BEAM ME UP, SCOTTY

LEGAL ISSUES WHEN EMPLOYEES TELECOMMUTE

Ashley Herd – Modern Luxury

Anthony L. Martin – Ogletree Deakins (Las Vegas)

Thomas M. McInerney – Ogletree Deakins (San Francisco)
INTRODUCTION

Telecommuting, otherwise known as “workplace flexibility” or “workflex,” is about rethinking how, when, and where people do their best work in ways that benefit both employers and employees. For thousands of organizations, workflex contributes millions of dollars in bottom-line gains, especially in terms of employee recruitment and retention. This paper is solely intended as a quick desk reference and resource for employers that want to provide their employees more flexible work arrangements but are unsure what potential legal issues might arise.

Generally, the potential areas of legal concern involve telecommuting or remote work. However, other workflex options can present legal considerations and will be discussed throughout as well. Please note that this white paper, which covers eleven (11) legal issues, is merely a reference; it is not legal advice, nor is it a fully comprehensive, detailed survey of every applicable law that might be implicated or triggered by use of one or more workflex options. Indeed, while this paper focuses on the main federal laws that intersect with workflex options, many states and localities have their own laws that may provide greater protection than the federal laws discussed or that may address issues not covered by federal employment laws. Although this paper will mention a few types of state and local laws to keep on your radar, please consult counsel for more information regarding applicable laws in the jurisdictions where you have employees.

LEGAL ISSUE NO. 1: The Americans with Disabilities Act (of 1990) as Amended

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against qualified individuals with disabilities (including applicants as well as employees) and requires that employers provide reasonable accommodations to these individuals unless doing so would create an undue hardship on business operations. The undue hardship analysis is based on an individualized assessment of current circumstances that shows a specific reasonable accommodation would cause significant difficulty or expense. All of these terms – “reasonable accommodation,” “qualified individual,” “disability,” and “undue hardship” – have very complicated and distinct legal definitions that may differ from colloquial understandings of the terms.

The ADA is two-pronged:

1. Employers cannot discriminate against applicants or employees with disabilities.

2. Employers may be required to accommodate applicants or employees with disabilities in ways that enable them to perform the essential functions of the job at issue.

The ADA is usually implicated in two types of scenarios:

1. When an employer provides a workflex option to one employee but denies use of the same option to a similarly situated individual with a disability.

2. When an individual with a disability requests an accommodation in the form of a workplace flexibility option.
These two scenarios often run together, and, indeed, almost all workflex options could theoretically be requested as an ADA accommodation. Denial of a request could lead to legal claims of discrimination and/or failure to accommodate the disability.

The U.S. Equal Employment Opportunity Commission (EEOC) has said that a reasonable accommodation is “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.”

In addition, the EEOC has found that sometimes a leave of absence may be a reasonable accommodation under the ADA, as may telecommuting or other remote work.

EEOC examples of possible reasonable accommodations include:

1. Making existing facilities accessible.
2. Job restructuring.
3. Part-time or modified work schedules.
4. Acquiring or modifying equipment.
5. Changing tests, training materials, or policies.
6. Providing qualified readers or interpreters.
7. Reassigning the individual to a vacant position. (The EEOC and some courts contend that this may include giving priority to a current employee with a disability over a more qualified candidate.)

*Tips for Minimizing Legal Risk:* Once an employer is on notice that an applicant or employee is requesting some type of modification or accommodation due to a medical condition or issue, the employer needs to make sure it follows its obligations under the ADA and engages in what is called the “interactive process.” This interactive process means that the applicant or employee and the employer must work together to find out what limitations the applicant or employee has and try to identify possible accommodations that would allow the applicant or employee to perform the essential functions of the job he or she wants or holds. Tips related to the ADA accommodation process:

1. Consider workflex options as possible accommodations. Not all jobs are conducive to every type of workflex. For example, individuals assigned to an assembly line in a manufacturing plant might not be able to alter their start time, whereas individuals in an office environment might be able to do so with minimal or no impact on business operations.

2. Take special care in situations where an applicant or employee asks to work from home as a reasonable accommodation. Consider taking the following actions before any such requests are made:
   a. Implement a telecommuting policy that contains, among other things, procedures for requesting telework, employee responsibilities, supervisor responsibilities, how equipment and software issues will be handled, and the like.
b. Update job descriptions to ensure that they accurately describe the actual, current job duties and any qualifications/requirements of the position. If physical presence in the workplace is truly essential for a particular position, it would be helpful to explicitly say so in the job description.

3. Engage in the interactive process with any employee who requests telework as a reasonable accommodation.

a. The employer and employee should review the essential functions of the position and determine whether some or all of the functions can be performed at home.

b. Several factors should be considered in determining the feasibility of working at home:

- The employer’s ability to adequately supervise the employee.

- Whether any duties require use of certain equipment or tools that cannot be replicated at home.

- Whether there is a need for face-to-face interaction and coordination of work with other employees. (Note: An employer should not deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. If the employer determines that some job duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs.)

- Whether in-person interaction with outside colleagues, clients, or customers is necessary.

- Whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace.

- How the organization has handled previous situations involving requests for telecommuting. If an individual with a disability performing job X asks to work from home and an individual without a disability also performing job X has already been permitted to work from home, it will be important to treat the former individual at least as well as the latter and thus permit working from home unless you can show that these individuals are not truly similarly situated. Denying an accommodation request could open the door to both a disability discrimination claim and a failure to accommodate claim.
• Whether inadvertently setting precedents for accommodation requests may impact undue hardship defenses. Be careful to make sure similarly situated individuals are not treated differently. For example, if you allow one individual to telework (regardless of reason) and later an employee with a disability in the same or a similar position seeks to telework, it will be harder for the employer to show that allowing telework in that situation would be an undue hardship on the organization. Treating similarly situated individuals differently can give rise to claims of disability discrimination as well as discrimination based on other protected characteristics.

4. Keep in mind that the ADA’s interactive process is just that: a process. Many employers do not fully grasp that the process will likely involve some give-and-take and may require multiple conversations to determine whether or how best to accommodate an employee.

Notable recent case: *Bilinsky v. American Airlines*, No. 18-3107 (7th Cir. June 26, 2019) (Employee with MS had successfully worked remotely from Chicago for years, and then post-merger, the company required all employees in her workgroup to relocate and work from Dallas headquarters. Employee claimed she needed to remain in Chicago rather than move to Dallas because heat exacerbated her symptoms. She was terminated for not relocating. The court held that working at headquarters evolved into an essential function of the job after the company changed its practice and policy. DISSENT noted that the company should have included that new physical presence requirement in a written job description.).

**LEGAL ISSUE NO. 2: The Fair Labor Standards Act**

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. For our purposes, the main issue employers should be aware of concerns nonexempt employees. Nonexempt employees are those employees who are not exempt from the FLSA’s obligations to provide overtime pay to employees who work more than 40 hours in a workweek. In other words, under federal law, nonexempt workers are entitled to overtime pay (at a rate of time and a half) for all hours worked over 40 in a workweek. However, wage and hour issues can arise that impact exempt telecommuters as well.

Three primary FLSA issues may arise with telecommuting employees:

1. Accurate recordkeeping of hours worked for nonexempt telecommuting employees. Because employers have a duty to keep track of all hours worked by nonexempt employees, accurate recordkeeping is critical. Some employers find it quite challenging to ensure that all time is properly recorded and paid in accordance with the FLSA’s overtime requirements when they have nonexempt employees working outside traditional brick-and-mortar buildings.
2. Accurate recordkeeping of hours worked for exempt telecommuting employees who later challenge their exempt status. Employers may run into trouble with exempt employees who telecommute if those employees later claim that they were misclassified as exempt and should have been paid as nonexempt employees. If the employer did not keep records (or direct the employee to keep records) of time worked, the courts will defer to the employee’s estimates of hours worked when calculating any unpaid overtime that might be due for misclassification.

3. Payment of business expenses. Another consideration is who will pay for data plans and internet service, office furniture, and other equipment. Under the FLSA, employers must not permit an employee to pay for employer business expenses if doing so will cause the employee’s earnings to fall below the required minimum wage or overtime requirements. Additionally, several states have laws that require employers to reimburse employees for certain business expenses. For example, California Labor Code Section 2802 expressly requires that employers reimburse employees for all necessary business-related expenditures. Very tricky issues with respect to payroll and income tax obligations arise when employees use personal devices for business purposes and get reimbursed at amounts higher than or lower than actual expenses incurred.

In addition to the FLSA, employers need to be mindful of additional state wage and hour obligations that might apply when a remote worker lives in a different state from the employer’s office. Generally speaking, employers must comply with the laws of the state in which the employee works. So, for example, if an employee works at home in New Jersey for an employer that has an office in New York, the employer needs to explore compliance with both jurisdictions’ laws. (This can impact overtime pay and minimum wage obligations if one state has a different test for overtime exemptions or minimum wage than federal law and/or the other state or municipality at issue. For example, an employee might be exempt from overtime under the federal law and the law of the state where the employer has an office, but not under his or her home state’s laws.)

*Tips for Minimizing Legal Risk*: Some employers generally disallow nonexempt employees from performing any remote work. Most resistance arises not from concerns about tracking time but rather tracking performance. However, for those employers that want to provide more flexibility to nonexempt workers, here are a few tips to minimize potential liability:

1. Develop a clear understanding of what constitutes “hours worked” under the FLSA.

2. Research software options for tracking work time remotely.

3. Have a clear written policy requiring that employees obtain advance permission for all overtime hours worked.

4. Ensure that your written policies and employee training materials make it crystal clear that working off-the-clock, under-reporting hours worked, and over-reporting hours worked are prohibited. (Remember, if someone works overtime without prior
permission, the employer must still pay the overtime but should take remedial action with respect to the employee’s policy violation.)

5. Ensure that policies are in place that communicate expectations regarding meal and rest periods. For example, make it clear to employees who are taking meal breaks (usually 30 minutes or more) that they must not perform any work during that time.

6. Include a safe harbor provision in your handbook and wage and hour policies. If improper deductions from an exempt employee’s pay are erroneously made, the employee will not lose his or her exempt status if the employer:

   a. Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism for employees to report the improper deductions. (The complaint mechanism should simply tell employees how to report violations, such as by sending written notification to their supervisor, human resources, the payroll manager, etc.)

   b. Reimburses the employee for any improper deductions.

   c. Makes a good-faith commitment to comply in the future.

*Note: This safe harbor is not available if an employer willfully violates the FLSA by continuing to make improper deductions after receiving employee complaints.

7. Conduct training on all wage and hour policies applicable to teleworkers and make sure employees acknowledge (on a signed and dated acknowledgment) that they have received, have read, and understand the policies and agree to comply with them.

8. Require all employees (exempt and nonexempt) to record their hours worked. For those telecommuting, logging in to and logging out of an online sign-in sheet to keep track of time might be the most feasible option.

9. Conduct periodic audits that compare hours reported to log-in and log-out reports to ensure accurate time recording.

10. Review applicable state and local laws to ensure compliance with wage and hour requirements that are potentially more generous than those set forth in the FLSA.

11. Provide employees who work remotely on a more than occasional basis with an employer-issued laptop and/or cellphone if needed for business purposes, and check state and local requirements for special requirements concerning business expenditures. Also, ensure that policies permit the employer to access business-owned devices in case there are questions surrounding time worked.
LEGAL ISSUE NO. 3: Workers’ Compensation Laws

Workers’ compensation benefits are medical and disability benefits for employees who sustain work-related injuries and diseases arising out of the course and scope of employment. Workers’ compensation laws vary state to state, so it is impossible to give a comprehensive overview of all requirements for all jurisdictions. However, you should be familiar with two general rules:

1. Employees working from home receive the same protections as those working in the traditional office setting for work-related injuries and illnesses.

2. Whether an injury is compensable under the applicable workers’ compensation law will be determined by the specific requirements of that jurisdiction.

Two areas where workers’ compensation laws are particularly important in the flexible workplace are:

1. The “coming and going rule.”

2. Home work itself (in other words, remote work).

In most traditional arrangements (i.e., where the employee travels from his or her home to an employer-provided office space), workers’ compensation laws do not cover injuries sustained while traveling to and from work. This principle is referred to as the “coming and going rule.”

However, there are situations where an employee injured during his or her commute may be entitled to workers’ compensation benefits. The number of these situations is increasing due to growing numbers of employees working from home and maintaining home offices and to ride-share arrangements involving personal or employer-owned vehicles. In such situations, employers must take into account possible exceptions to the traditional coming and going rule, such as the “dual-purpose doctrine.” Under the dual-purpose doctrine, or “dual-purpose exception,” an injury arising during one’s commute may be compensable if the trip serves both a personal purpose and a business purpose.

Under most workers’ compensation laws, travel between two parts of an employer’s premises is considered to be “in the course of employment.” If, for example, an employer requires an HR manager to travel from one employer plant to another in the course and scope of performing duties and the HR manager sustains injuries during the trip, such injuries are likely compensable.

When an employee primarily works at a home office and travels to a “traditional” office building, an argument could be made that the trips between these offices are – at least at times – trips between one business site and another. Each situation will turn on the specific facts presented and the state laws.

Generally, if the work is done at home for the employee’s convenience, travel to and from the “traditional” office building is not a business trip within the dual-purpose doctrine, since serving the employee’s own convenience in selecting an off-premises place in which to do the work is a personal purpose, not a business purpose.
In contrast, if an employer requires that an employee work from home and the employee is injured traveling between the “traditional” office and his or her home office to continue performing work for the employer, it will be difficult for the employer to argue that the injury was not incurred in the course of employment. However, there are few bright-line rules in this context, and each situation must be assessed on the particular facts presented and the assessment of factors considered in the particular jurisdiction.

In addition, and perhaps most important, keep in mind that accidents in the workspace at home can be deemed workers’ compensation injuries. In other words, if the illness or injury “arises out of” the course and scope of employment, regardless of the place the illness or injury occurs, it may be compensable.

**Tips for Minimizing Legal Risk:** To mitigate workers’ compensation claims, employers should:

1. Consider providing training to their telecommuting employees regarding injury prevention and assisting their employees in setting up ergonomically sound home offices.

2. Evaluate whether it is appropriate to inspect the home offices of employees.

3. Make their workers’ compensation carrier and employment counsel aware of any telecommuting arrangements so that they can provide further suggestions to minimize potential issues.

**LEGAL ISSUE NO. 4: Occupational Safety and Health Act of 1970**

Under the federal Occupational Safety and Health Act (OSH Act), employers are responsible for providing a safe and healthful workspace for their workers. The OSH Act covers most private-sector employers and workers in all 50 states. The Occupational Safety and Health Administration (OSHA) is the agency that implements the OSH Act and is part of the U.S. Department of Labor (DOL).

Among other things, the OSH Act requires that employers display the official OSHA Job Safety and Health — It’s the Law poster, inform workers about various hazards, provide safety training, and provide personal protective equipment where necessary.

The OSH Act also has recordkeeping requirements. Employers that are required by the OSH Act, because of their size or industry classification, to keep records of work-related injuries and illnesses will continue to be responsible for keeping such records, regardless of whether the injuries occur in a factory, a home office, or elsewhere, as long as they are work-related and meet the applicable recordability criteria. Generally speaking, the OSH Act requires that employers record and report occupational injuries and illnesses. Note, however, that “work-related” injuries under the OSH Act may be different from compensable injuries in the workers’ compensation context. In addition, the OSH Act prohibits employers from discharging, retaliating against, or discriminating against any worker because he or she exercised rights under the OSH Act. Finally,
note that many states also have their own OSHA-approved state programs that can cover both private and public sector workers.

Note that when it comes to OSHA, there is a distinction between a home office and a home-based worksite.

For home offices:

1. OSHA will not conduct inspections of employees’ home offices.
2. OSHA will not hold employers liable for employees’ home offices and does not expect employers to inspect the home offices of their employees.
3. If OSHA receives a complaint about a home office, the complainant will be advised of OSHA’s policy. If an employee makes a specific request, OSHA may informally let the employer know of complaints about home office conditions but will not follow up with the employer or employee.

For home-based worksites:

1. OSHA will conduct inspections of home-based worksites, such as home manufacturing operations, only when it receives a complaint or referral that indicates that a violation of a safety or health standard exists that threatens physical harm or that an imminent danger exists, including reports of a work-related fatality.
2. The scope of the inspection in an employee’s home will be limited to the employee’s work activities. The OSH Act does not apply to an employee’s house or furnishings.
3. Employers are responsible in home-based worksites for hazards caused by materials, equipment, or work processes that the employer provides or requires to be used in an employee’s home.
4. If a complaint or referral is received about hazards at an employee’s home-based worksite, the policies and procedures for conducting inspections and responding to complaints as stated in OSHA Instruction CPL 2.103 (the Field Inspection Reference Manual) and OSHA Instruction CPL 2.115 will be followed, except as modified by this instruction.
5. States may impose additional restrictions or requirements for home-based worksites.

*Tips for Minimizing Legal Risk:* Minimizing health and safety risks associated with telecommuting can be challenging. In addition to consulting a workplace safety attorney, employers should consider the following tips to help navigate these challenges:

1. Ensure that telecommuting employees are included in any safety training that might be applicable to them.
2. Instruct employees to immediately report accidents and injuries that could be work-related.

**LEGAL ISSUE NO. 5: Family and Medical Leave Act and State/Local Paid Family Medical and Sick Leave Laws**

The federal Family and Medical Leave Act (FMLA) provides certain employees with up to 12 workweeks of unpaid, job-protected leave for one or more of the following reasons:

1. The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care, and to bond with the newborn or newly placed child.

2. To care for a spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care.

3. For a serious health condition that makes the employee unable to perform the essential functions of his or her job, including incapacity due to pregnancy and for prenatal medical care.

4. For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or has been notified of an impending call or order to covered active duty status.

The FMLA also provides 26 workweeks of unpaid, job-protected military caregiver leave during a single 12-month period to care for a service member with a serious illness or injury if the eligible employee is the service member’s spouse, son, daughter, parent, or next of kin.

In some situations, FMLA leave is taken in a block of time. However, under certain circumstances, an employee may be entitled to take FMLA leave on an intermittent or reduced schedule basis.

The FMLA is incredibly complicated. Adding to that complication is the fact that states, cities, and counties have their own family medical leave and/or sick leave laws (some requiring unpaid leave, others requiring paid leave) for certain employees, providing greater protections than those afforded under the FMLA. Thus, for multistate employers, leave issues can be difficult to manage.

The FMLA itself is a workplace flexibility statute, providing leave in the form of a set block of time, intermittent leave, and reduced leave schedules. However, there are a few ways other workflex options may affect FMLA eligibility and administration:

1. **Hours worked requirement.** An employee must have worked for the employer for at least 1,250 hours during the 12-month period immediately before the date the FMLA leave is to start. Certain workflex options like sabbaticals or extended leave might cause an employee to fall under the 1,250-hour mark and lose FMLA leave eligibility unless the employer has a policy that states otherwise.
2. **Reduction in hours.** The amount of leave an employee is entitled to can also be affected if that employee has used other workflex options such as a reduced schedule. For example, if an employee has been working a reduced schedule of 30 hours a week, his or her FMLA leave entitlement (assuming the employee is otherwise eligible for leave) will be based on the 30-hour workweek.

3. **Posting requirements.** Telecommuting in particular can create some unique issues under the FMLA. Every employer covered by the FMLA must display or post a general notice about the Act. Among other things, the poster must be displayed in plain view where all employees can readily see it and the text must be large enough to be easily read. Willful violations of the posting requirements may result in civil penalties. Ensuring that telecommuting employees have proper notice of the FMLA (as well as other mandatory notices under applicable federal, state, and local laws) is critical to compliance.

4. **Determining the “worksite” for FMLA purposes.** One criterion for FMLA leave eligibility is that an employee work for an employer that has 50 or more employees within a 75-mile radius of a worksite. Determining eligibility can be tricky when you have several employees who are telecommuting. Generally speaking, the “worksite” is the office to which the employee reports and from which assignments are made. Interesting issues arise if an employee lives in one state and reports to an office in another state, and employers need to take special care to consider telecommuters when making eligibility determinations.

5. **Teleworking employees on FMLA leave.** Some employers may inadvertently get tripped up when they have telecommuting employees on FMLA leave, whether in block leave form, reduced hours, or intermittent leave. Hours spent working at home cannot be counted against an employee’s 12-week FMLA leave allowance because the employee would obviously still be performing the job.

*Tips for Minimizing Legal Risk:* Here are a few tips for lessening risk associated with administration of an employer’s FMLA obligations:

1. Handle FMLA aspects of leave first, then look at the issue in the context of any applicable state or local family medical leave and sick leave laws. (Be extra careful with paid sick leave laws. Usually, FMLA leave runs concurrently with state/local paid sick leave; however, look closely for exceptions.)

2. Make sure to consider telecommuters when determining whether there are the requisite 50 employees within a 75-mile radius of a worksite (and remember that, as is the case with many federal laws, states often have their own family medical leave acts and telecommuting employees might be eligible for leave under those states’ laws).

3. In addition to including an FMLA policy in your handbook and displaying requisite posters at your worksites, provide telecommuters with a hard copy and an electronic copy of applicable posters and notices (not just for the FMLA but for any and all
applicable laws). Be sure to require that employees acknowledge receipt of the posters and notices.

4. Have policies in place that require accurate reporting of hours worked, and make sure you do not count any hours worked against an employee’s FMLA leave bank.

LEGAL ISSUE NO. 6: Employee Benefits

Employers that allow employees to job share, work part-time or reduced schedules, or take leaves of absence need to be cognizant of potential implications for employee benefits issues.

* ERISA

The DOL describes the Employee Retirement Income Security Act (ERISA) as “set[ting] minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans.” ERISA itself does not require any employer to provide a retirement plan or health plan; however, when an employer chooses to offer such a plan, ERISA’s minimum mandates apply. For example, business owners may be required to include part-time workers in qualified retirement plans offered to other workers as it is impermissible to require an employee to work more than 1,000 hours per year to be eligible to participate in the plan. It is common for retirement plans to have minimum annual hours requirements in order for employees to earn additional years of service or to be eligible for a matching or profit sharing contribution, but, again, employers cannot set those minimums any higher than 1,000 hours.

When an employee goes on a reduced schedule, begins working part-time, or starts to take advantage of job-sharing options, these job status changes may impact the employee’s pension and 401(k) benefits.

*Tips for Minimizing Legal Risk Under ERISA: To curtail the potential for ERISA issues in the workflex context, employers should:

1. Review their pension and 401(k) benefits plans to determine minimum annual hours requirements.

2. Fully apprise employees of the impact that any job status change will have on their pension and 401(k) benefits.

3. Consult an employee benefits lawyer to discuss ERISA obligations.

* COBRA

The Consolidated Omnibus Budget Reconciliation Act (COBRA), which was an amendment to ERISA, allows employees and their families to continue group health plan coverage for a certain amount of time following a loss of coverage due to any of several events, including a reduction in work hours.
Sometimes health benefits plans provide benefits only to full-time employees. If the benefit is provided only to full-time employees, an individual may become ineligible for coverage when he or she moves from a full-time schedule to a part-time schedule or otherwise reduces his or her work hours beyond a certain threshold. At that time, COBRA may be triggered. So, for example, if an employee takes a sabbatical for several months and performs no work during that time, he or she may lose coverage under the terms of the plan, but COBRA would permit the continuation of medical, dental, and vision coverage at the employee’s cost for up to 18 months under federal law and possibly longer under certain state laws.

*Tips for Minimizing Legal Risk Under COBRA:* Although most employers understand the COBRA obligations that are triggered when an employee departs the organization, many such employers fail to recognize the COBRA implications that arise when an employee remains employed but nevertheless become ineligible for group health plan coverage for one reason or another. Here are a few tips for decreasing the chances that COBRA obligations are overlooked:

1. Look carefully at the eligibility requirements in health benefits plans when an individual requests to job share or work a reduced or part-time schedule.

2. Be sure to timely comply with COBRA requirements. COBRA contains strict notice, election, and payment timing rules.

3. Note that taking FMLA leave is not a qualifying event under COBRA, as employers are required to continue offering the same group health coverage to employees on FMLA leave. Certain state leave laws also require employers to continue offering the same group health coverage as well. For example, under California’s Pregnancy Disability Leave (PDL) law, the employer must continue the same group health coverage. Further, while the first 12 weeks of leave under the PDL law (which provides up to four months of leave for disability due to an employee’s pregnancy, childbirth, or related medical condition) runs concurrently with FMLA leave, it does not run concurrently with leave under the California Family Rights Act (CFRA), which explicitly excludes pregnancy and childbirth from its list of conditions entitling an employee to CFRA leave. California also has an organ and blood marrow donor law that requires continued benefits. However, a COBRA-qualifying event may occur if an employee on FMLA leave decides not to return to work following leave and loses group health coverage at that time. Talk to your employee benefits lawyer if you have questions about these types of scenarios.

*ACA*

The Affordable Care Act (ACA) amended ERISA to further regulate employee health coverage. Like ERISA, the ACA does not require that an employer provide benefits to employees. But in the case of large employers (generally defined as having 50 or more full-time employees, including full-time equivalents), companies that fail to offer certain minimum health coverage will be subject to a penalty tax assessment.

The ACA is too complex to allow for a thorough analysis of each and every aspect that could trigger consideration in the workplace flexibility context. It is important to note that the ACA
coverage mandates apply to “full-time employees” and that the ACA defines that term as employees working an average of 30 hours per week. As a result, an employer’s exposure for potential penalties under the ACA is determined by the number of employees it has, the number of hours those employees work, which employees are offered health coverage, and a number of other factors such as the cost of coverage and the design of the coverage itself.

*Tips for Minimizing Legal Risk Under ACA:* In addition to consideration of the ERISA and COBRA implications discussed above, employers should keep the following in mind with respect to the ACA:

1. Determine whether the ACA applies to them.
2. If the ACA does apply, ensure that the organization is offering all full-time employees health coverage that meets the ACA mandates. This requires diligent tracking of hours for eligibility purposes. In addition, when employees experience a change in status from full-time to flextime, the employer will want to carefully assess the impact of that change on health coverage eligibility. The impact of such a change can vary, depending on the timing of the change, the employer’s health plan design, and the method the employer has adopted for tracking eligibility for ACA purposes.

*OTHER EMPLOYEE BENEFITS ISSUES*

Outside of retirement and group health plans, employers will also want to be aware of the impact that moving away from a full-time schedule may have on other employee benefits. For example, if the organization offers voluntary group term life insurance to its full-time employees and that coverage ends upon a switch to a part-time schedule, the employer needs to ascertain whether there are conversion rights that need to be offered to the employee and, if so, whether the insurer or employer is obligated to make that offer. Most group life insurance policies have mandatory conversion rights, requiring immediate notice and action by the employee within a very short period of time to avoid a loss of coverage.

**LEGAL ISSUE NO. 7: Trade Secrets and Data Privacy Issues**

In May 2016, the Defend Trade Secrets Act of 2016 (DTSA) was signed into law. The DTSA creates a federal cause of action for trade secret misappropriation. The DTSA does not preempt state trade secret protections, and, while many states model their laws after the Uniform Trade Secrets Act (UTSA), state laws vary jurisdiction to jurisdiction. Generally speaking, however, a major requirement is that the employer takes reasonable efforts to protect trade secrets. If a trade secret holder fails to maintain secrecy, protection is lost. Electronic data in particular is vulnerable to being released or discovered.

In addition, employers must balance obligations to protect the confidentiality and/or privacy of employee data, other organizational data, and the data of clients and their customers and other third parties. Data breaches are common and can be incredibly problematic for companies, especially when highly sensitive information is released into the public domain (such as Social Security numbers or other personal identifiable information, medical records or other health information, or financial information).
Employees who work remotely may be handling sensitive organizational information—both for the employer and possibly also for third parties.

*Tips for Minimizing Legal Risk:* Employers invest a tremendous amount of resources developing and maintaining trade secrets. To protect those investments, employers should consider taking the following actions when it comes to employees working remotely:

1. Take affirmative steps to protect trade secrets so that, in the event of a misappropriation, the employer can show that it truly did take steps to maintain secrecy. This includes special consideration of any trade secret information to which a remote employee may have access.

2. Take steps to implement proper security measures to minimize potential liability for data breaches. In addition to requiring adherence to regular data security policies, employers would be wise to take additional measures with respect to employees who work remotely. For example:
   a. Allow remote access to employer systems only via a secure connection and secure network.
   b. Prohibit anyone other than the employee from using the work equipment.
   c. Require that the employee store organizational information and equipment in a home office with a lock.
   d. Require that the employee retain hard copy documents with sensitive organizational information in locked storage cabinets.
   e. Consider providing a shredder for the employee’s disposal of sensitive records that are no longer needed.
   f. Permit sensitive information to be downloaded to, sent from, and received by and on only employer-owned equipment as opposed to personal devices.

*Caveat:* Always remain mindful of employees’ privacy interests, including any applicable federal, state, city, or other local laws related to the same.

**Legal Issue No. 8: Other Considerations**

In addition to the ADA discussed earlier, there are many other federal, state, and local nondiscrimination laws. Other than the ADA, the main federal nondiscrimination law employers should be well versed in is Title VII of the Civil Rights Act of 1964, as amended. Title VII prohibits discrimination on the basis of race, color, national origin, sex, and religion. Similar to the ADA, it also affirmatively requires that employers provide reasonable accommodations for applicants’ and employees’ sincerely held religious beliefs unless doing so would create an undue hardship (i.e., more than a minimal burden) on the operations of the business.
Other federal laws employers should be aware of are:

1. The Age Discrimination in Employment Act of 1967 (ADEA), which prohibits discrimination against applicants and employees who are 40 or older on the basis of age.

2. The Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits discriminating against applicants or employees on the basis of genetic information and prohibits the use of genetic information in employment decisions. GINA also restricts certain entities from requesting, requiring, or purchasing genetic information and strictly limits disclosure of that information as well.

3. With respect to Title VII’s requirement to provide accommodations for sincerely held religious beliefs, accommodations may include things like changing a schedule to allow an employee to attend a church service, allowing unpaid leave to attend religious ceremonies, providing breaks for employees to pray at prescribed times during the day, allowing an employee to swap shifts with another employee to avoid working on designated Sabbath days, and the like.

4. In addition, Title VII, the ADEA, and GINA, as well as applicable state or local nondiscrimination laws (such as, for example, laws prohibiting discrimination against employees or applicants on the basis of sexual orientation or gender identity), are important in the world of workflex when companies allow some employees, but not others, to use workflex tools. Although attorneys hate the word “fair,” juries want to know that employees were treated fairly. If it appears that one employee was granted leniency where another was not, juries will want to know that there was a legitimate, nondiscriminatory reason to justify the disparate treatment.

*Tips for Minimizing Legal Risk: In addition to the tips set forth earlier, the following steps can help employers diminish legal risk under federal nondiscrimination laws:

1. Engage in the interactive process with any employee who requests the use of workflex options for the purposes of accommodating his or her religious beliefs or practices. The purpose of the interactive process is to determine whether there are any effective accommodations available that would not create an undue hardship on the employer.

2. Take special care to ensure that no one is denied or limited in the use of a workflex option (such as, for example, flexing his or her start time) when others who are similarly situated are permitted to use the option. Remember this golden rule: treat similar situations similarly.

LEGAL ISSUE NO. 9: The National Labor Relations Act

Among other things, the National Labor Relations Act (NLRA) protects the rights of nonsupervisor and nonmanagement employees to organize and bargain collectively with their employers and to engage in other forms of protected concerted activity.
In a unionized workforce, flexibility such as the ability to swap shifts will likely be considered a term and condition of employment and therefore be subject to negotiation with the union. In a nonunion work environment, the NLRA can limit the employer’s right to utilize employee committees to explore workplace flexibility alternatives.

*Tips for Minimizing Legal Risk: All employers should be cognizant of potential NLRA implications in the workflex context. Here are a few specific tips to consider:

1. Maintain the right to establish workflex schedules (as opposed to being committed to them) in a collective bargaining agreement. In other words, employers should keep the right to make changes to schedules to enhance flexibility.

2. Keep in mind that the NLRA may restrict a progressive nonunion employer’s use of a task force or other employee committee to establish workflex programs. Consult your labor attorney to understand these limits so that you lawfully seek input from your workforce.

LEGAL ISSUE NO. 10: The Uniformed Services Employment and Reemployment Rights Act of 1994

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects the job rights of individuals who take leave to perform uniformed service. Among other things, USERRA establishes the conditions upon which individuals can be absent from work for uniformed service and remain entitled to reemployment, provides rights to certain benefits continuation, requires employers to make reasonable efforts to accommodate veterans with disabilities, requires employers to provide training or retraining so that returning service members can be reemployed in the appropriate reinstatement position, and so on. In addition to the accommodation requirements outlined above, USERRA prohibits employers from denying “any benefit of employment” to covered service members on the basis of their performance of uniformed service. USERRA defines “benefit of employment” to include “the opportunity to select work hours or locations of employment.”

Anytime an employee needs to take a leave of absence for uniformed service or is returning from a uniformed service leave, USERRA may be triggered.

Situations may arise where managers become frustrated over perceived “unreliability” of service member employees (who may, for example, need to be away from work on short notice for drills and such), and managers may have knee-jerk reactions to terminate a service member’s telecommuting privileges, flextime options, or other workflex benefits.

*Tips for Minimizing Legal Risk: With the increased number of service members in the workforce, minimizing legal risk under USERRA is perhaps more important than ever. The following tips can help lessen the chances that employers will mishandle issues related to leave and reemployment of this population of the workforce:
1. Become knowledgeable regarding the employer’s obligations under USERRA if an employee needs to take a leave of absence for uniformed service or is returning from a uniformed service leave.

2. Do not attempt to remedy an issue of perceived “unreliability” of service member employees by terminating or otherwise denying workflex benefits. Such actions would likely be problematic under USERRA.

**LEGAL ISSUE NO. 11: Taxes**

Taxes are everywhere, and employers are tasked with the challenge of managing various payroll tax withholding and payment obligations. On the federal side, the Federal Insurance Contribution Act (FICA) requires that employers withhold three types of taxes from employees’ pay:

1. Social Security tax.
2. Medicare tax.
3. Medicare surtax if the employee earns over $200,000.

Additionally, employers have to pay their own portion of the Social Security tax and Medicare tax. Further, the Federal Unemployment Tax Act (FUTA) requires employers to pay tax on payroll to help fund state unemployment compensation benefits. In addition to these federal laws, many states and municipalities impose tax withholding obligations. The patchwork of state tax laws in particular can be very frustrating for employers.

Telecommuting in particular can create difficult tax issues. For example, at least one court has required an employer organized in State A to file business tax returns in State B solely because it had one employee telecommuting from State B. Further, some cross-border situations may result in telecommuters being taxed in both their home state and their employer’s state, and the employer may have to withhold payroll taxes with respect to one or both states. Additional complications involving unemployment contributions and benefits can arise in such cross-border situations.

*Tips for Minimizing Legal Risk:* In addition to consulting with an attorney well versed in employment taxation issues, employers should consider taking the following steps to minimize unintended tax problems:

1. Become familiar with applicable state and municipal tax information.
2. Determine whether the employer is required to register as an employer in any state where it has an employee who telecommutes.
3. Determine the appropriate state to which unemployment contributions should be made.
Beam Me Up, Scotty: Legal Issues When Employees Telecommute

Presented by
Ashley Herd, SVP of People & Legal, Modern Luxury
Anthony L. Martin (Las Vegas)
Thomas M. McInerney (San Francisco)

Why Allow Work Flexibility/Telecommuting (“Workflex”)?

- May contribute to bottom-line gains (recruitment, retention)
- Your competitors may be offering it
- Allows workers flexibility to juggle other commitments or accommodate disability
- Other reasons?
Practical Issues/Risks?

- Lack of communication
- Impact on workplace camaraderie
- Lack of face-time may undermine career advancement/relationships
- Lack of support or guidance from supervisors/colleagues
- Working remotely can be lonely

Situation #1

Employee with MS has worked remotely in Chicago for years due to climate impact on her condition (heat exacerbates her symptoms). After a merger, employer announces requirement that all employees in employee’s workgroup are to relocate and work from Dallas, or be terminated. The reason – the workgroup evolved over time from an all independent remote activities group to a team-centered crisis management focus, requiring more regular face-to-face meetings on short notice. However, there is no modified written job description post-merger reflecting the workgroup’s change in focus. Employee is a good employee and willing to assist anyone at any time; she is just not willing to relocate to Dallas.

Is employer’s discharge of employee for her refusal to relocate to Dallas lawful?
Legal Issue No. 1: The Americans with Disabilities Act

- Two prongs to ADA:
  - No discrimination against applicants or employees with disabilities
  - Accommodations to perform essential functions

- How does workflex come into play with ADA?
  - Offered to one employee but denied to another
  - When disabled requests accommodation
  - EEOC guidance on a “reasonable accommodation”?

Tips for Minimizing ADA Risk From Workflex

- Consider workflex options as possible accommodations (not all jobs conducive to remote work)
- Take special care where employees ask to work from home as an accommodation (e.g., have a policy addressing key issues, update job descriptions, etc.)
- Engage in interactive process (review essential functions of job, consider several key factors to determine feasibility, etc.)
Tips for Minimizing ADA Risk From Workflex (cont’d)

- Communicate early and clearly with employee
- Just because they give a doctor’s note does not mean you automatically have to say yes (	extit{Bilinsky v. American Airlines (2019)}).

Legal Issue No. 2: Wage and Hour Implications (The Fair Labor Standards Act and State Law)

- How does workflex come into play with wage and hour laws?
  - Accurate recordkeeping of hours worked for non-exempt
  - State requirements for meal/rest breaks
  - Accurate recordkeeping of hours worked for exempt (who later challenge their status)
  - Payment of business expenses (CA, IL, DC, IA, MA, MT, NH, ND, SD)
  - Other state law implications (e.g., minimum wage, regular rate)
Tips for Minimizing Wage and Hour Risk From Workflex

- Understand what constitutes “hours worked” in applicable jurisdiction
- Review and comply with applicable state and local laws
- Research software options for tracking hours worked
- Have clear policies re: overtime, off-the-clock, and breaks
- Include safe harbor provision in policies regarding erroneous deductions
- Conduct training on all wage and hour policies

Tips for Minimizing Wage and Hour Risk From Workflex (cont’d)

- Require all employees (exempt and nonexempt) to record their hours worked
- Conduct periodic audits to ensure accurate recordkeeping
- Provide employees with employer-issued laptop and cellphone if needed for business purposes, and comply with state and local requirements for business expenses
Situation #2

Telecommuter, in a rush to answer his work phone, is injured when he slips and falls on the wet floor in the bathroom.

Covered workers’ compensation claim? OSHA implications?

Legal Issue No. 3: Workers’ Compensation Laws

- Workers’ compensation benefits – medical and disability benefits for work-related injuries
- How does workflex come into play with workers’ compensation?
  - The “coming and going” rule/“dual-purpose” exception
  - Injuries occurring at home
**Tips for Minimizing Workers’ Compensation Claims Risk From Workflex**

- Consider training telecommuting employees regarding injury prevention and setting up ergonomically sound home offices
- Evaluate whether it’s appropriate to inspect the home offices
- Discuss with workers’ compensation carrier and counsel to provide further suggestions for minimizing risk

**Legal Issue No. 4: Workplace Safety**

- The federal OSHA statutes impose requirements on employers and impose various posting and recordkeeping requirements.
- How does OSHA come into play with workflex?
  - For home offices:
    - No inspection
    - Employers not liable and not required to inspect home offices
    - If OSHA receives a complaint, complainant will be advised of OSHA’s policy
Legal Issue No. 4: Workplace Safety (cont’d)

- For home-based worksites:
  - OSHA will conduct inspections (e.g., of home-based manufacturing facility) only when it receives a complaint of violation that threatens physical harm or imminent danger exists
  - Scope of inspection limited
  - Employers responsible for hazards caused by materials/equipment that employer provides or requires
  - Inspection will follow set procedures
  - States may impose additional restrictions or requirements

Tips for Minimizing Workplace Safety Risk From Workflex

- Ensure telecommuting employees are included in any applicable training
- Instruct employees to immediately report any work-related accidents or injuries
Legal Issue No. 5: FMLA/Local Paid Medical and Sick Leave

- FMLA provides, among other things, up to 12 weeks unpaid protected leave for:
  - Birth of child/adoption or foster care/baby-bonding
  - To care for family member with serious health condition
  - Serious health condition of employee
  - Qualifying exigency arising out of family member who has been notified of impending military service

Legal Issue No. 5: FMLA/Local Paid Medical and Sick Leave (cont’d)

- Hours worked requirement
- Reduction in hours
- Posting requirements
- Determining the “worksite” for FMLA purposes
- Teleworking employees on FMLA leave
Tips for Minimizing FMLA Risk From Workflex

- Handle FMLA aspects of leave first, then look at state and local (be careful with paid sick leave laws!)
- Consider telecommuters when determining requisite number of employees for FMLA
- In addition to other postings, provide telecommuters with hard copy and electronic copy of posters and notices
- Have policies requiring accurate reporting of hours worked

Legal Issue No. 6: Employee Benefits

- ERISA, COBRA, and the Affordable Care Act have differing requirements that may be implicated by telecommuting arrangements
Tips for Minimizing ERISA Risk From Workflex

- Review pension and 401(k) plans to determine minimum hour requirements
- Apprise employees of impact of any status change on their benefits
- Consult a benefits attorney to discuss ERISA obligations

Tips for Minimizing COBRA Risk From Workflex

- Carefully review eligibility requirements in benefit plans when individual requests a status change
- Timely comply with COBRA requirements
- FMLA leave is not a COBRA-qualifying event (California has its own special requirement)
Tips for Minimizing ACA Risk From Workflex

- Determine whether ACA applies
- If does, ensure offering full-time employees that meets mandates

Situation #3

Software developer pays someone overseas 1/5 of their salary to perform their actual job. Employee continually meets performance expectations, and is relatively “innocuous” to coworkers. While someone else does his job, he:

9:00 a.m.  Surfs Reddit and watches cat videos for a couple hours
11:30 a.m. Takes lunch
1:00 p.m.  It’s eBay time
2:00 p.m.  On to Facebook updating, some LinkedIn
4:30 p.m.  Complete end of day update email to management
5:00 p.m.  Logs off computer

Now imagine if he worked remotely...
Legal Issue No. 7: Trade Secrets and Data Privacy

- Employees working remotely may be handling trade secrets

Tips for Minimizing Trade Secret Risk From Workflex

- Take affirmative steps to protect trade secrets
- Take steps to minimize potential liability for data breaches
Tips for Minimizing Trade Secret Risk From Workflex (cont’d)

- Allow access only via secure connection
  - Prohibit anyone other than employee to use equipment
  - Require locking of organization equipment and hard copy documents
  - Consider a shredder
  - Permit sensitive information downloading only to employer-owned equipment
  - Continually monitor systems (VPN activities, etc.)
    - CAVEAT: Be mindful of privacy laws...

Legal Issue No. 8: Other Nondiscrimination Laws

- Potential statutes implicated: Title VII and state equivalents, Age Discrimination in Employment Act, Genetic Information Nondiscrimination Act
- How do discrimination acts come into play with workflex?
  - Religious accommodation requests
  - Some employees, but not others, are allowed workflex
Tips for Minimizing Discrimination Risk From Workflex

- Engage in interactive process accommodating religious request
- Treat similar situations similarly

Legal Issue No. 9: The National Labor Relations Act

- NLRA protects rights of nonsupervisory and nonmanagement employees to organize/bargain collectively and engage in protected concerted activity
- How does NLRA come into play with workflex?
  - In unionized workforce, flexibility such as ability to swap shifts may be subject to negotiation
  - In non-union environment, NLRA can limit employer’s right to utilize employee committees to explore workflex alternatives
Tips for Minimizing NLRA Risk From Workflex

- Maintain right to establish workflex schedules in a collective bargaining agreement
- Consult with attorney re: how NLRA may restrict a nonunion employer’s use of a task force or other committees to establish workflex program?

Legal Issue No. 10: Military Service

- The Uniformed Services Employment and Re-Employment Rights Act of 1994 (USERRA) protects job rights of those who take leave to perform uniformed service
- How does USERRA come into play with workflex?
  - Managers may become frustrated with perceived “unreliability” of service members, and may terminate telecommuting privileges, flextime options, or other benefits
Tips for Minimizing USERRA Risk From Workflex

- Advise and train managers regarding obligations if employee needs to take a service-related leave
- Do not remedy an issue of “unreliability” of service members by terminating workflex or other benefits

Beam Me Up, Scotty: Legal Issues When Employees Telecommute

Presented by
Ashley Herd, SVP of People & Legal, Modern Luxury
Anthony L. Martin (Las Vegas)
Thomas M. McInerney (San Francisco)
Ashley Herd is the SVP of People & Legal for Modern Luxury Media. After graduating from Emory School of Law, she began her legal career at Ogletree Deakins. She has also worked in the legal departments of Yum! Brands and McKinsey & Company. She lives in Atlanta but recently spent 2 years living in Sydney, Australia, with her family.
Anthony L. Martin
Office Managing Shareholder  ||  Las Vegas

Mr. Martin is the managing shareholder of the Las Vegas office. His unique practice encompasses two primary components:

1. Representation of management in traditional labor matters
2. The defense of employers in employment matters.

First, utilizing his prior experience with unions and the NLRB, Mr. Martin also represents employers in traditional labor law matters, including significant R-Case experience, the preparation of responses to ULP charges, conducting labor arbitrations, union avoidance, and the negotiation and maintenance of collective bargaining agreements.

Mr. Martin also defends employers throughout the country in claims including, but not limited to, suits brought pursuant to Title VII, Americans with Disabilities Act, Family Medical Leave Act, the Age Discrimination in Employment Act, as well as corresponding state law claims and administrative charges.

Mr. Martin also engages in the firm’s preventative practice, counseling employers on a wide variety of personnel issues, including proactive employee relations, conducting seminars, harassment training and teaching effective hiring and separation techniques for employers. He regularly advises employers regarding wage and hour issues, employee handbooks, policies and procedures, employee separation, reductions in force, employee leave, employment contracts, and assists employers with responses to administrative agency complaints.

Mr. Martin is a frequent speaker in the community and a founding member of Stay Connected, a free, quarterly seminar series focusing on significant labor and employment issues. Stay Connected is a partnership of HR and legal professionals dedicated to providing and maintaining a better workplace.
Thomas M. McInerney
Office Managing Shareholder  |  San Francisco

Thomas ("Tom") McInerney, the Managing Shareholder of the San Francisco office of Ogletree Deakins, has extensive employment litigation experience in complex litigation matters, with an emphasis on class actions, multi-plaintiff cases, and trade secret and other complex business disputes. He has tried to verdict several cases in both state and federal courts, and represents clients in a wide-range of fields, including technology, financial services, insurance, construction, energy/utility, healthcare, transportation and logistics, and personal services.

Tom’s expertise is in dealing with complex or novel issues, including sex and race discrimination and harassment, wage and hour class actions, alleged theft of trade secrets, and breach of contract. Tom also has significant experience in appellate matters, including litigating cases in the California Court of Appeal, the California Supreme Court, and the U.S. Court of Appeals for the Ninth Circuit. Arbitrations and mediations are also a large part of Tom’s practice. Tom has assisted clients in developing arbitration and mediation programs, and he has represented a wide variety of clients in these alternative dispute resolution proceedings.

Tom brings a practical business perspective to his practice, formed in part by his experience working with large, medium-size, and small business clients throughout California and elsewhere. Tom also serves on the Ogletree Deakins Management and Pro Bono Committees. Prior to joining the firm he was a labor and employment partner with another national law firm. Tom is also very active in the local San Francisco Bay Area community, and is an elected official in Marin County, California.