

Navigating the Workspace During COVID-19: Practical Tips and Guidance

By: Bartina L. Edwards, J.D. and Eliana L. Jones, J.D.

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Remote or teleworking is not a novel idea. Since 2000, remote or teleworking has been on the rise, increasing by approximately 140%.¹ However, the impact of COVID-19 across the nation and the practice of social distancing has made remote working something more than a job perk millennials seek. The Oxford Dictionaries define the *workplace* as a place where people work, such as an office or factory, while *workspace* is defined as space in which to work. Although both definitions are similar they are nonetheless different.

These days, it appears that almost every industry is functioning in such a fashion, thanks in part to the technological advances that help to keep us connected. With this newer teleworking venture, comes challenges and legal implications that affect employers and employees. As things continue to evolve daily, more than 3 million Americans are currently without employment. Thus, it becomes increasingly important to know your rights as an employee. The goal of this article is to provide relevant resources and general guidance to help you navigate the workplace, whether it is a physical office location or in your at-home workspace. It is not intended to constitute legal advice or technology expertise.

DISCLAIMER: Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed may change on a daily basis. This should not be considered legal advice and you are encouraged to contact our office for more specific information based on your individual situation or consult with an employment attorney licensed in your respective state. Federal law will be the same, however, other state based laws may vary by state.

Creating a Remote Workspace

Do I need to upgrade my computer network and/or internet security in order to work from home?

At the very minimum, you should have some form of malware or antivirus protection on your computer or mobile devices, especially if you are using your personal device to complete work tasks. This is a reasonable and practical step that has positive implications for you on a personal level as well. Also, take the time to be sure that your home internet network is private and password protected. Invest in VPN technology. VPN stands for virtual private network, which takes your internet connection and makes it more secure. It is inexpensive and adds a greater level of security. While many internet providers are increasing access to public Wi-Fi hotspots in an effort to make the internet more accessible, this comes with a risk. If you are located in an area that has access to one of these increased public hotspots, be weary. Using free and open public access internet is not as protected as using your own private internet network system and may be more susceptible to hackers.

How should I deal with confidential matters when remote working from home?

It is no doubt that one of the biggest challenges to remote working during this COVID-19 period is that you could potentially be in an environment with your entire household present. However, these unique circumstances do not erase your duty to protect company data, documents, and other items of a confidential and sensitive nature. Be intentional about practicing under company/employer policies

¹ Global Workplace Analytics, 2017 State of Telecommuting in the US, <https://globalworkplaceanalytics.com/2017-state-of-telecommuting-in-the-us>

regarding confidentiality, privacy and computer practices while at home. For example, keep files locked away in file cabinets, keep sensitive documents turned over face-down, take calls behind closed doors, use computer screens, and sign off of your computer when not working.

Do I have to work my standard work hours now that I am teleworking?

One of the greatest benefits of the remote workplace is the flexibility of the schedule. Be mindful that flexibility does not mean "no schedule." In the absence of a formal telework policy or employer guidelines outlying expectations, it is crucial that you maintain some form of a documented schedule. This schedule should resemble your normal work hours. If there is not an electronic mechanism by which you can document your hours of work, use your email to reflect hours you are working, and maintain a manual log of hours and work completed. For example, if you are receiving and sending emails, you can document you are working during those hours and on specific projects. If your manager has implemented a policy by which you should respond or check in, by all means, continue to adhere to that policy.

In accordance with the North Carolina Wage and Hour Act, you have a right to be paid for all hours worked. Furthermore, you will likely be expected to accurately complete timesheets. A good practice is to document all tasks and hours worked on company provided forms or self-created forms for your own personal records. This information should be contemporaneously captured to help ensure accuracy. (See also, https://www.dir.ca.gov/dlse/FAQ_ReportingTimePay.htm).

Should I use video-conferencing?

In this environment, it is almost impossible to operate effectively without video-conferencing. Teleconferencing is a good option, but often when hosting meetings with clients and customers in lieu of face to face options, video-conferencing is a more viable option that allows you to retain some level of connectivity. Teleconferencing is audio, only. Whereas, videoconferencing allows for audio and video since you can see, talk and share documents simultaneously. There are many options for video conferencing and free conference calls. Two of our favorites are: freeconference.com and zoom.com.

It is important that you are familiar with this technology. While simple to use, taking the tutorial is necessary to ensure effective, efficient and safe use. For example, *"This is the new COVID-19 reality: If you are using Zoom without the right precautions, you are vulnerable to a practice known as "Zoom-bombing." This sees uninvited attendees viewing your business meeting, or worse, sharing inappropriate images and content."*

Zoom's blog has a page dedicated to tips on avoiding Zoom-bombing <https://blog.zoom.us/wordpress/2020/03/20/keep-the-party-crashers-from-crashing-your-zoom-event/>.

The Forbes article lists tips to help avoid this from happening.

- Do not advertise your Zoom meeting on social media
- Change screensharing to "Host Only"
- Disable "Join Before Host" (keeps potential uninvited crashers from joining)
- Disable "File Transfer" (to prevent digital virus sharing)
- Disable "Allow Removed Participants to Rejoin" (prevents booted attendees from rejoining the meeting)

If you are using Zoom, especially with clients, please reduce the risks of Zoom-bombing by following tips provided in the article and in Zoom's blog. (see links to the articles above in this message).

Discrimination

Can I be terminated for having COVID-19?

In North Carolina, it is illegal for an employer to discriminate against an individual due to a disability. A disability may include an illness. Additionally, pursuant to the Americans with Disabilities Act, as amended (ADAAA), the definition of a disability is a physical or mental impairment that substantially limits one or more major life activities for the individual. With the amended Act, this includes certain temporary conditions if it falls within the scope of the Act. This includes certain situations where you are "perceived" as having a disability. The term used in the Act is "regarded as." In either a "regarded as" or an "actual" scenario, you experience an adverse action because of an actual or perceived impairment. There is no need for your employer to perceive the impairment to be "substantially limiting." So, for example, if the perception is that COVID-19 is serious and not a minor issue, and you experience an adverse action such as being ostracized in some manner, demoted or terminated, this may constitute a "regarded as" issue for you on the basis of being regarded as having a disability and thus being discriminated against because of the fear of the virus. This could rise to the level of an ADA or disability violation under the law.

Additionally and more direct is where an employer terminates you on the sole basis that you have contracted COVID-19. Depending on the facts, this will likely constitute a violation of the Americans with Disabilities Act, as amended and could violate the Families First Corona Virus Response Act (FFCRA). Other laws could be implicated. For additional guidance and resources, see eoc.gov.

What if I have been treated differently than other employees, as it pertains to teleworking opportunities?

If by different, you mean you are being treated differently because you are a member of a protected class, or on the basis of you or a family member having an illness related to COVID-19, as set out above, this may constitute discrimination. If you are not being offered the same opportunities to telework from home on the basis of your status as a member of a protected class, then you may have a discrimination claim against your employer. Depending on the type of claim will determine where your claim needs to be filed. One such agency for employment discrimination claims is the Equal Employment Opportunity Commission. If you believe you have been discriminated against, contact our office or another qualified employment attorney to explore your rights and options.

Reasonable Accommodations

I have been provided a reasonable accommodation by my employer, does it still apply if I am teleworking?

In short, it depends on the accommodation. The standard used for determining a reasonable accommodation also applies to the at-home work space. Thus, the new analysis is determined on the new set of circumstances. Is the requested accommodation that was being afforded to you prior to teleworking still reasonable and does not create an undue burden to the employer; or is the newly requested accommodation needed because of teleworking, and is it reasonable and does not provide an undue burden on the employer? For example, if your requested accommodation consisted of some form of computer equipment or software, and it would be burdensome to the employer to ensure that your teleworking workspace is equipped with the same equipment or software, then the employer may be relieved from providing this accommodation while you are working remotely. On the other hand, if the employer provided similar or same equipment or software to another of its employees who was or was not

disabled and in a same or similar role as you, this may warrant some further review, and you may wish to contact an employment attorney to determine if you believe you are being discriminated against. A simpler form of accommodation may be a form of leave or break. While it could be argued, continuing this accommodation in an at-home workspace is likely reasonable and not burdensome, in which case, would obligate the employer to continue to provide the accommodation. More guidance on this issue can be found at the eeoc.gov website, but some of the examples are not applicable and may require further analysis and review; so once you have visited the site, feel free to email us at eliana@blelaw.com or bedwards@blelaw.com, SUBJECT LINE: COVID19, to discuss whether further scrutiny of your particular situation is warranted.

Can I request a reasonable accommodation even if my employer has mandated a work-from-home policy?

Even if your employer has implemented a teleworking policy due to COVID-19, the fact that work is being completed outside of the normal workplace location, does not eliminate your right to make a reasonable accommodation request. The Americans with Disabilities Act, as amended (ADAAA) applies to local and state governments as well as private employers with more than 15 employees. Additionally, while the Families First Coronavirus Response Act (FFCRA) does not specifically deal with accommodations as defined under the ADA, there is some practical overlap, since it could be argued that an accommodation is made under the FFCRA for those who qualify, based on COVID-19. (For more information on FFCRA, see the article under our resources tab, *FFCRA Summary*.)

Under the ADAAA, a reasonable accommodation is a modification or adjustment to the work environment that enables a disabled individual to perform the job as made available to a similarly situated non-disabled individual. If you qualify as a disabled person, as defined by the ADAAA, you may request a reasonable accommodation. You will still be expected to comply with company policies. The request must be reasonable and not cause the employer an undue burden. However, know that there are separate leave rules that have been expanded under the FFCRA that may be implicated, depending on the circumstances.

My employer is deemed an essential company or industry, and I am a high risk individual. Can teleworking be a reasonable accommodation due to the coronavirus?

Within the scope of the ADAAA, in order to qualify for a reasonable accommodation you must meet the definition of having a disability as discussed above. So, if your underlying condition(s) places you at risk and support a request for an accommodation, for an actual or regarded as disability, teleworking may be reasonable if it is not an undue burden to your employer. Again, there have been certain allowances under the FFCRA that may be implicated. However, your employer may have the right to implement layoffs or other measures it deems safely appropriate due to the COVID-19 concern. As long as the employer is applying these measures equally and uniformly, these measures are likely going to be allowed. Notwithstanding, the employer is still governed under the existing anti-discriminatory laws and such actions should be watched very closely, balancing the current landscape with equal rights under the law. This ensures even well-intentioned actions do not run afoul of the applicable laws.

Leave of Absences

Does the Family Medical Leave Act apply during this time?

The Family Medical Leave Act (FMLA) remains lawful and still applicable. FMLA provides up to 12 weeks of unpaid leave and job protection for certain health related or personal life events, such as serious medical conditions, being a caregiver of an immediate family member suffering from a medical

condition or for the birth or adoption of a child. FMLA applies to state and local government as well as private employers with more than 50 employees, within a 75 mile radius. For an employee to qualify for FMLA, the employee must have worked for the employer at least 12 months and 1250 hours in the prior 12 months. The FMLA has been expanded utilizing the FFCRA, a separate piece of legislation.

How does the Emergency Family Medical Leave Work?

Due to COVID-19, Congress enacted the Families First Coronavirus Response Act (FFCRA). The FFCRA offers new protections for employees and expands the Family Medical Leave Act. Generally, the FFCRA applies to private and public employers with more than 50, but less than 500 employees. Under this Act, an employee can receive up to 2 weeks of paid leave for coronavirus related absences, with the option to extend for an additional 10 weeks in limited situations. The FFCRA also covers leave related to childcare, which is new and unique to the FFCRA. The new Act provides paid leave to employees with children, who due to school and daycare closures as result of the coronavirus are without childcare. The benefits of this Act expire on December 31, 2020. (For more information, see the article under our resources tab, *FFCRA Summary*).

Can I still be required to use sick or vacation leave if the employer has mandated teleworking for all employees?

Yes. If you have a need to use sick or vacation leave unrelated to COVID-19, you are required to use leave if you are unable to work remotely, and you are still required to work. The type of leave will be based upon your employer's leave policies. Due to the flexibility of remote working, you may be able to minimize the amount of leave requested, thereby reducing the amount of leave used.

Can I apply for unemployment benefits if I have not been terminated but am unable to work due to the company closures in response to COVID-19?

Yes. In addition to North Carolina, Governor Roy Cooper's Executive Order 118, which lifted restrictions on eligibility for unemployment benefits, which make you eligible to apply for unemployment insurance benefits if you are unable to work or even if your work hours have been reduced due to the public safety measures surrounding COVID-19, you are eligible to apply for unemployment benefits under The CARES Act. The CARES Act extends unemployment insurance to workers who usually aren't eligible for such benefits at the state level, so long as the unemployment (or reduced employment hours) is connected to COVID-19 (See <https://www.edd.ca.gov/Unemployment/>).

Mandated Teleworking

I am still required to report to my workplace; who decides whether an employer is an essential or non-essential company?

The "Essential" definition is set out in each particular Stay At Home Order, also known as a Shelter In Place Order. These orders are issued under statutory and executive order authority, and there is no standard definition of what is deemed essential or non-essential. Each state or local government can interpret what is covered as it pertains to its individual communities. By example, some of these industries include, healthcare/pharmacy, grocery stores, food production, gas stations, utilities, banking, law enforcement and emergency personnel. This is not an exhaustive list and each order should be referenced for a complete listing of essential businesses.

Can I be reimbursed by my employer for costs associated with mandatory teleworking?

Absent a company policy on the contrary, in North Carolina there is no specific statute or provision that mandates an employer to reimburse for costs associated with mandatory teleworking, at this time. However, if the required teleworking lasts for more than fifteen (15) days, you may be able to file a tax deduction for such costs, based upon costs associated with establishing a home office. Contact your tax official for more information on the home office tax deductions.

FOR MORE INFORMATION AS THIS UNPRECEDENTED ISSUE CONTINUES TO DEVELOP, continue to comply with local and federal guidance, check back with our office, and you may wish to visit the other resources listed below:

- **Legal Aid Fact Sheet:**
<https://legalaidatwork.org/factsheet/coronavirus-faq/>
- **United States Department of Labor (USDOL):**
<https://www.dol.gov/newsroom/newsletter/>
- **N.C. Department of Commerce:**
<https://des.nc.gov/need-help/covid-19-information>
- **Comprehensive COVID-19 Updates (Housing/Employment/Leave and more):**
<https://www.law.georgetown.edu/workers-rights-institute/coronavirus/?fbclid=IwAR2XfcXOJLv1QZiVUPvD9ucddCj5w2J7kdoHKICmAdZa8vJOrGJWNjIRE6c>

Stay Safe and Be well!

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