

Agenda

How COVID-19 Has
Changed How we Work

Remote Work Issues and Employees
Moving Out of State

Protecting Intellectual Property

ADA Accommodations



How COVID-19 Has Changed the Way Americans Work

Juliana Horowitz

Associate Director, Social and Demographic Trends Research

Pew Research Center 💥

Who we are: A nonprofit 'fact tank' that informs the public about the issues, attitudes and trends shaping the world. We are nonpartisan and nonadvocacy, meaning we do not take policy positions or make recommendations.

We are a subsidiary of The Pew Charitable Trusts, our primary funder. We partner strategically with philanthropists and institutional funders who share our commitment to impartial research and data that drive discussion.

What we do: Generate a foundation of facts to enrich public dialogue and support sound decision-making. We conduct public opinion polling, demographic research, content analysis and data-driven social science research.

Research Programs

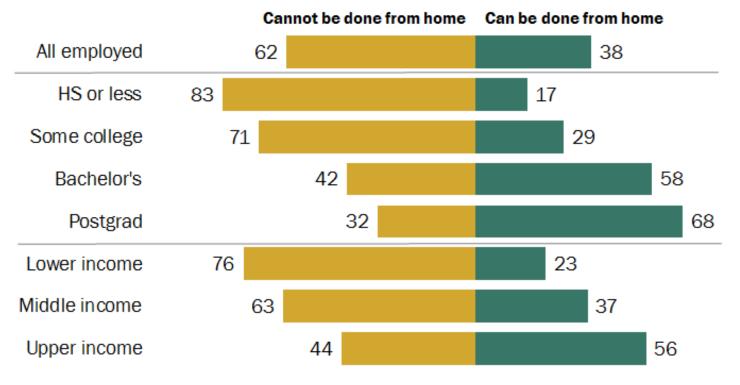
U.S. Politics & Policy
Journalism & Media
Social & Demographic Trends
Religion & Public Life
Internet & Technology

Science & Society
Global Migration & Demography
Global Attitudes & Trends
Research Methodology
Data Labs

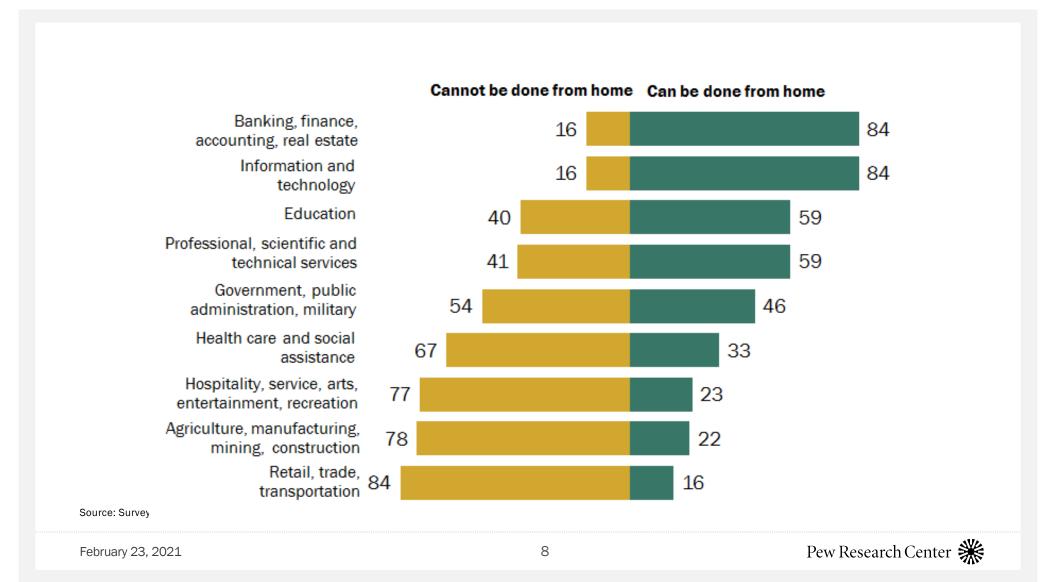
About the survey

- Nationally representative survey of 10,332 U.S. adults conducted online Oct. 13-19, 2020, using Pew Research Center's American Trends Panel; margin of sampling error is plus or minus 1.6 percentage points
- Findings based on nationally representative sample of 5,858 employed adults who have only one job or have multiple jobs and consider one of them their primary job

Percent of employed adults saying that, regardless of their current arrangement, for the most part, the responsibilities of their job ...

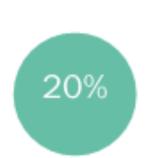


Note: "Some college" includes those with an associate degree and those who attended college but did not obtain a degree. Family income tiers are based on adjusted 2019 earnings.

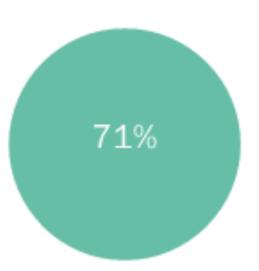


Among employed adults who say that, for the most part, the responsibilities of their job can be done from home, percent saying they ___ all or most of the time

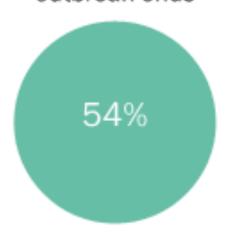
Worked from home before the coronavirus outbreak



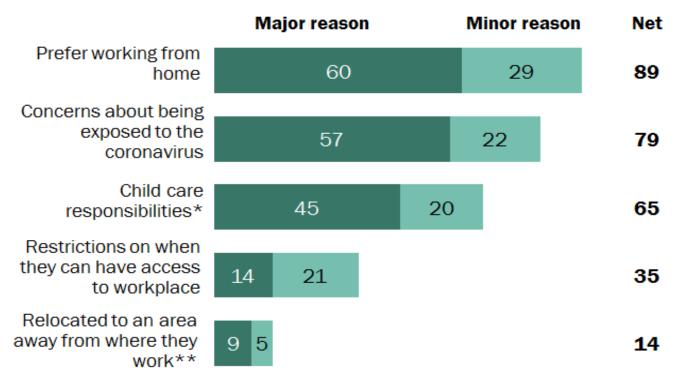
Currently are working from home



Would want to work from home after the coronavirus outbreak ends



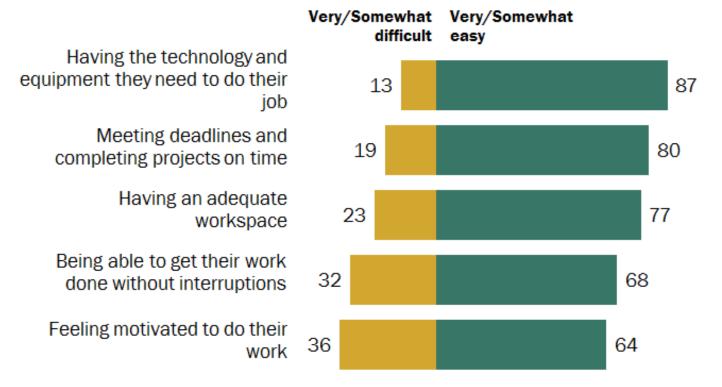
Among employed adults who are working from home all or most of the time and whose workplace is open, percent saying each of the following is a ____ why they're currently working from home

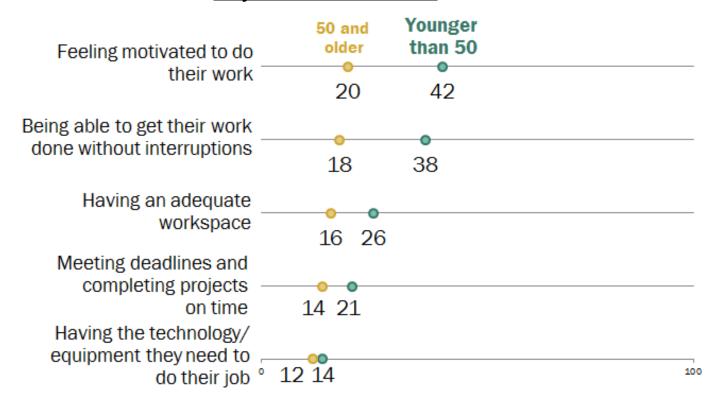


^{*} Among those with children younger than 18.

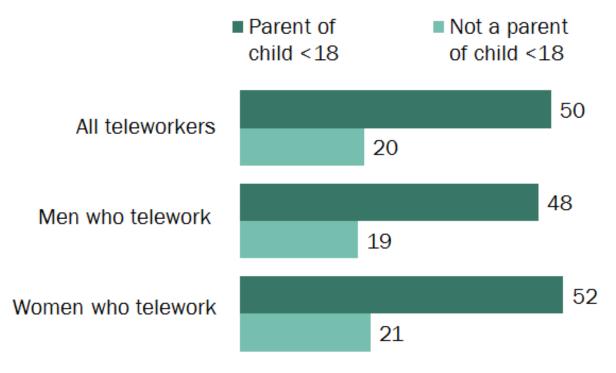
^{**} Either permanently or temporarily

Among employed adults who are working from home all or most of the time, percent saying, since the beginning of the coronavirus outbreak, each of the following has been ____ for them

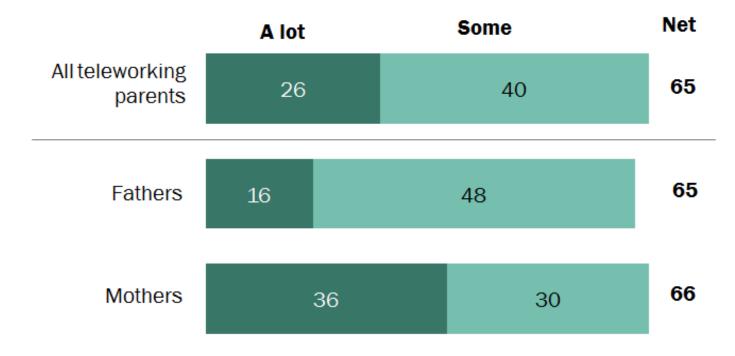




Among employed adults who are working from home all or most of the time, percent saying, since the beginning of the coronavirus outbreak, it has been very or somewhat difficult for them to get their work done without interruptions

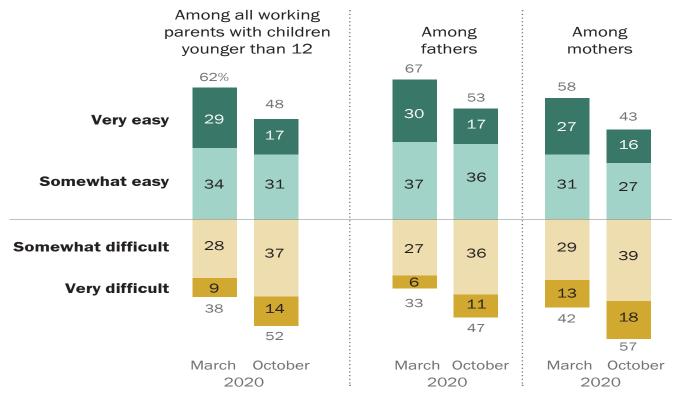


Among employed parents with children younger than 18 who are working from home all or most of the time, percent saying they have ___ childcare responsibilities while working from home



Note: Figures may not add to subtotals due to rounding. Source: Survey of U.S. adults conducted Oct. 13-19, 2020.

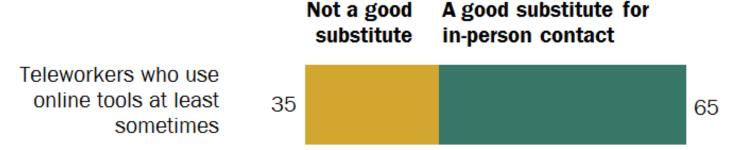
Among employed parents with children younger than 12, percent saying it has been ___ to handle childcare responsibilities during the coronavirus outbreak



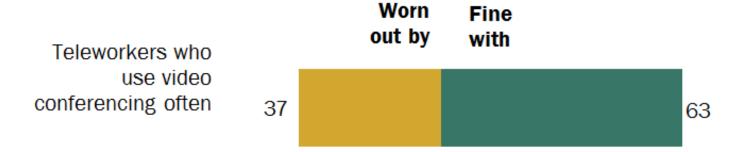
Note: Figures may not add to subtotals due to rounding. Source: Survey of U.S. adults conducted Oct. 13-19, 2020.

Among employed adults who are working from home all or most of the time, percent saying ...

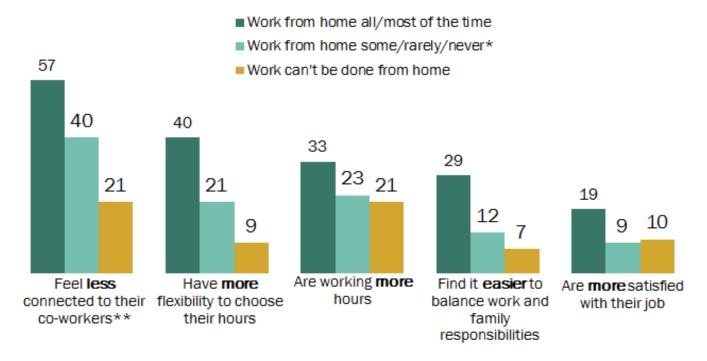
Online tools such as video conferencing or instant messaging are ...



They feel ___ the amount of time they spend on video calls or online conferencing



Among employed adults who are working in the same job as before the coronavirus outbreak, percent saying that, compared with before the outbreak, they ...



^{*} Based on those who say that, for the most part, the responsibilities of their job can be done from home.

^{**} This question was not asked of those who are self-employed and do not have any employees. Source: Survey of U.S. adults conducted Oct. 13-19, 2020.

Find our work

www.pewresearch.org

@pewresearch and @facttank

Subscribe to our newsletters at www.pewresearch.org/follow-us/

Follow us on social media



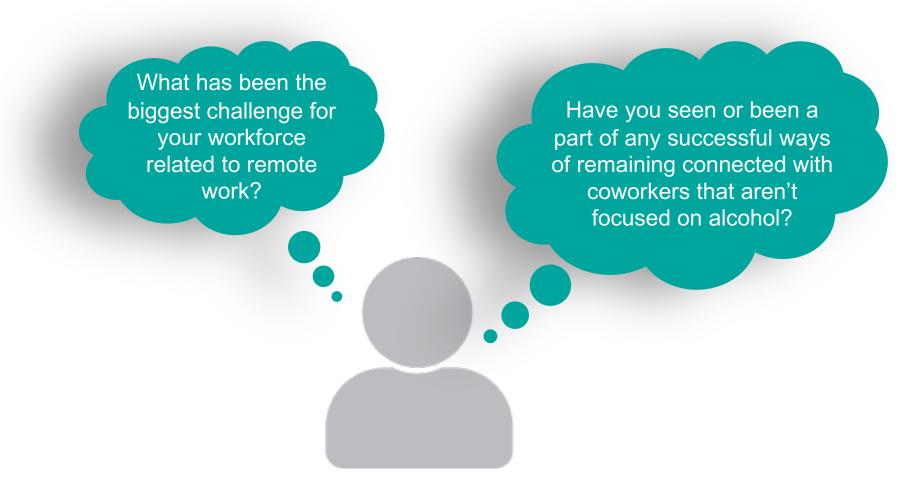




Drinking and the Teleworker

- Drinking during working hours on the rise.
- Overall 45% of teleworkers report drinking during working hours.
- 46% of teleworkers report logging off early to have a drink
- 60%+ of the respondents working remotely said virtual happy hours with co-workers have increased alcohol intake





POLL 1: What has been the biggest challenge for your workforce related to remote work?

- A. Employee engagement / motivation
- B. Technology issues
- C. Collaboration
- D. Meeting deadlines

POLL 1 Results



Vaccination and the ADA

- EEOC okays diagnostic COVID-19 tests as a condition of working/returning to work; neutral screening measures, such as temperature checks and symptom screening; and asking (and excluding) employees if they have tested positive for COVID-19
- Vaccinations more invasive, so added scrutiny.
- Administration of a vaccine is <u>not</u> an ADA medical examination, but information obtained before administration (such as to identify contraindications to vaccination) may be.
 - If vaccination is optional, answering pre-vaccination screening questions must be optional, and declining to respond may result only in disqualification from vaccination and no other adverse action
 - All responses to prescreening questions must be kept in confidential medical file.
 - Requiring proof of vaccination is <u>not</u> a medical inquiry. Asking why
 an employee is unable to vaccinate safely is a medical inquiry.



Vaccination and the Americans with Disabilities Act

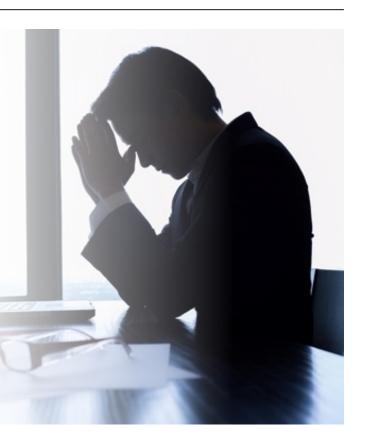
- Under the ADA, an employer may require vaccination to prevent a direct threat to the health or safety of individuals in the workplace.
- If a mandatory vaccination requirement could screen out an individual with a disability, employer must show employee would pose a direct threat due to a significant risk of substantial harm to health or safety of him/herself or others that cannot be eliminated or reduced by reasonable accommodation.

Direct threat test

- (1) the duration of the risk
- (2) the nature and severity of the potential harm
- (3) the likelihood that the potential harm will occur
- (4) the imminence of the potential harm
- If direct threat exists, consider reasonable accommodations that would allow employee to work (e.g., adjust job duties, telework, leave of absence) before excluding from workplace or terminating.

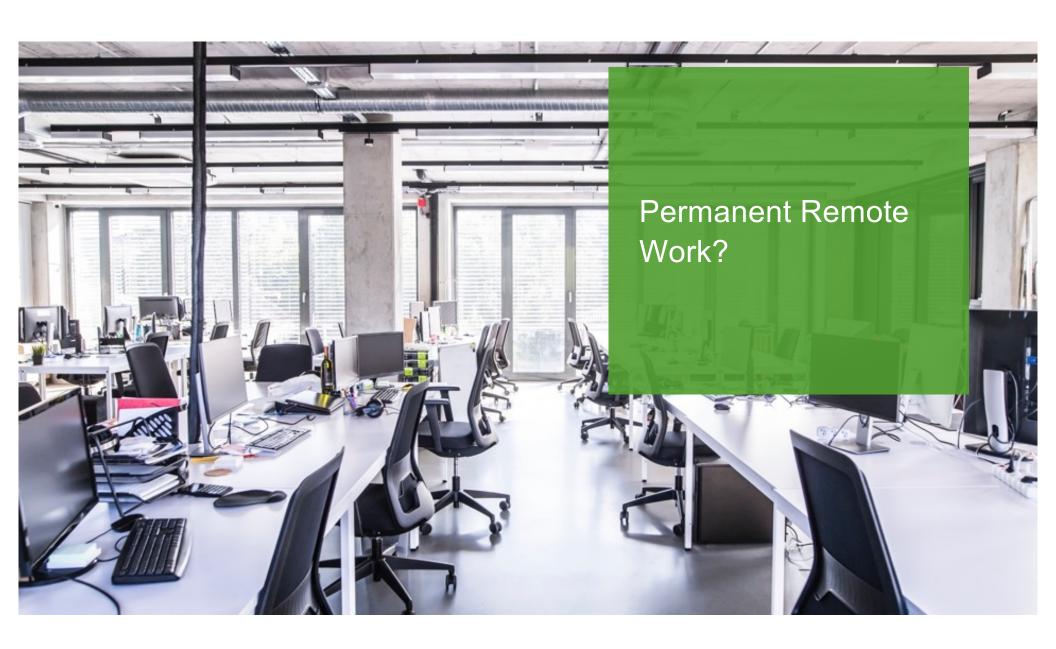
Vaccination and Title VII – Religious Accommodation

- Employee request for an exemption from mandatory vaccination due to his or her sincerely held practice or observance must be granted unless it would pose an undue hardship
- Undue hardship (religious accommodation): more than a de minimis cost or burden on employer
 - Different standard than ADA undue burden analysis
- Sincerity of religious belief should be presumed absent an objective basis for questioning religious nature or sincerity, in which case employer can request additional information
- If no reasonable accommodation is possible, employer may lawfully exclude employee from the workplace.









POLL 2: Are you planning to have some or all of your workforce work remotely (who were not pre-COVID) permanently?

A. Yes

B. No

THE WALL STREET JOURNAL.

Most Salesforce Employees to Work Remotely at Least Part Time After Pandemic

Software giant plans for staff to work from office several days a week or from home full-time, with just a fraction required on site daily



Revamping office layouts to increase collaboration space instead of having a "sea of desks"

Employees expected to do much of their independent work remotely. Mock-ups of new offices feature...private nooks, with an emphasis on clean desks and social distancing.

Expects more than 65% of its workforce to come into the office 1-3 days a week, up from 40% before the pandemic

Unspecified number of employees will be fully remote

POLL 2: Results

Wage and Hour Laws Haven't Changed

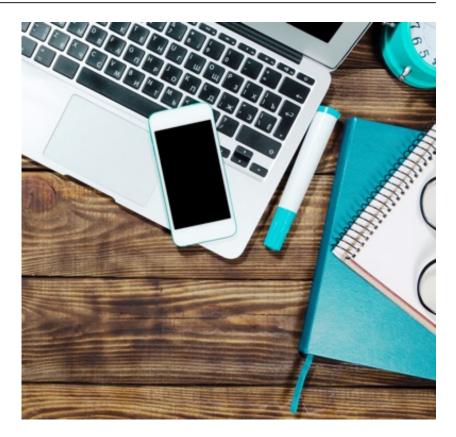
Non-Exempt Hours Worked Refresher

- Any time spent performing activities that are primarily for the employer's benefit are compensable hours worked (29 C.F.R. § 785.11)
- All time spent in physical or mental exertion primarily for the benefit of the employer is compensable hours worked (*Tennessee Coal & Iron Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944)).
- Employer must compensate for all compensable hours worked if the employer knew or should have known the employee was working regardless of if the hours were recorded (29 C.F.R. § 785.13)



Workday

- Portal-to-Portal Act <u>did not change</u> definition of "workday"
- The "workday" is generally defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." (29 C.F.R. § 790.6)
- Activities that take place between the first and last principal activities of the day are generally compensable.
- The Supreme Court has interpreted "principal activity or activities" to include "all activities which are an integral and indispensable part of the principal activities." *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (Dec. 9, 2014)



Significant DOL Opinions and Court Decisions

What's New and What's Ahead in 2021

- Wage & Hour Division, December 31, 2020, Opinion Letter, FLSA2020-19
 - "Continuous Work Day Rule"
 - All time between the first and last principal work activities of the workday is compensable (other than a *bona fide* meal period).
 - Compensability of time commuting to work or tending to personal matters for employees primarily working from home
- Non-compensable time = time employee is "completely relieved" of duties
- Reasonable, more flexible interpretation in the midst of COVID

Tracking Time for Remote Workers



- Beware of auto-deduct rules without exceptions
- Make sure employees are clocking in and out accurately
- Police off-the-clock work
- You may have constructive records of additional work through computer records

Non-Exempt Employees Working Remotely



Wage and Hour Laws Haven't Changed

- Exempt salaries can be reduced due to diminished work but it should be set prospectively and NOT fluctuate week-to-week or month-to-month.
- Ensure exempt employees still meet the duties test
- Remember, Plaintiff lawyers are hungry, too.
 - Lawsuits claiming unpaid time logging in to networks
 - Claims that rounding systems are unfair
 - Employee expense reimbursement claims (CA and IL)

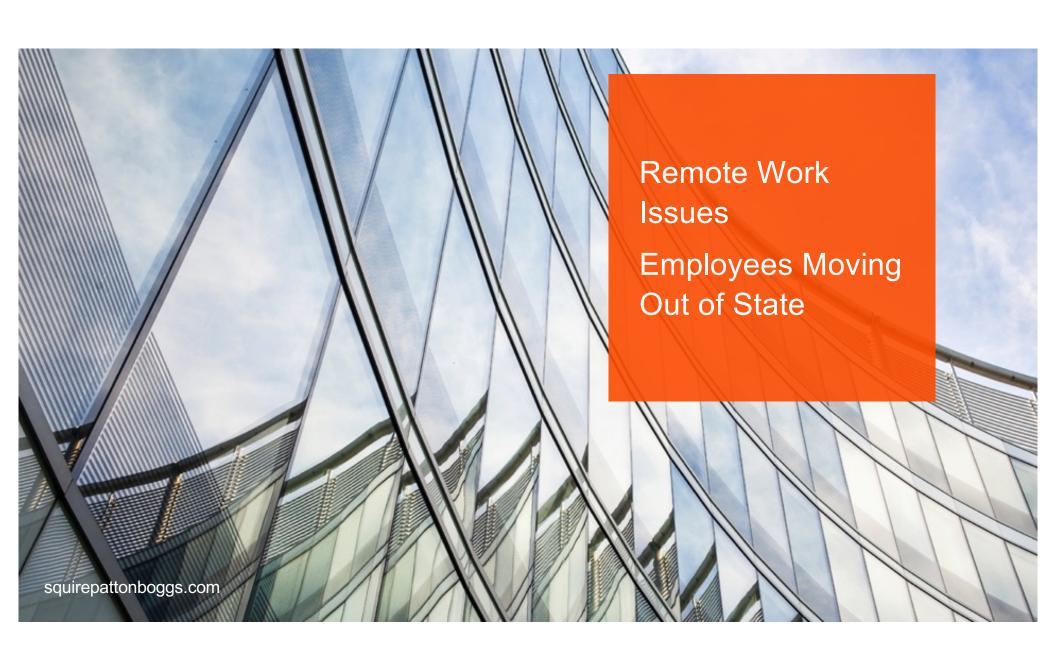


POLL 3: Is your company providing expense reimbursement for home offices?

A. Yes

B. No

POLL 3: Results



Out-of-State Employee Considerations

Taxes

Need to ensure proper state and local income tax withholdings for individual

Workers' Compensation Insurance

The employer will need to obtain workers' compensation insurance in the state where the employee is performing the services

Unemployment Insurance

The employer will need to register for and pay the unemployment insurance premiums for the employee through the state unemployment insurance program where the employee is performing the services

Employee State and Local Income Tax Withholding

- Remote working environments could expand the states in which employers are required to withhold.
 Some employers may not even know where employees are working from.
- It is also possible that employers will be required to withhold in more than one state, possibly resulting in double withholding for the employee.
 - For example, if an employee is a resident of State A but working from State B, both states may require withholding. Oftentimes states will 'credit' taxes paid to other states, but not always.

Where is an employee's "Resident" for tax purposes?

Residency determinations can be straightforward, but oftentimes they are not.

Consider, for example, an employee who owns a home in **State A** and usually works in **State A**, but due to the pandemic the employee has been "temporarily" working from their vacation home in **State B**, for more than a year.

Is the employee a resident of State A or State B? Both?

COVID-19 Remote Worker Relief

Many states have enacted measures to reduce administrative burdens during the COVID-19 remote work environments.



Out-of-State Employee Considerations

State and Local Labor Law Compliance

Daily Overtime

• Alaska, California, Colorado, Nevada

Leave Laws, examples:

- Paid sick leave
- · Paid family leave
- Military leave
- Bone marrow & blood donation leave
- Jury duty leave

State Training Requirements

Sexual harassment training (e.g., NY, IL, CT, CA)

Employee Records

- · Background checks
- Personnel file access (e.g., MA requirements on disciplinary rules)

Employee Notices

- Pay theft notices (e.g., NY & CA)
- Separation notices

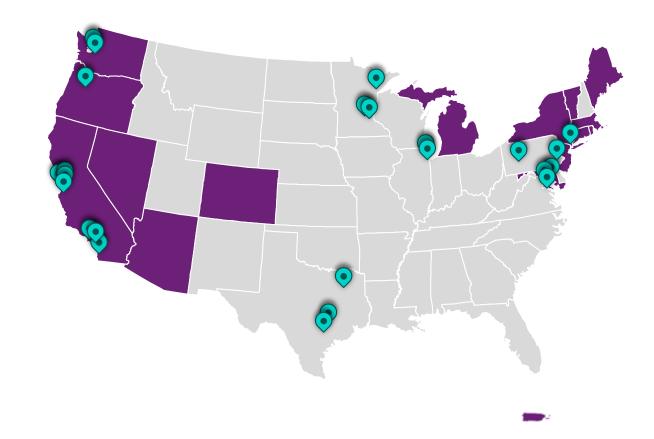
Paid Sick Leave

States

Arizona
California
Colorado
Connecticut
Maine
Maryland
Massachusetts
Nevada
New Jersey
New York
Oregon
Rhode Island
Vermont
Washington

Territories

Puerto Rico



Cities / Counties / Townships

Berkeley, CA Emeryville, CA Los Angeles, CA Oakland, CA San Diego, CA San Francisco, CA Santa Monica, CA Chicago, IL Cook County, IL Duluth, MN Minneapolis, MN St. Paul, MN Washington DC Montgomery County, MD New York, NY Westchester CO, NY Philadelphia, PA Pittsburg, PA Portland, OR Austin, TX (legal challenge) Dallas, TX San Antonio, TX Seattle, WA Tacoma, WA

Paid Family Leave

Locations

California
Colorado
Connecticut
Massachusetts
New Jersey
New York
Oregon
Rhode Island
Washington
Washington, DC



Jurisdictions with Background Check Laws

States

California Colorado

Connecticut District of Columbia

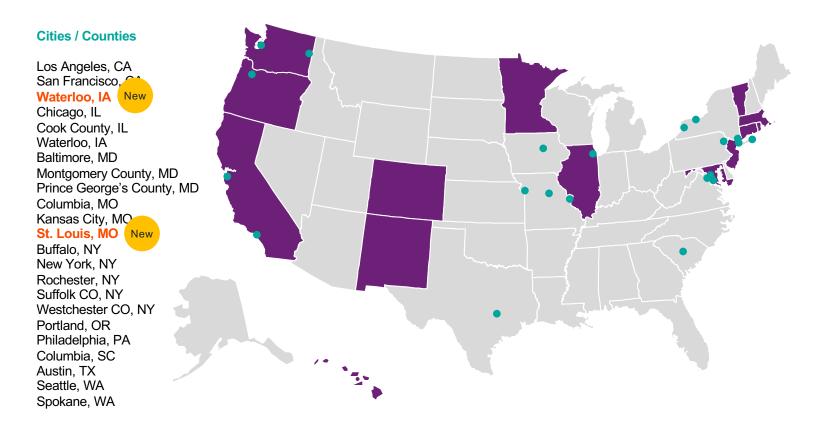
Hawaii

Illinois

Maryland

Massachusetts Minnesota **New Jersey** New Mexico Oregon Rhode Island Vermont

Washington



POLL 4: Has your company implemented any policies restricting employees from moving to another state?

A. Yes

B. No

POLL 4: Results

How Are You Tracking Your Remote Workers?



Have any restrictions on moving?







How Employers Can Protect Their Interests

Non-Competes

Non-Solicitation of Employees

Non-Solicitation of Clients/Customers

Confidentiality
Provisions/
Non-Disclosure
Agreements

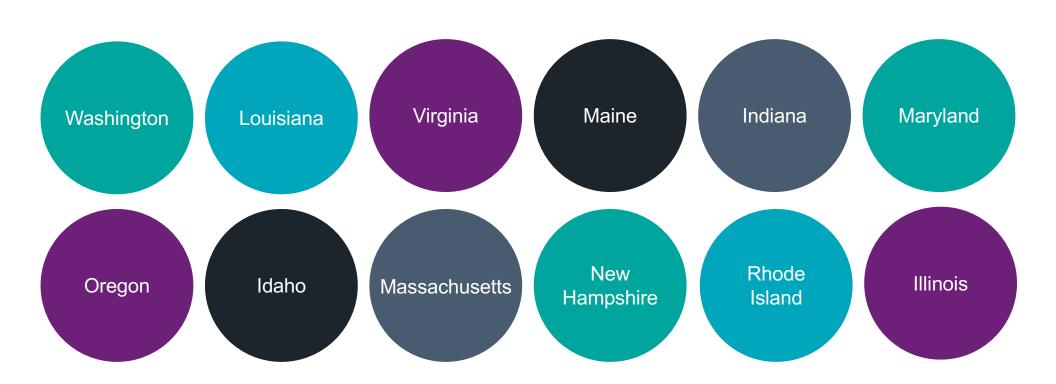
Acceptable Use Policy

Trends

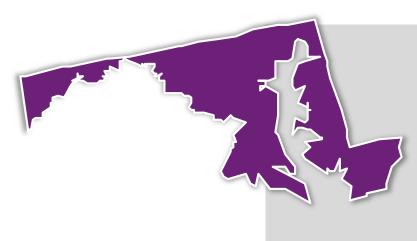
- Nearly all states permit non-compete agreements in some form, with California as an exception unless there is a sale of business and with North Dakota and Oklahoma allowing them only in narrow circumstances.
- Despite most states permitting them in some form, more states are passing laws limiting restrictive covenants;
 - More restricted when it comes to certain types of workers (i.e., lower wage earners)
 - Notice requirements
 - Legitimate business interests and "indirect" solicitation more narrowly construed
- Trend is to put more restrictive measures in place



State Laws in the Last Five Years



Maryland – SB 328



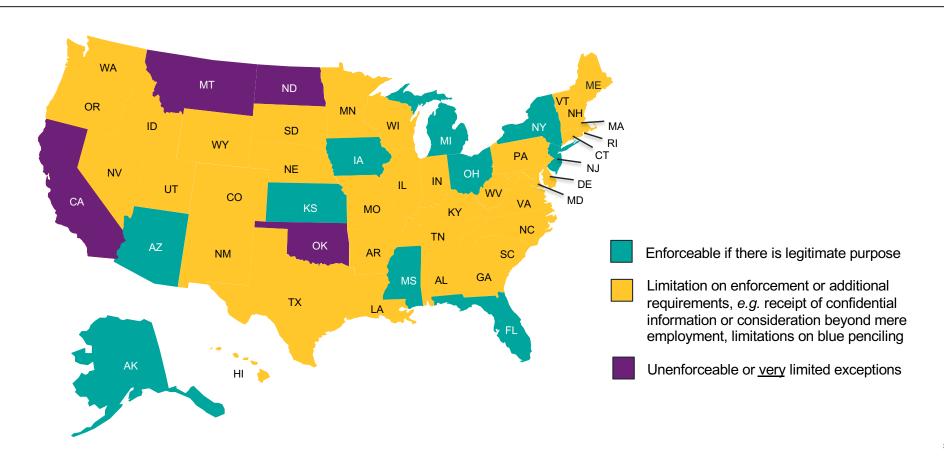
- Effective October 1, 2019
- Noncompete agreements are void and against public policy for any employee who earns equal to or less than \$15 per hour or \$31,200 annually

Virginia – 40.1-28.7:7



- Effective July 1, 2020
- Noncompete agreements are prohibited for any "low wage employee"
- "Low wage employee" means any worker whose average weekly earnings in the previous year are less than the average weekly wage of the Commonwealth, but does not include employees whose earnings are derived, in whole or predominately from, sales commissions, incentives or bonuses
- Currently \$1,204 per week (\$62,608 per year)
- Must post a copy of the law

Overview of Non-Compete Agreements



Other Upcoming and Proposed Regulations

- District of Columbia's "Ban on Non-Compete Agreements Amendment Act of 2020"
 - Signed into law by Mayor Bowser on January 11, 2021
 - Broadly bars non-competes with employees who work in D.C., with only narrow exceptions
 - Also contains broad prohibitions on "no moonlighting" agreements that apply during the period of employment
- New York Senate Bill S3937C
 - Would create additional restrictions on "no poaching" agreements between employers (including in franchise agreements)
 - Currently in committee

Advantages of Supplying Equipment

- Easier to protect employer proprietary information.
- Easier to monitor employee activities, but make sure you have given adequate privacy notices.
- Control work gateways to limit off-theclock work.
- Easier for help desk to support.
- Better for employee morale.



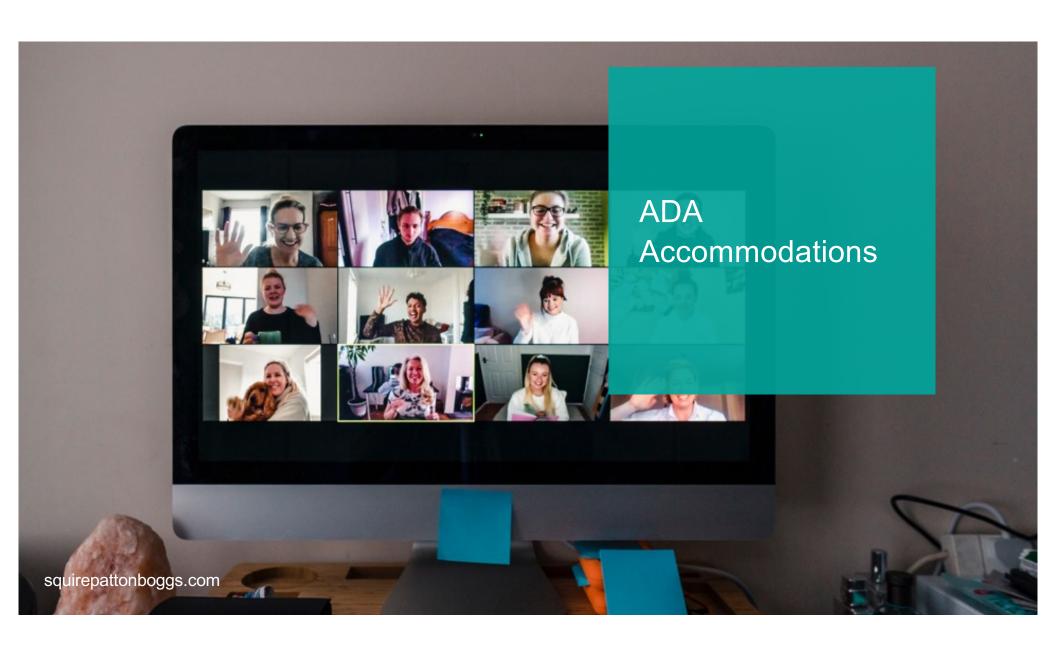
POLL 5: Does your company provide computers to all remote workers?

A. Yes

B. No







Refresher of the Law: Americans with Disabilities Act

Must provide reasonable accommodation to an otherwise qualified individual with a disability unless it would be an undue hardship.

Otherwise qualified = able to perform the essential functions

Essential functions = job description (plus other evidence)

42 U.S.C. §12112



Accommodations Under ADA/State Disability Law

Protecting employees with underlying disabilities vulnerable to COVID-19 complications

Plexiglas dividers	Allowing leaves of absence
Other barriers between customers and coworkers and the disabled employee	Work-from-home arrangements (and equipment needed to effectively WFH)
One-way aisles/directional signage	Temporary job restructuring
Engineering and administrative controls	Reallocation of marginal job duties
Providing additional PPE	Temporary transfers to different departments
Providing private workspaces	Modifying work schedules to reduce exposure during work hours and commuting
Time off from work	Permitting virtual meetings in lieu of in-person gatherings and travel

Reasonable Accommodation Process

- May still request information or documentation to determine whether employee has disability and whether disability necessitates an accommodation
- May still engage in interactive dialogue to determine whether requested accommodation addresses limitation posed, and whether other accommodations that pose less of a hardship may suffice
- May provide accommodations on interim or trial basis, or during certain high-risk periods, or only while employees are working from home, or until medical documentation is provided
- · May consider unique pandemic-related hardships in "undue burden" analysis
- Although employers may not discriminate against employees based on their association with a person with a disability, employers need not provide "accommodations" to employees because of their family members' or spouse/partner's disability

Telework as an ADA Accommodation

- Even if teleworking was offered on a short-term basis to mitigate COVID-19 spread, employers need not automatically provide telework arrangements as a reasonable accommodation when the workplace reopens.
- However, if prior request for telework was denied and employee worked effectively during COVID-19 closure, the request may need to be reconsidered.



https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

