

# HOW TO MANAGE FLEXIBLE WORK

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# WHAT THE HECK JUST HAPPENED?

## A BRIEF HISTORY OF TIME

- Smart phones really sent flexible teleworking off and running and we didn't even know it.
  - Wow, you can access Myspace from a phone? This is just like the Jetsons!
  - Hey, Blackberry lets you email! LOL
  - You start checking emails during your kid's baseball game.
  - Pretty soon you were remote working on top of regular working. 😞
  - Flexible work wasn't even a "thing" other than a crummy work life balance.

# PEOPLE WHO GREW UP WITH TECHNOLOGY STARTED SCHOOLING THE BOOMERS

- More recent members of the workforce didn't really meet and negotiate over their flexible work but simply put it into effect.
  - About the time you were going to get on them for not being at work at 9 a.m. or sometimes 10, they would email or text you at 10 p.m. on a Saturday with some detailed review of a 70 page contract or thoughts on a complex issue.
    - That was ok until they expected a response back during bingo night...
  - Desk top computers were viewed as the technology equivalent of a Close N Play record player.
  - Physical offices were viewed as a kind of a funny but puzzling thing good mostly for dropping off or picking up stuff.

# GIVE HR A TOOL AND WATCH 'EM RUN (or at least powerwalk)

- Human Resources has always been really good at flexible work.
- HR's main function is to be the parent that is available all the time in case a ~~kid~~ employee gets hurt or gets in trouble so
  - you can put on a bandaid,
  - give em a pep talk,
  - Provide a socially distant and policy compliant hug (figuratively) and
  - send them back to work until we can get it fixed tomorrow.
- You can't do that M-F 9 to 5.

# HR ROCKS (CON'T.)

- Pro tip:

Email or text an HR person during any waking hour and I bet you get a response back faster than you thought you would.

- HR can just about duct tape anything regardless of when or where we are at.
- We are like Macgyver except we can save the day by phone or in a manner that does or does not create government data.
- Let's see a fire department put out a fire by email.
- We rock.

# WHAT IS FLEXIBLE WORK?

- That gets us to the whole issue of formal teleworking and what it is today.
- Blame the pandemic.
- Looking back I was not a huge fan. Sure
  - the whole mask thing made us all equally attractive,
  - you could eat mini Chips Ahoy while wearing a mask and nobody could tell,
  - COVID beards were pretty cool,
  - but still.

# CREATION OF FLEXIBLE WORK POLICIES – OUR INVOLUNTARY PILOT PROGRAM

- So we got shut down.
- Well some folks got shut down anyway.
- We simplified this during panic time into three categories:
  - Stay Home and find out Bob Barker is not on the Price is Right (but Erica is still on All My Children)
  - Keep Coming to Work
  - Stay Home But Work in some capacity

# CREATING FORMAL FLEXIBLE WORK POLICIES (Con't.)

- The Stay Home category didn't need much in the way of policies.
- If you got sent home and we didn't need you, it was pretty easy.
  - Unemployment was available and with the supplemental pay, some folks were better off not working.
  - Sometimes it was better not to lay off because of potential recall needs.
  - How that all worked and the problems it created is another story for another day.
  - It created the need to focus on bringing back or finding employees at present – flexible work now becomes a recruitment and retention consideration.

# CREATING FORMAL FLEXIBLE WORK POLICIES (Con't.)

- The Keep Coming to Work category was where you didn't get sent home because
  - what you did had to be done; and
  - The work could only be done somewhere besides home
- Policies tended to be more nuts and bolts related to practical application.
- That was that - except for the whole hero pay issue we are working through now (and some grouchiness).

# CREATING FORMAL FLEXIBLE WORK POLICIES (Con't.)

- The key to the whole teleworking surge and policy focus was the large group in the middle. This was the Stay Home But Work category.
- Stuff needed to be done but you really couldn't go anywhere so we had to figure out how you could do all or at least some of your work from home.
- Spoiler alert, and fast forward, home winds up being where the heart is (sort of).

# CREATING FORMAL FLEXIBLE WORK POLICIES

- How we could do stuff from home meant we needed to develop policies about what could be done and how it needed to be done.
- These flexible work policies created the concepts and terms we are talking about today.

# CREATING FORMAL FLEXIBLE WORK POLICIES (Con't.)

- Once we named it flexible work, we created our problem (actually that is not true, it just meant we needed to address all the stuff we should have addressed earlier but ignored).
  - Lawyers get within 4 feet of anything and make it more complex/awful.
  - You name it, you gotta pay for it and start defining it by policy.

# CREATING FORMAL FLEXIBLE WORK POLICIES (Con't.)

- If we just wrote down, you need to do your job from work, oh and you need to do it at home too, that would have created some negative feedback so we had to use some fancier terms in our policies.
- Pro tip – the last bullet point is how some of our bosses define this new thingy in their heads\*
  - \* making sure it stays a thought bubble rather than a verbal bubble takes some HR guidance.

# CREATING FORMAL FLEXIBLE WORK (Con't.)

- In sitting down and putting policies together, we figured out that the 3 separate groups really did not have bright distinctions all the time.
- Turns out the group that was able to work from home made it work at some level.
- The group that was laid off needed to be put on the payroll or we were going to lose them – there was some stuff they could do at home so incremental return to work or turning it into work from home were both viewed as flexible work.
- The group that had to come to work said hey what about us?

# CREATING FORMAL FLEXIBLE WORK (Con't.)

- Teleworking in its purest form is doing all of your work from home.
- Pure Teleworking means:
  - You never need to come to the office or go anywhere for work.
    - Except maybe training or other limited instances.
  - The pandemic was heaven for the best of the introverts.
  - Predictions –
    - those of us who thought pure teleworking would just go away are bad at betting.
    - this is going to be an ongoing recruitment and retention factor.
    - There is a difference between pure teleworking and outsourcing work but that line is going to be a thing we are going to need to spend more time discussing (but not today).

# CREATING FORMAL FLEXIBLE WORK (Con't.)

- Putting together policies for these true teleworkers is generally not too bad –
  - Set em up safely per OSHA,
  - Figure out the technology,
  - Address data privacy issues,
  - Monitor productivity and define work hours; and
  - Don't let them work from home in a Caribbean nation until we get that figured out better.

# CREATING FORMAL FLEXIBLE WORK (Con't.)

- The more common instance is where folks can do some but not necessarily all of their work from home.
- A good descriptor for this is hybrid teleworking.
- This is the area that tends to create the gray policy and legal issues because hybrid working really comes down to a matter of the degree to which it is working from the “office” and working from “somewhere else”.

# CREATING FORMAL FLEXIBLE WORK (Con't.)

- We also can't forget about the third category of folks that need to come to work.
- This group thinks they are missing the party on what they think is awesome about flexible work.
- What we do about that sometimes needs to wind up in policy.

# WHAT DO THESE POLICIES NEED?

1. We need to figure out who has to work where – can the position work flexibly.
  - Not everyone can work in a flexible arrangement.
  - Counties need to be open in order to conduct public business.

# WHAT DO THESE POLICIES NEED? (Con't.)

- Minn. Stat. Sec. provides that:
  - **373.052 COUNTY OFFICES; CLOSING, EFFECT.**
  - **Subdivision 1. Business days.**
  - County offices shall be open for public business on all business days except (a) legal holidays, (b) holidays established by the county board pursuant to contract with certified employee bargaining units, and (c) emergency situations. For purposes of this section "business day" means Monday, Tuesday, Wednesday, Thursday and Friday.
  - **Subd. 1a. Hours by board.**
  - The county board shall establish the hours during which county offices shall be open on business days.
  - **Subd. 1b. Closing.**
  - The county board by resolution may authorize the closing of a county office on other days as stated in the resolution, if there is an emergency situation, public business is transacted at other reasonable times and places, and the public interest is served. An emergency closing may be retroactively approved by the county board at its next succeeding meeting.

# WHAT DO THESE POLICIES NEED? (Con't.)

- That means we can't just go virtual for everything.
- It is also not practical – snowplow drivers can't just plow a path between their refrigerator and the tv.

# WHAT DO THESE POLICIES NEED? (Con't.)

- So we need to figure out how to identify which positions can work flexibly:
  - what positions can do what
  - from where
  - How will that work?

Pro tip – good job descriptions are invaluable in this determination.

# WHAT DO THESE POLICIES NEED? (Con't.)

- In making this determination, the factors typically are:
  - Maintaining a desired level of service
  - Maintaining public accountability
  - Operating efficiently
  - Cost effectiveness

# WHAT DO THESE POLICIES NEED? (Con't.)

## 2. What do we mean by flexibility – does that include hours?

- Flexible work has become associated with work from home but is this also a good time to look at hour flexibility?
- Job sharing may be back as a recruitment and retention tool.
- Time “suffered or permitted to work” is compensable time.
  - Managing flexible work requires defining work hours.
  - Just working on the honor system creates liability problems – if you don't put in controls, then the employee's statement of what is going on carries the most weight.
  - Time keeping systems are very important in any flexible work arrangement.

# FAIR LABOR STANDARDS ACT (FLSA) CONSIDERATIONS

A sometimes vexing issue for hybrid teleworking is its potentially awkward fit with the requirements to compensate employees for travel time during the work day but not for home to work.

- This Portal to Portal consideration can be briefly noted as employees who commute to and from the worksite are not entitled to compensation for such travel time.
- This is also true where the employee is assigned to a different site location.
- But time spent by an employee in travel as part of the employer's principal activity must be counted as hours worked. 29 CFR Sec. 785.38

# FAIR LABOR STANDARDS ACT (FLSA) CONSIDERATIONS (Con't.)

- So what happens if a person is considered to have their office at home and has to go somewhere?
  - Coming into the normal worksite for training is not that difficult where that work site is deemed to be assigned to that site location.
  - It is a little harder if the employee starts from home and heads directly to see client A, then client B, then client C before returning home.
  - If you define home was your work location, note there may be consequences.
- How to deal with this?
  - Employees who do this regularly may not be good fits for flexible work assignments on those days.
  - Defining a teleworker is a murky number if the employee has to go somewhere.

# WHAT DO THESE POLICIES NEED? (Con't.)

## 3. How do we measure productivity?

- A key element in flexible work is accountability – this is particularly true in the public sector.
- How do we figure out if the person is actually providing true value in this situation?
- Is a Lake Superior lighthouse keeper doing a great job sitting on the beach in St. Thomas as long as no ships crash?
- VPNs are good and measurement tools are in a lot of technology that we use – sometimes we didn't even know it was there.

# WHAT DO THESE POLICIES NEED? (Con't.)

## 4. How do we maintain data security?

- This needs to be on the managing flexible work checklist.
- Working on a home computer and having all kinds of private data on it tends to be frowned on in the data practices world.
- Again, a VPN works well.

# LABOR RELATIONS IMPACTS

- Unions are reflecting membership interest in having the bargaining unit members be able to participate in flexible work.
  - The unions representing employees that were in flexible work mode are seeking to put that into union contracts.
  - Flexible work policies typically impact a number of mandatory and permissive subjects of bargaining.
  - In addressing this, look at how your existing contract language fits with flexible work - emphasis on hours of work, on-call, call back.

# LABOR RELATIONS IMPACTS (Con't.)

- In this context, the discretion to assign and end teleworking at management discretion is vitally important
- The ideal end result is a memorandum of agreement that provides that the county's flexible work policy will apply to the members of the bargaining unit on the same basis as the nonunion programs.

# LABOR RELATIONS IMPACTS (Con't.)

- This interest by the unions and a discussion point in negotiations is a good opportunity to seek a change to existing specifically defined hours of work language.
- If you are working from home, how is on-call or call back going to work when you don't have to take off your fuzzy slippers to "go" to work?

# OSHA CONSIDERATIONS

For working from home, there should be a plan with an identified physical area where work is performed.

- Maintaining a safe home office/rickety dock up north is the teleworker's responsibility but the employer should put limits on it anyway.
  - The county will not reimburse you for a new computer that died when you spilled wine on it.
  - Electric shocks from dropping your laptop in the hot tub is a work comp claim we will contest.

# OSHA CONSIDERATIONS

- Osha will not hold employers liable for employee's home offices, and does not expect employers to inspect the home offices of their employees. <https://www.oshagov/enforcement/directives/cpl-02-00-125#policy>.
- The federal government has good resources on the nuts and bolts of safe teleworking sites. <https://www.telework.gov/guidance-legislation/telework-guidance/telework-guide/>

# WORKING IN MINNESOTA OR OUT OF STATE?

- Just living in another state and working in Minnesota has been around for a long time – particularly for counties that are near borders.
- For example, unemployment provides that:
  - When an employee works in Minnesota and at least one other state, or there is a work/residence split, the employer should use the following information to determine whether wages paid to the worker must be reported to the Minnesota Unemployment Insurance (UI) Program.
  - Report the wages paid to your employee to the MN Unemployment Insurance Program when:
    - 50% or more of the employment during the quarter is performed in Minnesota.
    - 50% or more of the employment during the quarter is not performed in Minnesota or any other state, or Canada, but some of the employment is performed in Minnesota and the employee's residence is in Minnesota during 50% of the calendar quarter.
    - The employment during the quarter is performed outside the United States and Canada, by an employee who is a United States citizen in the employ of an American employer, if the employer's principal place of business in the United States is located in Minnesota.
- Minn. Stat. § 268.035 Subd.12.

# WORKING IN MINNESOTA OR OUT OF STATE? (con't.)

- The much tougher issues in this area are not fully settled.
- For example, the issue of what state can tax what income is being hotly debated. The U.S. Supreme Court ducked the issue and did not take up New Hampshire's challenge to Massachusetts' policy of taxing out-of-state workers who were telecommuting.

# OUT OF COUNTRY WORKFORCES

- Allowing teleworkers to operate outside of the United States has so many tentacles that I strongly advise against allowing such an arrangement.
- The best tip in this area is to look at the feds view.
- The feds hate it and they have embassies so they should know how it works.
  - The feds call it Domestic Employees Teleworking Overseas (DETO).
  - The official position is that DETO arrangements for federal employees are extremely rare due to increased security concerns and costs to employing agencies.
  - Federal agencies considering a DETO arrangement have to do so on a case-by-case basis, and only if the agency has an established DETO policy in place for enforcement and administration.
  - <https://www.telework.gov/guidance-legislation/telework-guidance/overseas-telework/>

QUESTIONS?