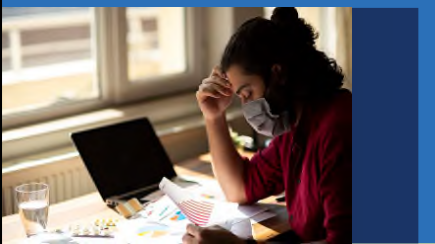


Considerations For Remote Employees



Allyson Terpsma, Anne Steen, Sean Cook & Nate Steed,
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Allyson Terpsma



- Advises on civil rights law, disability and leave issues, wage and hour compliance and labor relations
- Drafts employee handbooks and employment-related agreements
- Conducts internal investigations and represents clients before government agencies

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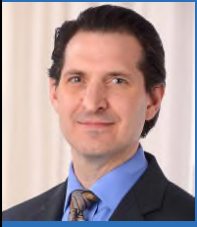
Anne Steen



- Warner associate working on primarily labor and employment issues including civil rights law, disability and leave issues, wage and hour compliance, labor relations, as well as application of current COVID-19 rules and guidance as it pertains to employers and employees
- Drafts and reviews employee handbooks and employment-related agreements

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Sean Cook

- Chair of Warner's Tax Law Practice Group, former chair of the MICPA M&A Committee Task Force and is a CPA
- An attorney who focuses on tax law, mergers and acquisitions, closely-held businesses, trusts and estates, corporate and charity law

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Nate Steed

- Attorney who focuses on technology and intellectual property law, health law and privacy and information security law
- Helps organizations in the acquisition and use of software and hardware and the internet of things
- Helps clients maintain compliance with state and federal privacy and information security laws

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Employment Issues for Remote Workers

Allyson R. Terpsma
Anne E. Steen



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Introduction

- Managing employees remotely
- Classification issues
- FLSA recordkeeping and expense reimbursement issues
- FMLA and FFCRA leave
- Remote work as a reasonable accommodation under the ADA
- Workers' compensation issues
- Protecting trade secrets and confidential information
- Company property
- Discrimination issues for remote workers

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Managing Employees Remotely

How can employers ensure that work is being done or in-home distractions are not interfering?



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Managing Employees Remotely

Addressing workplace performance issues

- Can you require an employee to come in if they are performing poorly while working remotely?
 - **NIOSH Emergency Rules:** employers must create a policy "prohibiting in-person work for employees to the extent that their work activities can **feasibly** be completed remotely."
 - Written policy indicating that employees are not to perform in-person work where that work can feasibly be completed remotely.
 - Employer obligation to demonstrate "infeasibility" of remote work
 - Remote work determination must include: which classifications report for in-person, why they must be physically present, and reasons that this work cannot be completed remotely
 - **MDHHS Guidance:**
 - Only permit in-person work when attendance is "strictly required" to perform job duties
 - Workers who are "physically" unable to complete required job tasks remotely
 - Does not include permitting in-person work because working remotely may result in decreased productivity or efficiency

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Managing Employees Remotely

Addressing workplace performance issues

- Document and address as if on-site
- Hold supervisors accountable
- Employer policies still apply



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Classification of Remote Workers

Employee or independent contractor?

- Working off-site or having flexibility in one's schedule is not determinative.
- Two examples:
 - FLSA
 - Michigan Workers Compensation and Unemployment



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Classification of Remote Workers

FLSA

- Whether as a matter of **economic reality** the individual is dependent upon the business they work for.
- **Six factors:**
 1. Permanency of the relationship between the parties;
 2. The degree of skill required in rendering the services;
 3. The worker's investment in equipment or materials for the task;
 4. The worker's opportunity for profit or loss, depending on his or her skill;
 5. The degree of the potential employer's right to control the manner in which work is performed;
 6. Whether the service rendered is an integral part of the potential employer's business.

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Classification of Remote Workers

Michigan Workers' Compensation and Unemployment

- IRS 20-Factor Test
- Three General Categories:
 1. Behavioral Control;
 2. Financial Control; and
 3. Relationship Factors



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FLSA Issues with Remote Workers

- Time spent working and recordkeeping concerns
- Expense reimbursement



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FLSA Issues with Remote Workers

Does remote working shift any of the responsibility of how hourly staff are paid since its harder to track now?



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FLSA Issues with Remote Workers

Time Spent Working and Recordkeeping

- Non-exempt employees must be paid for all hours worked at a rate not less than applicable minimum wage.
- Working time includes any time when the employee is "suffered or permitted to work."
 - If employer knows or has reason to know that work is being performed
 - Can include time spent working at home or away from work premises
- Employer's responsibility to ensure that the employee does not perform any work that the employer does not want performed

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FLSA Issues with Remote Workers

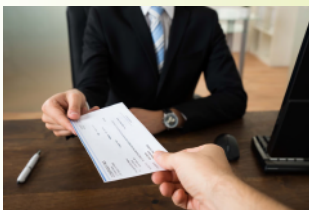
Time Spent Working and Recordkeeping

- Send reminders regarding applicable policies;
- Consider restricting remote access for non-exempt employees outside of normal work hours;
- Remind managers not to invite employees to work after-hours;
- Provide a reasonable reporting procedure for non-scheduled work time;
- Require employees to sign off on their time records daily or weekly

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FLSA Issues with Remote Workers

What is it common for the employer to pay for — internet costs? Equipment? Accommodations necessary to the work site for ADA reasons?



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FLSA Issues with Remote Workers

Expense Reimbursement

- Employees must be compensated for expenses required for the performance of the employer’s work to the extent their earnings would otherwise fall below minimum wage
- Expenses incurred that are required for the employer’s work may include:
 - Particular tools or equipment;
 - Internet or cell phone service or data;
- **ADA:** Employers may also be required to pay for items required to support a reasonable accommodation under the ADA

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FMLA Leave and Remote Work

When are remote employees eligible for FMLA leave?

- If a business is a “covered employer,” an employee needs to meet several criteria in order to be eligible for FMLA leave:
 - With the company 12 months;
 - Have worked at least 1,250 hours during the 12 months prior to the start of FMLA leave;
 - *Employer must employ at least 50 employees within 75 miles of the employee’s worksite**

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FMLA Leave and Remote Work

When are remote employees eligible for FMLA leave?

- With remote employees, how do you determine what an employee’s “worksite” is for purposes of determining whether the employer employs 50 employees within 75 miles of that spot?
 - Worksite is the office to which they report and from which assignments are made, *not* their personal residence.

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FFCRA and Remote Work

- Qualifying reasons based upon the inability to work **or telework**.
- Example: unable to work or telework because "experiencing symptoms of COVID-19 and seeking a medical diagnosis."
 - "able to telework" (and therefore may not take paid sick leave under the Act) if:
 - (1) the employer has work for the employee to perform;
 - (2) the employer permits the employee to perform the work from the location where the employee is waiting; and
 - (3) there are no extenuating circumstances, such as serious COVID-19 symptoms, which prevent the employee from performing that work.

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Teleworking as an ADA Accommodation

- Employers must provide reasonable accommodations to qualified persons with a disability unless doing so would pose an undue hardship.
- Reasonable accommodations can include employees who are allowed to telework from home in some circumstances.



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Teleworking as an ADA Accommodation

- The fact that an employer temporarily excused an essential function of the job for purposes of protecting their workforce from COVID-19 does not necessarily mean:
 - that the employer permanently changed the job's essential functions;
 - that telework is always a feasible accommodation; or
 - that it does not pose an undue hardship as an accommodation
- However, if there was a previous request for telework as an accommodation that was denied due to concerns regarding the employee's ability to perform essential functions, the fact that they performed work remotely for several months may be relevant to a renewed request.

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Workers' Compensation

Is the employer liable for workers' compensation claims for safety issues that come up in a remote office?



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Workers' Compensation

- Work-related injuries that occur in the designated home work space during working hours *may* result in a viable workers' compensation claim.
- Safety should be emphasized
- Establish guidelines for a home office and provide training regarding workstation setup
- Set fixed hours, including meal and rest periods
- Require employees to report any job-related injury to their supervisor as soon as possible
- Check with workers compensation, employment practices liability, and general liability insurance carriers

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Workers' Compensation

Note regarding COVID-19 workers' compensation claims for remote employees.



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Trade Secrets & Confidential Information

- Reiterate company policies regarding trade secrets and confidential information for employees working remotely
- Make clear what physical items may be removed from the workplace and what precautions should be taken for confidential documents and information.



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Company Property

- Specify in writing:
 - What equipment or property belongs to the employer
 - That company property that is at home for purposes of remote work should not be used by someone who is not employed by the company and should be kept secure
 - That there is no expectation of privacy regarding the use of the company's computers or other electronic systems, which are subject to employer monitoring.
- Articulate a process for reporting any lost, damaged, or stolen company property
 - But: do not make pay deductions without consulting state and federal wage laws

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Discrimination Issues

- Remote employees are still employees and cannot be discriminated against on the basis of protected characteristics
- Outline objective, neutral criteria for who is allowed to telecommute and apply them consistently
- Remote employees should still be exposed to opportunities for training, mentoring, and advancement
- Comply with all "posting" requirements

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Tax Issues for Remote Workers and the Employer

Sean H. Cook



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Introduction

- State income tax on Employees
- Impact on Employer



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Taxation of Remote Employees

- General rules
- State actions during COVID-19
 - Relief
 - Adverse Actions
- State reciprocity – Michigan has such agreements with Illinois, Indiana, Kentucky, Minnesota, Ohio and Wisconsin



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Impact on Employer

- Withholding
- Registration with the applicable Department of Revenue
- Possible need to register as conducting business in the state
- Possible unemployment compensation contributions
- Nexus, apportionment and source of Employer revenue

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Nexus

- Concept that allows a state to subject a business to taxation
- Old approach: People, PPE and Sales
- New approach being adopted by states: Economic presence (i.e. *Wayfair* decision)
- PL 86-272 Federal protection (adopted in 1959)
- Businesses may be at-risk as states look for revenue and have lower the bar to taxation

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New Possible Federal Relief

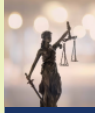
- Remote Worker Relief Act of 2020 – H.R. 8056
- Remote and Mobile Worker Relief Act of 2020 – S. 3995



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Summary of H.R. 8056

- Proposed
- Could be added to the 4th stimulus package
- Deals with income tax and withholding requirements for employees
- Addresses nexus issues for businesses
- Would be effective January 1, 2020



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Income Tax/Withholding

- Remote workers deemed to be working at the "primary work location of such employee"
- However, an employer can elect to treat employee as working at remote location if the employer "maintains a system that tracks where such employee performs duties on a daily basis"
- Covered Period
 - Starts on date employee began working remotely
 - Ends when employee returns and not less than 90% of employer workforce called back but no later than December 31, 2020



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Nexus

- Remote workers for an "out-of-state" business would not:
 - Trigger Nexus
 - Establish minimum contacts or presence that would subject an out-of-state business to registration, taxes or other related requirements in the jurisdiction where such remote employee is working
- Apportioning and sourcing to remote work state ignored and will be set at the "primary work location"
- However, the same rule regarding tracking of a remote worker applies




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Definitions


- Out-Of-State Business: A business that does not have a tax filing requirement in another jurisdiction
- Primary Work Location: Where the employee regularly assigned to work when such employee is not working remotely during the Covered Period (see prior slide)



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Definitions

- Working Remotely: Working at other than the Primary Work Location at the direction of the employer due to COVID-19
 - To comply with any government order
 - To prevent the spread
 - Due to a family member contracting
- Other terms defined: Employee, Employer, Taxing Jurisdiction and Wages



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Data Privacy and Cybersecurity Challenges

Nate Steed



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Overview

- Cybersecurity and data protection
- Legal compliance considerations
- Third party contracts



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Cybersecurity

- Cyber threats come in many different forms
- Concerns are one the rise with more workforce members working remotely



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Data Security Best Practices

- Remain Diligent: Cyber criminals don't let a good opportunity go to waste
- Keep employees informed
- Update (or develop) data privacy and security policies and procedures
- Train and retrain employees
- Encourage reporting



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Data Security Best Practices

Select service providers before you need them

- Insurance
- Legal
- Forensics
- Public Relations



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Data Security Best Practices

- Require use of work-issued equipment
- Ensure programs and operating systems are up to date
- Invest in antivirus solution
- Guard the gates
 - Secure your home network
 - Avoid public Wi-Fi (or use VPN)



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Data Security Best Practices

Backup and encrypt your data

Don't store work data on personal devices

Get rid of unneeded information (securely)

Be mindful of your space

- Lock devices
- Take calls in private



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Legal Compliance Considerations



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Does HIPAA apply?

HIPAA applies

- Health information obtained by an employer through its capacity as a health plan

HIPAA does not apply

- Employer receives information in its capacity as an employer

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Legal Compliance Considerations

GDPR

- Transparency
- Limited scope
- Adequate security measures

CCPA

- No delay in enforcement
- Data security is important

Other state law implications

- Notice and consent requirements
- Breach notification considerations



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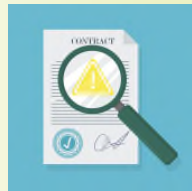
Third Party Contracts



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Third Party Contracts

- Proliferation of service providers
- Timing issues
- Negotiation issues



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Third Party Contracts



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Third Party Contracts

Normal considerations:

- Confidentiality and security
- Data backup
- Offshoring
- Accessibility & return
- Audit
- Data breach liability
- Liability limits & Indemnification



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Third Party Contracts

Normal considerations:

- Confidentiality and security



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Third Party Contracts

Normal considerations:

- Accessibility & return



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Third Party Contracts

Normal considerations:

- Data breach liability
- Liability limits
- Indemnification



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Upcoming Webinars: WNJ.com/EVENTS

November 20 Webinar: Managing Your Risk of COVID-19 Employment Litigation

December 1 Webinar: Data Solutions Planning for 2021

Employee Remote Work Policy

Remote Work Policy and Determination Spreadsheet available for purchase for \$250 from your Warner attorney or ssprague@wnj.com

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Conclusion

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