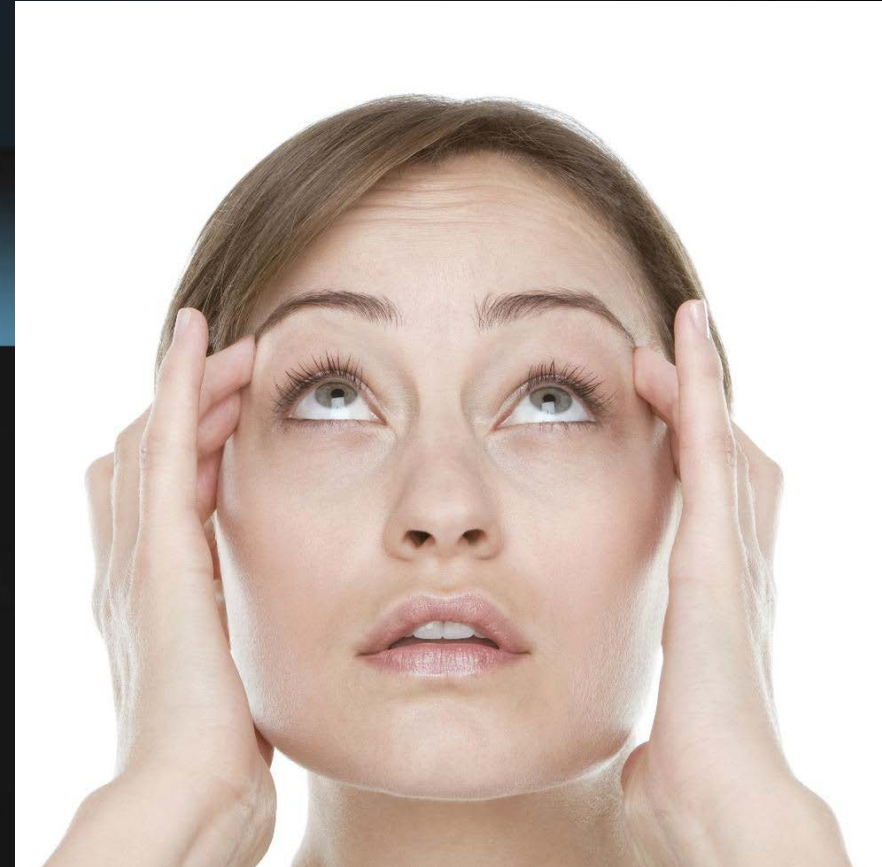


Legal Remedies for Human Resource Headaches

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33rd Annual Conference
KY SHRM



Telecommuting

MCBRAYER

[The Headache]

- With the increasing availability of internet-based communication and other advanced technologies, it is easier than ever to work as efficiently at home as it is in the office, so what must employers do when confronted with requests to telecommute? What are best practices?
- What happens when an employee requests telecommuting as a reasonable accommodation for a disability under the Americans with Disabilities Act?



Key Considerations for Addressing Telecommuting Requests



- Wage and hour compliance
 - Governing minimum wage laws and overtime compensation apply
 - How do you keep track of telecommuting hours?
 - What happens when exempt employee fails to telecommute the requisite number of hours?
 - “On call” time may be compensable for non-exempt employees when employee cannot use the time effectively for personal pursuits
 - Do you have a telecommuting agreement? Does it specify hours, schedules and how everything will be recorded?
 - Rest breaks and meal breaks must be provided per law, just as if employee was on location

Key Considerations for Addressing Telecommuting Requests

- Workers' compensation, OSHA compliance and risk management
 - What happens when an employee is injured at home while telecommuting?
 - Employers should review workers' compensation insurance policies to make sure they cover injuries arising from home-based employment
 - What if telecommuting employee is in a different state? Other state laws may govern workers' compensation insurance.
 - Is an employee's home a job site for OSHA and risk purposes?
 - OSHA does not require employers to inspect employee's home for workplace safety.
 - If hazardous materials are in use, employers should still ensure that telecommuters comply with workplace safety policies, and provide these policies to the employee in writing
 - Who is responsible for safety when business visitors are received at the home?
 - What happens when family members are injured in the telecommuting "work" area?
 - These should be addressed in a telecommuting agreement.

Key Considerations for Addressing Telecommuting Requests

- Miscellaneous issues
 - Tax issues across city/county/state borders
 - Intellectual property rights and security
 - Is there a danger to company IP on employee's personal home computer?
 - Does employee's home work area provide adequate security against cyber attack?
 - Employment discrimination issues in the administration of a telecommuting program
 - Telecommuting privileges must be applied in a nondiscriminatory manner

Key Considerations for Addressing Telecommuting Requests

- ADA and reasonable accommodation
 - Can telecommuting be a reasonable accommodation under the ADA/ADAA? Yes.
 - MUST telecommuting requests be granted as reasonable accommodation?
 - NO, not always.
 - EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015)
 - If a job requires face-to-face interaction and coordination of work with other employees, interaction with clients or customers or even access to information/documents only located at the workplace as an essential function of the job, then telecommuting is not reasonable as an accommodation.
 - The question will always go to whether all essential functions of the job can be performed via telecommuting.

Compensation for Non-Exempt Employees

[The Headache]

- Do I need to compensate a non-exempt employee for travel time on an overnight flight? What about while that employee is staying away from home on a multiday business trip?
- I heard that my non-exempt employees must be compensated for answering work-related email off the clock, even when I tell them not to – is that true?
- I make all my non-exempt employees attend a food service training course after business hours, but I don't pay them for their time – is that okay?



Non-Exempt Employees – Travel Time

29 CFR 785.39 states:

"As an enforcement policy the Divisions will not consider as worktime that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile."



Non-Exempt Employees – Travel Time

What that means:

- Only travel time to:
 1. overnight stays,
 2. when such travel occurs outside of the normal work hours of the employee,
 3. regardless of the day of the week,and only when the employee is not otherwise working, is exempt from payment.
- Travel during work hours or travel to one-day assignments in another city should be paid time.
- ANY driving that is done at the direction of the employer is paid time, unless the employee has the option to use another form of travel and chooses to drive instead.

Non-Exempt Employees – Off-the-clock Work

- The key words of the Fair Labor Standards Act (“FLSA”): “suffer or permit to work.”
- If you know or have reason to know that an employee is performing off-the-clock work and she or he is not being compensated for it by you, you may be in violation of the FLSA.
- Employees can claim violations of the FLSA for up to three years after the alleged violation, and employees can also recover “liquidated damages,” which is another amount equal to the amount of the back pay added on to the back pay.

Non-Exempt Employees – Off-the-clock Work



Off-the-clock work:

Answering emails and text messages; taking business phone calls; loading or unloading trucks; paperwork; post-shift work such as cleanup; any work that is done on behalf of the employer, *even if the employer doesn't explicitly request the work.*

Non-Exempt Employees – Off-the-clock Work

What can you do about it?

- **Institute clear policies** – off-the-clock work is not allowed, period.
 - Provide clear guidelines – what is off-limits, etc.
- **Train supervisors and managers** - help them understand what counts as off-the-clock work.
- **Limit access to technology** – if employees can't access email or other work tech after hours, they can't perform off-the-clock work.

Non-Exempt Employees – Off-the-clock Work

What can you do about it?

- **Don't let employees stay late/keep working if they aren't on the clock** – if they have clocked out, send them home and don't let them stick around to “finish up” something. That is compensable time.
- **Breaks and lunches** – Enforce policies where employees must leave desks during breaks, so they do not work during unpaid lunch hours, for example.

[Non-Exempt Employees – Off-the-clock Work]

Also, although this should go without saying:

DO NOT EVER ask your non-exempt employees to work off-the-clock. DO NOT ask them to answer emails, text messages or phone calls unless you have a robust system of time-keeping to make sure that work is compensated.

Non-Exempt Employees – Training Time

Must employees be paid for time spent in trainings?

Yes. 29 C.F.R. § 785.27

- Participation in training programs need not be counted as working time if all of the following criteria are met:
 - Attendance is outside of the employee's regular working hours;
 - Attendance is in fact voluntary;
 - The course, lecture, or meeting is not directly related to the employee's job;
 - The employee does not perform any productive work during such attendance.



Non-Exempt Employees – Training Time

Training that is NOT compensable (an example):

- An I.T. worker voluntarily takes college courses after hours, and the employer reimburses part of the worker's tuition, even if the courses improve the worker's performance for the employer.

[Bad Weather Policies]

The Headache

- Can an employer make a policy where employees must either use paid time off or go without compensation on a day when bad weather forces the employer to close for the day?



Bad Weather

- Nonexempt employees
 - Easy – employers are only required to pay nonexempt employees for hours spent doing actual work
 - Even when an employee was scheduled to work, if the business is closed due to bad weather, employer doesn't need to pay
 - Even when a worker is sent home early due to bad weather – only time worked that day is compensable

Bad Weather

- Exempt employees
 - Not so easy –
 - Exempt employees must be compensated for an entire week for any week that they work at all, so exempt employees must be paid for days the employer is closed due to bad weather
 - The only real exception is when a business is closed for an entire week and the employee does no work during that week
 - HOWEVER, exempt employees can be made to use their paid time off to compensate for bad weather closures (and this should be addressed in your employee handbook)
 - Caveat: if the employee does not have enough days left, the day cannot be docked from the employee's salary

Running Out of Leave

[The Headache]

- My exempt employee took all the mandated leave under the Family and Medical Leave Act, but still remains absent. What can I do?
- My employee needs time off for illness, but is not covered by FMLA. What can both I and the employee do?



Absence beyond FMLA Leave

- Leave for illness and disability
 - FMLA leave is 12 weeks in a 12-month period
 - ADA leave is unlimited so long as it is provided as a reasonable accommodation for a disability and doesn't create undue hardship on the employer
 - An employee may be eligible for ADA leave after FMLA leave, but only if the illness qualifies as a disability under ADA
 - Both FMLA and ADA provide job protection, although reasonable accommodations under the ADA cannot create undue hardship on the employer

Absence beyond FMLA Leave

- When an exempt employee does not come back to work after 12 weeks of FMLA leave:
 - To begin docking an exempt employee's salaried pay, that employee must be out the entire week, UNLESS employer has a bona fide, formal written sick leave policy that says otherwise and provides a scheme for compensating loss of salary due to sickness or disability
 - With a written plan in place, you can begin docking for full days missed once paid leave or insurance has been exhausted



Absence beyond FMLA Leave

- We'll let the federal rule (29 CFR 541.062) explain:

“Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law.”

Absence beyond FMLA Leave

- The rule does not dictate what you put into your plan, save for the fact that you must provide some sort of compensation coverage for days missed. It doesn't say how many days of coverage you must provide, however
- Also, FMLA allows for salary deductions for partial days for new child care or serious medical conditions if the absence qualifies under FMLA.
- Sick leave policies must be carefully drafted to account for these nuances



Absence beyond FMLA Leave

- What if my ill employee is not covered by FMLA and the illness is not a disability under ADA?
 - If the employee is exempt, DOL rules under the Federal Labor Standards Act prevent you from docking the employee's pay if the employee works any part of a week, absent a formal compensatory sick leave policy; otherwise, dock pay away
 - After that, employers can decide whether to keep or terminate an employee whose job is not protected by federal rules. Kentucky is an at-will employment state, and federal rules don't prevent employee termination when non-discriminatory or when the employee is not covered by ADA or FMLA

Any questions?

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