

LEGAL AND PRIVACY

Legal landmines that brands may face as COVID-19 restrictions are lifted in US

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Working from home will require enhanced skills to convince prospects

By **Rania V. Sedhom**

With most U.S. states next week entering Phase 2 or 3 of COVID-19 lockdown relaxations, brands may be breathing a sigh of relief that business is returning to normal.

However, due to the uncertainties related to COVID-19, many employers allowed employees to work from home or offered flexible work arrangements. Have those new, temporary policies exposed marketers to lawsuits?

Just in case ...

Aside from lawsuits, are there concerns that may have been neglected during the past few months in an effort to accommodate employees?

Companies who normally disallowed telecommuting, or working from home, suddenly permitted it for some employees. Three consequences that may lead to lawsuits are whether: (1) the company advised its employees that the policy was temporary, (2) the policy was applied evenhandedly, and (3) the company accommodated individuals with disabilities who worked from home.

If a brand intended to limit its work-from-home policy to the COVID-19 period, it should so state in its employee communications.

If the brand failed to do so, it may face discrimination charges from employees who want to continue working from home and are no longer permitted to do so.

If working onsite is an essential job function, brands should remind their employees that on-site work is mandatory and delineate the reasons to the extent necessary.

If a brand wants to maintain flexibility and permit some employees to work from home, it should be certain that the flexibility is applied fairly and does not discriminate.

Remember, policies may not be discriminatory on their face, but may have a disparate impact.

In other words, a policy may seem neutral but, when applied, discriminates against a group of people based upon gender, race and religion.

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As HR departments administer long-term, or permanent, telecommuting policies, they should assess the effect of the policy on both the business and employee rights.

If an employee has a disability-related accommodation at work taking additional breaks or using an ergonomic keyboard or chair employers need to consider providing those same accommodations for an employee's work at home, subject to the same undue hardship considerations as exist with providing such accommodations when working in the office.

Some other considerations should be taken into account.

Workers compensation

Home-based employees are entitled to the same workers' compensation benefits as office workers.

If an employee is working from home at the employer's request and not for the employee's convenience, injuries occurring at home while performing work-related duties may be covered under an employer's Workers Compensation policy.

Privacy and cyber security policies

Most employers who are working from home through COVID-19 are using their own computers.

Several employers simply did not plan for telecommuting, certainly not for this long a time period, and may not have invested in additional laptops.

It is very uncommon for individuals to have as many firewalls and reliable security software on their home computers.

However, if an employee inadvertently exposes customer or company confidential or proprietary information, an employer will be held liable.

Tax nexus

Nexus can be described as a tax connection between a state or city and an entity.

When a business has nexus with a state or city, that company is usually required to register with the tax authority and pay applicable corporate, employment, excise and sales taxes.

Having a physical presence in a state or city establishes a tax nexus. A single employee working from home can obligate a company to register, pay taxes and the like.

Several states, including Massachusetts and New Jersey, as well as the District of Columbia, stated that they will not enforce certain nexus provisions related to remote employees at least for the period that the employee is working remotely due to COVID-19.

Starkly absent from this list is New York. Therefore, brands with offices in New Jersey and employees working from home in New York, will need to register to do business in New York, withhold appropriate taxes, and pay appropriate taxes to New York State.

Caveat COVID-19: As states re-open for business, businesses may need to prepare for potential lawsuits and other pitfalls resulting from telecommuting, and other policies created during the pandemic.



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