Challenges with Telecommuting

Considerations for Companies with Telecommuting Staff

An Aon White Paper

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Introduction

Workers’ Compensation coverage is a no-fault coverage for injuries or illnesses that occur during the course and scope of one’s employment. Simply put, it means that if an employee did something to contribute to their getting injured, no fault or liability can be placed on them. There are some exceptions to this broad definition, such as injuring oneself at work due to alcohol use or getting injured as a result of horseplay, but what if an employee’s work environment is their home? Would that employee be covered under workers’ compensation if an injury occurred there? How does an employer define what is work and what is not? What if an employee runs out to put the trash out and gets injured? What responsibilities does an employer have for their telecommuting employees? Are there OSHA requirements for the employer?

The Pros of Telecommuting

In recent years, companies have allowed more and more employees to work from home. For many companies, this has served their business plans quite well as there are a number of pros to support telecommuting, including, but not limited to:

- **For communities**
  - Positive Community Branding
    - Ability to hire the disabled, care-givers, the retired, remote workers—all those who could not get to an office
  - Reduction in Pollution
    - Workers who telecommute are not using their cars—reduces a communities carbon footprint

- **For individuals**
  - Improves Life-Work Balance
    - Reduces overall stress
  - Reduces the Carbon Footprint
    - Reduces fuel consumption
  - Increases Productivity
    - Time spent commuting can now be spent working
  - Improves Remuneration and Morale
    - Saves the worker from additional costs with clothing, fuel, car insurance & repairs; estimated $2.7k per year

- **For companies**
  - Increases Productivity; Increases Morale
    - Reduces turn-over and absenteeism
  - ADAA Compliance
    - Having workers who have been injured can be considered a reasonable accommodation
  - Increases cost savings
    - A report by Thompson & Knight (2000), opined that companies can save up to $11k or more per year, per employee who works from home.
  - Reduces the spread of illnesses such as the cold and flu
The Cons of Telecommuting

While there are many pros to telecommuting, there is always a flipside that we must also be aware of, including but not limited to:

- Requires good time management skills
- Out-of-sight, Out-of-Mind
- Lack of contact with fellow workers
- Legal—Workers’ Compensation
- General and Cyber Risk Liability

OSHA Requirements

One of the primary directives of OSHA (Occupational Safety and Health Administration) is to protect the worker by maintaining a safe workplace. As such, OSHA periodically inspects the workplace. OSHA has recently recognized that the U.S. work force is entering a new phase of employment and exposure through telecommuting, as a result, OSHA responded by introducing a set of guidelines for Home-Based Worksites (OSHA, 2000).

OSHA states that it will not conduct inspections of home offices, will not hold employers liable for home offices, and does not expect employers to inspect home offices. OSHA’s policy for home based offices also includes the following:

- If OSHA receives a complaint about a home office, the complainant will be advised of OSHA's policy.
- If an employee makes a specific request, OSHA may informally let employers know of complaints about home office conditions, but will not follow-up with the employer or employee.
- OSHA will only conduct inspections of other home-based worksites, such as home manufacturing operations, when OSHA receives a complaint or referral that indicates that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, including reports of a work-related fatality.
- The scope of the inspection in an employee’s home will be limited to the employee's work activities. The OSH Act does not apply to an employee's house or furnishings.
- Employers are responsible in home worksites for hazards caused by materials, equipment, or work processes which the employer provides or requires to be used in an employee's home.
- If a complaint or referral is received about hazards at an employee's home-based worksite, the policies and procedures for conducting inspections and responding to complaints as stated in OSHA Instruction CPL 2.103 (the FIRM) and OSHA Instruction CPL 2.115, will be followed, except as modified by this instruction.
- Employers who are required, because of their size or industry classification, by the OSH Act to keep records of work-related injuries and illnesses, will continue to be responsible for keeping such records, regardless of whether the injuries occur in the factory, in a home office, or elsewhere, as long as they are work-related, and meet the recordability criteria of 29 CFR Part 1904.
A recent article “Telecommuting and Workers’ Compensation” written by Paul D. Hooper of CID Management, opined that there are a number of steps that companies can consider to protect themselves and their workers. He suggests the following be made in an attempt to minimize potential problems:

**Select appropriate employees for telecommuting**
- It is suggested that employees earn the right to work from home because not everyone is suited for it.
- Overall work performance could be a baseline to start the process. (Caution should be taken to ensure that the Americans with Disabilities Act is carefully reviewed when using telecommuting as an accommodation).
- Consideration should be given to first starting any telecommunicating program as a controlled pilot program at a particular business or company location. This will allow a company to evaluate its workforce within the pilot program as well as refine any challenges they may encounter.

**Email and/or fax work assignments**
- Rather than having employees make a trip to a primary worksite, consideration should be given to sending any work assignments electronically.

**Set fixed work hours**
- One of the advantages of working from home is the flexibility of working at any time. However, it is best to establish “normal” business hours; those that are designated for work and those that are allotted to other duties.
- If employees are injured during “normal working hours”, it may be much easier to establish that they are “on the job”.
- Therefore, injuries that occur outside normal working hours would more than likely not be work-related.

**Define the work area**
- Establish physical boundaries for the “home office”.
- It is important to clearly establish what area(s) of the home are considered to be part of the work environment and what areas are not work-related.

**Teach employees about injury prevention**
- As with the on-site employees, telecommuting workers should fully participate in all environmental, health and safety training. The largest injury exposure for employees working from home is ergonomic type injuries.

**Check the work site**
- Most employers do not evaluate home offices of their employees, but whenever an employee is given the opportunity to telecommute, consideration should be given to evaluating the work space that s/he will be working from.
- Others may evaluate a home office only upon a request by the employee. (It is important to respect the privacy of the home when any inspection is to be performed).

**Require proper reporting procedures**
- Ensure telecommuting employees are knowledgeable about reporting an injury because when workers are telecommuting as they are usually not supervised.
- OSHA requires that all work-related injuries and/or illnesses be reported in a timely manner. Whenever an injury or illness occurs in the home office, the same reporting guidelines apply.
Workers’ Compensation

On the one hand, OSHA holds the employer accountable for home worksites for hazards caused by materials, equipment, or work processes which the employer provides or requires to be used in an employee’s home while simultaneously stating that it will not perform any inspections, nor does it require employers to perform any inspections of home offices. While there is ambiguity around this, there is also ambiguity under Workers’ Compensation and the telecommuter.

The major challenge for telecommuter claims is determining, what is an injury that “arises out of employment”. When you look at the laws governing telecommuters they are actually identical to those covering persons working in a more traditional on-site environment; the doctrine is the same. The words “in the course of employment” pertain to the time, place and circumstances of the accident. This generally means that the injury has occurred:

1. Within the period and established hours of employment
2. At a place where the employee reasonably may be in the performance of the employee’s duties and,
3. While the employee was fulfilling the employee’s duties or is engaged in something incidental to their business

If an injury/illness arose “as a result of employment” or, “in the course of employment” then the assumption is that the injury/illness would be covered by workers’ compensation. If the injury/illness does not meet the above 3 points and is not work-related, the presumption is that it is not covered. The key requirement is that the injury/illness is a result of some work-related factor.

If a telecommuter is injured while working at home, then several factors need to be considered when investigating the injury, including, but not limited to:

1. Did the time and accident location happen within the home and in a place that was designated as a work area?
2. Did the injury occur during the telecommuters established normal working hours?
3. What was the worker doing when the injury happened; was the employee doing work-related tasks or was s/he taking care of personal business or taking a break?
4. What are the employer’s policies for keeping a home workplace safe?
5. Is there a clearly written telecommuting policy?

The compensability of a telecommuting claim is still dependent upon the state and the specific facts surrounding the injury in question.

The majority of states accept telecommuting injuries under workers’ compensation and they utilize the below facts, (as previously stated above), as the litmus test to establish the compensability:

1. Within the period of employment
2. At a place where the employee reasonably may be in the performance of the employee’s duties and,
3. While the employee was fulfilling the employee’s duties or is engaged in something incidental to their business
Employers should be prepared to do the research on how each state workers’ compensation statutes in which they are doing business in, respond to employees who telecommute and who get injured. It should also be noted that an employer should understand if there has been any specific case law that may have eroded the original intent of any telecommuting statutes. This understanding can be accomplished by working with the employer’s workers’ compensation defense counsel for a particular state.

Liability and Cyber Risk Exposures

Employers should ensure that they have the proper liability insurance coverage and policy limits to cover the potential exposures that they face with a telecommuter work-force for such potential exposures as general and cyber risk liabilities. For example, if a visitor conducting business with the telecommuter while at the home office is injured on the home office premises, there is a possibility that the visitor could bring a 3rd party claim against the telecommuters Homeowner’s coverage as well as the employer’s liability coverage.

Employers should also be aware of potential IT security risks regarding their proprietary information and intellectual capital. A cyber breach could cause a major business interruption as well as financial and reputational harm, amongst other serious things. Some of the areas to consider are (but not limited to):

- Reviewing the company’s own Cyber Mitigation Policy and how any security walls will interface with the internet provider
- Vetting the types of internet providers you will want your telecommuting work-force to utilize
- What type of information would need to be specifically coded as confidential

Most companies anticipating having a telecommuting work force have historically done their due diligence relative to the insurance coverage’s needed, such as ensuring that a company have Cyber insurance coverage, but it is noteworthy to advise that these exposures do exist and employers should be aware of the “deep pockets” doctrine that many plaintiff law firms utilize when bringing any type of a liability claim against an employer.

Establish a telecommuting policy

So how can an employer attempt to mitigate some of the challenges with a telecommuting work force; through the establishment of a well-drafted corporate policy regarding the terms of the telecommuting. Subjects like specific work hours, conduct, break periods, non-employee visitations, work areas on premises and leaving the premises could all be part of the policy. Having such an agreement would present strong evidence of the intentions and responsibilities of the employer and the telecommuting employees.
Make sure all employees who telecommute are provided with a copy of the policy and agree to the terms. While such policies may not be binding in court, they can go a long way toward establishing the ground rules and expectations.

Thompson and Knight (2000) state such a policy should contain the following, including, but not limited to:

- Definitions
- Policy statement
- Principles of telecommuting
- Work hours
- Voluntary program
- The selection of the telecommuting candidates
- Equipment assignment
- Performance evaluation
- Time keeping
- Work site inspection
- Expenses to be covered (i.e. Internet services, etc.)

Conclusion

Historically, those individuals who chose to telecommute were typically older, more experienced, more committed to their employers, and generally less likely to file a workers' compensation claim. As technological advances are made though, more and more employers are allowing telecommuting because employers are realizing that there are a number of positive results. Also, technology now allows the employer to provide better oversight of the work product, but the physical environment of the telecommuter, their own homes, will continue to be a challenge.

An employer’s ability to test the validity of a telecommuting claim will ultimately depend upon the precautionary measures that were implemented by them; as noted above, establishing a strong telecommuting policy, one that will immediately establish expectations between the employer and their telecommuting employees.

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AGRC’s Casualty Risk Consulting team is dedicated to providing clients with innovative and sustainable solutions for their risk management needs. The differentiating factor is the Strategic Improvement Platform, a continuous improvement model leveraged to assess, plan, implement solutions, and measure success for our clients.

The Five Phases of the Aon Strategic Improvement Platform

- **Calibrate**: A critical understanding of our client’s vision to ensure we deliver solutions that are consistent with long-term business plans.
- **Diagnose**: Establish baselines and benchmarks to identify strengths and prioritize opportunities for improvement. Then, by assessing the current state of the casualty program from a risk management, culture and prevention perspective, we help client build a program that drives measurable impact.
- **Strategize**: Team with clients to build a proactive, metric-driven plan to drive near-term milestones and long-term and sustainable successes. The objective is to help clients build SMART goals, so sustainable and replicable success for your organization can be managed.
- **Execute**: A hallmark of our consulting approach is “execution through client service”. Planning with poor execution will not drive results, therefore, Aon’s global resources are ready to support, compliment or directly manage portions of the strategic plan.
- **Measure**: The purpose of designing a strategy and then committing time and resources to its implementation is to drive results. Part of our planning sessions will be to identify how our clients will measure success.