. See, e.g., 29 C.F.R. § 1630.2(n)(3)(vi) ("Evidence of whether a particular function is essential includes . . . [t]he work experience of past incumbents in the job . . ."); [EEOC v. Ford Motor Co.](#), 782 F.3d 753, 774 (6th Cir. 2015) ("[T]he telecommuting arrangements of other resale buyers undercut Ford's claim that, at any given moment, resale buyers must engage in spur of the moment, face-to-face troubleshooting in order to perform their jobs effectively."). 8. [Mosby-Meachem v. Memphis Light, Gas & Water Div.](#), 883 F.3d 595, 605 (6th Cir. 2018). 9. 29 C.F.R. § 1630.2(n)(3)(ii) ("Evidence of whether a particular function is essential includes . . . [w]ritten job descriptions[.]."). 10. 29 U.S.C.S. § 201 et seq. 11. See [U.S. Department of Labor Wage and Hour Division Fact Sheet #22](#) (July 2008). 12. 29 C.F.R. § 785.11.

Mitigate Risk of Off-the-Clock and Overtime Claims

To mitigate the risk of teleworker off-the-clock and overtime claims, employers should consider taking the following steps:

- ✓ **Use software that can accurately record and submit hours remotely.** Direct teleworkers to use software that allows them to accurately record and submit their hours remotely. There are a number of easy-to-use timekeeping smartphone applications. Some are even free. In addition, require teleworkers to agree in writing that they will use the firm-recommended software to document time spent working.
- ✓ **Create a written policy.** Adopt a written policy requiring all workers, including teleworkers, to record all hours worked contemporaneously.
- ✓ **Adopt a written policy prohibiting unauthorized overtime.** Adopt a written policy prohibiting unauthorized overtime, strictly monitor for compliance with that policy, and impose discipline for any violations. While an employer may still have to pay overtime upon an employee's first infraction, if the employee continues to work overtime following discipline, the employer can credibly argue that it did not "suffer or permit" the work.
- ✓ **Assume commute time by teleworkers is not normal travel time.** Assume that any commute time by teleworkers (i.e., to work in person for a meeting or otherwise) is not normal travel from home to work and compensate teleworkers for such time. To reduce costs, employers can try to limit the occasions when a teleworker is required to come to the office.

Immigration Reform and Control Act (IRCA) Compliance

ICRA Overview

Congress enacted Immigration Reform and Control Act (IRCA)¹³ in 1986 to prevent unauthorized employment of foreign workers by requiring U.S. employers to verify their U.S. workforce. Specifically, IRCA requires employers to complete the Form I-9 verification process for all new hires to confirm their valid U.S. work authorization as citizens, U.S. permanent residents, asylees, or work-authorized foreign nationals. This process involves new hires presenting their employers with specific types of required original documentation evidencing their U.S. legal work authorization and identity and completing their section of the Form I-9 on or before their first day of hire. The employer must thereafter complete the verification section of the Form I-9 within three business days of the employment start date to confirm the validity of the documents presented.¹⁴

Consider Immigration Violation Risks When Hiring Teleworkers without First Meeting

Although an employer could feasibly hire a teleworker without first meeting him or her in person by having an off-site authorized representative complete the verification of original documents presented by the employer for completing the Form I-9 verification process, keep in mind that there are certain risks inherent in this approach, including:

- ✓ **Improper completion of Form I-9.** Employers are still liable for any violations resulting from the improper completion of the Form I-9s by off-site authorized representatives.¹⁵
- ✓ **High civil penalties.** If found liable, civil penalties can number in the hundreds to thousands of dollars per each Form I-9 violation.
- ✓ **Unwarranted security by federal authorities if violations are found.** A systematic pattern of Form I-9 violations can also bring unwanted scrutiny and targeting by federal authorities that could lead to more serious charges and fines.



¹³ 8 U.S.C.S. § 1101 et seq. ¹⁴ See U.S. Citizenship and Immigration Services (USCIS) M-274 I-9 Handbook at § 4.0 for details. ¹⁵ See U.S. Citizenship and Immigration Services (USCIS) M-274 I-9 Handbook at § 4.0.

Health and Safety Issues

OSHA Overview

The Occupational Safety and Health Act of 1970 (OSHA),¹⁶ which was passed to assure U.S. employees safe and healthful working conditions, applies to every private employer who has any employees doing work in a workplace in the United States. Covered employers must provide a workplace free from recognized, serious hazards, record work-related injuries and illnesses, and comply with OSHA standards and regulations.

While home offices are workplaces covered by OSHA, the U.S. Department of Labor has advised that it:

- ✓ Will not conduct inspections of employees' home offices
- ✓ Does not expect employers to conduct such inspections
- ✓ Will not hold employers liable for employees' home offices¹⁷

If OSHA receives a complaint about a home office, it will inform the employee of OSHA's policy and, only upon request, will informally apprise an employer of a complaint regarding the conditions of a home office.¹⁸ 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.¹⁹

Promote Safe Working Conditions for Teleworkers

Although OSHA does not require employers to ensure that their teleworkers' home offices are safe and healthful, there are benefits to promoting safe working conditions for teleworkers, including:

- ✓ **Required to record any work-related injuries and illnesses of telecommuting employees.** Employers may be required (due to size or industry classification) to record any work-related injuries and illnesses experienced by telecommuting employees. In the context of teleworkers, 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."²⁰
- ✓ **Liable for any devices or electronic platforms used by teleworkers.** Employers could be held liable for any devices or electronic platforms provided to employees to facilitate telecommuting.²¹
- ✓ **Workers' compensation could cover injuries.** Workers' compensation could cover injuries incurred at a home office during the course and scope of employment.

For these reasons, consider issuing employees safety checklists and/or tips that address the following topics:

- ✓ Fire safety (working smoke detector in area, access to unobstructed exits, etc.)
- ✓ Electrical safety (e.g., use of surge protectors, proper extension cords, and power strips)
- ✓ Workstation design and arrangement (ergonomics)
- ✓ Emergency procedures (access to first aid kit and evacuation plan)



¹⁶, ²⁹ U.S.C.S. § 651 et seq. ¹⁷ See OSHA Instruction, Directive Number CPL 2-0-125, "Home-Based Worksites" (Feb. 25, 2000). ¹⁸ Id. ¹⁹ Id. ²⁰ U.S. Department of Labor, OSHA Standard Interpretations, "Determining work-relatedness for injuries in the home when telecommuting" (Mar. 30, 2009). ²¹ See U.S. Department of Labor, OSHA Instruction, "Home-Based Worksites," Directive No. CPL 2-0-125 (February 25, 2000). ("Employers are responsible in home worksites for hazards caused by materials, equipment, or work processes which the employer provides or requires to be used in an employee's home.")

Telecommuting Policies

If an employer decides to offer telecommuting arrangements, it should prepare and disseminate a telecommuting policy and/or guidelines to ensure consistency amongst employees who participate in such arrangements. Every employee authorized to participate in a telecommuting arrangement should also sign a telecommuting agreement.

Draft a Telecommuting Policy

A model telecommuting policy should:

- ✓ Describe the process for requesting a telecommuting arrangement, including identifying the relevant decision maker(s)
- ✓ Explain any eligibility criteria, such as performance expectations and prior length of employment
- ✓ Clearly state the company's expectations (substantive and ministerial) for telecommuters (e.g., the telecommuter must perform all duties of his or her current role in a manner satisfactory to his or her manager; be available during the company's regular hours (and define those hours); keep their home workspace in a clean, professional, and safe condition; comply with the company's timekeeping, overtime, and paid time off policies and procedures; record all time worked in the manner directed by the company; etc.)
- ✓ Detail what telecommuting expenses will be reimbursed and how (most typical are telephone charges, internet service, and office supplies)
- ✓ State that management will regularly revisit the telecommuting arrangement to determine whether it continues to be appropriate and effective

Create a Model Telecommuting Arrangement


A model telecommuting arrangement should identify the following information:

- ✓ The telecommuter's alternative workplaces
- ✓ The number of hours the employee is expected to work at the alternative workplace and the specific hours the employee will keep
- ✓ Any special equipment needed
- ✓ The proposed start and end dates of the arrangement

Related Content

For an overview of practical guidance on the novel coronavirus (COVID-19) covered in many practice area offerings in Lexis Practice Advisor, including Labor & Employment, see

> [CORONAVIRUS \(COVID-19\) RESOURCE KIT](#)

 **RESEARCH PATH:** [Labor & Employment > Workplace Safety and Health > Occupational Safety and Health Act > Practice Notes](#)


For advice on dealing with coronavirus in the workplace, see

> [9 CORONAVIRUS SCENARIOS THAT COULD TRIP UP EMPLOYERS](#)

 **RESEARCH PATH:** [Labor & Employment > Trends & Insights > Articles](#)

For an overview of OSHA, see

> [OSH ACT REQUIREMENTS, INSPECTIONS, CITATIONS, AND DEFENSES](#)

 **RESEARCH PATH:** [Labor & Employment > Workplace Safety and Health > Occupational Safety and Health Act > Practice Notes](#)

For practical guidance on reasonable accommodation under the ADA, see

> [AMERICANS WITH DISABILITIES ACT: GUIDANCE FOR EMPLOYERS](#)

 **RESEARCH PATH:** [Labor & Employment > Discrimination, Harassment, and Retaliation > EEO Laws and Protections > Practice Notes](#)

The telecommuting arrangement should include a certification that the telecommuter has reviewed, understands, and agrees to follow the telecommuting guidelines, as well as all company policies and procedures, including, but not limited to the following:

- ✓ **The telecommuter will remain an at-will employee.** The telecommuter will remain an at-will employee during the term of this Agreement, and the Agreement in no way creates either an express or implied employment contract for any particular period.
- ✓ **The telecommuter's job responsibilities will not change.** The telecommuter's job responsibilities will not change due to the telecommuting arrangement, except as may be specifically outlined and approved in his/her Agreement.
- ✓ **The telecommuter will continue to be subject to all company policies.** The telecommuter will continue to be subject to all company policies and procedures during the term of the Agreement.
- ✓ **The telecommuter's work location is free from hazards.**
- ✓ **The telecommuter will maintain safe working conditions.** The telecommuter will maintain safe working conditions and practice appropriate safety habits.
- ✓ **The terms of the Agreement may be revised by the company at its discretion at any time during the term of the Agreement.**
- ✓ **The Agreement is voluntary and does not create an entitlement to a continued telecommuting arrangement.** If the Agreement is terminated, the company will generally provide reasonable advance written notice to the telecommuter to give the telecommuter time to transition back to the primary workplace.
- ✓ **The agreement to enter into a telecommuting arrangement is understood to be a benefit available to qualifying employees.** It is not a right owed to any employees, nor an obligation owed by the company.



Workplace Posters

Various federal and state labor laws require employers to post posters notices and advising workers of particular laws and regulations in the workplace, in conspicuous locations where they are easily visible to all employees. These requirements extend to remote workers too.

To ensure teleworkers view these posters, employers should:

- ✓ Electronically post the posters to the company intranet
- ✓ Physically mail the teleworker their own set of posters
 - **Out-of-state teleworkers.** For out-of-state teleworkers, employers should be sure to provide the posters covered by the laws where the teleworkers work and the laws at the location of the company's headquarters.

Maintaining physical paper copies of posters at the office is likely only sufficient if the teleworker visits the office frequently.

Information Security

Employers with remote workers need to be mindful of data security, which can be compromised by risky behavior by remote workers, including their failure to follow company procedures.

To mitigate security risk, employers should consider memorializing the following instructions and requirements as part, or an addendum to, its telecommuting policy:

- ✓ Make sure that all devices owned by the teleworker are data encrypted.
- ✓ Require teleworkers to use a secure connection while remotely accessing company data.
- ✓ Reiterate instructions around confidentiality.
- ✓ Instruct teleworkers never to use their personal email address for work communications.
- ✓ Prohibit teleworkers from working over public Wi-Fi (or, at a minimum, from sending or accessing sensitive information over public Wi-Fi).
- ✓ Have workers save data on a central file database rather than locally on their laptops.
- ✓ Train employees to identify suspicious email files and to bring these to management's attention.
- ✓ At the start of any teleworker arrangement, itemize all company equipment issued to the teleworker and ensure that all such equipment is promptly returned upon the conclusion of the arrangement and/or the employee's separation from the company.



Training and Monitoring Telecommuting Employees

Employers often express concern over how to manage, train, and supervise telecommuters. However, modern technology can often allay these concerns.

Employers can use technology to stay in close contact with their teleworkers by:

- ✓ Establishing daily or weekly check-ins using video and screen-sharing technology, where the team can discuss ongoing and upcoming projects
- ✓ Supplementing this daily/weekly contact with a persistent chat open to all members of the team

To ensure teleworkers meet performance expectations, employers should adopt the following measures:

- ✓ **Establish clear performance objectives.** Action plans with specific timetables are particularly useful in this regard.
- ✓ **Track productivity by achievement of predefined goals.** Track productivity by achievement of predefined goals rather than with software showing when employees are logged in or off the network, which may foster distrust by teleworkers.
- ✓ **Schedule quarterly check-ins with individual telecommuters.** Schedule quarterly check-ins with individual telecommuters to discuss performance, as well as any issues the employee may be experiencing as a function of working remotely.
 - **Keep in mind.** While such attempts to monitor productivity are entirely lawful, employers should take care not to impose higher work standards on teleworkers. For example, teleworkers should not be expected to work longer hours than their peers merely because they are working from home.

E-signatures

Because teleworkers by definition do not regularly report to a physical office, it can be difficult for employers to ensure that they complete and return—in a timely manner—physical agreements and other documents that require traditional physical or “wet” signatures, particularly if the teleworker does not have access to a scanner or fax. Allowing teleworkers to sign and transmit such documents electronically can prove much more convenient and potentially more secure.

Before an employer decides to allow certain documents to be e-signed, it should consider the following key factors:

- ✓ **Enforceability.** Any benefit gained by allowing a teleworker to e-sign (e.g., a contract) is obviously lost if the signature is not subsequently enforceable in a court of law. Accordingly, employers must determine whether e-signatures are accepted in the jurisdiction in which they are transacting and if so, whether the document type in question can be e-signed.
 - **Federal law.** With the passage of the federal Electronic Signatures in Global and National Commerce Act in 2000 (the E-Sign Act),²² the use of a digital signature in the United States is as legally valid as a traditional written signature, subject to a few exceptions, such as court orders or notices, official court documents, and the cancellation or termination of health insurance or benefits or life insurance benefits.
 - **State law.** The E-Sign Act does not preclude states from limiting the use and effectiveness of e-signatures provided certain prerequisites are met. Most states, including New York, Massachusetts, New Jersey, and California, as well as Washington, D.C., have adopted local versions of the E-Sign Act, though some prohibit the use of electronic documents for all documents. For example, New York prohibits the use of electronic signatures on, inter alia, wills, trusts, and powers of attorney and health-care proxies (except for contractual beneficiary designations). In addition, courts in certain jurisdictions have refused to enforce employee agreements when the authenticity of the signature could not be established by the employer.²³
- ✓ **Best practice.** As a best practice, employers should put their e-signature policy in writing in a widely disseminated and available document, such as an employee handbook. In addition, documents with electronic signatures should ideally include before the e-signature an employee affirmation like the following: “By providing my electronic signature credentials and selecting the submit button below, I accept the terms and conditions herein. I understand that this electronic signature is as legally binding as if physically signed by me in writing. No certification authority or other third-party verification is necessary to validate my electronic signature.”
- ✓ **Risk prevention.** Although a wet signature could theoretically be forged, generally, e-signatures present greater risk for fraud than wet signatures. Therefore, employers are well advised to adopt controls to ensure that e-signatures are authentic. Common controls include requiring an individual to enter a password unique to the signatory, inputting a code sent by text message or email to the signatory, or answering a predetermined security question. These same measures also serve to authentic an employee’s signature. Several companies, such as DocuSign, offer e-signing tools that allow employers to upload documents, set signature locations, send documents via email, and prompt recipients to e-sign.



²² 15 U.S.C.S. § 7001 et seq. ²³ See, e.g., *Ruiz v. Moss Bros. Auto Group, Inc.*, 232 Cal. App. 4th 836, 843–44 (2014) (where plaintiff testified that he could not recall e-signing the agreement in question, the fact that the agreement purportedly bore his electronic signature and a date and time stamp did not establish that the signature was in fact his).

Additional Telecommuting Best Practices

To ensure that telecommuting aids employers and their teleworker(s), employers should adopt the following additional best practices:


- ✓ **Assess technology.** Assess technology on an annual basis to make sure that teleworkers are appropriately supported and connected.
- ✓ **Determine whether to disclose telecommuting arrangements to clients.** Consider any obligations to disclose teleworking arrangements to clients.
- ✓ **When terminating a telecommuting arrangement, consider legal consequences.** If planning to terminate a telecommuting arrangement, make sure to consider the legal consequences first and save all records surrounding the decision making.
- ✓ **Remember to include teleworkers in promotions and raises.** Do not overlook teleworkers for promotions and raises or otherwise treat teleworkers differently than employees who are physically present at the office.
- ✓ **Instruct managers not to regularly communicate with nonexempt teleworkers.** Instruct managers not to regularly communicate with nonexempt teleworkers who may be inclined to respond immediately, thereby creating potential FLSA compliance issues if not compensated for such work.
- ✓ **Train managers on working with teleworkers.** Train managers on how to successfully manage an employee transitioning from working at the office to working remotely.
- ✓ **Comply with payroll laws.** Make sure the company complies with payroll laws, which typically depend on the employee's location, not where the employer's office is located.
- ✓ **When telecommuting arrangement ends, collect all company equipment, data, and documents.** After a telecommuter's employment ends, remember to collect all equipment, data, and documents in the telecommuter's possession. **L**

[Jeffrey H. Ruzal](#) is a member of Epstein Becker Green's Employment, Labor & Workforce Management practice. 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. [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. She represents clients in employment-related litigation on a broad array of matters, including claims of discrimination, harassment, retaliation, wrongful termination, and breach of employment contract.

Related Content

For federal workplace notice and posting requirements, see

> [WORKPLACE NOTICE AND POSTING REQUIREMENTS CHART \(FEDERAL\)](#)

 **RESEARCH PATH:** [Labor & Employment > Screening and Hiring > Hiring and Onboarding > Practice Notes](#)


For more information on state laws prohibiting disability discrimination and/or requiring reasonable accommodations, see

> [DISCRIMINATION, HARASSMENT, AND RETALIATION STATE PRACTICE NOTES CHART](#)

 **RESEARCH PATH:** [Labor & Employment > State Law Surveys and Content Guides > State Law Content Guides > Practice Notes](#)


For more information on state wage and hour laws, see


> [WAGE AND HOURS STATE PRACTICE NOTES CHART](#)

 **RESEARCH PATH:** [Labor & Employment > Wage and Hour > Statutory Requirements and Exemptions > Practice Notes](#)

For practical guidance on Form I-9 compliance, see

> [I-9 POLICIES AND BEST PRACTICES FOR I-9 COMPLIANCE](#)

 **RESEARCH PATH:** [Labor & Employment > Screening and Hiring > Hiring and Onboarding > Practice Notes](#)

 **RESEARCH PATH:** [Labor and Employment > Employment Policies > Terms of Employment > Checklist](#)