



What Employers Need to Know About Remote Work

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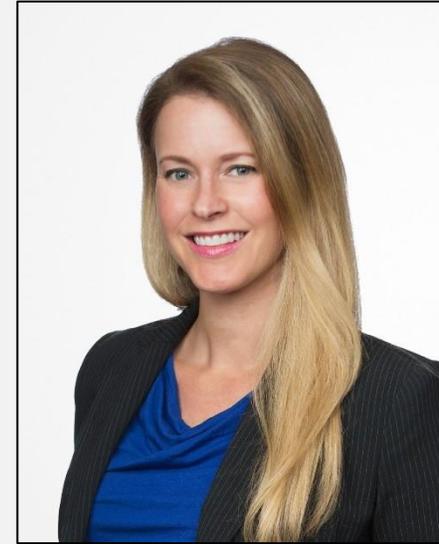


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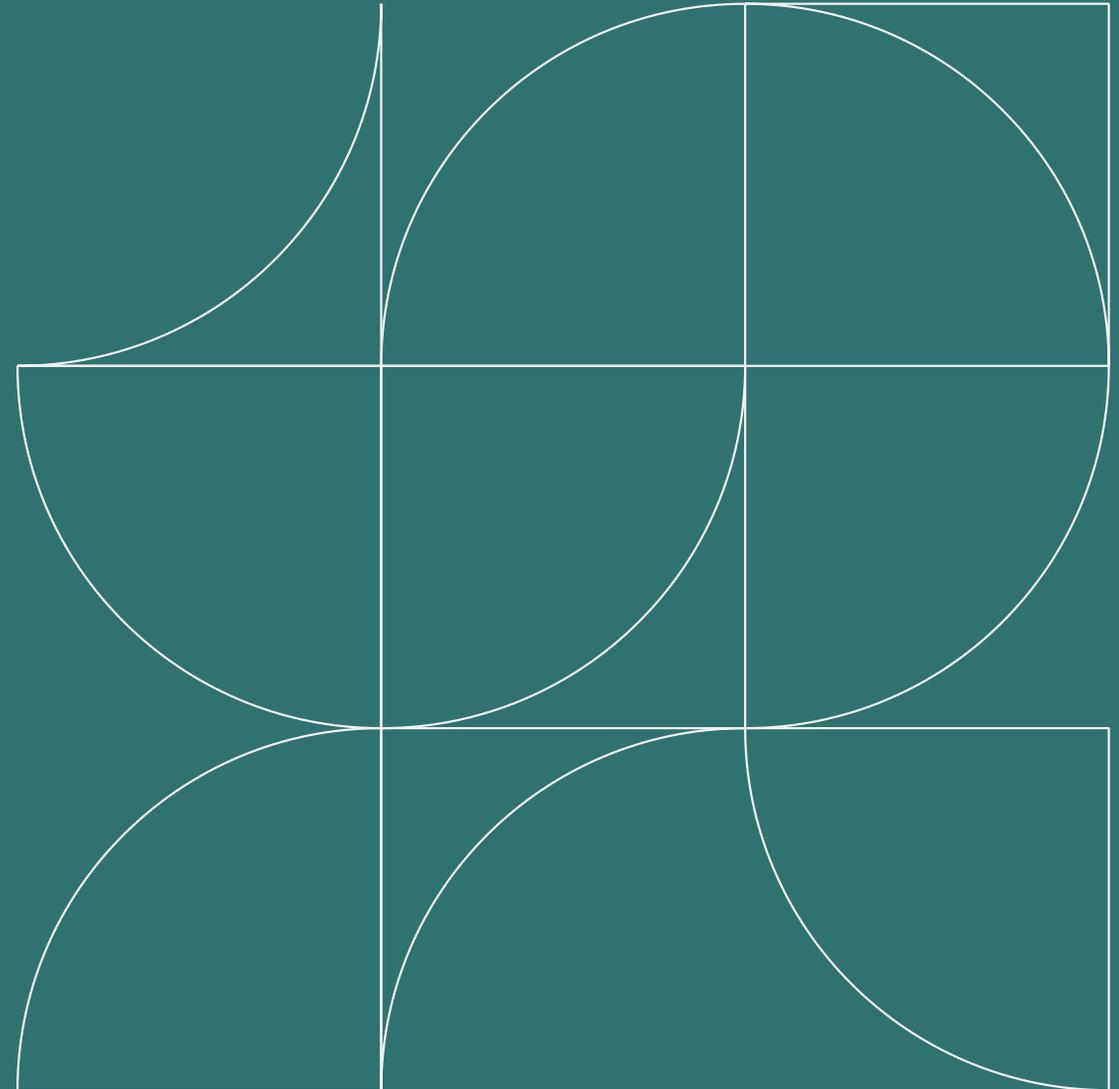
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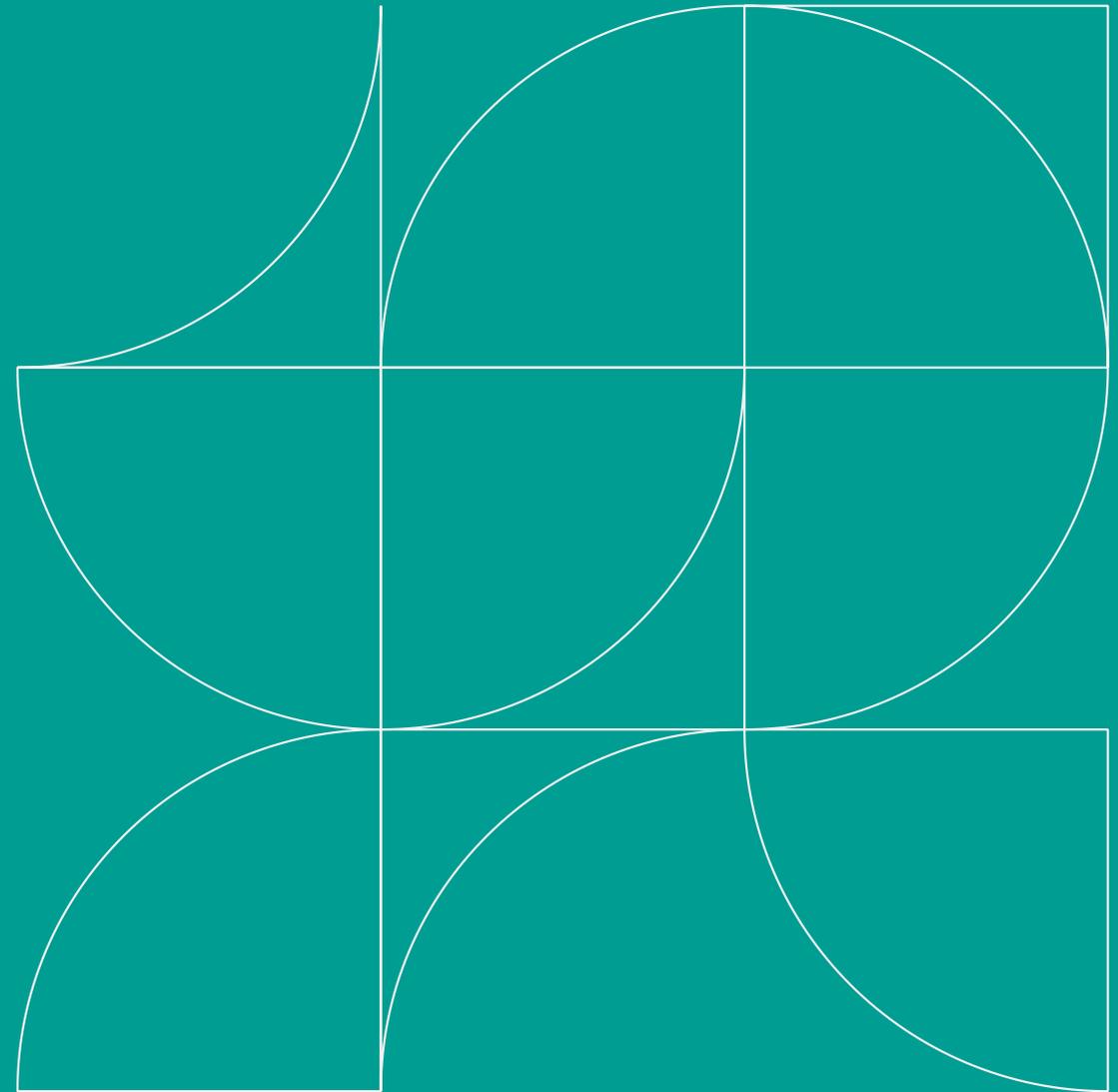
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Agenda

- The Future of Work Depends on Remote Work
 - Wage and Hour Issues / Expenses
 - Monitoring and Managing Performance for Remote Workers
 - Accommodation Issues
 - Protecting Privacy of Remote Workers and Data Security
 - Tax Issues
 - Harassment and Discrimination
-

The Future of Work Depends on Remote Work



Employers Are Moving To Remote Work



- Covid-19 has accelerated a trend of employees working from home
- Twitter and Square have announced that employees may elect to work from home “forever”
- Bill Gates predicted that 50% of business travel and 30% of office life will “disappear” in the post-COVID-19 era
- Companies hiring new leaders as “Director of Remote Work”
- How do employers employees take advantage of the benefits and minimize the risks?

The Benefits of Remote Work



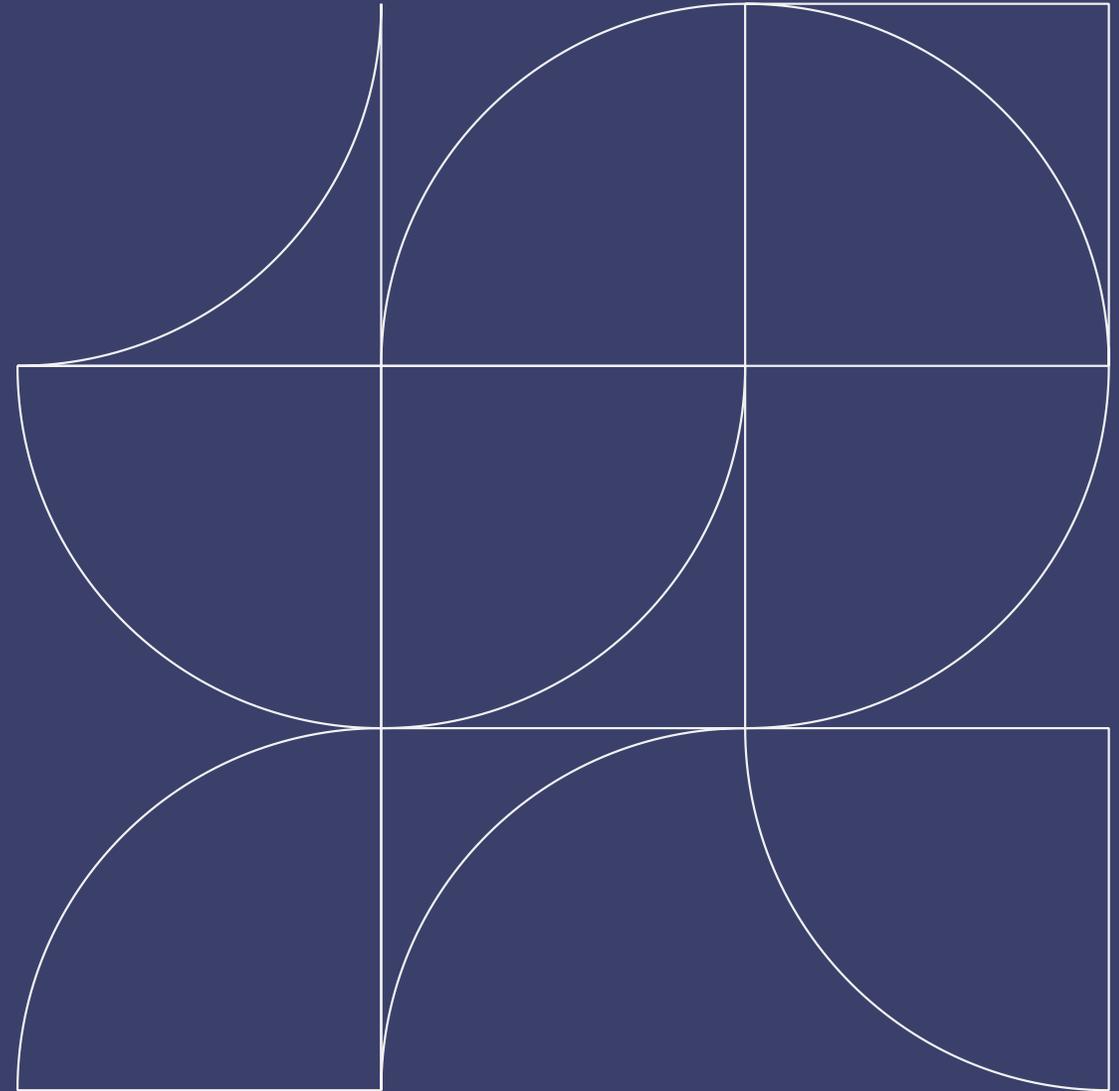
- Since the pandemic, many jobs that were “impossible to do remotely” went remote.
- Companies invested the time and money for remote access.
- Supervisors have figured out how to supervise without being physically present.
- Research shows that telecommuting makes many workers more productive.
 - They are more satisfied and less likely to quit.
 - They have more time to work because they do not spend time commuting.
 - U.S. workers increased their average workday by almost 40%, the largest jump worldwide.
- Telework can be balanced with on-site work.
- Many knowledge workers need spurts of unstructured interaction, followed by hours of quiet time to execute—time that’s often more productive done away from the office.

But There Are Many Challenges to Remote Work



- Including...
 - Engaging Remote Workers
 - Monitoring and Managing Performance for Remote Workers
 - Workplace Compliance Issues Keeping Us Up at Night

***Workplace Compliance
Issues Keeping
Lawyers Up At Night***



Awareness of New and Different Employee Locations



Many employees are embracing a “work from anywhere” mentality. That means your employees may consider moving not just to another state, but another country.

- Where employees are working may unknowingly subject companies to new jurisdiction’s laws and taxes.
- Make sure you understand the implications of having employees living and/or working in different jurisdictions and have a policy that addresses these implications.
- Recirculate policies requiring employees to disclose physical locations.
- Revise them as necessary – your brand new handbook from January 2020 may be outdated already.
- Make sure employees keep the company updated on any changes to contact information.

Paying for Remote Worktime – Nonexempt Employees



- Work from home creates numerous opportunities for employees to work without the employer’s knowledge
 - Does the company have knowledge? Can knowledge be imputed? How?
 - Set clear expectations for when an employee will work and be available by phone and email (i.e., what are the employee’s core hours)
- The continuous workday concept says that, other than a meal period, all time from the first activity of the day to the last activity of the day is compensable, including breaks
 - What about those who are managing a home and educating and caring for children at the same time?
 - Must they be paid for this non-worktime, or can they be instructed to segment out/not record this time?
 - Must they be paid for longer “boot-up” time when working on slower connection from home?
- And how should the worktime be tracked?
 - Abandon time clock, ask employees to self-report time, monitor productivity?

Meal and Rest Breaks of Remote Nonexempt Employees



- California requires meal and rest breaks to occur at certain points during the workday and to last for a minimum number of minutes.
 - How do you know they are taking breaks at the right times and for the right lengths at home?
- Hard to differentiate work from taking a break when employee works at home where they may voluntarily work through meal and rest breaks
 - Meal and rest period penalties under California law
 - California requires employees to have option to leave the workplace for meal and rest periods to be considered bona fide

Managing Work Schedules for Employees Working Remotely



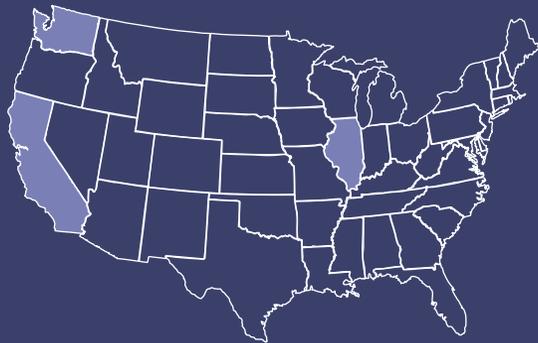
Set Work Schedules, Perhaps Including Breaks

- Setting regular work hours reduces the risk of off-the-clock work and helps employees maintain a work-life balance
- Some employees will need flexibility in that fixed schedule (e.g. 6-9, break from 9-3, works again in the evening)
- Reinforce meal and rest break laws by discussing expectation that will take breaks

Manage Managers

- Clear overtime policies – employees need to understand to record even if no pre-approval for OT and managers need to approve for pay
- Employers should reinforce wage-hour policies to managers as well so they do not treat non-exempt employees working from home as if they are exempt

Reimburse Expenses of Home Workers



Many companies' expense reimbursement policies are geared toward employee travel. But the use of personal equipment and services at home to conduct business may need to be reimbursed under state law as well.

In California, employers must reimburse for *all* reasonably incurred expenses – even if they would have been incurred regardless.

Clients currently grappling with whether to provide reimbursement retroactive to start of pandemic to minimize or mitigate risk of class actions on this basis.

Reimbursable Business Expenses (cont'd)



Think about everything employees must use to work from home: internet, cell phones, landlines, electricity, office supplies, etc.

How much should the employer pay to cover these costs, where it is mandated?

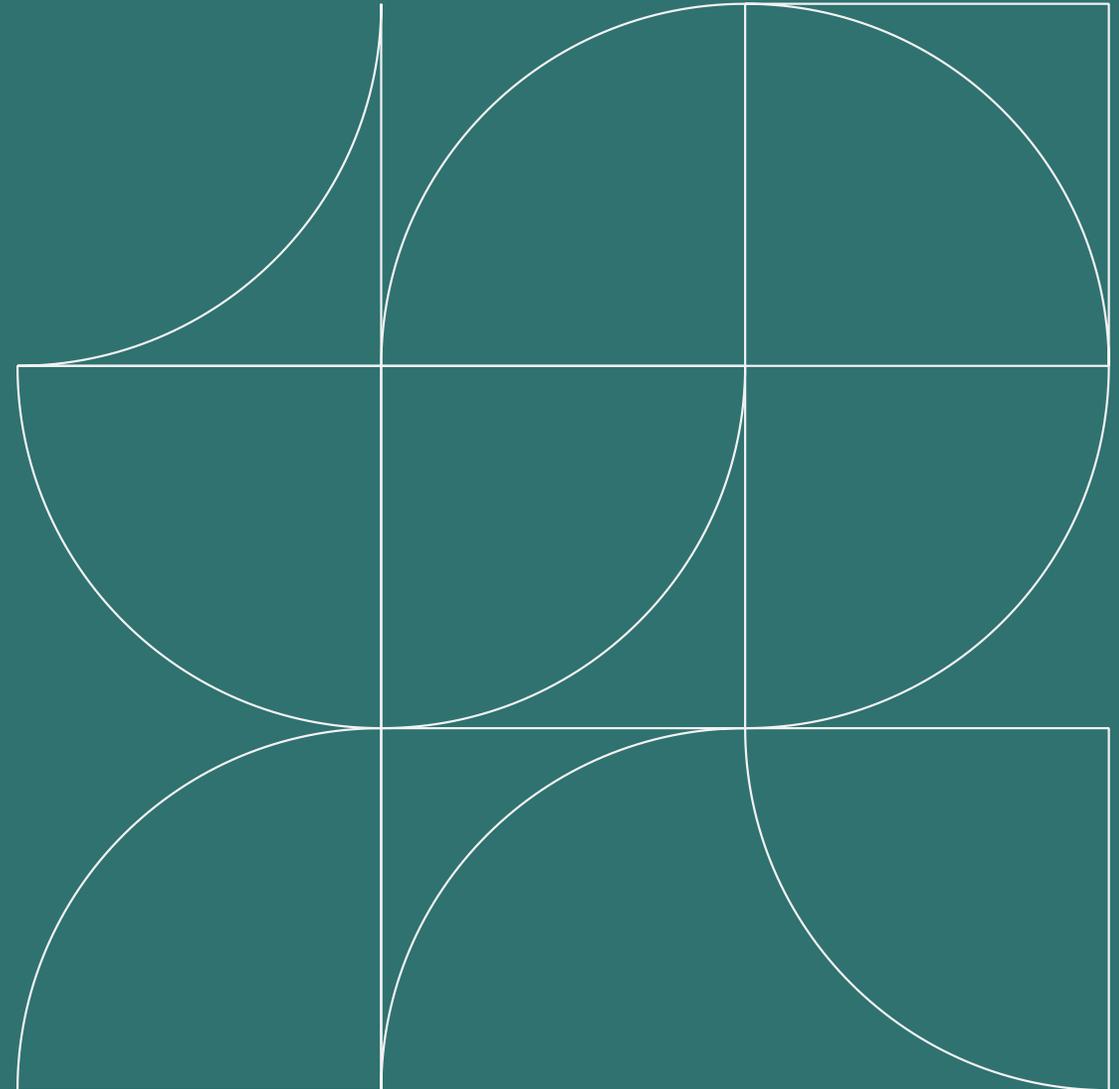
- Possible best practice: set a flat rate amount for the expenses, while allowing employees the opportunity to seek additional reimbursement if their actual expenses are higher.

Stipend for general home office improvement is a different issue; raises regular rate concern when not tied to a specific expense.

Dovetails with safety: Employee should designate a specific, clearly defined area of the employee's house in which the employee will perform work

- Key that work area be set apart from the rest of the employee's house to help ensure that covered (workplace) injuries can be distinguished from those that are not covered

***Accommodations, FMLA,
and Performance
Management
Considerations for a
Remote Workforce***



Accommodations Issues for a Remote Workforce



- The Americans with Disabilities Act along with state laws require employers to engage in the interactive process to determine whether reasonable accommodation can be made for an employee's disability or medical condition.
- Remote work has raised new challenges and questions regarding the accommodations process and whether requested accommodations are reasonable.

Reasonable Accommodations for a Remote Workforce



- Generally, if physical presence in the office is an essential function of an employee's job, an employer is not required to permit the employee to work remotely as an accommodation.
- Pandemic already resulting in increased requests to work from home as accommodation for disabilities.
- Key question remains – if the job has been performed from home for the past year and a half, can employer claim working from home post-pandemic is not reasonable?

Reasonable Accommodations for a Remote Workforce



- Just because an employer has allowed all positions to work from home during the pandemic, the employer does not have to allow all positions to work from home post-pandemic.
- Recommendation: Reevaluate the essential functions of positions and allow post-pandemic work-from-home as accommodations, *if the essential functions of the position can be performed from home.*
- Use the time now to clearly document which positions are not capable of being performed from home.
- Certain requests to work from home may not be reasonable in the long term.

Reasonable Accommodations for a Remote Workforce



Don't forget that remote workers may also need accommodations in their remote workspace!

- Home office equipment for tele-workers (e.g., ergonomic chair, keyboard)
- If employer provides special equipment to disabled employees in the office, it will be difficult to argue the same accommodation to tele-worker is unreasonable.
- Even if not mandatory, consider health, safety, and productivity of benefits of ensuring employees have ergonomic home workspace.

Reasonable Accommodations for a Remote Workforce



- Flexible work schedules for tele-workers
 - Alternative or flexible work schedule will be difficult to administer remotely
 - Need to ensure accountability of employees working remotely by specifically defining the work schedule
- Use time records or work logs to verify employee working agreed-upon schedule
- New software to monitor productivity (e.g., track mouse movements or keystrokes)
 - Employees may consent to the software in exchange for the flexibility

FMLA Issues for a Remote Workforce



- Family Medical Leave Act (“FMLA”) requires most employers to give eligible employees twelve weeks of unpaid leave, either continuously or intermittently.
- Similar to issues with flexible work time as an accommodation under the ADA, intermittent FMLA leave will be difficult to track.
- Key Questions: How can employers track employee absences and ensure leave is taken consistent with FMLA obligations?
 - Frequent communications with employee to remind them about the restriction and employer’s obligation to follow it.
 - Require employee to accurately track time

The Importance of Active Performance Management

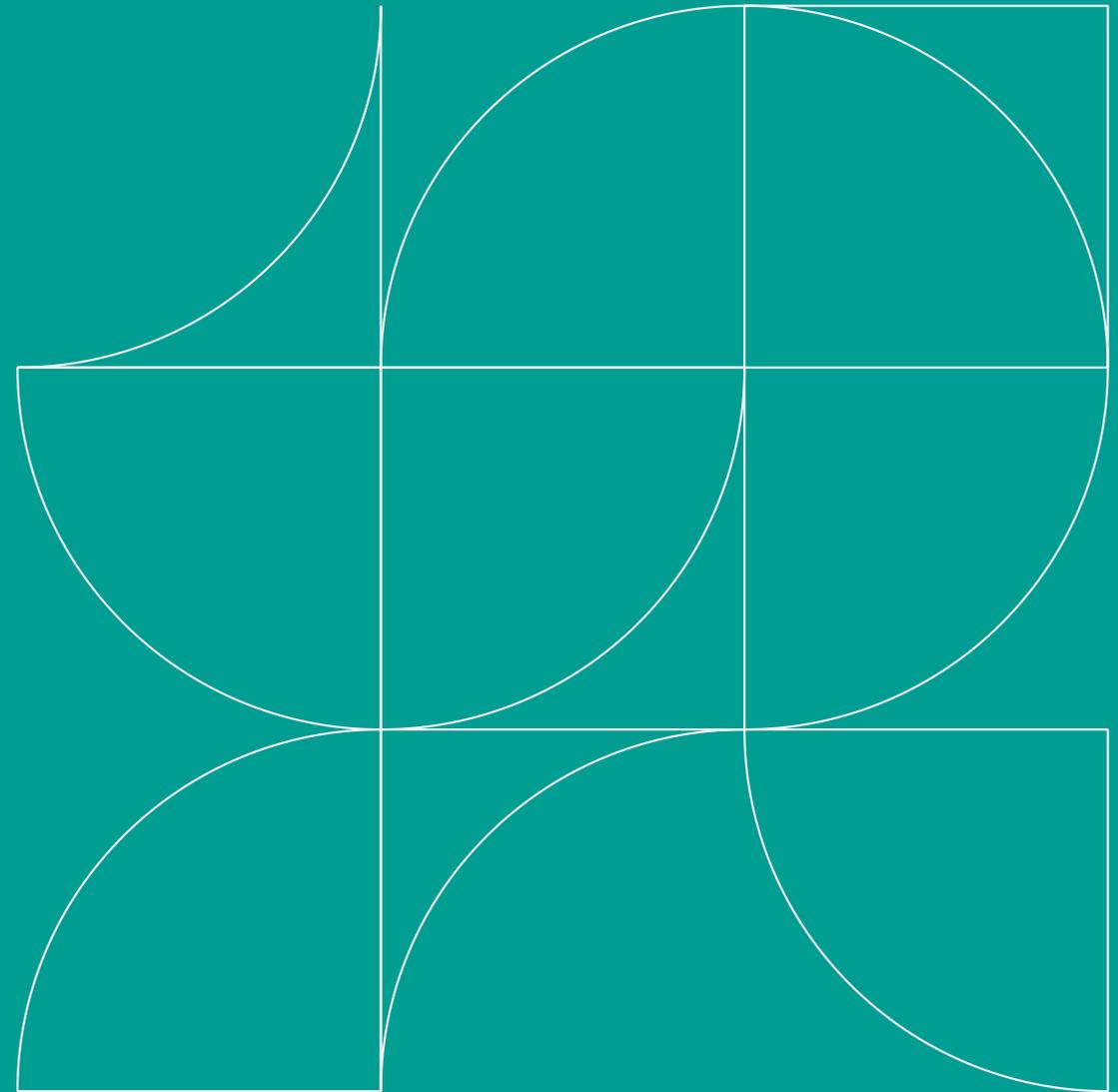


- It is critical that managers provide clear expectations and feedback to employees who are working remotely
- Provide written expectations regarding availability and work product/deliverables that include deadlines
- Focus should be on work quality, meeting deadlines (rather than amount of time working)
- Managers will need to increase their communication with employees
- Schedule regular check-ins with employees (more frequent, shorter check-ins may be more useful)
- Identify how employee should be communicating with you and his/her co-workers
- Address any issues as soon as they arise and make a concrete plan about your expectations moving forward

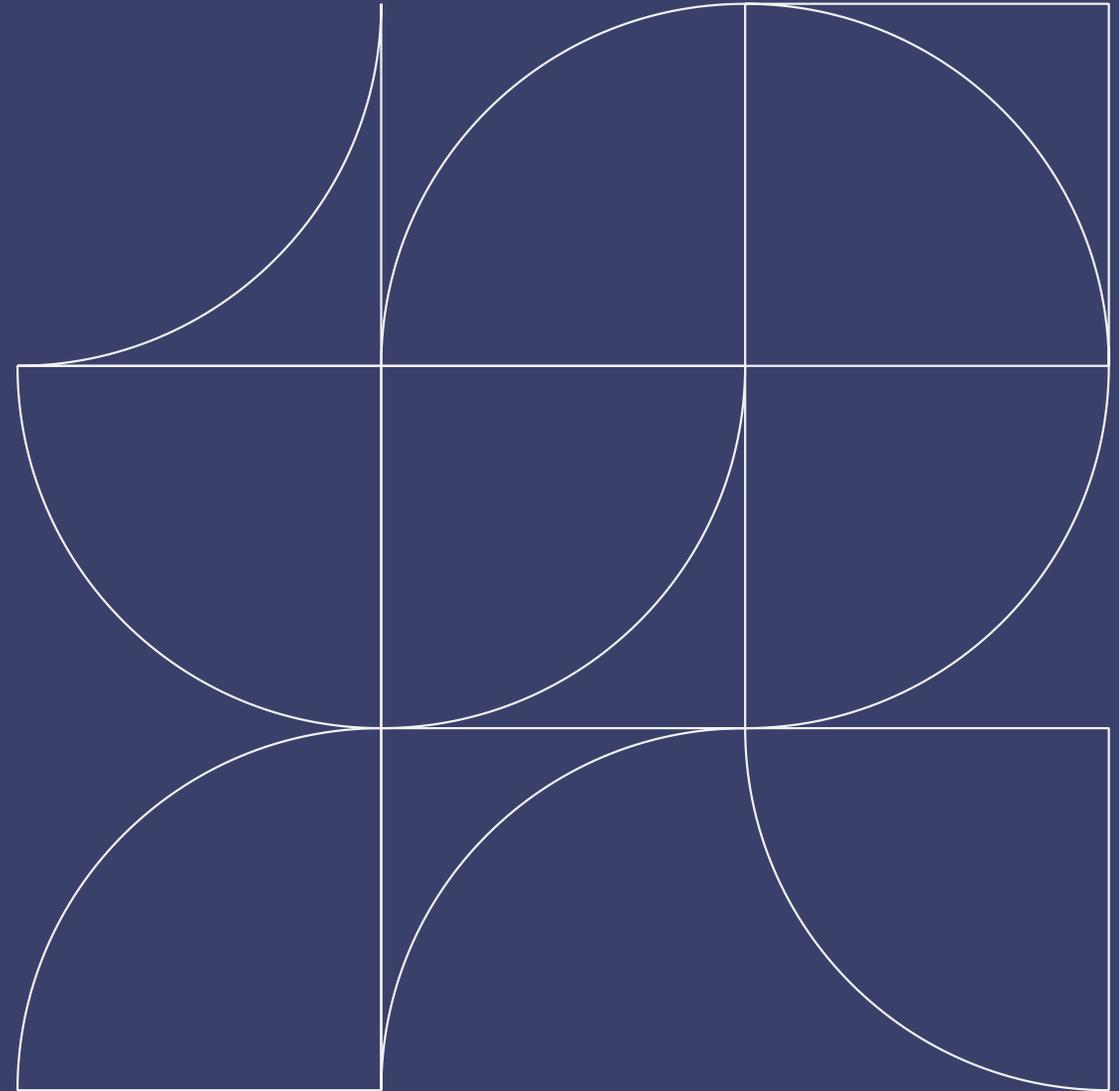
Importance of Engagement for Remote Workforce

- Positive reinforcement goes a long way
- “Stay interview”
- Manage Paid Time Off -- encourage time away from work when employees are already remote
- Require video participation when necessary, but try to avoid Zoom fatigue

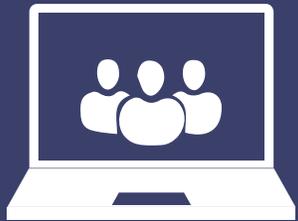
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Data Privacy and Tax Issues



Privacy and Data Security



- Consider allowing employees to take computers from the premises for use in a remote location
 - Employees might not realize how electronic data can commingle personal information with work information
 - Employees might not have a computer in their home they can designate only for work use

Privacy and Data Security (cont.)

If workers use their own computers, ensure corporate data and information is secure

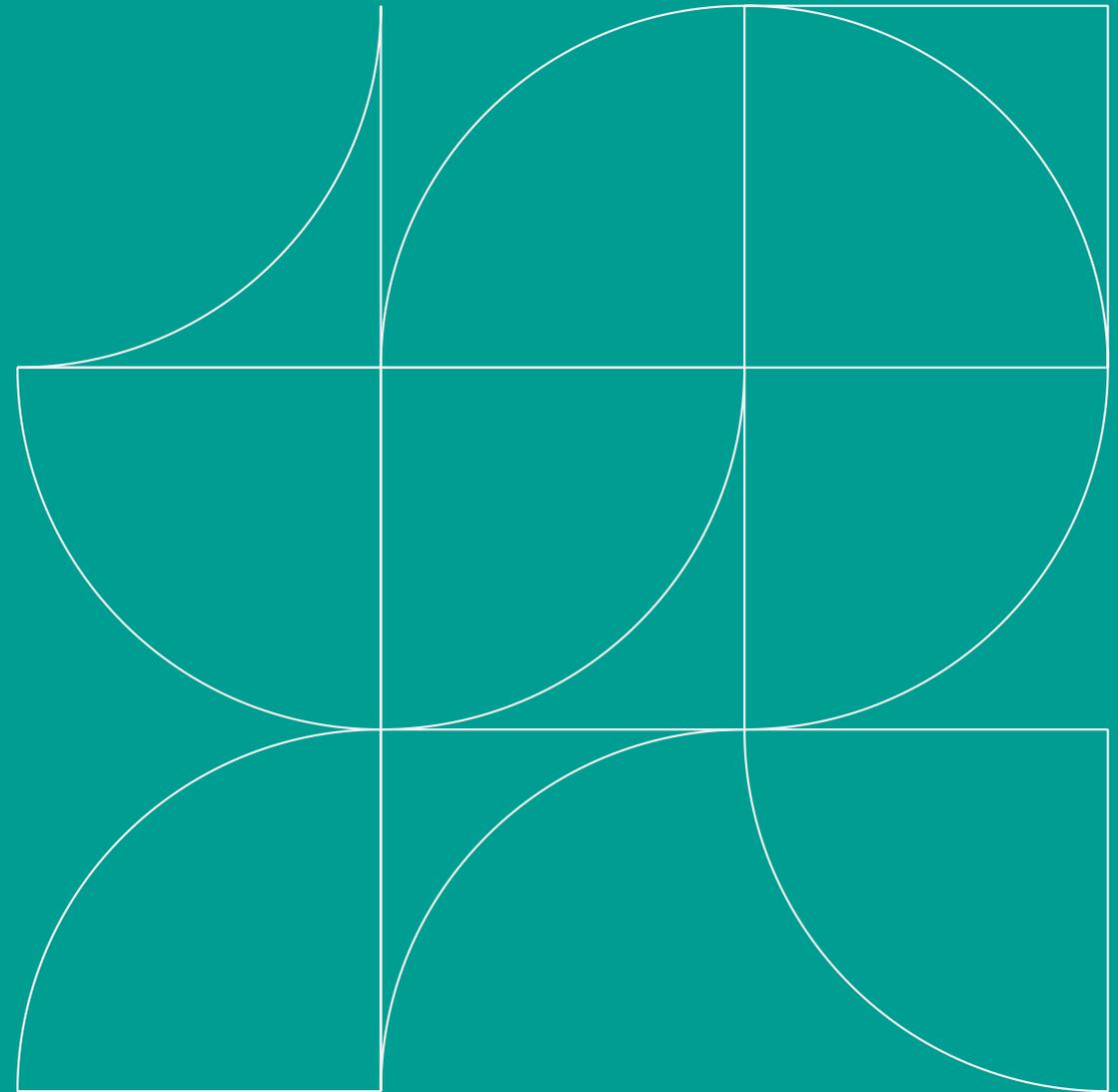
1. Reserve right to access device
2. Encrypt sensitive data
3. Implement data security protocols
4. Departing employee protocol
5. Have the right policies, **signed by employees**
 - BYOD Policy
 - Non-Exempt Electronic Device Use Policy
 - Use of Electronic Devices While Driving
 - Confidentiality Agreements
 - Information Security Policy

Taxes and Other “Business” Issues



- “Physical presence” rule requires employers to withhold at the rate for the state in which the work is performed, even if the business is headquartered in another state.
 - Remote worker who performs work in a state may be obligated to pay tax there and might also create new tax withholding obligations for the employer
- Business formation and registered agents
 - Where new employees work may mean company is now “conducting business”
- Professional Licenses
 - State-specific requirements
- Benefits/Insurance for Employees
 - State-specific requirements
 - Unemployment insurance (need only be paid to one state)
 - Workers’ compensation insurance

Harassment & Discrimination With a Remote Workforce



Continuing Harassment and Discrimination Prevention



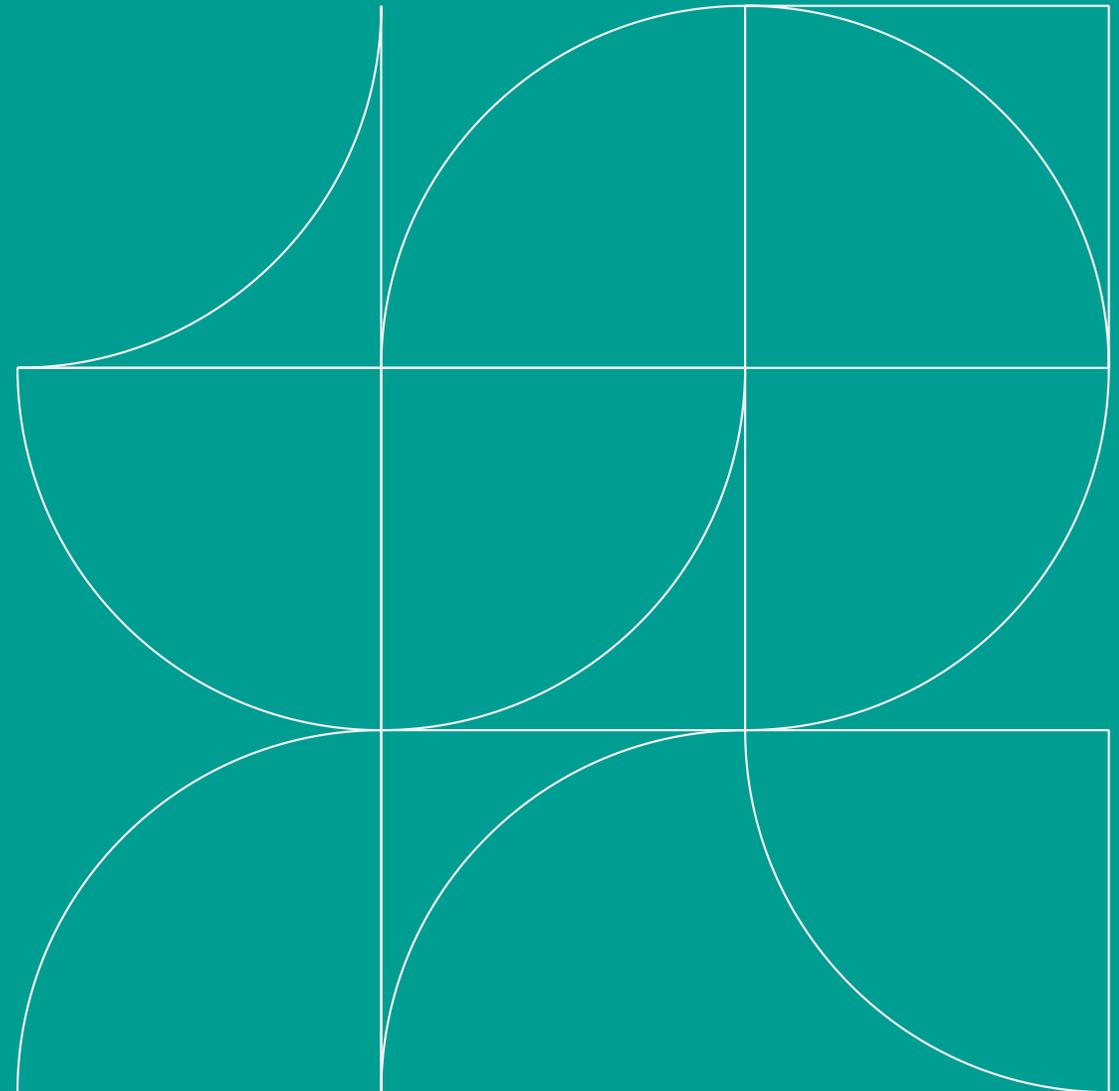
- Preventing harassment and discrimination is still important with a remote workforce
- Harassment and discrimination may be more easily hidden when your workforce is not easily visible
- Employers must continue their commitment to a work environment where everyone is treated with respect

Continuing Harassment and Discrimination Prevention



- Policies prohibiting harassment and discrimination remain in effect
 - Remind employees that these policies apply to email, as well as more informal communication such as instant messaging, texting, etc.
 - Ensure that video conferences (e.g., Zoom, WebEx) remain professional in terms of conversation, dress and location.
- Impact on investigations (e.g., harassment complaints, safety complaints)
 - Important to continue to do investigations (can do video interviews where body language is important)
- Issues related to COVID-19
 - Employers should not single out particular groups who are at higher risk (e.g., older employees, employees with underlying medical conditions)

Seyfarth's COVID-19 Resource Center is updated daily. Be sure to sign up for more webinars, updated legal alerts, and other helpful resources: www.seyfarth.com/covid19



Thank You

