From Here to There and There to Here:Hybrid Workers are Everywhere




From there to here,
from here to there,
FUNNY things are
EVERYWHERE.
To THERE
To HERE
NEAR
FAR
One Fish Two Fish Red Fish Blue Fish by Dr. Seuss
Dr. Seuss

What have we learned?



- Remote work has been overall more successful than expected
- There is no clear answer on how much remote work is the right amount of remote work
- Remote work is not as successful for new or the less experienced employees
- Meetings with an emotional component need to be in-person
- You may need an office space, but its size and role will change

What is the consensus?



- Employees are demanding to work from home
- (Some) Employers are less fearful of employees working from home
- Employer see the potential cost savings when employees work from home
  - Reduced business travel
  - No more snow days!!
- Employers recognized business can function when employees work from home

Remote Work Presents Opportunities

- How can we move the “home office” perks into the regular office?
- Can we offer a hybrid work from home schedule?
- How do we balance employee job duties require in-person work versus employees who have flexibility to work remotely.



ADA: Title I

No employer shall discriminate against any qualified individual with a disability in regard to any aspect of employment

Aspects of employment include remote work

A “Qualified Individual?” is one

- Who satisfies the requisite education, skill, experience, and other related requirements of the job held or desired; and

- Who, with or without reasonable accommodation, can perform the essential functions of the job.

What are Essential Functions of a position?

- Fundamental Responsibilities determined by the employer
- Not marginal tasks

Considerations:

- Employer's judgment
- The written description prepared before advertising or interviewing
- The performance of the function is the reason the job exists
- The consequences of the function not being performed
- The amount of time spent performing the function
- A limited number of employees among whom the performance of the function can be distributed
- The function is highly specialized such that the incumbent is hired for that expertise
- Collective Bargaining Agreement

What is a Disability?

An individual with a "disability" is someone who:

- Has a physical or mental impairment that substantially limits one or more major life activities
- Has a record of such an impairment
- Is regarded as having such an impairment

*ADA also covers "associational disabilities" – those individuals who are associated with someone who has a disability

What is a Physical or Mental Impairment?

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems; or

- Any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

EEOC Guidance

https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation

(Mar 2, 2003)

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

(Updated as of March 14, 2022)

EEOC Guidance: Telework permitted during COVID-19 pandemic may not necessarily be required post-pandemic as accommodation – but one factor will include duration of the telework.

Is Being "in person" an Essential Function of the job?

Samper v. Provident St. Vincent Med. Ctr., 675 F.3d 1233 (9th Cir. 2012)

- Employee, neonatal nurse, had fibromyalgia, and missed substantial work over a period of several years. Employee terminated for attendance issues.
- Plaintiff employee argued her absences were due to her disability, in violation of the ADA .
- Defendant Employer argued regular in-person attendance is an essential function.

Samper v. Provident, continued

- Court cited a number of cases holding attendance is an essential functions, if:
  - The position may require work as "part of a team."
  - The position require face-to-face interaction with clients and other employees
  - The job require the employee to work with items and equipment that are on site.
- "common-sense" that on-site regular attendance is an essential job function neo-natal nurse."



EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir., 2015)

- Employer, fired employee a woman with irritable bowel syndrome who had worked as a resale buyer of steel
- Resale buyer's job is highly interactive. Some of the interactions occur by email and telephone. But many require "good, old-fashioned interpersonal skills"
- Court also considered:
  - employee's performance
  - work habits
  - overall attendance



Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595 (6th Cir. 2018)

- Plaintiff was an in-house attorney; focus was labor, employment, and workers' compensation issues.
- General Counssel sent an email to Legal Department:
  - "Please be reminded that office hours for the Legal Department are 8:30 a.m.–5:00 p.m. Monday through Friday. All employees, including the lawyers, are expected to be at work and devoting their time and attention to Division business during those hours."
- Plaintiff had some complication with her pregnancy at 24 weeks, and she asked to work from home for 10 weeks.
- Employer denied the request based on a determination that physical presence was an essential function of the job and concerns about maintaining confidentiality.

Key points

1. Courts holds that in -person attendance is an essential function for “most jobs” - but not *all* jobs.
2. Determining whether in-person attendance is an essential function is a “highly fact-specific” exercise.
3. Cases will turn on:
   i) the duration of the remote work request;
   ii) a demonstration that other essential functions can be completed remotely.

Courts will uphold a termination if the employer can Show that in-person attendance is essential.



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The Interactive Process- Fact finding

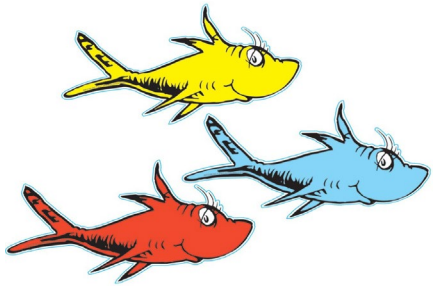
- Get the basic facts about the medical condition (reason) that requires a change in the way a job is performed.
- Ask why is it necessary and for how long the employee is asking to work from home.
- Understand how the essential functions of the job - can it be performed from home?
- Rethink changes in the workplace that could enable the employee to perform onsite.

Is in-person attendance truly essential?

- Discussions with managers about what the job actually does
- Fact specific inquiry, identify why in-person work is essential
  - Teamwork/collaboration
  - Special equipment
  - Supervision
  - Interactions with citizens, vendors, etc.
- Assess employee performance to date
- Consider changed circumstances since the pandemic started

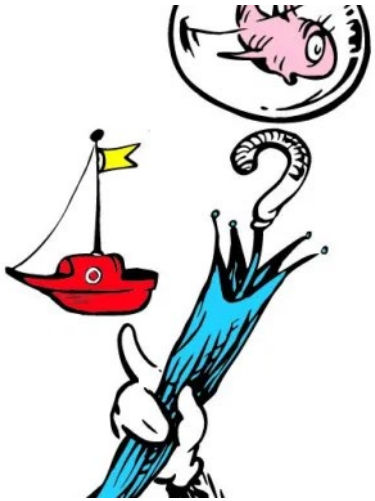
Key Provisions for Creating a Policy

- Eligibility for Telework
- Subject to Revision
- Confidentiality and IT Capability
- Protecting City Data
- Not a Substitute for Family Care, PTO, or Leave
- Workplace Safety
- Communication
- Reasonable Accommodations
- Equipment and Reimbursement
- Timekeeping
- Wage and Hour Issues



Fair Labor Standards Act (FLSA)

- Requires that an Employee must be paid for all of the time worked
- But doesn't define the term, "work"
- Requires the Employer to keep accurate pay records
- All hours worked must be counted to determine overtime hours worked, by work week





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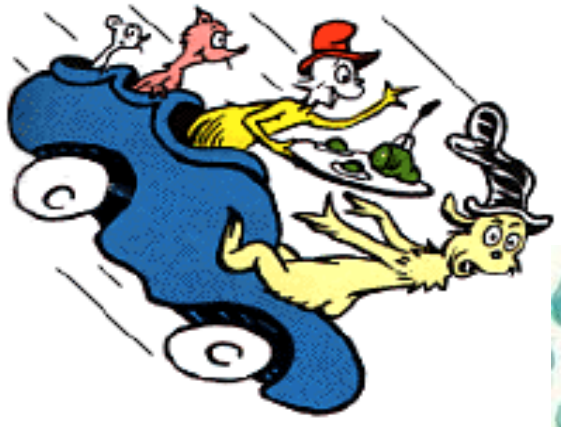
Travel Time – Some General Rules

- Home to Work: Regular Commute – Not Compensable
- Home to Work: Special Location – Compensable
- **Travel During Work Hours – Compensable**
- Travel Away From Home – Compensable







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Continuous Workday Doctrine

- The entire period between the start and the end of an Employee's workday job activities —beginning when the Employee starts "a task that is integral and indispensable to the employee's duties"—is compensable

- Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)

- U.S. Department of Labor Opinion Letter FLSA2020-19

Continuous Work Day

- Employee's travel time between worksites (including home and office) *after they have started working for the day* is ordinarily compensable time.
- But Opinion Letter FLSA2020-19 clarifies that an employee's travel time *for personal reasons* (whether prior to, during, or after their regular workday) is non-compensable time

  - *even if the employee changes work locations after attending to those personal matters*.
  - In such instances, the employee would either be considered off-duty or engaged in normal commuting.

Continuous Workday (cont.)

- For example, if an employee starts their workday virtually at home in the morning and runs personal errands on their way into work for the afternoon, such travel time is not compensable. However, if an employee virtually begins their principal work activities and then heads straight to the office, such travel time may be compensable.
- The difference? The employee's ability to control what he or she does in the intervening time between one work location and the next.



Continuous Workday (cont.)

- Checking email or performing preliminary work *before leaving home in the morning* does not ordinarily begin the continuous workday.
- Similarly, evening preparatory or administrative work does not extend the continuous workday after an employee returns home.
- Test of a continuous workday: whether a task ***must*** be performed at a specific time or place, or whether the time could be [the employee's] own purposes.'

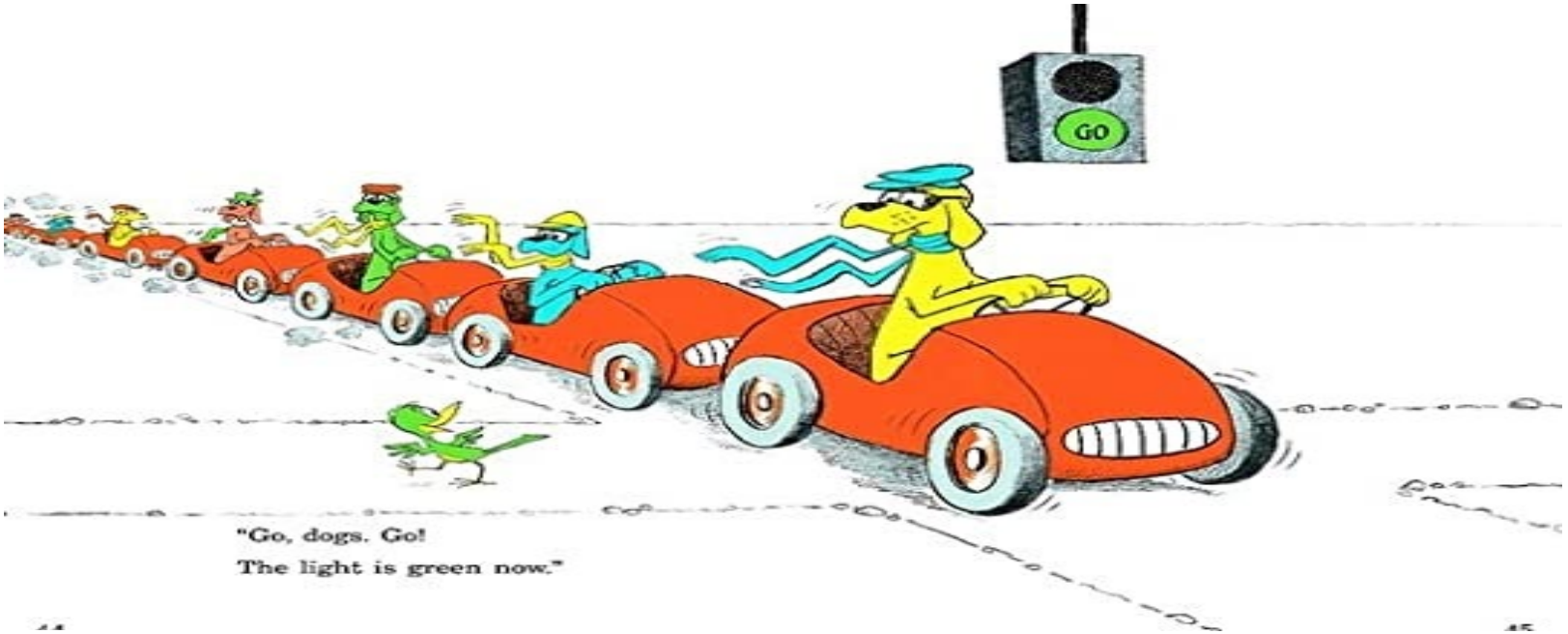


Best Telework Practices

- Establish definite start/stop times;
- Require Employees to track all hours worked on a daily basis;
- Departments should also establish policies regarding when it is permissible for an employee to travel between home and the office during the workday; (telework) and
- Determine in advance whether Employees may be compensated for travel between the two, absent business need - and Supervisors should communicate that expectation to the Employee

Type of Travel	Compensable	Not Compensable
Home-to-work commute		✓
Travel to different worksites during the workday	✓	
Travel to a different city, returning the same day	✓	
Travel that requires an overnight stay		
During regular work hours	✓	
Outside of regular work hours		✓
Driving that is required by the employer	✓	

Questions?



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