



# Ready Employer 1: Cheat Codes for Handling Wage/Hour Issues in Today's Workplace

David M. Gobeo

Elizabeth M. Rodriguez

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## Introduction

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- » Following the COVID-19 pandemic, many employers have chosen to continue work-from-home (remote working) policies.
- » Remote working presents legal and practical issues for employers.



## COVID-19 ACCELERATED MOVE TO REMOTE WORK

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At least 18 major companies have announced employees can work remotely long-term.

- Google
- Uber (\$500 home office stipend)
- Airbnb (\$500 home office stipend)
- REI
- Zillow
- Twitter
- Square
- Microsoft
- Reuters
- Facebook
- Salesforce
- Amazon
- Spotify
- Hitachi
- Coinbase
- Mastercard
- Nielson
- Nationwide Insurance



## Important Facts

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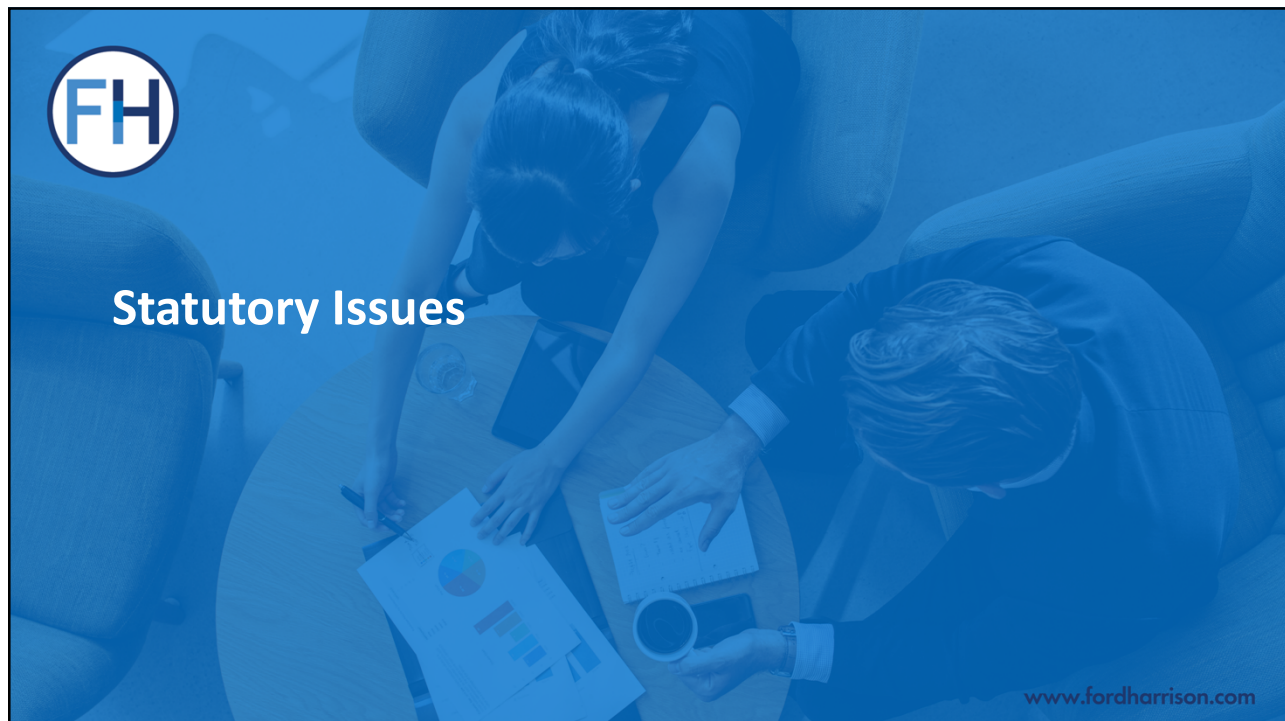
- » By 2025- 75% of the workforce will work remotely at least 5 days a month
- » Research from Owl Labs found that remote and hybrid employees were 22% happier than workers in an onsite office environment and stayed in their jobs longer
- » A survey of CFOs done by Globalization Partners found that 92% of CFOs believe that having a remote work policy helps attract and retain talent. They also believe that it levels the playing field for smaller companies.



## Issues Impacting Remote Work Arrangements

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- I. Statutory Issues (Non-FLSA and FLSA)
- II. Productivity and Performance
- III. Connection and Culture
- IV. Protection and Policies



## Statutory Issues: the ADA

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- » For employees who have been permitted to work from home and who have a disability under the ADA that restricts them, what legal obligations apply?
  - » Remote working may be a “reasonable accommodation.”
  - » Possible ADA Class Actions.



## Statutory Issues: Worker's Compensation

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Generally speaking, a work-related injury is one that happens “in the course and scope of employment” (when the employee is doing something to benefit the employer.)

What about working in the home office?

- » Possibly yes, even if the employer does not have control over the employee's home office.
- » Applies to trips and falls, as well as mental health/stress issues.





## Statutory Issues: State Leave & Compensation Laws

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State leave of absence laws can apply with just one employee in the State.

- » Consider California: employment laws apply when any employee performs any services in California
- » Also consider: state expense reimbursement laws, PTO, sick leave, and vacation pay laws.



## Statutory Issues: Expense Reimbursement

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Must check the laws of each state where you have remote workers.

- » Class action lawsuits filed against employers seeking reimbursement for business expenses.
- » Business-related expenses may include:
  - » Home office supplies
  - » Travel costs
  - » Vehicle expenses
  - » Electric bills
  - » Cellphone expenses
  - » Internet services
  - » Postage
  - » Office Supplies
  - » Ergonomic desk and chair
  - » Printer and printer supplies
  - » Subscription costs for services such as Zoom



## Statutory Issues: Expense Reimbursement

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Currently, these states have statutory provisions addressing employer obligations to reimburse employees for some expenses:

- » California
  - » Illinois
  - » Iowa
  - » Massachusetts
  - » Minnesota
  - » Montana
  - » New Hampshire
  - » New York
  - » North Dakota
  - » Pennsylvania
  - » South Dakota
  - » Washington D.C.
- » Be sure remote working agreement and policy explicitly state that equipment provided belongs to the employer and specified how the Company will get it back.



## Statutory Issues: even more to consider

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- » Unemployment Contributions
- » Biometric Privacy Laws (for applicants)
- » Drugs (marijuana) and drug testing.
  - » Ex: Illinois law protecting off-duty lawful use of products
- » Ban the Box laws
- » Required meal and break periods



## Statutory Issues: Key Takeaway

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Check all applicable state laws before allowing an employee to work remotely on a long-term or permanent basis.



## REMOTE WORK AND THE FLSA

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DOL issued Field Assistance Bulletin No. 2020.5 (August 24, 2020)  
“Employer obligation to exercise reasonable diligence in tracking teleworking employees’ hours of work.”

- An employer is required to pay its employees for all hours worked, including work not requested but suffered or permitted, including work performed at home.
- If an employer knows or has reason to believe that work is being performed, the work must be counted as hours worked.
- An employer may have actual or constructive knowledge of additional unscheduled hours worked by their employees, and courts consider whether the employer should have acquired knowledge of such hours through reasonable diligence.



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## REMOTE WORK AND THE FLSA

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- » One way an employer may exercise such diligence is by providing a reasonable reporting procedure for non-scheduled time and then compensating employees for all reported hours, even hours not requested by the employer.
- » If an employee fails to report unscheduled hours worked through such a procedure, the employer is not required to undergo impracticable efforts to investigate further to uncover unreported hours and provide compensation for those hours.
- » However, an employer’s time reporting process will not constitute reasonable diligence where the employer either prevents or discourages an employee from accurately reporting the time he or she has worked.



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## REMOTE WORK AND THE FLSA

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- » The FLSA requires an employer to exercise its control and see that work is not performed if it does not want it performed. The employer bears the burden of preventing work when it is not desired.
- » An employer can require employees to get authorization from management before working overtime and may discipline employees who violate the policy.
- » When an employee fails to follow reasonable time reporting procedures, he or she prevents the employer from knowing its obligation to compensate the employee.



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## REMOTE WORK AND THE FLSA

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- » Where an employee does not make use of a reasonable reporting system to report unscheduled hours of work, the employer is thwarted from preventing the work to the extent it is unwanted, if the employer is not otherwise notified of the work and is not preventing employees from using the system.
- » Failure to compensate an employee for unreported hours that the employer did not know about, nor had reason to believe was being performed, does not violate the FLSA
- » Where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer, the employer's failure to pay for the overtime hours is not an FLSA violation.



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## REMOTE WORK AND STATE LAW ISSUES

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- » State and local laws may impose greater requirements than the FLSA.
- » California Labor Code Section 2802 requires an employer to reimburse employees for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.
  - » Assumption is that the employer must provide employees with the equipment necessary for them to perform their job.
  - » Employer may not pass its operating expenses to employees.
  - » Can include phone and internet expenses.
- » If an employer requires an employee to work from home, then the employer may be obligated to provide additional equipment.



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## Best Practice

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- » Best Practice – develop a robust remote working policy to include the remote employee's obligations to:
  - » Record time worked accurately;
  - » Log in and out as scheduled;
  - » Never have responsibility during working time to care for children or others;
  - » Ensure no distractions;
  - » Ensure the workplace is safe;
  - » Safeguard employer confidential information;
  - » Comply with all rules that apply in the workplace (no alcohol or drugs);
  - » Be present remotely for all scheduled meetings and meet productivity requirements.



## Best Practice

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- » Best Practice – develop an agreement for the remote employee to acknowledge the requirements;
- » Include employment-at-will reminder;
- » That remote working is VOLUNTARY and not required by the employer;
- » The remote working arrangement may be discontinued at any time by the employer or employee – including issues regarding performance.





## Protecting Data

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- » Company's privacy and security policies need to cover software, hardware, information and access control
- » Have employees use a Virtual Private Network (VPN) service that keeps browsing secure
- » Encrypt confidential information
- » Set up two-factor authentication for every device
- » Make sure to protect the work employees produce (Intellectual Property)



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## Productivity and Performance

### » Work Time/Non-Work Time

- » Do you know who is “exempt” and who is “non-exempt”?



## Productivity and Performance

### » Work Time/Non-Work Time

#### » For exempt employees

- » avoid unauthorized deductions

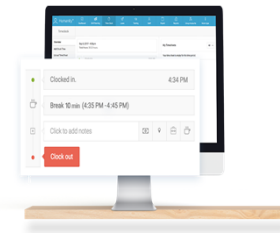


## Productivity and Performance

### » Work Time/Non-Work Time

#### » For non-exempt employees

- » Control work time – “suffered or permitted”
- » Absolutely essential to have good policies to:
  - » Track work time;
  - » Ensure employees are aware of policies regarding working time;
  - » PROVIDE A METHOD FOR EMPLOYEES TO REPORT PAY DISCREPANCIES



## Productivity and Performance

### » Work Time/Non-Work Time

- » Clarify and communicate performance objectives and how you will measure productivity



## Productivity and Performance

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- » Absences, Leaves, and PTO
- » All Company policies that apply in the office would apply to remote workers.



## Connection & Culture

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## SOME STATED BENEFITS OF WORKING REMOTELY

- » No commuting
- » Ability to be more efficient
- » Fewer distractions
- » Avoiding rigid schedule of life in office
- » Cost savings as less office space is needed
- » Safer environment
- » Fewer sick days



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## SOME STATED BENEFITS OF NOT WORKING REMOTELY

- » Interaction with people
- » Meeting with coworkers
- » Socializing with colleagues
- » Impromptu face-to-face interaction
- » Social capital
- » Feeling part of a community/team
- » Access to technology
- » Professional development/coaching
- » Mentoring/quality control



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## ISSUES RELATED TO MOVING TO REMOTE WORK

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- » Remote personnel management
  - » Hiring and promotion interviews
  - » Mentorship and talent development
  - » Discipline and performance management meetings
  - » Terminations



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## Connection and Culture

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- » Equipment and Work Environment
  - » What equipment is needed?
  - » Who is responsible?
  - » What about cost?
  - » What about safety?



## Connection and Culture

### » Travel?

- » Safety
- » Work time
- » Expenses



## Connection and Culture

### » Team Building

- » In person or virtual?
- » Same culture in a different environment?



Emphasize that the Company's culture should, at minimum, be the same when interacting with fellow employees, and customers/clients.





## Addressing downside

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- » Employees can feel alone and isolated
  - » Lack of “water cooler” discussions
  - » Set up coffee breaks
- » Difficult to separate work and home tasks
- » Difficult to collaborate
- » Difficult to unplug
- » Work goes unnoticed
- » Learning and mentoring are more difficult
- » Fixing technical or equipment issues



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## Protections & Policies

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## ISSUES RELATED TO MOVING TO REMOTE WORK

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- » Determine which group, or groups, are eligible to work remotely. Consistency is important to avoid claims of discrimination.
- » Ensure that remote employees remain subject to the company's policies and expectations.
- » Decide whether to allow employees to work remotely in states where the company does not yet have a legal presence. Allowing employees to work in a state where the company has no office may have the same effect as expanding operations to that state.



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## OFFICE OPERATIONS

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- » Workday schedule
  - » Start/end times
  - » Staggered schedules
  - » Rotating remote workdays
- » Office redesign
  - » Retreat from densification, open-office designs, and hoteling?
  - » Emphasis on collaborative space for times when people are together?



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## Protections and Policies

### » Security and Privacy

- » Confidential information
- » Regulatory compliance (e.g., HIPAA)
- » Electronic monitoring



## Protections and Policies

### » Work Rules

- » Ensure remote employees know they apply while remote working, such as: use of drugs/alcohol, having drugs/alcohol “in the workplace”, ensuring the employee does not also have caregiving responsibilities while working from home.

### » Insurance

- » Yes, you still need workers’ compensation!
- » Talk to your broker

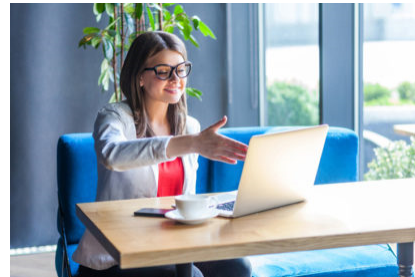


## Protections and Policies

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### » Interviewing and Onboarding

- » I-9 Compliance: <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance>



## Protections and Policies

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### » Separation of employment

- » Maintaining privacy and sensitivity
- » Return of property
- » State laws come into play here & all State law requirements for terminations apply.



## Protections and Policies

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### » Remote Work Policy

#### » Putting it all together

- » Don't forget to reinforce existing policies (e.g., anti-harassment)

It is essential to establish a remote working policy and an agreement for this employee to sign incorporating all of the work-from-home requirements.



## Protections and Policies

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### » Don't forget posters and notices

- » FLSA, FMLA, EPPA, etc.

#### » The DOL Wage and Hour Division issued a Field Assistance Bulletin on Dec. 3, 2020.

- » Generally speaking, FLSA, FMLA, & other required posters are required to be "posted" may be provided via electronic means if: (1) all of the employer's employees exclusively work remotely, (2) all employees customarily receive information from the employer via electronic means, and (3) all employees have readily available access to the electronic posting at all times.
- » As a practical matter, a determination of whether employees can readily see the electronic posting will depend on the facts.





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## Questions?

David M. Gobeo, [dgobeo@fordharrison.com](mailto:dgobeo@fordharrison.com)

Elizabeth M. Rodriguez, [erodriguez@fordharrison.com](mailto:erodriguez@fordharrison.com)

[www.fordharrison.com](http://www.fordharrison.com)