Workplace Agility:

A STATE AGENCY PERSPECTIVE

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Telework, also referred to as "flexible" or "agile work," has been on the rise for years and skyrocketed in the United States with the advent of COVID-19. Teleworking in state government agencies has increased by 122 percent since 2005.[1] While some employers already had remote/telework policies in place when COVID struck, others allowed employees to work remotely during COVID-19, without putting formal policies in place.

Even agencies that had a remote work policy in place before the pandemic might benefit from evaluating current policies and practices and charting the course forward as the pandemic subsides. This article highlights legal considerations when creating/updating flexible work policies.

Definitions

There is flexibility in "flexibility." Generally speaking, a flexible work arrangement is any one of a spectrum of work structures that alters the time and/or place that work gets done on a regular basis.

A flexible work arrangement includes:

a. Flexibility in the *scheduling* of hours worked, such as alternative work schedules (e.g., flex time and compressed workweeks) and arrangements regarding shift and break schedules;
b. Flexibility in the *number* of hours worked, such as part-time work and job shares;
c. Flexibility in the *place* of work, such as working at home or at a satellite location.[2]

In light of the myriad means of providing flexibility in the workplace, odds are that your client or state agency provides some means of flexible work.

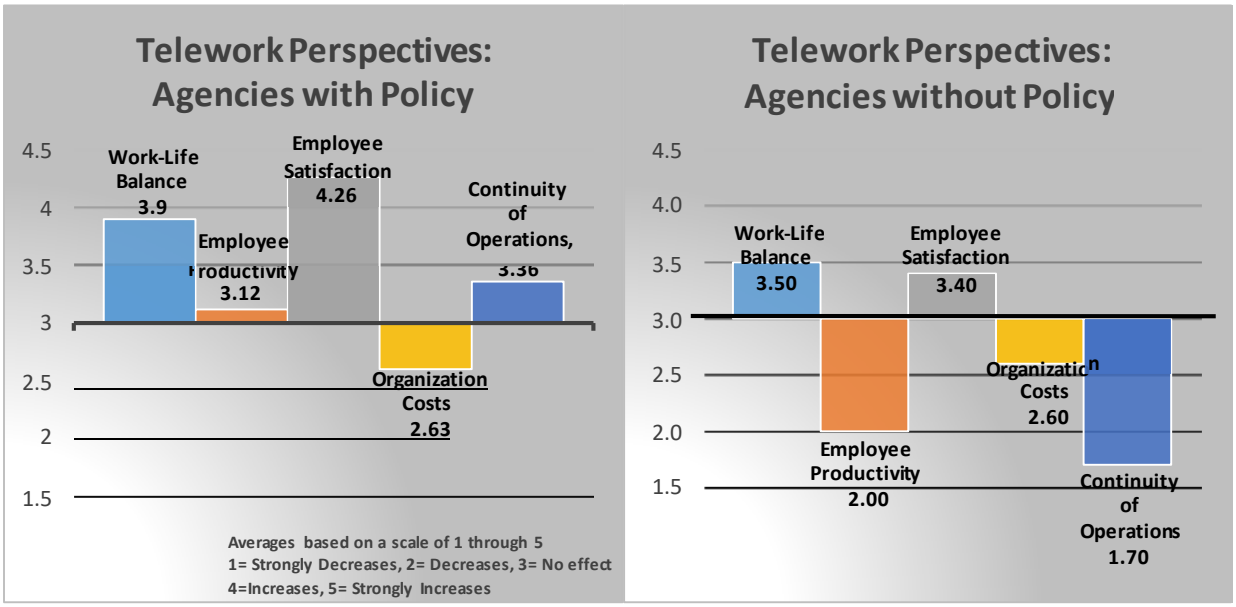
Trends in Flexible Work Practices

According to a 2014 survey by the Texas Department of Information Resources, 84 percent of state agencies and institutions of higher education have or are planning a telework policy.[3] The

[1] Texas Dept. of Info. Resources, Telework in Texas: http://publishingext.dir.texas.gov/portal/internal/resources/DocumentLibrary/Technology%20Brief%20-%20Telework%20in%20Texas.pdf
[2] Georgetown University Law Center, Flexible Work Arrangements: A Definition and Examples (2006): https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1009&context=legal
[3] Texas Dept. of Info. Resources, Telework in Texas: http://publishingext.dir.texas.gov/portal/internal/resources/DocumentLibrary/Technology%20Brief%20-%20Telework%20in%20Texas.pdf

survey also found that perspectives on the efficacy of telework varies depending on whether or not an agency has a telework policy:

Comparison of Perspectives on Telework by Agency Representatives With and Without Policy



Source: 2014 DIR Telework Survey[4]

If you already have a remote work policy, the heavy lifting likely has already occurred, and the extant policy should be assessed for updates needed to address issues that came to light during the pandemic or the considerations outlined herein. In the absence of a formal flexible work policy, notify employees that temporary allowances were made to accommodate the global pandemic and establish clear expectations for returning to work and/or allowing a post-pandemic flexible work environment. Informal remote work offerings should be formalized to set clear expectations for both employers and employees to mitigate future disputes. Note that even if your client or agency elects not to allow remote/telework, permitting an employee to work from home still might constitute a reasonable accommodation under the Americans with Disabilities Act.[5]

Unique State Agency Considerations

Texas law outlines the normal office hours for a state agency and allows the chief administrator of a state agency to modify the regular office hours if deemed necessary or advisable, or "to take care of any emergency or public necessity that the chief administrator finds to exist."[6] The law also allows the governing boards of institutions of higher education or a university system to make

[4] *Id.*
[5] EEOC, Work at Home/Telework as a Reasonable Accommodation (2003), available at https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation
[6] Tex. Gov't. Code Section 658.005(a)-(c).

exceptions to work-week and workday definitions, "to achieve and maintain operational efficiency at the institution of higher education, university system, or an office, department, or division of either."[7]

Texas law requires state agency employees to conduct agency business only at the employee's regular or assigned temporary place of employment unless the employee is travelling or received prior written authorization from the administrative head of the employment state agency.[8] The law expressly provides that:

> The employee's personal residence many not be considered the employee's regular or assigned temporary place of employment without prior written authorization from the administrative head of the employing state agency.[9]

Accordingly, not only is a written agreement regarding remote work a good idea, it is legally required for state agency employees, and it may provide a defensive tool against a myriad of potential employment pitfalls. Upon surveying state agencies, the Texas Department of Information Resources found that those with successful telework programs stressed the importance of "setting clear and measurable goals and identifying and express[ing] expectations."[10]

Which positions will be allowed to work remotely?

Each employer must assess the work that needs to get done and whether said work can be performed effectively and efficiently remotely. Working offsite can take many forms. Some considerations may include:

a. *Job Responsibilities*—Not all positions are amenable to remote work. For example, some positions have a need for specialized materials or equipment that are available only at the work site. Some questions to consider are:
   i. Is the employee's presence at the regularly assigned place of employment required on a daily or routine basis?
   ii. The U.S. Department of Labor recommends a self-assessment of the following:[11]
      1. Sufficient portable work for the amount of telework proposed
      2. Comfort with the technologies, if any, that will be needed to telework
      3. Good communication with managers, co-workers, customers that will enable a relatively seamless transition from onsite to offsite
      4. Telework office space that is conducive to getting the work done

[7] Tex. Gov't Code Section 658.007(a).
[8] Tex. Gov't. Code Section 658.010(a).
[9] Tex. Gov't. Code Section 658.0101(b).
[10] Texas Dept. of Info. Resources, Telework in Texas: http://publishingext.dir.texas.gov/portal/internal/resources/DocumentLibrary/Technology%20Brief%20-%20Telework%20in%20Texas.pdf

[11] Telework Basics, https://www.telework.gov/federal-community/telework-employees/telework-basics/

5. Dependent care arrangements in place
6. Ability to be flexible about the telework arrangement to respond to the needs of the manager, the work group and the work.

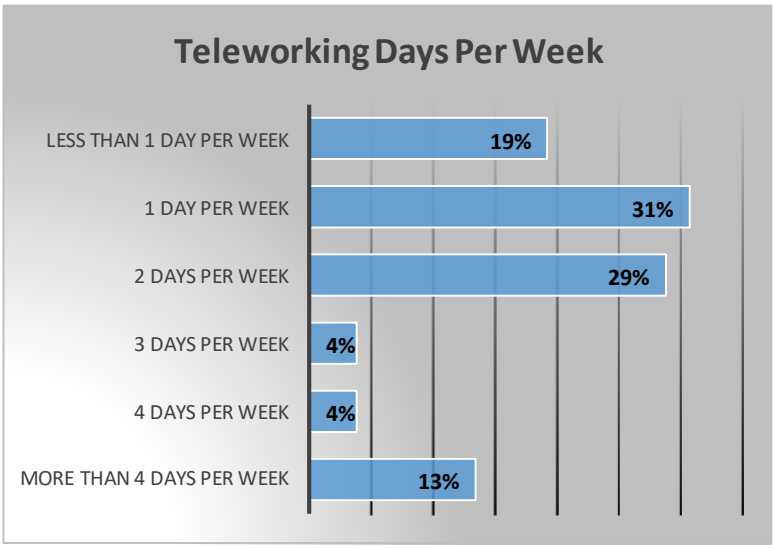
iii. The U.S. Department of Labor identifies the following habits of a successful teleworker:[12]

1. Ability to work with minimal direct supervision
2. Organized work practices, good planning skills
3. Ability to meet schedules and deadlines
4. Effective time management skills
5. Effective communication skills

b. *Employee Performance*—Does the employee have a history of performance that makes him/her suitable for remote work? Employers must remain cognizant of the uniform application of performance standards that disqualify employees from working remotely.

c. *Duration*—Remote work arrangements may vary from allowing employees to work remotely most or all of the time, or only on certain days or parts of the day. The following graph reflects the amount of time that state agencies and higher education institutions reported that their employees spend teleworking:

Days per Week Agency Employees Telework



Source: 2014 DIR Telework Survey[13]

[12] *Id.*

[13] Texas Dept. of Info. Resources, Telework in Texas: http://publishingext.dir.texas.gov/portal/internal/resources/DocumentLibrary/Technology%20Brief%20-%20Telework%20in%20Texas.pdf

d. *Confidentiality and Security*—Will employees be using personal or employer equipment while working remotely? Does the employee access and/or use confidential information for work? If so, is the employer comfortable granting the employee access to said information outside of the regular work place? Does the employer have sufficient security mechanisms in place in the event that the information is lost or stolen outside of the regular work place? Will additional security or other training be required in order to work remotely? Increased data breaches[14] and Zoom bombings[15] throughout the pandemic reinforced the need for enhanced vigilance. While employees generally do not have an expectation of privacy at the office, what rules apply when employees work remotely? It is important the employers put employees on notice about any surveillance that might be conducted so that the employee does not have a reasonable expectation of privacy with regard to activities performed with the employer's resources.

e. *Safety Considerations*—Any remote work agreement should specify and include contact information for the supervisor that should be contacted in the event that the employee is injured. Any remote work policy should provide that the employer assumes no liability for injury at the remote work site for any other person who would not be in the work area, had the duties been performed at the regular place of employment.

Wage and Hour Compliance Issues

The Fair Labor Standards Act does not address the scheduling of employees and, thus, enables an employer to change an employee's work hours without notice (subject to a prior agreement with the employee).[16] When employees are allowed to work remotely, expectations regarding normal office hours may vary depending on whether the employee is exempt or non-exempt.

a. *Exempt Employees* —For exempt employees, the remote work agreement should specify the hours during which the employee will normally be expected to perform work and be available by telephone and email, or any other means of communication (e.g., Zoom).

b. *Non-Exempt Employees* —Federal regulations provide that, "Work not requested but suffered or permitted is work time.[17]" Federal rules expressly provide that the aforementioned rule applies to work performed away from the premises or the jobsite, or

[14] TechRepublic, "2020 Sees Huge Increase in Records Exposed in Data Braches," available at: https://www.techrepublic.com/article/2020-sees-huge-increase-in-records-exposed-in-data-breaches/

[15] Las Cruces Sun News, "Gadsden school district meeting 'zoom bombed' by pornographic video, investigation pending," available at: https://www.lcsun-news.com/story/news/education/2021/04/20/gadsden-school-district-zoom-meeting-interrupted-pornographic-video/7305736002/

[16] U.S. Dept. of Labor, Fair Labor Standards Act Advisor, https://webapps.dol.gov/elaws/faq/esa/flsa/015.htm?_ga=2.88032664.1024011366.1618951027-2067396195.1618240432

[17] 29 C.F.R. 785.11

even at home.[18] The number of hours that non-exempt employees are expected to work each week should be stated in the remote work agreement.

i. Overtime Hours—Not all state laws mirror the Fair Labor Standards Act. Accordingly, overtime requirements may vary based on the state where the employee performs the work. The remote work policy should provide that additional time or overtime will not be permitted without prior written authorization. While a rule prohibiting overtime in and of itself is not sufficient,[19] the law provides that "any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted."[20] While a remote work policy can and should prohibit overtime without prior written approval, the employee must be paid for any overtime that is worked. Supervisors should remain vigilant and enforce work hour expectations. For example, regular receipt of work-related communications after work hours should be a red flag that supervisors should pay attention to and address.

ii. Meal and Rest Breaks—Just like non-exempt employees at the traditional work site, remote non-exempt employees are entitled to take off-duty meal and rest breaks, and any expectations regarding same should be memorialized in the remote work agreement. States vary in the extent to which they assert authority over work performed in their jurisdiction. Accordingly, work performed outside of Texas may be subject to different rules and/or record-keeping standards with respect to rest breaks.

iii. Timekeeping—In an effort to ensure that a state agency exercises control over the work hours performed, remote work agreements should specify record-keeping obligations for all hours worked, including overtime, and that they are submitted for review regularly. Remote non-exempt employees should be required to record their time each day and certify that their submission is accurate and reflects all hours worked.

c. *Are remote employees located in a different state than your client*? While many states implemented rules regarding tax implications for remote workers during the pandemic, others did not. What happens after the pandemic? There is not a bright-line rule for when an employee working for a Texas employer outside of the state becomes subject to the laws of the state where (s)he is performing the work. Factors for determining the applicable law will include, but not be limited to, the employer's presence in the state where work is being performed and the duration of the employee's work in the state. Remote employees working outside the state where the employer is located can impact many employment issues: the applicable minimum wage, meal and rest breaks, record-keeping, taxes and

[18] 29 C.F.R. 785.12

[19] *See* 29 C.F.R. 785.13 which provides in pertinent part that, "…it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so."

[20] 29 C.F.R. 785.23

workers' compensation. Accordingly, employers should ensure that they know where remote work is being performed, require employees to keep them apprised of any changes, and manage expectations about responsibilities for failure to do so.

Conclusion

Whether COVID provided your client or agency with a crash course in remote work or tested standing policies, the experience of working remotely through a pandemic offers the opportunity to create and/or reevaluate attitudes, policies and procedures about flexible work. The Texas Department of Information Resources' survey of state agencies and institutions of higher education found that the following practices increase both employer and employee satisfaction with a telework program:

- Set clear and measurable goals for employees and agree on metrics to evaluate performance.
- Set clear expectations and establish clear procedures to ensure the arrangement succeeds.
- Communication is essential: Employees, managers, and teams must agree to terms of communication, including when employees will be available and by which method.[21]

While I am hopeful that none of us will ever again be thrust into remote work as a result of a pandemic, we can use our experience to improve our remote work policies and procedures to clearly communicate expectations, processes and means of staying in touch while working apart.

[21] Texas Dept. of Info. Resources, Telework in Texas: http://publishingext.dir.texas.gov/portal/internal/resources/DocumentLibrary/Technology%20Brief%20-%20Telework%20in%20Texas.pdf