

Telework 2021: Employment Law Issue Spotting

In the wake of the global COVID-19 pandemic, nearly half of the United States workforce teleworked throughout 2020. Now, with declining cases and increasing vaccination numbers, there is hope that the pandemic will soon be over, or at least manageable to a point where normal life will resume, and that workers will once again be able to return to the office.

But employers and employees alike have found a silver lining in the pandemic. From reduced overhead costs for businesses to eliminating or reducing commute time for workers, there are signs that telework may be, on some level or another, a permanent fixture in the American workforce beyond the pandemic. This trend could be especially true in Oregon, where some of the top employment sectors include professional, administrative, and technical and support services—jobs that tend to be more conducive to telework.

Either due to government orders or as an employer-imposed precaution, telework was thrust upon us in the last year without much chance to think about the legal implications of employees working from home. Absence of employee bodies in a traditional workspace does not mean that the usual workplace rules do not govern. The following is a brief overview of some of the employment laws implicated by telework—issues that may stick around if the telework trend continues beyond the pandemic.

Taxes

Employers may now have greater state tax waters to navigate if their employees reside in states other than where the employers' offices are located. From local franchise tax to certain types of business tax and state income tax, employers' tax liabilities could be adding up unwittingly. For employees whose employers' offices are in a state *without* income tax (for example, Washington) but who reside in, and work remotely from, a state *with* income tax (for example, California or Oregon), they may be incurring unexpected tax liability.

Workers Compensation

Oregon's State Accident Insurance Fund ("SAIF") has indicated that injuries that arise out of and in the course of employment while a worker is teleworking are treated much the same as injuries that occur in the office. In one notable example, the Oregon Court of Appeals held that an injury sustained by a worker who tripped over her dog was compensable. SAIF has indicated that the caselaw is still developing on this front, but injuries that occur while a worker is in their home office are potentially compensable, even if the object or cause of the injury (e.g., a dog) would not have been present in the normal office.

Americans with Disabilities Act

Telework has long been a thorn in the side of the U.S. Equal Opportunity Commission ("EEOC") where one of the more common telework issues to arise under the Americans

with Disabilities Act is whether telework can amount to a reasonable accommodation. The EEOC announced guidance late last year that stated that just because an employer offered telework during the pandemic does not mean that the employer has to offer telework on a continuous basis. However, many employers and employees are now comfortable conducting business remotely and an employees' innocuous telework request might also be an accommodation request—even if the employee does not explicitly mention their medical condition or use the word “accommodation.”

Wage and Hour

In a 2019 case, *Maza v. Waterford Operations LLC*, the Oregon Court of Appeals held that employers face strict liability when employees miss meal breaks notwithstanding the employer's good faith effort to ensure employees actually take their breaks. It is easy to envision a teleworker who, on a busy day, grabs their lunch and sits back down to their computer in order to keep up with production demands. But it is not so easy for employers to monitor their employees—that is, to see if they are actually moving away from their computers during breaks. Similar issues exist for non-exempt employees who start their workday a little early or end their workday a little late to get the job done, but the employer does not know and is not paying overtime compensation.

The aforementioned issues are a snapshot of *some* of the employment law issues arising from the expanded world of telework; many other legal issues loom in the background. Moving forward, the conservative approach is to assume that any legal issue that can arise in a traditional office space can arise at a home office. It is prudent to keep a close eye on the development of administrative rules and caselaw regarding telework, even as the pandemic ends, as working from home remains popular with the workforce.