



NHRMA 24

86TH ANNUAL CONFERENCE + TRADESHOW

CS04

Managing a National and Global Remote Workforce: Key Legal Pitfalls to Avoid

Managing a National and Global Remote Workforce

Key Legal Pitfalls to Avoid

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Today's Agenda

Out-of-Country

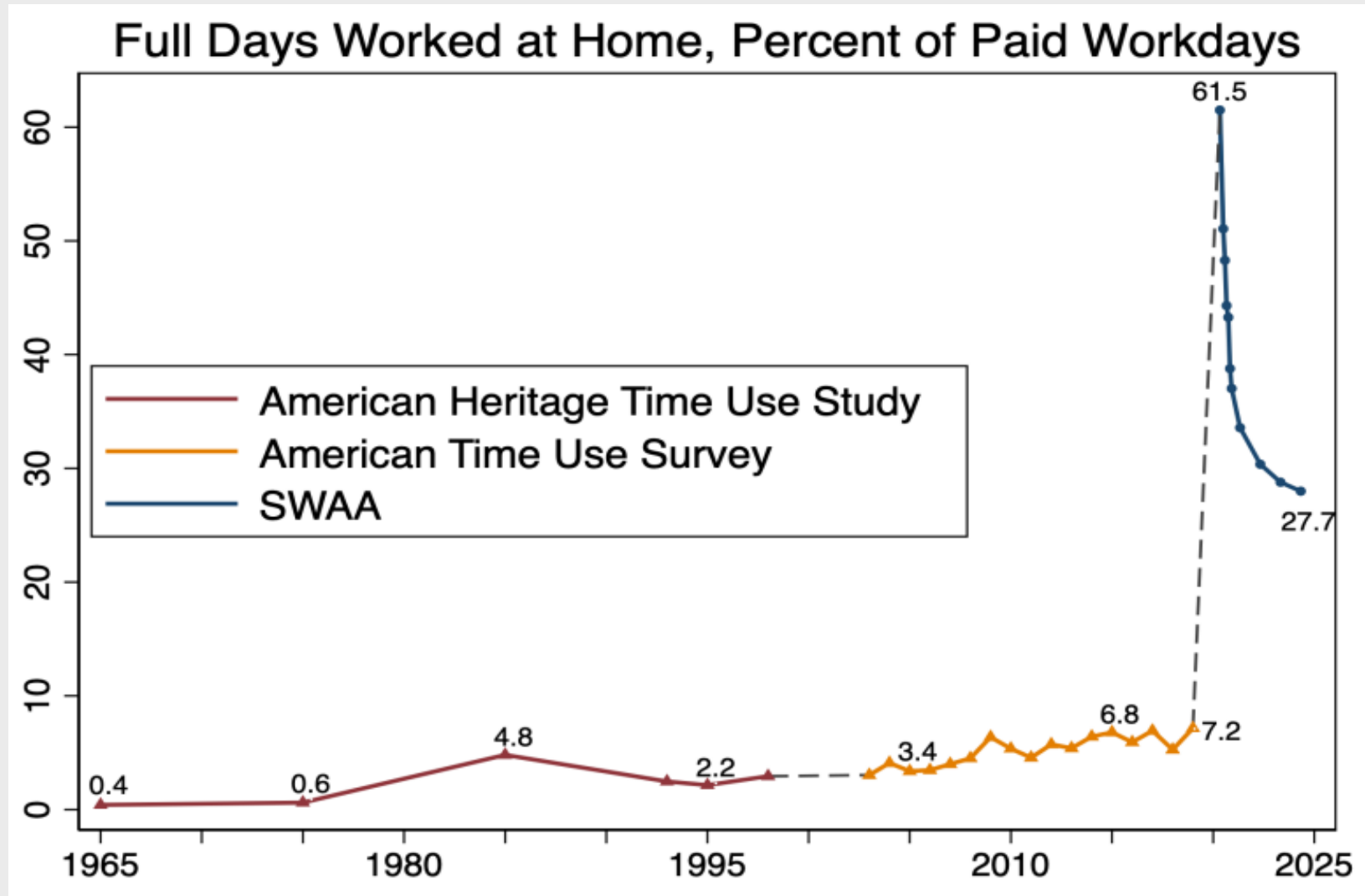
- Corporate Tax and Payroll
- Immigration
- Local Employment Law

Today's Agenda

Out-of-State

- Hiring
- Wage and Hour
- Leave Laws
- Workers Compensation
- Unemployment Insurance
- Separation

The Pandemic Permanently Increased Remote Work, Equivalent to Almost 40 Years of Pre-Pandemic Growth



1) How many of you
have remote
workers in states
other than Oregon?

2) How many of you
have remote
workers outside the
country?



The image features a dark blue background with a pattern of thin, horizontal white lines. On the left, there is a vertical bar with segments of light blue, grey, and light blue. Two large circles overlap: a green one on the left and a blue one on the right. The overlapping area is filled with white, curved, concentric lines. The text 'International Considerations' is centered within the blue circle.

International Considerations

International Considerations

- International workers pull their employers into cross-border employment relationships that trigger nuanced legal challenges.
- If a telecommuter in Portland asks to move abroad and start working for a while from Munich, the legal issues tend to arise under host-country law.
- Focus primarily on the payroll mandates and employment law challenges of the international telecommuter's overseas host-country, not the employer's home country.



International Corporate Tax and Payroll

Corporate Tax (Permanent Establishment)

- When a foreign company starts “doing business” (as that concept is defined under local law), local law requires the foreign company to:
 - Register a local corporate branch or subsidiary;
 - Get a local-country taxpayer identification number;
 - File annual corporate tax returns; and
 - Migrate the remote worker to a new in-country payroll, using the new in-country taxpayer identification number and a local payroll provider.

Corporate Tax (Permanent Establishment)

- PE analysis in the international remote worker context turns on a few variables.
 - Host-country definition of “doing business.”
 - Remote employee’s agency authority or brick-and-mortar offices in host-country.
 - Remote worker local projects and tasks like launching host-country customer support, marketing, or recruiting.
 - Be mindful of scale of operations in host-country.

International Payroll

- Payroll mandates are non-delegable duties. Meaning an employer cannot avoid payroll mandates even if the employee pays all host-country income taxes and social security.
- If possible, migrate the employee to an already available host-country payroll. Otherwise, migrate employee to new in-country payroll.
- Imagine a company in Portland, Seattle or Boise employs an international telecommuter in Canada, France or India. What should they do?

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International Immigration

Immigration

- Some international remote workers are not citizens of their destination host countries and may not get a right to work locally.
- International remote workers who go off to work in nations where they are not citizens usually need a legal authorization to work, more than just a tourist visa.
- Common scenario is the “trailing spouse” moving abroad to follow family who gets a host-country residence visa that fails to confer permission to work.



International

**Local
Employment Laws**

International Employment Law

- Host-country employment laws differ significantly from what employers are used to in the U.S.
 - In Canada, an employment relationship may be terminated without just cause if the employee is provided with reasonable notice (or damages in lieu of reasonable notice).
 - In New Zealand employers must give employees a written employment agreement.
 - Importing restrictive covenants from the U.S. to host countries is unlikely to achieve enforceability without modifications being made.

International Employment Law

- Specific Telecommuting Laws
 - Mexico’s Federal Labor Law requires that labor inspectors verify that telecommuters – employees who work from home – register with Mexico’s “Register of Employers.” Employers that fail to register home workers are subject to a fine.
 - Costa Rica requires an employer register “home workers” in the “sealed and authorized book” at Costa Rica’s “Office of Salaries of the Minister of Work and Social Security.”

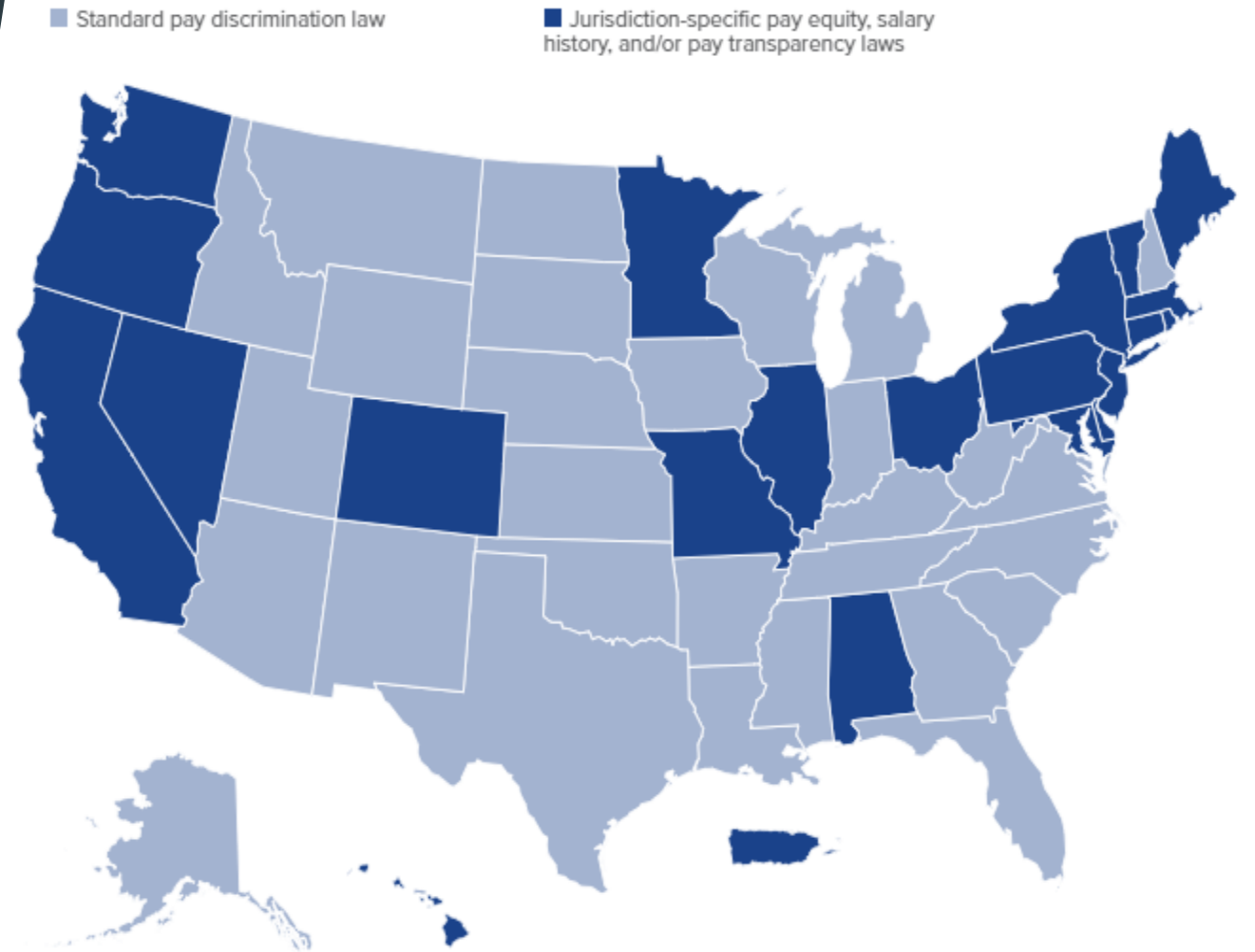


Domestic

**Hiring and
Recruiting**

Hiring and Recruiting

- ▶ Pay Transparency Laws
 - ▶ Compensation range included in internal and external job postings depending on employee headcount.



Hiring and Recruiting

► Employment Agreements

- Many states place limitations on agreements relating to noncompete, severance, confidentiality, and arbitration.

- Some states have salary thresholds, among other statutory requirements, that must be met in order for a noncompete to be enforceable.

| State | Salary Threshold |
|-----------------------|------------------|
| Colorado* | \$123,750.00 |
| District of Columbia* | \$154,200.01 |
| Oregon | \$113,241.00 |
| Washington | \$120,559.99 |



Domestic Wage and Hour

▶ Misclassification (Exempt v. Nonexempt)

- ▶ Job titles do not determine exempt status. Exempt status is based on salary threshold and duties.
- ▶ Salary thresholds and duties tests vary under FLSA and state to state.
- ▶ Evaluate exempt status by location and duties that vary from remote work.

▶ FLSA-Covered Employers

- ▶ \$43,888 per year for executive, administrative, and professional exemptions.
- ▶ January 1, 2025, threshold increases to \$58,656 per year.
- ▶ Information about Coverage under FLSA (enterprise coverage or individual coverage).

States with *higher* salary thresholds than July 1, 2024 DOL rule (\$43,888)

| State | Annual Salary | Weekly Salary |
|--|---------------|---------------|
| Alaska | \$48,796.80 | \$938.40 |
| California* | \$66,560.00 | \$1,280.00 |
| Colorado | \$55,000.00 | \$1,057.69 |
| New York City and Nassau, Suffolk & Westchester Counties, New York | \$62,400.00 | \$1,200.00 |
| New York (remainder of state)** | \$58,458.40 | \$1,124.20 |
| Washington State | \$67,724.80 | \$1,302.40 |

Minimum Wage



Varies by location. Failure to pay minimum wage may result in damages, including back pay, liquidated damages and attorney fees and costs.



Derivative wage claims can result such as failure to pay wages owed at termination with continuing penalties.



Manage time and track hours worked. Clearly define what constitutes work - including checking email and managing non-work interruptions - and instruct employees when they can and cannot perform work.



Train supervisors on what to do when they have reason to believe an employee is not working during scheduled hours or working outside scheduled hours.

Overtime and Breaks



Varies by location. Failure to pay overtime may result in damages, including back pay, liquidated damages and attorney fees and costs.



Derivative wage claims can result such as failure to pay overtime or meal penalties owed at termination with continuing penalties.



Timekeeping practices and procedures matter!



Train supervisors on what to do when they have reason to believe an employee is missing meal periods or working unauthorized overtime.

Expense Reimbursement

- Varies from state to state. Most states only require reimbursement if failure to do so would bring the employee's wages below the minimum wage. Others are more stringent:
 - California, Connecticut, Washington D.C., Illinois, Iowa, Massachusetts, Montana, New Hampshire, North Dakota, and South Dakota all require some form of reimbursement.
 - California = must reimburse “necessary” and “reasonable” business expenses which includes *using personal cell phones for work calls*.
 - May need to reimburse internet and computer equipment.



Domestic Leave Laws

Leave Laws



Leave entitlements vary between states, counties, and municipalities. Employee thresholds vary.

Washington (Seattle and Tacoma)
New York (New York City and Westchester)
California (+ municipal ordinances)



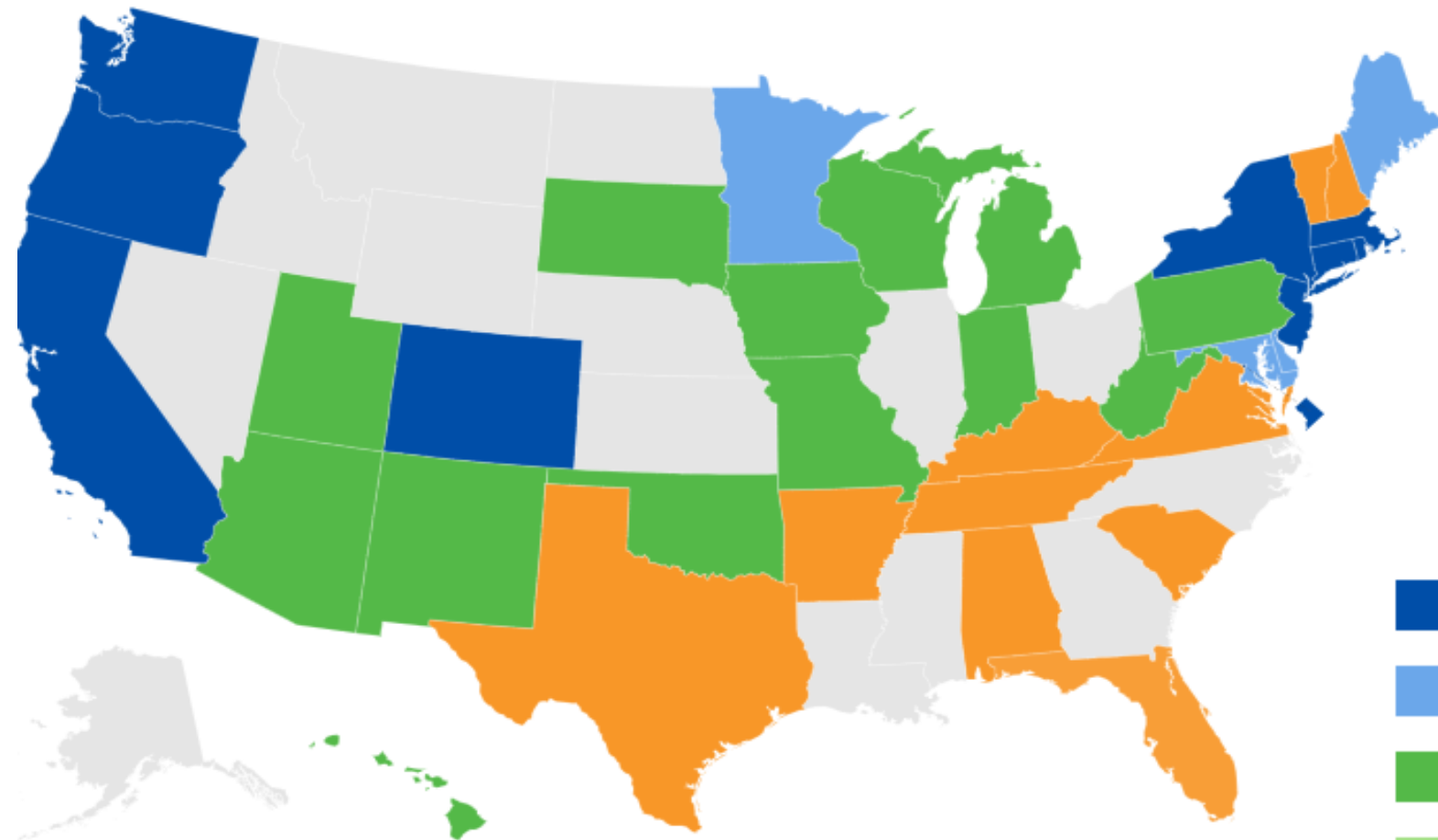
May need policy supplements to address locales depending on headcount.

Accrual rates and carryover limits;
Frontload allotment;
Eligibility and reasons for using sick leave; and
Separation and reinstatement.



Violations can result in fines and lawsuits with recovery of damages and attorney's fees.

Leave Laws - PFML Programs



- PFL or PFML in force
- PFML passed, not yet in force
- PFML proposed
- Active study on PFML
- Alternative policy passed or proposed
- PFL not required



Domestic Workers Compensation

Workers Compensation

Generally, required to have workers' compensation coverage where the employee's work is "localized."

Typically fact-dependent based on whether an employee works regularly at an employer's place of business and the location where an employee is domiciled and spends a substantial part of his or her working time. States may apply different tests.



Uninsured employers of injured workers can generally face criminal and civil penalties, including liability for lost benefits and attorneys' fees for failure to comply with local workers compensation laws.

Workers Compensation



Public, private, and self-insured workers' compensation coverage obligations vary state to state.



Some states have reciprocal agreements with other states about when and how they accept out-of-state workers' compensation insurance.



Employers that wish to take advantage of reciprocity will generally need to obtain extraterritorial coverage from their existing insurers and provide proof of same to the remote employee's state agency.



Consider employment practices liability and/or directors and officers liability insurance policies to avoid gaps in coverage.



Domestic

**Unemployment
Insurance and
Taxes**

Unemployment Insurance and Taxes

The DOL's [Localization of Work Provisions](#) created a uniform four-factor test to determine which state wages should be reported to and unemployment insurance tax paid.

Permanent out of state remote employees typically subject to out of state unemployment insurance obligations.

Hybrid workers working in more than one state require a more complex analysis.



Remote employees may create sufficient nexus to establish that a nonresident employer is doing business in that state and is subject to state taxes such as corporate income tax, franchise tax, and sales and use tax.

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Domestic Separation

Separation

- ▶ Many states prohibit certain terms in a severance agreement such as confidentiality, no-rehire, non-disparagement.
- ▶ Reductions in force - be wary of state mini-WARN acts that require advance notice, continuation of group health insurance, and reports to public workforce agencies.
- ▶ Oregon Workplace Fairness Act prevents confidentiality relating to discrimination and harassment as well as no rehire provisions in severance agreements unless requested by the employee.
- ▶ NY mini-WARN requires 90 days' notice and applies to companies with 50 or more employees where either 250 FT employees from a site will be affected or at least (25) employees if that number makes up at least 33 percent of the site.



Recommended Practices

Recommended Practices



Adopt a written Remote Work Policy (with a formal approval process).



Identify “No-Go” locales that create administrative burdens and restrict remote work in these locations.



Revise employment agreements and policies/handbooks.



Develop a management team to lead compliance efforts and questions.

Recommended Practices



Document where employees are working so you know which wage and hour or other laws to apply - everything from minimum wage and overtime, to expense reimbursement, exemptions, meal and rest breaks, wage statements, sick leave, and the list goes on.



Reinforce timekeeping procedures to ensure non-exempt employees record meal breaks and hours worked.



Train employees on appropriate email and chat communications to reduce inappropriate workplace conduct that can lead to harassment and discrimination claims.



Mental health issues and burnout can be harder to spot in remote employees. Develop a way to check in on a weekly basis and provide information about leave and EAP when warranted.

A Quick Note on RTO and Culture

1. RTO Considerations
 - Morale implications?
 - Adjustment issues?
 - Scheduling issues?
 - Reasonable Accommodation Requests?
2. Remote Culture Considerations
 - Mentoring/Training?
 - Onboarding/Team-Building?
 - Creativity/Engagement?



A Quick Note on Remote Work Accommodations

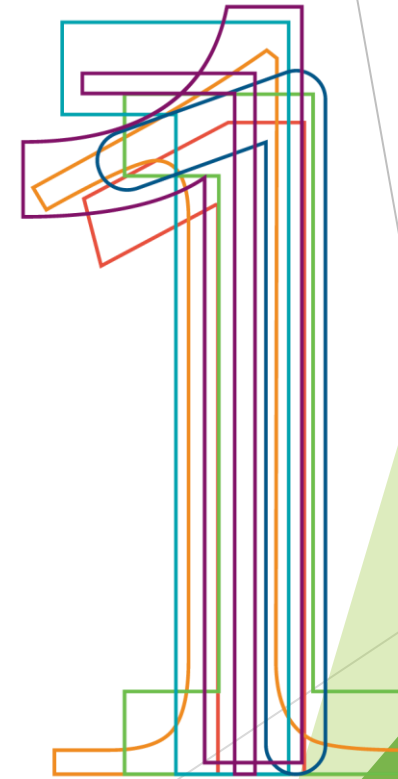
How many of you have received a request for accommodation to work remotely due to stress or anxiety?

Doctor's note: "Darcy struggles with in-person work since the proximity of co-workers and having in-person interactions with others are highly stressful to them. Their home office stabilizes them, allowing them to perform their work. Even the commute creates anxiety because of the fear of arriving at work safely."



Work From Home: Find Out the Facts

- Interactive Process is Critical
 - Obtain the basic medical facts, address generalized fears
 - Why, and how long do you anticipate the need to WFH?
 - Are there any changes or modifications we could make that would enable you to perform your job duties on-site?
 - How, specifically, would those help?
 - Is complete WFH the only modification you believe we could offer?



Work From Home: Interactive Process

- Obtain medical information, if necessary
- Consider possible accommodations
- Examples:
 - Partial remote work
 - Enhanced protective gear or other safety measures
 - Decreased contact with co-workers or modifying workspace/schedule
 - Temporarily eliminating “marginal” job functions
 - Time off under the ADA/FMLA/PLO



Work From Home: What is the Hardship?

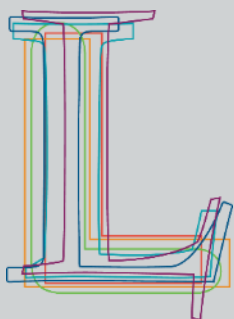
- Discussions with managers
 - **Key:** Why is in-person work essential?
 - Need to be able to support the buzzwords - with specificity:
 - Teamwork/Collaboration
 - Creativity
 - Supervision
 - Assess performance to date: Does this give us an argument to limit/deny WFH?
 - Have business circumstances changed since pandemic started?
 - What does retention data look like?



WFH: What is the Hardship?

DOCUMENT!





Questions?

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