

# New Ways of Working

## **01. Has the government introduced any laws and/or issued guidelines around remote-working arrangements? If so, what categories of worker do the laws and/or guidelines apply to - do they extend to “gig” workers and other independent contractors?**

### United States

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*Yes, many states have passed laws that recognise remote-working arrangements. This includes laws concerning employee reimbursement of costs relating to remote work, workers' compensation, tax, timekeeping and meal breaks, data privacy, and providing accommodation. Because companies may be legally considered to be employers or “co-employers” of consultants and contractors, these rules may also apply to non-employees.*

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## **02. Outline the key data protection risks associated with remote working in your jurisdiction.**

### United States

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Data privacy rules vary from state to state. Remote work, in particular, raises issues where employers have less control over the working environment and employees are potentially accessing sensitive information in their home that they share with others. Employers should ensure that employees working remotely can demonstrate that their location provides sufficient privacy, security, and safety to secure the confidentiality of the employee's work, company information and materials. Additionally, health-related data must be protected and employers should be required to protect trade secrets and other confidential data. Employers must also maintain reasonable security measures to protect sensitive personally identifying information.

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### **03. What are the limits on employer monitoring of worker activity in the context of a remote-working arrangement and what other factors should employers bear in mind when monitoring worker activity remotely?**

#### United States

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Monitoring and surveillance laws vary from state to state, and there are also, potentially, tort and criminal laws regarding invasion of privacy that must be considered where the employee has an expectation of privacy. While audio or key-stroke monitoring may be minimally intrusive, video surveillance is almost always problematic. Some states require only one-party consent for audio monitoring, but others require that all the parties to a conversation consent to such monitoring.

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### **04. Are employers required to provide work equipment (for example, computers and other digital devices) or to pay for or reimburse employees for costs associated with remote working (for example, internet and electricity costs)?**

#### United States

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There is a patchwork of various state laws, either by judicial decision or statute, affecting expense reimbursement, particularly in instances involving mandatory remote work as opposed to remote work requested by the employee. Ascertaining expense reimbursement obligations is one of the most challenging aspects of implementing a compliant teleworking arrangement. Some states do not require reimbursement of work equipment, internet, etc, while others, such as California, do require reimbursement of "all necessary expenditures."

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## 05. What potential issues and risks arise for employers in the context of cross-border remote-working arrangements?



### United States

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Employees who cross state borders trigger a host of risks for their employer. The obligations of the jurisdiction where the work is performed will generally prevail (depending upon duration). For example, state law, and even municipal law, control employers' leave obligations (such as time off to vote, paid family leave, or paid sick leave). With paid sick leave, this can become very complicated, as each law has different tracking, recordkeeping and accrual requirements. In addition, state withholdings and income tax, as well as insurance (workers compensation), must be considered. Local ordinances often also control wage-and-hour issues such as how and when an employee must be paid, pay-statement requirements, whether an exemption applies or overtime must be paid, and other nuanced areas such as required employer policies, or notices relating to wages or unemployment insurance.

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## 06. Do employers have any scope to reduce the salaries and/or benefits of employees who work remotely?



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Most jurisdictions in the US have at-will employment, so that with appropriate advance notice, salaries and benefits of at-will employees can be reduced without issue (ie, assuming no contract and the pay does not fall below the threshold for minimum wage or to maintain any particular exemption). However, as with any workplace policy, the law mandates that selection for wage reduction be without regard to protected status such as race, age or disability. Thus, there may be an exposure to risk of claims to the extent that those who work remotely are seeking an accommodation or there is a potential for disparate impact. Thus, employers should ensure that there is no "disparate impact" on any protected status that is required to work remotely.

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## 07. Do employers have a legal duty to provide covid-19-safe working environments? If so, what practical

## steps can employers take to satisfy this duty?



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Employers have duties under the federal Occupational Safety and Health Act (OSHA) and state and local laws (mini-OSHA) to ensure safe working environments. This includes completing covid-19 Prevention Plans and complying with reporting obligations. In addition, many industry-specific standards also exist, such as OSHA's covid-19 Emergency Temporary Standard (ETS), generally applicable to the healthcare industry.

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## **08. Can employers require or mandate that their workers receive a covid-19 vaccination? If so, what options does an employer have in the event an employee refuses to receive a covid-19 vaccination?**



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Federal anti-discrimination laws don't prohibit employers from requiring all employees who physically enter the workplace to be vaccinated for covid-19, accommodations must be made for those with religious objections or a disability. Another option is to consider having employees show vaccination proof or submit to weekly covid-19 testing, wear masks, and keep physically distant from other workers and visitors. Employers can also encourage and incentivise employees to get vaccinated by offering prizes, developing vaccination education campaigns, offering vaccinations on-site, covering any costs that might be associated with getting the vaccine, or providing paid time off for employees to get the vaccine and recover from any potential side effects. However, state lawmakers have introduced dozens of legislative proposals to make it harder for employers to require that employees get a covid-19 vaccine.

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## **09. What are the risks to an employer making entry to the workplace conditional on an individual worker having received a covid-19 vaccination?**



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While federal anti-discrimination laws don't prohibit employers from requiring all employees who physically enter the workplace to be vaccinated for covid-19, accommodations must be made for those with religious objections or a disability through alternative measures. Those can include getting tested weekly or working remotely. In addition, state law is rapidly evolving in this area and we have seen a steady increase in worker lawsuits that are filed on the basis that treating unvaccinated people differently is discriminatory or unlawful.

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## **10. Are there some workplaces or specific industries or sectors in which the government has required that employers make access to the workplace conditional on individuals having received a Covid-19 vaccination?**



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Yes, this includes the healthcare industry, as well as some federal and municipal agencies.

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## **11. What are the key privacy considerations employers face in relation to ascertaining and processing employee medical and vaccination information?**



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With limited exceptions, the Americans with Disabilities Act requires employers to keep confidential any medical information they learn about any applicant or employee. Medical information includes not only a diagnosis or treatment, but also the fact that an individual has requested or is receiving a reasonable accommodation. In addition, employers must maintain reasonable security measures to protect sensitive personally identifying information. Specific data privacy rules vary state by state.

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## 12. What are the key health and safety considerations for employers in respect of remote workers?

### United States

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The OSHA governs the relationship between employers and employees with respect to workplace health and safety, and provides employer mandates regarding possible hazards in the traditional workplace. The key issues in work from home safety revolves around ergonomics. But the law recognises that employers have limited direction and control over the employee's residence or other remote locations such as coffee shops, public libraries and so forth. Nevertheless, employers have in many instances required employees to commit to keeping a safe workplace in their home and wherever they may work.

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## 13. How has the pandemic impacted employers' obligations vis-à-vis worker health and safety beyond the physical workplace?

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With covid-19, the focus has shifted from workplace injury to workplace illness. Thus, the obligations have been expanded in that employers have had to think about exposures both inside and outside the workplace, and establishing safety protocols to help prevent employees from bringing the hazard into the workplace.

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## 14. Do employer health and safety obligations differ between mobile workers and workers based primarily at home?



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Yes. Employees who as part of their job travel, visit customers and clients, and go from place to place, may be exposed to health and safety conditions that are beyond their employer's control. Nevertheless, employers need to take reasonable steps to keep their employees safe, even when they are outside the brick-and-mortar workplace. The employer's obligations to ensure their workers' safety follows them as they travel for work, and, to the extent feasible, employers need to anticipate and mitigate against potential risks. On the other hand, employees who work from home are less likely to be exposed to these kinds of hazards, and the employer's responsibility for the safety of employees who work from home is far less than for mobile workers or, of course, on-site workers.

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## **15. To what extent are employers responsible for the mental health and wellbeing of workers who are working remotely?**



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This is not an area that has been a priority in the United States, particularly if the employees are remote. However, this will likely be a developing area in the future that employers will have to consider in light of the changes being brought about by the pandemic.

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## **16. Do employees have a “right to disconnect” from work (and work-related devices) while working remotely?**



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Generally speaking, no. However, federal and state laws may require employers to pay overtime to certain “hourly” employees who work more than a certain number of fixed hours per day or week, and some state laws mandate a day of leisure or some number of hours per day for lunch or other breaks.

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## **17. To what extent have employers been able to make changes to their organisations during the pandemic, including by making redundancies and/or reducing wages and employee benefits?**



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The pandemic has caused many companies to have to re-evaluate employee salaries and wages, and to make staffing changes. Where required by collective-bargaining agreements, these changes have resulted in bargaining with unions.

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## **18. What actions, if any, have unions or other worker associations taken to protect the entitlements and rights of remote workers?**



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Unions are criticising company responses (especially the lack of paid leave, sufficient staffing, and a process to address employee safety concerns) in recent organising efforts. The best thing non-union employers can do to avoid union drives of this nature is to be transparent. Employers should develop and communicate a covid-19 response that is compliant with state or federal mandates and “best practice” recommendations, be as flexible as is reasonably possible in balancing the interests of employees and the business, and regularly update employees.

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## **19. Are employers required to consult with, or**

# otherwise involve, the relevant union when introducing a remote-working arrangement? If so, how much influence does the union and/or works council have to alter the working arrangement (for example, to ensure workers' health and safety is protected during any period of remote work)?



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Unionised employers may unilaterally implement a policy requiring employees to work from home if the applicable collective bargaining agreement contains language granting the employer the right to implement such a requirement. Unilateral action also would be permissible if a local, state or federal law mandates working remotely for certain classifications for employees. Even in that case, however, the employer would still have an obligation to bargain over any discretionary aspects of the policy, such as:

- classes of employees subject to remote work (unless specified by the order);
- frequency and timing;
- consequences of an employee's refusal; and
- where the remote work will be performed.

Other provisions in a collective bargaining agreement may cede control over the situation to the employer. For example, the CBA may include a "management-rights provision" which permits the employer to operate and manage the workplace, require standards of performance, implement improved operational methods and procedures, or promulgate rules, regulations and personnel policies. Even if the clause does not explicitly address the issue of working from home, it may be argued that the union has waived its right to bargain over the matter.

Employers with union-represented employees need to carefully review existing collective-bargaining agreements to determine whether there is sufficient management rights language that would permit an employer to mandate working from home as a condition of employment.

Furthermore, to the extent an employer seeks to avoid a bargaining obligation by claiming that working from home is consistent with a local, state, or federal law or regulation, it will need to show that it is actually mandated by the law to require this.

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