



COVID 19 RESOURCES FOR NONPROFITS

WHAT TO DO WHEN YOUR WORK FORCE IS WORKING FROM HOME

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WHAT TO DO WHEN YOUR WORKFORCE IS WORKING FROM HOME

In light of the COVID-19 pandemic, New York State currently has implemented requirements for many employers to reduce their in-person, non-essential workforce by 100%. See Executive Order No. 202.8. As a result, many employees, including those of non-profit organizations, are currently working remotely, and will likely continue to do so for some time.

The questions and answers below offer information and insight regarding some common issues that arise for employers when employees work from home.¹ **When in doubt contact NYLPI who can match you with pro bono legal counsel.*

SOME OR MOST OF OUR EMPLOYEES ARE WORKING AT HOME. SHOULD WE HAVE A WORK FROM HOME POLICY?

Yes. It's always a good idea to communicate proactively and in writing with employees regarding the organization's expectations while working from home. This Advisory contains some suggestions for what to include in a Work From Home Policy, but note, it is advisable to have a lawyer review a draft policy before the organization implements it.

¹ This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship.

WHAT SHOULD WE PUT IN A WORK FROM HOME POLICY?

Consider including the following:

- Explain eligibility factors regarding which employees will be permitted to work from home (e.g., which positions are eligible, length of service requirements, etc.). The policy should also provide that the organization retains sole discretion to terminate the program for a participant at any time, including sole discretion regarding the duration of any work from home arrangement.
- Explain that the organization's regular employment policies (as outlined in the employee handbook or otherwise circulated) that are applicable will apply equally to employees while they are working from home. For example, policies regarding timekeeping and overtime, protection of the organization's confidential information, and expense reimbursement.
- Require employees to set a regular work schedule and to give that schedule to their supervisor or manager. Make clear that during the established regular work schedule, the employee must be fully available to perform work for the organization. Deviations from or modifications to the regular work schedule must be approved by the employee's manager or supervisor, in writing (email is fine).
 - If adherence to a regular schedule is unrealistic in light of competing family needs during the pandemic, consider other methods of ensuring employees' ability to communicate with their supervisors and each other to perform their jobs effectively. For example, consider requiring employees to email or call their supervisors at the beginning and/or end of each workday to provide information about their schedule and availability for the upcoming day as well as their accomplishments during the previous day.
- Clearly state how many hours nonexempt employees (i.e., employees who are eligible to receive overtime pay) are expected to work each day.

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- Remind nonexempt employees that they must obtain prior written approval before working more than 40 hours in a week (again, an email from their supervisor is fine).
- Remind nonexempt employees that they must take scheduled meal breaks (see below for additional detail).
- Explain that policies on overtime, work hours, scheduling time off, and leaves of absence apply with equal force while employees are working from home. An employee working from home must obtain written approval from his/her supervisor before taking vacation days or leaves of absence.
- Establish productivity expectations and standards. For example, by including a statement that there will be no change in monitoring or evaluation of employees' workflow and performance or that requirements for job-specific targets will remain the same.
- Outline expectations regarding communications and responsiveness. Establish acceptable methods of communication between team members. For example, employees must check voicemail, email, text, Slack, and/or Whatsapp hourly and respond promptly.
- Remind employees that it is their responsibility to protect confidential information belonging to the organization (see below for additional detail).
- Outline the organization's policy on expense reimbursement (see below for additional detail).
- Outline requirements and/or expectations for home work spaces (see below for additional detail).
- State that no in-person client and/or business-related meetings should be conducted in an employee's home office.

Have employees sign the Work From Home policy or at least have them acknowledge receipt by return email.

WHERE SHOULD OUR EMPLOYEES PERFORM WORK?

- Employees working from home should identify a specific work space in their homes or remote locations to work. That means that each remote employee is responsible for designating, setting up, and maintaining a safe, secure, and comfortable work environment for work purposes. Employees are also responsible for reasonably furnishing and maintaining the designated work space in a safe and professional manner.
- Employers should remind their employees that they must take reasonable precautions to keep themselves safe while working at home (including fire and electrical safety and ergonomic safety) and protect equipment belonging to the organization (e.g., computers/laptops, organization-issued phones, etc.) from theft, damage, and misuse.
- Employees should also be reminded that confidential and/or sensitive information must not be seen by individuals other than employees (including family members or roommates!) and must be maintained in a secure environment. Employees should consult Human Resources or their manager(s) with any questions regarding setting up home or remote office environments to ensure that they adequately protect the organization's proprietary information.
- It is the employee's responsibility to determine any income tax implication of maintaining a home office area. The organization should not provide tax advice or assume additional tax liabilities. The organization can, however, encourage employees to consult with a tax professional to discuss any income tax implications associated with remote working.
- Finally, employers should also consider whether the organization will pay or reimburse employees for equipment or any other items related to setting up a remote work environment. See below for additional detail.

HOW DO WE MAKE SURE OUR EMPLOYEES ARE ACTUALLY WORKING WHILE THEY ARE AT HOME?

- Good question! This is a perennial concern with any employee working at home, and whether and how to address this concern will be business-driven based upon existing policies and practices. Consider providing employees who will work from home with clear guidance regarding their expected work schedules and responsiveness. For example, employers should establish the expected number of work hours per day and week, and require written approval for any changes to those hours. Also consider establishing mechanisms to ensure that employees are actively working, such as ensuring that they timely respond to emails and other communications with team members. Many employers also provide training to supervisors who may not be familiar with managing a remote workforce.

HOW DO WE MAKE SURE OUR EMPLOYEES AREN'T WORKING TOO MUCH WHILE THEY ARE AT HOME?

- Working “too much” is a serious concern, both because federal and state laws require that nonexempt, hourly employees be paid for all time worked, whether it is performed on or “off the clock.” Working too much can also lead to employee burnout.
- Employers should make sure that nonexempt, hourly employees are not working when they should be “off the clock.” For example, if an hourly employee who is working remotely responds to email, takes work calls, or works on a project outside of their designated work hours, that time must be captured in the employer’s timekeeping system and the employee must be paid; at the same time, consider appropriate action for the employee’s violation of the rule against working outside of designated work hours without express approval.
- Further, nonexempt, hourly employees who do not carefully track their time may inadvertently work more than 40 hours in a week without realizing it and be owed overtime as a result.

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- A good way to deal with this issue is to give nonexempt, hourly employees written instructions to record all of their working time. Supervisors should also closely monitor work being performed by nonexempt, hourly employees, as well as time submissions, and they should promptly follow up with employees if they spot issues.
- To avoid exempt employees feeling like they are always “on call,” the organization should encourage exempt employees to set clear work schedules and managers should be mindful of trying to schedule meetings in a manner respectful of their team members’ schedules.

IF OUR EMPLOYEES ARE WORKING AT HOME, DO THEY STILL NEED A LUNCH BREAK?

- Yes. Even though employees are working remotely, they are still entitled to meal periods and rest breaks. Employers should make clear that employees must still follow the applicable meal and rest break requirements (including documenting meal breaks) and remind employees that if they perform work during their meal period, they must record this time as time worked.
- As a reminder, employees in New York who work a shift of 6 hours or more are entitled to a 30-minute, uninterrupted meal break between 11:00 a.m. and 2:00 p.m. for each shift that covers that period. Employees who start their shifts between 1:00 p.m. and 6:00 a.m. are entitled to a 45-minute meal break in the middle of the shift for each day they work 6 hours or more. If the workday extends from before 11:00 a.m. until after 7:00 p.m., employees are also entitled to an additional 20-minute meal break between 5:00 p.m. and 7:00 p.m.

WHAT ADDITIONAL STEPS CAN WE TAKE TO REDUCE POTENTIAL WAGE AND HOUR RISKS ASSOCIATED WITH NONEXEMPT (HOURLY) EMPLOYEES' WORKING FROM HOME?

- If the organization does not already have one, consider putting in place a timekeeping system that allows employees to accurately record all time worked. There are many computerized systems available, or the employer can simply require the employee to submit a signed timesheet each day or week. If it is a new or different timekeeping system than what employees use when they are in the office, employers should provide training to the employees on how to use the system and how to accurately record their hours worked.
- As discussed above, remind employees of the organization's time-recording policy and its meal and rest break requirements, and reiterate that employees are not to perform any work other than during their authorized work hours. It is also a good practice to remind employees that they must receive manager approval in writing before they work overtime.
- Another good way to mitigate potential wage and hour violations is to have employees affirm on their timesheets that they have accurately recorded all of their hours worked and that they have also been provided the opportunity to take applicable meal or rest breaks. Supervisors should promptly review time entries but they should not change an employee's time records without first having the employee acknowledge that the change is accurate.

DO WE HAVE TO REIMBURSE EMPLOYEES FOR REMOTE WORK EXPENSES IN NEW YORK?

- New York law is unclear whether employers are *required* to reimburse employees working remotely for business expenses. Thus, the safer practice is for the organization to provide reasonable reimbursement for remote working business expenses.
- Below are some best practices for expense reimbursement:
 - Communicate in advance in writing with employees regarding what expenses will and will not be reimbursed, as well as the expense reimbursement process, during periods of remote work. Have employees acknowledge the communication (in writing or via electronic signature) or, alternatively, keep a record of when, to whom, and how (i.e., via email or otherwise) the communication was sent.
 - Employers should provide any necessary supplies and equipment that employees will need while working remotely including, for example, laptops or computers, monitors, and office supplies. Consider whether the organization's remote working applications or systems only run on certain devices or platforms (i.e., Android or iPhone) and, if so, whether it can alternatively use resources that run on multiple systems so that neither employers nor employees have to buy additional devices to work remotely. If the organization is unable to provide this type of equipment to its employees, it should consider implementing a "bring your own device" ("BYOD") policy where employees use their own personal equipment; agree to certain conditions involving content, safety, security, and the employer's access; and are reimbursed or provided a stipend for related business expenses incurred while using that equipment, such as internet and phone service.
 - Employers should reimburse for all reasonable and necessary out-of-pocket expenses that an employee incurs for the "sole benefit" of the employer, such as when an employee sends a necessary work-related package via an overnight delivery service or purchases office supplies necessary to perform his or her job.

- The organization can also identify in its policy any items that are not necessary for the performance of employees' work duties (e.g., printers or new furniture) and, therefore, will not be reimbursed by the organization (or will not be reimbursed without preapproval).

HOW SHOULD WE CALCULATE APPROVED EXPENSE REIMBURSEMENT AMOUNTS FOR MOBILE DEVICE AND INTERNET USE BY EMPLOYEES WORKING REMOTELY?

- For employees who are required to work from home, and must use their personal mobile phone and internet connection for work, the safest practice is to provide some amount of reimbursement to such employees. There are various ways to determine the amount of reimbursement. One way is to identify, and reimburse the employee for, *a reasonable percentage* of the employee's monthly charge for such connections (tied to the amount of time the employee uses the connection for business versus personal purposes). Another way is to provide a *lump-sum reimbursement amount* intended to cover all reasonable and necessary expenses for a biweekly or monthly period.
- To determine the reasonable amount, the employer should work with a lawyer to conduct a privileged analysis of what is a reasonable reimbursement amount for expenses and keep a privileged record of the analysis.
- For example, reimbursement amounts could be calculated and determined based on (1) regional costs of the basic range of necessary equipment and services; (2) internal employer data (if available) regarding what the employer's remote workers have historically submitted to cover remote working expenses; and/or (3) a monthly allotment based on what the organization deems to be reasonable.

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- Whichever method the employer chooses, it is important to provide a policy document stating that (1) the employer reimburses employees for the expenses reasonably expected to be incurred and (2) if the employee believes that the reimbursement is insufficient, the employee must submit an expense reimbursement request with supporting documentation showing why the reimbursement is inadequate.

OUR EMPLOYEES USE THEIR PERSONAL DEVICES (E.G., PHONES, TABLETS, AND/OR LAPTOPS) TO WORK FROM HOME. CAN WE REQUIRE THAT THOSE EMPLOYEES ALLOW OUR IT PERSONNEL TO ACCESS THOSE PERSONAL DEVICES?

- To the extent employees are using personal devices to work remotely for the organization, the organization's BYOD policy should state that employees must permit the organization's IT team to access those devices solely for business purposes in certain situations. For example, IT must be permitted to access personal devices in order to provide technical support and security needed for the performance of remote work. Access must also be granted: when required by a court order or other legal process; to assist in an internal investigation; to erase the business-related contents if the device is lost or stolen; and to address various issues when the employee's employment ends.

WHAT IF ONE OF OUR EMPLOYEES GETS HURT WHILE WORKING FROM HOME?

- It's a good practice to remind employees that even when working from home, they must immediately report all work-related injuries they sustain to either their supervisor or Human Resources. An employee should not delay more than 24 hours in reporting a work-related injury regardless of how minor the injury might be.
- The organization should also check with its workers' compensation insurance carrier to confirm whether employees are covered while working from home.

I HAVE SOME VERY SPECIFIC QUESTIONS, WHAT SHOULD I DO?

Contact NYLPI and they can put you in touch with the right lawyer for your situation.

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