THE VIRTUAL OFFICE AND THE EMPLOYER’S DUTY TO COMPLY WITH STATUTORY STANDARDS

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I. INTRODUCTION

Advances in technology have ushered in the “Virtual Office” Age. The advent of telecommuting and home-offices generates numerous unique and interesting legal issues. Already intricate employment-law issues, such as wage-and-hour compliance, workers’ compensation, and safety and health protections, can become particularly complex when the employee is a “telecommuter.” “Telecommuting” has been defined as “the partial or total substitution of computers or telecommunication technologies, or both, for the commute to work.” Cal. Gov’t Code § 14200. Telecommuting moves the work to the workers, rather than the workers commuting to the work.

With rapidly improving technologies and steadily worsening commute conditions, telecommuting and creating “virtual offices” quickly gained popularity through the last decade. Some experts predicted that the total number of telecommuters would swell to 20 million by the turn of the century. Full-time telecommuters, however, currently represent less than 5% of the U.S. workforce—and may be on the decline. Employers nevertheless can expect to be confronted with the issues implicated by telecommuting employees.

This paper addresses employment-law issues associated with the “virtual office,” including wage and hour, workers’ compensation, safety and health, telecommuting as a reasonable accommodation for a disability, and potential liability to third-parties who deal with a telecommuting employee. In the appendix to the paper, we also present a sample telecommuting policy that employers may wish to implement.

II. THE VIRTUAL OFFICE AND THE EMPLOYER’S DUTY TO COMPLY WITH WAGE-AND-HOUR LAWS

Employers already face significant challenges when trying to comply with the wage-and-hour laws. The task may be even more arduous when employers permit employees to

1 Indeed, the number of American workers who telecommuted grew to more than 11 million in 1997, an increase of 30 percent since 1995. See A Growing Work Force The Jobs Benefits vs. Drawbacks Redefining, PORTLAND OREGONIAN, Sept. 3, 1998, at A18.

2 Steve Creedy, Telecommuting’s Easy–If Anyone Will Let You Do It, PITTSBURGH POST-GAZETTE, Aug. 25, 1996, at C-3. Telecommuting has also been credited for reducing traffic congestion during the 1996 Summer Olympic Games held in Atlanta, Georgia, which was dubbed the “largest telecommuting experiment in U.S. history.” See ’96 Summer Games Set Vigorous Telecommuting Trend in Atlanta, CAN. NEWSWIRE, September 5, 1996, available in LEXIS, Nexis Library, Financial News File.

3 Bonnie Harris, Companies Turning Cool to Telecommuting Trend, LOS ANGELES TIMES, December 28, 2000 at A1.
telecommute. For example, employers are required to keep detailed employee time records and
to pay non-exempt employees overtime for hours worked beyond the applicable legal maximum.
Employers with telecommuting employees must develop a way to measure accurately hours
worked because the employer cannot record those hours based on observation. Non-exempt
employees working in the virtual office, in particular, may pose the greatest wage-and-hour
challenges for employers.4

A. Measuring the Hours Worked by a Non-Exempt Telecommuting Employee

This section will focus on certain important issues employers must confront when trying
to pay non-exempt employees working in the virtual office in a manner consistent with
applicable wage-and-hour laws.

The Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-219, contains a number of
requirements that employers must consider when developing policies for the virtual office,
including provisions governing overtime pay and record-keeping requirements.5 For example,
an employer must keep records of hours worked, in part because non-exempt employees must be
paid at least one and a half (1½) times their regular rate of pay for any hours worked in excess of
forty in a work week. 29 C.F.R. § 516.2. An employer must also keep records of, for example,
the beginning and ending times an employee works, including recording meal periods and split
shifts and total hours worked in a pay period. 29 C.F.R. § 516.2.

Likewise, most employers must comply with state wage-and-hour laws.6 Thus, just as
under the FLSA, employers have an obligation to record and maintain records regarding hours

4 Although compliance with the wage-and-hour laws may be less onerous where exempt employees are
concerned, employers that establish systems to evaluate the productivity of telecommuting exempt
employees should take care that such systems do not run afoul of the FLSA’s “salary basis” test. See 29
C.F.R. § 541.118 (exempt employee “must receive his full salary for any week in which he performs any
work without regard to the number of days or hours worked”).

5 Certain record-keeping requirements, such as the requirement to record the employee’s name, address,
gender, occupation and social security number, should be no more difficult with telecommuters than with
employees who physically commute. See 29 C.F.R. § 516.2.

6 Generally speaking, an employer must follow the law (federal or state) that provides the greatest
protection to the employee. For example, if a state requires that overtime be paid for all hours worked
beyond eight (8) in a work day (e.g., the rule in California), an employer would have to pay an employee
the applicable overtime premium for hours worked in excess of eight per day, even if the employee
worked less than forty (40) hours during the work week.

7 California’s and New York’s record-keeping requirements are similar to those required by federal law.
Before an employer can determine its duty to pay overtime to a non-exempt employee, it must determine the “hours worked” by the employee during the relevant period. Generally, if any employee is “suffered or permitted” to work, even though not instructed or requested to do so, the time so spent may be compensable working time, or hours worked.

1. “Hours Worked” Under the FLSA

The FLSA does not contain a specific definition of “hours worked.” Instead, federal regulations provide that “[a]s a general rule the term ‘hours worked’ will include: (a) all time during which an employee is required to be on duty or to be on the employer’s premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so.” 29 C.F.R. § 778.223.

Time spent doing work without the employer’s knowledge or authorization may not be compensable as hours worked under the FLSA. See, e.g., Forrester v. Roth’s I.G.A. Foodliner, Inc., 646 F.2d 413 (9th Cir. 1981) (finding that when employer does not know or have reason to know employee is working overtime, employer’s failure to pay overtime does not violate FLSA). However, it is the employer’s duty to ensure that no work is performed unless authorized by the employer, and the employer must enforce any rules against such unauthorized work. 29 C.F.R. § 785.13. Even when an employee does work not required by the employer, he or she is entitled to be compensated for that work if the work is suffered or permitted by the employer, i.e., if the employer knows or has reason to know that such work is being performed and allows it to continue. 29 C.F.R. §§ 785.11, 785.12. This is the case even when the employee is performing the work at home. Id.

It may perhaps be particularly difficult to measure the hours worked by on-call employees working out of a virtual office. Under the FLSA, non-exempt employees who are required to remain “on-call,” or who are required to remain near the employer’s premises, so that they cannot use the time effectively for their own personal purposes, are generally entitled to be compensated for the entire period spent on call. 29 C.F.R. § 785.17. Employees who are on call, but whose personal activities are not restricted to a significant extent, may not be entitled to compensation for time spent on call. Id; see also 29 C.F.R. § 553.221(d) (“time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits”); Owens v. Local No. 169, 971 F.2d 347 (9th Cir. 1992) (listing number of factors that courts should consider when analyzing whether on-call time should be compensable).

2. “Hours Worked” Under California Law

In contrast to the FLSA, California has a specific definition of “hours worked.” The primary California counterpart to the FLSA is a series of Wage Orders promulgated pursuant to the California Labor Code by the Industrial Welfare Commission (“IWC”). Wage Orders carry the force of law; employers who violate them are subject to civil and/or criminal penalties. Each of the Industrial Welfare Commission (“IWC”) Wage Orders provides in pertinent part:
Hours worked, means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.8

The California Labor Commissioner interprets this definition to mean, for example, that an employer must compensate an employee for all work performed for the employer’s benefit when the employer knows or should know that the employee is working. Consequently, the burden typically will be on the employer to prove that work performed by the employee was not authorized and that the employer did not and had no reason to know that the employee was performing work. See Aubry & Long, CALIFORNIA WAGE AND HOUR GUIDE 23-24 (1995).

Under California law, eight hours of labor constitutes a day’s work. Cal. Lab. Code § 510(a). Accordingly, employers must pay non-exempt employees daily overtime at a rate of at least one and one-half (1½) times an employee’s regular rate of pay for: (1) hours worked beyond eight hours in a day; (2) hours worked beyond forty in a workweek; and (3) the first eight hours worked on the seventh consecutive day of work in a workweek. Additionally, employers must pay twice the regular rate of pay for hours worked: (1) beyond twelve hours in a day; and (2) over eight hours on the seventh consecutive day of work in a workweek. Id.

Another difference between federal and California wage-and-hour law involves how to treat on-call time. See Aubry & Long, CALIFORNIA WAGE AND HOUR GUIDE 23-24 (1995). In California, the employee need only be subject to the “control of the employer” for the employee to be entitled to compensation; the employee need not actually be engaged in “work.” Division of Labor Standards Enforcement, Policies and Interpretations Manual, § 46.3.3 (October 1998). The ultimate consideration under California law is determining the extent of the “control” exercised over the employee, a fact-intensive inquiry. When determining whether an employer exercises sufficient control over the activities of a worker, the California Labor Commissioner will consider whether there are geographical restrictions on the employee’s movement; required response time; the nature of the employment; and the extent to which the employer’s policy impacts an employee’s personal activities during on-call time. Id. § 46.4.2.2.

3. “Hours Worked” Under New York Law

Like California, New York defines “hours worked” as all “hours that an employee is permitted to work or is required to be available for work at the assigned place of work.” 12 N.Y.C.R.R. § 190-1.3(m). When interpreting this language, the Division of Labor Standards generally uses an analysis similar to that used by federal courts. Although there are no reported judicial or attorney general opinions interpreting the regulation, an employer must compensate

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8 IWC Wage Order 5-2001 adds to this definition the provision “and in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked.”
an employee for the time that an employee works on behalf of the employer when the employer knows or should know that the employee is working.

The regulations make clear that an employer must pay an employee compensation for work “at a place prescribed by the employer,” which includes time spent traveling, to the extent that the travel is part of the employee’s duties. 12 N.Y.C.R.R. § 142-2.1(d). An employee who by request or permission of the employer reports for work on any day must be paid for at least four hours or the number of hours in the employee’s regular shift, whichever is less, at the basic minimum wage rate. 12 N.Y.C.R.R. § 142-2.3. Pursuant to the hotel industry wage order, “working time” is time spent actively engaged in service or time of permitted attendance at the employer’s facility, and time spent traveling at the request of the employer from one of the employer’s establishments to another. Waiting time, other than time off duty for a split shift, during which an employee is required or permitted to wait during the workday while no work is provided by the employer, is deemed working time. The employer must pay the employee for such waiting time, taking into account the total number of hours of working time for that week, less allowances for meals. An employee who travels from one establishment to another for the same employer during the working day must be paid for travel time at the minimum rate without any allowance for tips, and must be reimbursed for fare. 12 N.Y.C.R.R. § 138-2.4(a). This regulation is similar to the federal regulations concerning waiting time and travel time. See 29 C.F.R. §§ 785.15, 785.16 (focusing on waiting time); 29 C.F.R. § 785.38 (focusing on travel time).

B. Determining Which Law Governs When an Employee’s Home Office Is in One State and the Employer’s Office Is in Another State

An employer may be faced with a potentially complex wage-and-hour issue when its office is located in one state but an employee telecommutes from a second state. For example, a non-exempt employee may live in Glen Ridge, New Jersey, and telecommute from home three days each week. On the other two days of the week, she may physically commute to her employer’s offices in New York City. To the extent that there are differences between New Jersey and New York wage-and-hour law, an employer must determine which law governs. The following are examples of how various states would address such a choice-of-law issue.

1. New York

The New York Division of Labor Standards has advised that when an employee is based in New York, work performed outside of New York “on occasion” is controlled by New York law, unless preempted by federal law. In the situation where an employee ordinarily works outside of New York, New York law will govern in those cases where the New York law provides more benefits to the employee than the alternative forum’s wage-and-hour law. This principle is premised on section 218(a) of the FLSA, stating that an employee will always receive the protection of the federal or state wage-and-hour provisions offering the greatest benefits.
Although there are no New York wage-and-hour cases directly on point, courts have established a conflict-of-law framework for workers’ compensation claims. In Rutledge v. Al. G. Kelly & Miller Bros. Circus, 18 N.Y.2d 464, 468, 276 N.Y.S.2d 873, 874 (1966), a claimant employee was a resident of Pennsylvania, whose employer was also headquartered in Pennsylvania. The employee was injured in New York, where “two thirds of his work activity was located.” Id. at 468, 276 N.Y.S.2d at 874. In holding New York law applicable, the court stressed that New York has a strong public interest in compensating victims of industrial accidents occurring in New York, even though the “control of the work, payment of wages, and employment of the claimant all may have their roots elsewhere.” Id. at 474, 276 N.Y.S.2d at 879. This analysis, focusing primarily on the benefits an employee receives under a statutory scheme, is consistent with the Division of Labor Standards’ policy of utilizing New York’s wage-and-hour law whenever it will most effectively benefit the employee. See also Robins v. Max Mara, U.S.A., Inc., 923 F. Supp. 460, 464 (S.D.N.Y. 1996) (finding New York law applicable to discrimination claim where employee had scarce contacts with alternative forum).

2. California

The California Labor Commissioner has stated that, when an employee is headquartered in California, work performed outside of California “from time to time” is governed by California law unless preempted by federal law. However, when an employee regularly works outside of California, the Labor Commissioner’s enforcement policy may be different.

While California has no wage-and-hour cases directly on point, courts have analyzed the choice-of-law issue in the context of workers’ compensation claims and sexual harassment claims. The California Supreme Court has ruled that California’s “more generous” workers’ compensation laws apply to a California resident who contracted for his employment in California even though he worked and was injured in another state and his employer was headquartered in Colorado. Travelers Ins. Co. v. Workmen's Comp. Appeals Bd., 68 Cal. 2d 7, 64 Cal. Rptr. 440 (1967). In Campbell v. ARCO Marine, Inc., 42 Cal. App. 4th 1850, 50 Cal. Rptr. 2d 626 (1996), a California appellate court concluded that California’s anti-discrimination statute (the Fair Employment and Housing Act) did not cover an employee of a California-based company who was offered the job at her Washington residence, who did not reside in California, who generally worked outside of California, and who was injured outside of California. Id. at 1860, 50 Cal. Rptr. 2d at 633. The Ninth Circuit engaged in a similar analysis when it evaluated whether California’s wage-and-hour law was preempted by federal maritime law. Pacific Merchant Shipping Ass’n v. Aubry, 918 F.2d 1409 (9th Cir. 1990), cert. denied, 504 U.S. 979 (1992). In Aubry, the Ninth Circuit found that California law was not preempted by federal maritime law because the employees in question resided in and were hired in California, they paid California taxes, they were paid in California, and they worked on vessels off the California coast that “[did] not engage in foreign, intercoastal, or coastwise voyages.” Id. at 1415-19. Cf. Fuller v. Golden Age Fisheries, 14 F.3d 1405 (9th Cir.), cert. denied, 512 U.S. 1206 (1994) (reaching opposite result from Aubry because plaintiffs did not reside in Alaska, were not hired in Alaska, and their vessels were engaged in “coastwise” voyages, whose predominant job situs was high seas rather than territorial waters of Alaska).
These cases suggest that when determining which wage-and-hour laws would govern when an employee telecommutes from one state to California, a California court would consider:

1. where the employee resides;
2. where the employment contract was formed;
3. where the employer resides;
4. where the work was to be performed;
5. where the injury occurred; and
6. where employees are paid and pay taxes.

3. **Connecticut**

According to the Connecticut Wage and Workplace Standards Division, if the employer’s office to which the telecommuting employee is assigned is located in Connecticut, Connecticut wage-and-hour law should apply to that employee. If, however, the employer’s office is located outside of Connecticut, Connecticut will weigh factors, including where the employment contract was formed, where the employee resides, where the work is to be performed, and where the employer resides, to determine which wage-and-hour law to apply.

4. **Illinois**

A federal district court in Illinois decided not to apply Illinois’ Wage Payment and Collection Act, 820 ILCS 115/1, to a person seeking to collect wages from an Illinois employer because the plaintiff neither lived nor worked in Illinois. In *Glass v. Kemper Corp.*, 920 F. Supp. 928 (N.D. Ill. 1996), aff’d, 133 F.3d 999 (7th Cir. 1998), the plaintiff sued his Illinois employer to recover wages he was allegedly due for work performed in Barcelona, Spain. The plaintiff was a Georgia resident when the employment contract was formed and a Wisconsin resident when he brought the lawsuit. *Id.* at 929. The court concluded that both the employer and the employee must reside in Illinois for an aggrieved employee to take advantage of and enforce Illinois law. *Id.* at 930 (citing to language of Section 115/1 of Wage Payment and Collection Act, which “applies to all employers and employees” in Illinois).

5. **Pennsylvania**

According to the Pennsylvania Wage and Hour Office, if an employee generally works the majority of each week in Pennsylvania, Pennsylvania wage-and-hour law should apply to that employee. This enforcement policy is consistent with the results courts that have faced the issue have reached. If the employee does not work in Pennsylvania, then Pennsylvania law should not apply, even if the employer has other employees in Pennsylvania. Thus, in *Killian v. McCulloch*, 873 F. Supp. 938 (E.D. Pa. 1995), the court held that Pennsylvania Wage Payment and
Collection Law (“WPCL”) did not apply when the employees in question did not work in Pennsylvania, even though their employer resided there. *Id.* at 942 (noting that Pennsylvania has strong interest in protecting those who work in Pennsylvania but little interest in protecting those who work elsewhere); see also *Cookson v. Knauff*, 43 A.2d 402 (Pa. 1945) (finding Pennsylvania workers’ compensation law applies when injury occurred in Pennsylvania, contract was to be performed in Pennsylvania, and employer resided in Pennsylvania, even though contract was formed in Canada).

6. Other States

Many of the elements discussed above are reflected in the *Restatement (Second) of Contracts* section 188. Thus, that section may provide employers in states that have not yet considered this issue with some guidance as to which wage-and-hour law should apply to telecommuters. Section 188 sets forth the following elements that an employer should consider when addressing which law governs:

1. where the contract was formed;
2. where the contract was negotiated;
3. where the contract is to be performed;
4. the residence of both the employer and employee; and, if applicable
5. where the subject matter of the contract is located.

C. Meal and Rest Periods for Employees Working in Virtual Offices Located in New York or California

One problem for New York and California employers who employ telecommuting employees may involve meal and rest breaks. Generally, California law requires that a non-exempt employee receive one paid ten-minute rest period for every four hours worked and one thirty-minute unpaid meal period for every five hours worked, unless an employee works no more than six hours in a work day. *Cal. Lab. Code § 512; IWC Wage Orders 1-17-2001.* In the latter instance, an employer and employee may mutually agree to waive the meal period. *Id.* §512 Employers must provide a second thirty-minute meal period after ten hours of work. *Id.*

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9 Although the language of California Labor Code section 512 seems to authorize penalties for employers who do not provide non-exempt and *exempt* employees with meal and rest breaks, the IWC’s Wage Orders clearly exclude exempt employees from meal and rest break eligibility. The IWC is expressly authorized to promulgate regulations for every five hours worked, unless an employee works no more than six hours in a work day. *Cal. Labor Code § 516.* Thus, an administrative agency or a court will likely rely on the meal and rest break provisions in the Wage Orders to interpret Labor Code section 512.
The second meal period may be waived by mutual consent, however, if the total hours worked are no more than twelve per day and the first meal period was not waived. *Id.*

Employers may not *require* employees to work during any meal or rest period. Wage Orders 1-17-2001 § 11(C). On-duty meal periods, however, are permitted when (1) the nature of the work prevents the employee from being relieved of all duty, and (2) the employee and employer enter into a written agreement permitting an on-duty meal period. *Id.* The IWC has clarified that the written agreement executed by the employee must state that the employee may revoke the on-duty meal period agreement at any time. *Id.*

A California employer that fails to provide the required meal and rest periods is subject to criminal and civil penalties that include payment of one additional hour of pay at the employee’s regular rate of pay for each work day that the meal or rest period is not provided. *Id.* §§ 11(D), 12(B).

By New York State statute, all persons employed in or connected with a factory must receive at least one hour for lunch. N.Y. Lab. Law § 162.1. Individuals employed in all other workplace settings must be provided at least thirty minutes for lunch. N.Y. Lab. Law § 162.2. Every person who starts work before 11 a.m. and continues working later than 7 p.m. must receive an additional meal period of at least 20 minutes between 5 p.m. and 7 p.m. N.Y. Lab. Law §§ 162(3)-(5). White collar management staff are encompassed within this provision. Nonetheless, the Commissioner of Labor has the power to permit a shorter meal period. N.Y. Lab. Law § 162.5. Although one court has held that an employee cannot bring a cause of action against an employer to recover compensation for time lost because the employer did not provide an alternative meal period, see *McElroy v. City of New York*, 50 Misc. 2d 223, 270 N.Y.S.2d 113 (Sup. Ct. 1966), aff’d, 29 A.D.2d 737, 287 N.Y.S.2d 352 (2d Dep’t 1968), the Commissioner of Labor retains the power to enforce the requirements for meal periods. N.Y. Lab. Law § 21.1.

In sum, employers subject to California law and New York law need to ensure that non-exempt employees working in a virtual office take all meal and rest breaks for which they are eligible, or the employer may be subject to liability for violating wage-and-hour laws.

**D. Who Should Pay for Telecommuting Costs?**

Proponents of telecommuting claim that allowing employees to work in a virtual office saves money.¹⁰ No one denies, however, that furnishing the virtual office with the necessary technology (e.g., computer, modem, fax) can be costly. Who should pay for such equipment may depend on whether the telecommuting is voluntary or required. If the employee is required to telecommute, the employer would probably be required to either provide the necessary equipment or to reimburse the employee for the cost of that equipment. See, e.g., Cal. Lab. Code

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¹⁰ For example, AT&T claims that it saved $2 million during a two-year telecommuting pilot program involving 600 employees. Daniel S. Levine, *Home Office: Working Hard, Or Hardly Work?*, SAN FRANCISCO BUS. TIMES, May 17, 1996, at 8A.
§ 2802 (requiring employers to indemnify employees for “all that the employee necessarily expends or loses in direct consequence of his obedience to the direction of the employer”); *Falk v. FFF Indus., Inc.*, 731 F. Supp. 134, 143 (S.D.N.Y. 1990) (finding that “nothing in the definition of ‘wages’ . . . lends itself to . . . a narrow reading”).

E. A Pitfall for the Unwary: Telecommuting Employee or Independent Contractor?

When faced with challenges of trying to comply with the wage-and-hour laws, particularly when it is not clear whether to apply one state’s law as opposed to another’s, an employer may understandably wish to avoid these issues altogether. Two options may enable an employer to do just that: allowing only exempt employees to telecommute, an option which might not satisfy the employer’s needs, or contracting with telecommuting “independent contractors.”11 Because independent contractors are not employees, an employer need not comply with wage-and-hour laws with respect to those workers. *See, e.g.*, 29 U.S.C. §§ 206, 207 (applying minimum wage and maximum hour requirements, respectively, to employees); Aubry & Long, *California Wage and Hour Guide* 14 (1995) (California Labor Commissioner has no jurisdiction over claims by independent contractors because independent contractors are not employees); *Di Lorenzo v. Sbarra*, 124 A.D.2d 446, 507 N.Y.S.2d 548 (3d Dep’t 1986) (holding that independent contractors are not “employees” within the meaning of New York wage-and-hour provisions regulating the payment of wages and benefits to employees). However, the employer must be wary: if a person looks like an employee, acts like an employee, and the employer treats the person like an employee, courts are likely to find that the “independent contractor” is actually an employee.

States and courts have developed a variety of tests, all of which require a fact-intensive analysis, to determine whether a worker is an employee or an independent contractor. These tests focus primarily on whether a company has the right to control the means of performance or just the result of the work. *See, e.g.*, *Chin v. United States*, 57 F.3d 722, 725 (9th Cir. 1995) (discussing common-law rules for distinguishing between employee and independent contractor); *Frankel v. Bally, Inc.*, 987 F.2d 86, 89 (2nd Cir. 1993) (discussing tests for determining whether worker is independent contractor or employee, including traditional “right to control” test); *In re Brown*, 743 F.2d 664, 667 (9th Cir. 1984) (noting right to control is most important factor); see also *Griggs v. Dalton*, 1996 U.S. Dist. LEXIS 10621, at ¶5 (N.D. Cal. July 25, 1996), aff’d, 1997 U.S. App. LEXIS 18893 (9th Cir., July 21, 1997) (discussing fact that court must consider “economic realities” of employment relationship). When a company has the right to control the means of performance, it is more likely that the worker will be deemed an employee. Because the penalties can be great if an employer misclassifies a worker as an

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11 But, as noted above, even with exempt employees there may be compliance challenges, *e.g.*, the “salary basis” test.
independent contractor, employers are well-advised to seek legal counsel before deciding how to classify workers who provide services from a virtual office.

The U.S. Court of Appeals for the Ninth Circuit, sitting en banc, recently reaffirmed an earlier panel decision of the court that Microsoft Corporation erred in denying millions of dollars in employee benefits to workers because they were misclassified as independent contractors and other temporary workers. See Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997), cert. denied, 118 S. Ct. 899 (1998).

In Vizcaino, the court ruled that the terms of employee benefit plans generally extending benefits to employees override specific provisions in contracts between the company and the workers that purported to disqualify them from those benefits.

The plaintiffs in Vizcaino were a class of workers previously characterized by Microsoft as “independent contractors” or “freelancers.” Microsoft had denied these individuals employee benefits available to regular Microsoft employees under the company’s ERISA-governed employee savings plan (“SPP”) and non-ERISA stock option plan (“ESPP”) pursuant to the plaintiffs’ contracts with the company, which specifically excluded them from benefits eligibility.

After suing Microsoft for the benefits, the plaintiffs originally lost in the district court, but won reversal on appeal. A panel of the Ninth Circuit ruled that because the plaintiffs qualified as Microsoft’s “common-law employees,” they were eligible for benefits under the plans, regardless of how Microsoft characterized their status with the company. Even though the plaintiffs were paid out of Microsoft’s accounts receivable department, rather than its payroll department, and the savings plan expressly limited benefits to employees on Microsoft’s “United States payroll,” the majority construed the plan to include all company employees, regardless of the source of payment of their compensation. The panel also gave the Microsoft stock option plan a broad construction, ruling that it, too, included the plaintiffs regardless of their temporary status with the company.

On Microsoft’s petition for further review by the Ninth Circuit en banc, a majority agreed that as Microsoft employees, the plaintiffs were entitled to the benefits regardless of how they were characterized in their individual contracts and regardless of the fact that the contracts purported to deny them benefits. The majority ruled that in context, the contracts’ reference to the exclusion of benefits was based on the assumption that the plaintiffs were individual contractors and other temporary workers. Because that premise was erroneous, the majority ruled, the disqualification of the plaintiffs from benefits was equally without effect.

The majority withheld final judgment on the plaintiffs’ eligibility for benefits under the SPP, remanding the issue to the ERISA plan administrator for a determination whether the term “employees on Microsoft’s United States payroll” included the plaintiffs, who instead were paid out of the accounts payable department. The majority, however, left little doubt that it expected the plan administrator to find in favor of the plaintiffs on that issue. As for the ESPP, a non-
ERISA plan, the majority ruled as a matter of law that the plaintiffs were covered and entitled to the benefits.

Following the en banc review by the Ninth Circuit, Microsoft agreed to settle the Vizcaino matter for $96.9 million, thereby underscoring the importance of proper classification. Daily Labor Report, December 13, 2000, at AA-1.

F. Suggestions for Complying With the Wage-and-Hour Laws in Cyberspace

To avoid creating or incurring liability under the wage-and-hour law, employers with employees working out of virtual offices should consider the following practical tips:

1. Enter into telecommuting agreements setting forth the terms and conditions of the telecommuting relationship, which make clear that the employee is telecommuting on a voluntary basis. (A sample such agreement appears as Appendix A.)

2. Develop and strictly enforce timekeeping and overtime standards for telecommuting non-exempt employees. For example, to monitor an employee’s hours worked, the employer may require the employee to either “log on” to his or her computer and access the employer’s network to “check in” or to call in when he or she starts and finishes work. Employers should also consider disciplining a telecommuting employee, including terminating the telecommuting arrangement, when the employee repeatedly works unauthorized overtime. In addition, telecommuters should maintain regular “office hours.”

3. If an employee telecommutes from another state, carefully consider which state’s wage-and-hour laws will apply. Because these issues may be nettlesome, employers would be well advised to seek the advice of counsel.

III. WORKERS’ COMPENSATION AND THE VIRTUAL OFFICE

A. What Is Workers’ Compensation?

Workers’ compensation is a compromise in which employers assume strict liability for employees’ on-the-job injuries and employees’ potential recovery is limited. Workers’ compensation provides benefits, typically payment of lost wages, medical expenses and vocational rehabilitation without requiring proof of fault. For example, in California and New York, a worker may recover benefits for an industrial injury or occupational disease arising out of and in the course of employment if all of the following conditions are met:

1. Where, at the time of injury, both the employer and the employee are subject to the workers’ compensation provisions;

2. Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment; and
3. Where the injury is proximately caused by the employment, either with or without negligence.

Cal. Lab. Code § 3600; see also N.Y. Work. Comp. Law § 10 (providing essentially same test). In return, the employee is barred from bringing a civil action, subject to a few exceptions.

Virtually all employers and employees are required to participate in the workers’ compensation system. For example, California’s workers’ compensation statute covers “every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.” Cal. Lab. Code § 3351. New York contains a similarly broad definition of employee, specifically cataloguing occupations covered by its workers’ compensation law. N.Y. Work. Comp. Law §§ 2, 3. Although the scope of workers’ compensation coverage is usually straightforward in the typical office setting, whether an injury that occurs in an employee’s home office should be covered by workers’ compensation is a more difficult question.

Telecommuting employment situations involve at least two interesting workers’ compensation issues. First, when an employee works out of her home office it may be difficult to determine whether the injury occurred in the course and scope of employment. Second, although employees commuting to and from work are generally not covered by workers’ compensation, a telecommuter who is injured while physically commuting from a home office to the employer’s office (e.g., for a staff meeting) may be covered.

B. Injuries Occurring at the Home Office: Did the Injury Occur in the Course and Scope of the Employment?

An employer is only liable for workers’ compensation for employees who injure themselves in the course and scope of their employment. See, e.g., Cal. Lab. Code § 3600; N.Y. Work. Comp. § 10. Generally, an injury arises in the course and scope of employment if the type of action giving rise to the injury is one which is reasonably part of the employment relationship. See, e.g., Shoemaker v. Myers, 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303 (1990) (injury covered if risk was one “reasonably encompassed within the compensation bargain”); Neacosia v. New York Power Auth., 85 N.Y.2d 471, 476, 626 N.Y.S.2d 44, 48 (1995). Stated another way, an injury arises in the course and scope of employment when the action causing the injury was reasonable and, under the circumstances, “sufficiently work related.” See id., at 476, 626 N.Y.S.2d at 48. For example, because criticism or discipline is a “normal part of the employment relationship,” even “intentional, unfair or outrageous” discipline should be covered by workers’ compensation. See Shoemaker, 52 Cal. 3d at 25, 276 Cal. Rptr. at 318; see also Rosen v. First Manhattan Bank, 202 A.D.2d 864, 609 N.Y.S.2d 436 (3d Dep’t), aff’d, 84 N.Y.2d 856, 617 N.Y.S.2d 455 (1994) (injury resulting from employer’s intentional discipline of employee because employee had disputed loan of money, a practice sanctioned by employer, was compensable under workers’ compensation statute); Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d 148, 233 Cal. Rptr. 308 (1987) (finding that stroke caused by supervisor’s intentional harassment was covered by workers’ compensation because supervising is part of employment relationship).
Even an injury that occurs away from the workplace may be compensable under workers’ compensation if the injury arose from the employment. See, e.g., Neacosia, 85 N.Y.2d at 471, 626 at N.Y.S.2d at 44 (holding that workers’ compensation covers injuries sustained in car accident as employee was driving home from dropping his work uniform off at dry cleaners); Wood Pontiac Cadillac v. Superior Court, 5 Cal. App. 4th 810, 6 Cal. Rptr. 2d 924 (1992) (finding that workers’ compensation covered worker injured on her way to get lunch because she was on a compensated break).

One California workers’ compensation case is particularly instructive for companies with telecommuting employees. In Kidwell v. Workers’ Compensation Appeals Bd., 33 Cal. App. 4th 1130, 39 Cal. Rptr. 2d 540 (1995). In Kidwell, the plaintiff injured herself while practicing the standing long jump at home for her employer’s mandatory annual physical fitness test. Id. at 1153, 39 Cal. Rptr. 2d at 542. Kidwell had failed the standing long jump test before, and, as a result, had been assigned a “fitness plan.” Id. According to Kidwell’s fitness plan, which she signed, injuries sustained while following the fitness plan were considered job-related, even if they occurred while the employee was not at work. Id. at 1134, 39 Cal. Rptr. 2d at 542. Injuries sustained in an activity not covered by the fitness plan were specifically excluded from coverage. Kidwell was apparently practicing jumping techniques, an activity that was not part of her fitness plan, when she fell forward after executing a jump and injured her thumb. Id.

Kidwell sought workers’ compensation benefits, claiming that her injury occurred in the course and scope of her employment. According to the court of appeals, workers’ compensation would cover Kidwell’s off-duty injury if the activity causing the injury was a “reasonable expectancy of, or [was] expressly or impliedly required by, the employment.” Id. at 1136, 39 Cal. Rptr. 2d 543-44 (quoting Cal. Lab. Code § 3600). A reasonable expectancy, according to the court, involves two elements: whether the employee subjectively believes participation is expected and whether that belief is objectively reasonable. Id. An employee’s belief can be objectively reasonable even if the employee is not compensated for his or her off-duty activity and even if the employer does not provide equipment for or supervision of the activity. Id. at 1138, 39 Cal. Rptr. 2d at 545.

In addressing whether Kidwell’s belief that she had to practice the long jump was objectively reasonable, the court noted that the long jump was a specific requirement of the physical fitness test, “not an exercise.” Id. at 1138, 39 Cal. Rptr. 2d at 545. Next, the court pointed out that Kidwell was practicing solely to improve her performance on the test.12 Id. at 1139. Finally, the court pointed to testimony establishing that the only way to perfect long jump techniques was to practice them. Id. Because of the above reasons and the fact that Kidwell would lose tangible job benefits by failing the test, the court found that Kidwell’s belief that she

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12 The court differentiated Kidwell’s situation (i.e., practicing to improve her standing long jump technique) from one in which an employee injures herself while exercising or working out, such as playing in a lunchtime basketball game. Id. at 1139, 39 Cal. Rptr. 2d at 545.
had to practice the long jump was objectively reasonable and a reasonable expectancy of her employment. *Id.*

Determining whether a telecommuting employee’s injury is covered by workers’ compensation will typically involve analyzing when the injury occurred (while working?), where the employee injured herself (did the injury occur in a work area used to conduct the employer’s business?) as well as whether the injury occurred during an activity that the employer reasonably expected was a requirement of her job. If an injury occurs during working hours, where it occurs is probably less relevant. *Jennette v. MCS Cannon*, 211 A.D.2d 943, 621 N.Y.S.2d 229 (1995) (employee injured during working hours while on her way home to change clothes at her employer’s direction covered by workers’ compensation); *Wood Pontiac Cadillac*, 5 Cal. App. 4th at 810, 6 Cal. Rptr. 2d at 924 (employee injured off employer’s premises during working lunch covered by workers’ compensation); *Tovish v. Gerber Electronics*, 630 A.2d 136, 32 Conn. App. 595 (1993) (death of outside salesman who worked from a home office and died while shoveling snow from his driveway to call on clients was covered by workers’ compensation).

Similarly, if the injury occurs in a room unrelated to the employer’s business, for example, a child’s bedroom, the time the injury occurs might be less relevant. *Felix v. Asai*, 192 Cal. App. 3d 926, 237 Cal. Rptr. 718 (1987) (employee who deviated from errand of employer at end of working day found not acting in scope of his employment). Although, if the employee was in a child’s bedroom and engaged in an activity that she reasonably believed was required to carry out her job duties, where the injury occurred may have little bearing on determining whether the injury is compensable under workers’ compensation.

### C. Are Injuries Occurring During the Commute From a Home Office Covered by Workers’ Compensation?

Generally, commuting between the employee’s home and the employer’s office is not considered to be within the course and scope of employment and therefore not covered by workers’ compensation. See, e.g., *Neacosia*, 85 N.Y.2d at 475, 626 N.Y.S.2d at 47. However, there are important exceptions to this rule. For example, an employee performing a “special errand” for the employer may be acting within the course and scope of the employment during the travel between the place of employment and the employee’s home. See, e.g., *id.* at 479, 626 N.Y.S.2d at 48. Also, an injury occurring while travelling between her home office and the employer’s office may be compensable, at least if the travel is for the employer’s benefit. See, e.g., *Fine v. S.M.C. Microsystems Corp.*, 75 N.Y.2d 912, 554 N.Y.S.2d 827 (1990).

The plaintiff in *Fine* filed a claim with the New York Workers’ Compensation Board (“WCB”) for death benefits in connection with her husband’s death. Her husband was an engineer laboratory technician who had set up a separate area at home from which he could work. On the Saturday the plaintiff’s husband died, he had gone to his employer’s office to work. From that office he telephoned his wife to tell her he was returning home to finish his work there. On the way home, he was involved in a car accident and later died from his injuries. *Id.* at 914. Because the employer knew about the home office, allowed the plaintiff’s husband to
work there, and benefited from his work there, the WCB found that the injuries sustained while travelling home were compensable. On appeal, the Supreme Court of New York reversed because it found that the plaintiff’s husband did not regularly work at home. That court stated that “[c]learly, an occasional piece of work performed at home is insufficient to transform travel to and from employment into an incident of employment.” Fine v. S.M.C. Microsystems, Inc., 147 A.D.2d 749, 750, 537 N.Y.S.2d 632, 634 (1989). The plaintiff appealed this decision to the Court of Appeals which in turn reversed the lower court’s decision and reinstated the initial ruling. Fine, 75 N.Y.2d at 914, 554 N.Y.S.2d at 829 (finding that “the Board’s decision was supported by substantial evidence”). Although the Court of Appeals noted that travel to and from work usually is not within the course of employment, it found that:

[a]t-home work and commuting between home and employment may, however, qualify when it is “either a specific work assignment for the employer’s benefit at the end of the particular homeward trip or so regular a pattern of work at home that the home achieves the status of a place of employment.

Id. Thus, it appears that, in certain circumstances, injuries occurring while an employee commutes from a home office to the employer’s place of business may be compensable under workers’ compensation.

IV. COMPLYING WITH THE OCCUPATIONAL SAFETY AND HEALTH LAWS

Occupational safety and health is governed by an overlapping system of federal and state laws. These laws require employers, among other things, to provide and maintain safe work environments for their employees. The federal legislation, the Occupational Safety and Health Act (“OSHA”), was enacted in 1970. Under OSHA, states may establish their own plans and programs, subject to federal approval. Complying with the occupational safety and health laws may require companies who permit employees to telecommute to go outside the traditional office environment to ensure that the virtual office is a safe place to work.

A. Federal OSHA Requirements

OSHA requires an employer to provide a place of employment free from recognized hazards likely to cause death or serious physical harm to an employee. 29 U.S.C. § 654. This requirement has been interpreted to impose an affirmative duty on employers to ensure that the

13 The decedent’s supervisor testified that he had allowed the decedent to work from home in the past and that the work done there was for the employer’s benefit.

14 A state plan must specifically provide for standards “at least as effective” as federal standards and must contain adequate assurance that the state will be able to enforce it effectively. 29 U.S.C. § 667.
work environment is safe and, if unsafe conditions are identified, to correct the problem. See, e.g., *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 4-5 (1st Cir.), cert. denied, 519 U.S. 991 (1996).

OSHA also authorizes the federal government to inspect any “workplace or environment where work is performed by an employee” to verify compliance with OSHA requirements. 29 U.S.C. § 657. However, OSHA inspections by government officials are subject to Fourth Amendment restrictions on unreasonable searches. That is, a governmental search to ensure OSHA compliance cannot unreasonably intrude upon a person’s reasonable expectation of privacy. As a result, OSHA searches will generally be conducted only with the consent of the party to be searched or pursuant to a search warrant. See, e.g., *In re Kelly-Springfield Tire Co.*, 13 F.3d 1160, 1166 (7th Cir. 1994).

Recently, The United States Occupational Safety and Health Administration (US/OSHA) formalized its policy on home-based work. Home offices are not the subject of OSHA inspections. This policy was first announced by US/OSHA’s Assistant Secretary, Charles N. Jeffress, in Congressional testimony on January 25, 2000, and then became the subject of a directive, issued on February 25, 2000.

In testimony before the Subcommittee on Employment, Safety, and Training of the Senate Committee on Health, Education, Labor and Pensions, US/OSHA’s Assistant Secretary, Charles N. Jeffress, testified that although no provision in the law expressly excludes home offices, “OSHA holds employers responsible only for work activities in home workplaces other than home offices, for example, where hazardous materials, equipment, or work processes are provided or required to be used in an employee’s home.” OSHA Congressional Testimonies, Charles N. Jeffress, January 25, 2000. The Assistant Secretary further testified, “[T]o provide certainty to employers about our policy, we are taking this opportunity to clearly state our enforcement policy . . . as follows:

1. We believe [OSHA] does not apply to an employee’s house or furnishings;
2. OSHA will not hold employers liable for work activities in employees’ home offices;
3. OSHA does not expect employers to inspect home offices;
4. OSHA does not, and will not, inspect home offices; . . .”

OSHA Congressional Testimonies, Charles N. Jeffress, January 25, 2000 (emphasis in original).

The February 25th directive describes the Department of Labor’s strong support of telecommuting and home-based work as providing flexible, “family-friendly” work arrangements. OSHA Directive, No. CPL 2-0.125, February 25, 2000. The directive distinguishes between home offices and “other home-based worksites, such as home
manufacturing operations.” *Id.* A home office is defined as a home-based worksite where office work activities take place. “Such activities may include the use of office equipment (e.g., telephone, facsimile machine, computer, scanner, copy machine, desk, file cabinet).” *Id.* The directive further indicates, “[US/]OSHA will only conduct inspections of other home-based worksites, such as home manufacturing operations, when [US/]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.” *Id.* The scope of an OSHA inspection of a home-based worksite is limited to the employee’s work activities. *Id.* Employers, however, must still keep records of work-related injuries and illnesses occurring at employees’ homes. *Id.*

In the last days of the Clinton administration, US/OSHA also enacted sweeping new regulations governing ergonomics in the workplace. 29 C.F.R. § 1910.900. These controversial regulations were intended to reduce the number and severity of musculoskeletal disorders (MSDs) caused by exposure to risk factors in the workplace. 29 C.F.R. § 1910.900(a). Under these new regulations, employers, among other things, were required to initially provide employees with basic information regarding MSDs. 29 CFR § 1910.900(d). The basic information included such items as the signs and symptoms of common MSDs, risk factors, jobs and work activities associated with MSDs and a short description of the requirements of OSHA’s ergonomics program standard. *Id.* The other numerous requirements had implementation dates beginning in January 16, 2002. 29 C.F.R. § 1910.900(c)(2).

One of the more controversial provisions was a medical restriction provision that required employers to provide an employee who experiences an MSD incident and has resulting work restrictions with “Work Restriction Protection.” 29 C.F.R. § 1910.900(r). Work Restriction Protection “maintains the employee’s employment rights and benefits, and 100% of his or her earnings until the earliest of the following three events occurs:” (1) the employee can safely return to work, (2) a health care professional determines that the employee can never return to work, or (3) ninety (90) calendar days have passed. 29 C.F.R. § 1910.900(r)(2). This injury-triggered component of the new ergonomic standard sparked sharp criticism and controversy. In fact, the new ergonomics standards were so controversial that on March 6 and 7, 2001, the Senate and House of representatives passed a resolution (S.J. Res. 6) that, if signed by President Bush, will rescind the regulations. *Daily Labor Report*, March 8, 2001, at AA-1.

Even if the new ergonomic standards are struck down, ergonomic hazards, even those occurring in a home-office setting, may nevertheless be enforced under OSHA’s general duty clause, 29 U.S.C. § 654(a)(1). *Cf. Secretary of Labor v. Pepperidge Farm Inc.*, 1997 WL 212599 (OSHRC), *2 (holding that ergonomic violations could be cited under the general duty clause). An employer violates the general duty clause where: (1) a condition or activity in the employer's workplace presents a hazard to employees, (2) the employer or the employer's industry recognizes that hazard, (3) the hazard is causing or likely to cause death or serious physical harm, and (4) feasible means exist to eliminate or materially reduce the hazard. *Secretary of Labor v. Dayton Tire, et al.*, 1998 WL 99288 (OSHRC), *24.
States that have state plans in place must adopt ergonomic rules that provide at least as much protection as the new federal standard.

B. State Occupational and Safety Requirements

1. New York

Although New York State does not have a state plan covering both private and public employees, the Public Employee Occupational Safety and Health Act of 1980 (“PESH”), N.Y. Lab. Law § 27-a, extends the same federal safety and health standards that cover private sector employees to public employees. See Hartnett v. Ballston Spa, 152 A.D.2d 83, 547 N.Y.S.2d 902 (3d Dep’t 1989), appeal dismissed, 75 N.Y.2d 863, 552 N.Y.S.2d 919, appeal denied, 75 N.Y.2d 711, 557 N.Y.S.2d 309 (1990) (noting PESH adopted all OSHA standards). It is thus useful to examine the PESH standards, because they have implications for all employers.

PESH applies to all public employees at the state and local levels and to employees of public authorities and any other governmental agency or instrumentality. N.Y. Lab. Law § 27-a(1). PESH defines “employees” as “persons permitted to work by an employer.” N.Y. Lab. Law § 27-a(1)(b). One court has gone so far as to classify volunteer firefighters as employees under PESH because the court concluded that the law was intended to include all employees not covered by OSHA. Hartnett, 152 A.D.2d at 85, 547 N.Y.S.2d at 904. The court also held that wages do not have to be exchanged for services in order for PESH to apply. Id. at 84, 547 N.Y.S.2d at 903.

PESH generally requires that an employer comply with specific safety and health standards promulgated under the law, and requires every employer to provide all of its employees a place of employment which is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees.” N.Y. Lab. Law § 27-a(3)(a). This is a similar, though broadened version of OSHA’s general duty clause. See 29 U.S.C. § 654(a)(1) (requiring employers to provide employees a “place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees”).

Public employers must maintain records of occupational injuries and illnesses similar to those required by federal OSHA regulations. N.Y. Lab. Law § 27-a(9)(a); 12 N.Y.C.R.R. § 801. These records must be maintained on a calendar-year basis and be retained for five years. N.Y. Lab. Law §§ 801.4, 801.7; see also New York State Coalition of Public Employers v. State Dep’t of Labor, 89 A.D.2d 283, 281, 456 N.Y.S.2d 465, 468 (3d Dep’t 1982), aff’d, 60 N.Y.2d 789, 469 N.Y.S.2d 679 (1983) (concluding that PESH could not incorporate federal OSHA recordkeeping provisions because they are not “standards” and are therefore subject to rulemaking proceedings).

In addition to PESH, there are a number of other local and state statutory provisions that could affect employers of telecommuters. The New York Right-to-Know Law details the
requirements of employers to provide information concerning toxic substances to employees and to notify employees of exposure to such substances. N.Y. Lab. Law §§ 875-883. The statute broadly defines the term “toxic substance” as “any substance which is listed in the latest printed edition of the National Institute for Occupational Safety and Health Registry of toxic effects of chemical substances or has yielded positive evidence of acute or chronic health hazards in human, animal or other biological testing.” N.Y. Lab. Law § 875(2). In New York v. GTE Valeron Corp., 155 A.D.2d 166, 553 N.Y.S.2d 555 (3d Dep’t 1990), a former employee sued his employer, seeking detailed information concerning toxic substances to which he may have been exposed during his employment. The court held that the employee was entitled to such information, and that the New York law was not preempted by the federal OSHA standard. Id. at 170, 553 N.Y.S.2d at 557.

Similar to New York State, New York City has adopted a “Community Right-to-Know Law,” which requires companies with “facilities” that meet certain specified limits for use, storage, handling or disposal of hazardous substances, to file Facility Inventory Forms (“FIF”). N.Y.C. Admin. Code § 24-701 et seq. All hazardous substances must be clearly labeled within thirty days after an FIF is first filed. N.Y.C. Admin. Code § 24-711.

New York has also enacted one of the more restrictive smoking laws in the nation. The Clear Indoor Air Act, while requiring employers to adopt and implement comprehensive smoking policies for all places of employment, does not apply to private homes.15 N.Y. Pub. Health Law § 1399-q. There are no reported decisions applying the Clean Indoor Air Act to employees who telecommute, and thus it is unclear whether, and how, the law would apply to employers of telecommuters.

2. California

In 1973, the California legislature enacted the California Occupational Safety and Health Act of 1973 (“Cal/OSHA”), which covers workers in both the private and public sectors. Cal/OSHA requires employers to provide and establish:

1. a safe and healthful work environment;
2. safety devices and safeguards;
3. safe and healthful employment practices and operations; and
4. “every other thing reasonably necessary to protect the life, safety, and health of employees.”

15 The state act has been supplemented by various local ordinances, including the New York City Clean Indoor Air Act. N.Y.C. Admin. Code § 17.501 et seq.
Cal. Lab. Code § 6401. Cal/OSHA defines the workplace broadly as “any place, and the premises appurtenant thereto, where employment is carried on.” Id. § 6303. A telecommuting employee’s home office would appear to fall well within this definition.

Cal/OSHA also requires employers to establish and implement a written injury prevention program. Id. § 6401.7. As part of such a program employers must establish a system for identifying and evaluating workplace hazards, including scheduled periodic inspections to identify unsafe conditions and work practices. Id. § 6401.7(a)(2). Employers must also establish a training program designed to instruct employees in general safe and healthy work practices and to provide specific instructions with respect to hazards specific to each employee’s job assignment. Id. § 6401.7(a)(4).

California’s Occupational Safety and Health Standards Board (“Board”) has promulgated ergonomics standards which apply to activities in the workplace causing “repetitive motion injuries.” 8 Cal. Code of Regs. § 5110. Employers are required to evaluate workplace activities to determine whether such activities cause repetitive motion injuries; employers then have to determine how to reduce or eliminate the cause of such injuries. Id. Finally, employers are required to train employees regarding the employer’s ergonomic program, ergonomic hazards that cause repetitive motion injuries and the symptoms and consequences of such injuries and methods for minimizing repetitive motion injuries. Id.

California has other statutes which further protect worker health and safety. Chief among those laws is the California Corporate Criminal Liability Act of 1989 (“Corporate Liability Act”) Cal. Penal Code § 387 (known in some circles as the “Be-a-Manager-Go-to-Jail Act”). The Corporate Liability Act requires any corporation (as well as certain managers) that has actual knowledge of a “serious concealed danger” associated with its product, service, or business practice, to inform the Department of Industrial Relations and warn its affected employees in writing of the danger. Id. Employers must also take affirmative steps to remedy any such danger. Id.

A serious concealed danger exists where the normal and reasonably foreseeable use of, or exposure to, a product or business practice creates a substantial probability of death or great bodily harm, and danger is not one that is readily apparent to the individual likely to be exposed. Id. For example, if asbestos is present and individuals who have not been trained in asbestos identification are exposed to it, the presence of asbestos may constitute a serious concealed danger. A failure to warn employees of a serious concealed danger after acquiring knowledge of the danger may be punishable by up to three years imprisonment and $1 million in fines. Id. Failure to correct a serious concealed danger may also result in additional liability under Cal/OSHA for failure to provide a safe workplace. See Cal. Lab. Code § 6400 (requiring employers to provide safe workplace).

3. Washington State

On May 26, 2000, Washington State Department of Labor and Industries adopted a new ergonomics rule. WAC §296-62-051. Washington’s ergonomic regulations do not have the
medical restriction provisions found in the federal regulations. Unlike the federal standard, the Washington rule is designed to be hazard and prevention based, rather than an injury-triggering regulation. The Assistant Director for Occupational Safety and Health, Michael Silverstein, stated that Washington’s standard will be as effective at preventing injuries as the federal standard even without the controversial medical restrictions provisions found in the federal standard. Daily Labor Report, February 5, 2001, at A-4.

C. Implications for Employers Maintaining Virtual Offices.

Compliance with the occupational safety and health laws appears to require employers with telecommuting employees to take affirmative steps to ensure that a telecommuting employee’s home office is set up and maintained in a manner that will provide a safe working environment. Employers are not obligated to inspect telecommuting employee’s home offices. Nevertheless, employers may be required to make the home office “ergonomically correct,” by providing ergonomically-designed desks and chairs.

How far these duties extend is unclear because the occupational safety and health laws as initially drafted did not contemplate the home office work environment. Prudent employers should address these issues when developing telecommuting programs and policies to ensure that there are mechanisms in place that will enable them to satisfy their duties under the occupational safety and health laws.

V. The Employer’s Duty to Accommodate: Are Employers Required to Provide a Virtual Office to a Disabled Employee?

The Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. §§ 12101 et seq., prohibits employers of 15 or more employees from discriminating against individuals with covered disabilities.16 Id. §§ 12111 (definition of “employer”), 12112 (prohibiting discrimination). The ADA also requires employers to provide “reasonable accommodations” that permit disabled individuals to perform the essential functions of a job, notwithstanding their disability, unless the employer can demonstrate that the accommodation would impose an “undue hardship” on the employer or pose unacceptable risks to health or safety. Id. § 12112. The Rehabilitation Act of 1973 imposes similar requirements on federal agencies and recipients of federal financial assistance, see 29 U.S.C. § 794, as does the California Fair Employment and Housing Act (“FEHA”). Cal. Gov’t Code § 12940(a). New York’s equivalent statute, the Human Rights Law, prohibits employers from discriminating on the basis of disability, among other things. N.Y. Exec. Law § 296.

16 The ADA defines “disability” as: (1) a physical or mental impairment that “substantially limits” one or more of the “major life activities” of such individual, (2) a record of such an impairment, or (3) the perception that one has such an impairment. 42 U.S.C. § 12101(2).
This section will focus on an employer’s duty to accommodate. It will also touch upon potential liability under federal, New York, and California laws for denying a disabled individual access to a public accommodation.

A. Is Telecommuting a Reasonable Accommodation?

Neither the ADA nor the California or New York statutes define what is a “reasonable accommodation.” Instead, employers are left to grapple with whether a requested accommodation would pose an “undue hardship.” If it does, then the employer is not required to provide the requested accommodation. 29 U.S.C. § 12112.

Undue hardship refers to any accommodation that would be “unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.” Appendix to 29 C.F.R. § 1630.2(p); see, e.g., Vande Zande v. Wisconsin Dep’t of Admin., 44 F.3d 538, 543 (7th Cir. 1995). Although the ADA does not specifically address telecommuting, there is every reason to believe that employers should consider providing home offices and telecommuting centers as possible accommodations. The courts are divided on the question of when, and under what circumstances, telecommuting would constitute a reasonable accommodation.

1. Vande Zande v. Wisconsin Dep’t of Admin., 44 F.3d 538 (7th Cir. 1995)

Plaintiff Vande Zande, a paralyzed woman, worked for the state of Wisconsin performing tasks of a clerical nature. Id. at 543-44. Because of her disability, she was subject to recurring pressure ulcers which kept her at home. Id. at 543. During one extended incidence of pressure ulcers, Vande Zande asked to be provided with a desktop computer, although she already had a laptop computer, and to be allowed to work full time at home. Id. at 544. Her supervisor refused, instead allowing her to work part time at home and to use sick leave to make up the difference in hours worked. Id.

Vande Zande then sued, claiming that her employer did not reasonably accommodate her disability. Id. The district court granted summary judgment for the employer, and Vande Zande appealed. Id. at 543.

The Seventh Circuit began by analyzing an employer’s duty to accommodate under the ADA. Id. at 541-45. After noting that “accommodations” include modifications to an employer’s “ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work,” the court analyzed the meaning of “reasonable.” Id. at 542.

The court first discussed whether cost should enter the equation when determining what is reasonable. Id. Vande Zande argued that the court should only consider cost when trying to determine whether a proposed accommodation would work an “undue hardship” on an employer. Id. The court, however, dismissed this argument, finding that an accommodation may be affordable but not reasonable if the cost were “disproportionate to the benefit.” Id. at 542-43 (noting that employer “would not be required to expend enormous sums in order to bring about a
trivial improvement in the life of a disabled employee,” even if cost would not result in undue hardship).

The Seventh Circuit went on to affirm the district court’s ruling, stating that no jury could “stretch the concept of ‘reasonable accommodation’ so far” as to require the state to provide a desktop computer to Vande Zande or to excuse her from having to use her sick leave. *Id.* at 544. The court noted that most jobs require teamwork under supervision, and that such work cannot be done at home without a reduction in the quality of the work. *Id.* The court acknowledged, however, that “[t]his will no doubt change as communications technology advances, but is the situation today.” *Id.*

Thus, the court concluded that an employer generally is not required to accommodate a disabled employee by allowing the employee to work at home, “where their productivity inevitably would be greatly reduced.” *Id.* at 544-45. The court also noted that an employer who permits an employee to work at home should not be deemed to have conceded that working at home is a reasonable accommodation. *Id.* at 545.


In this case, plaintiff Smith had worked for the defendant employer as a sales representative until he sustained a debilitating back injury. *Id.* at 860. Smith’s doctors reported that, as a result of his injury, Smith was fit only for the most sedentary type employment and would be unable to perform the essential functions of his sales representative position. *Id.* at 861. Because of his disability, Smith requested that his employer reassign him to a position permitting him to work from his home. *Id.* at 862. Soon thereafter, the employer informed Smith that, because it had been unable to find him a position involving sedentary work, his employment would be terminated. *Id.* Smith then commenced an action against his employer claiming that it had failed to accommodate his disability in violation of the ADA.

Affirming the district court’s order granting summary judgment, the Sixth Circuit held that Smith’s proposed accommodation was not objectively reasonable in view of his disability. *Id.* at 867. The Court noted that Smith failed to show that any open position that would accommodate his disability existed while his employer tried to find him a job. The court held that the ADA does not require employers to create a new position for a disabled employee who can no longer perform the essential functions of his job. *Id.* Citing *Vande Zande*, the court went on to hold that Smith failed to present any facts indicating that “his was one of those exceptional cases where he could have performed at home without a substantial reduction in quality of [his] performance.” *Id.* (quotations omitted). Accordingly, the court held that the employer did not violate the ADA by failing to creating a position for Smith that would enable him to work out of his home. *Id.*

In this case, the D.C. Circuit appeared to indicate that employers are required to consider offering telecommuting as a potential accommodation, but can reject this option in appropriate situations.

Plaintiff Langon, a computer programmer, suffered from multiple sclerosis. When Langon’s disease caused her to have an erratic work schedule and unapproved absences, her employer tolerated the disruption and even made certain modifications to her work space in an attempt to accommodate her disability. *Id.* at 1054-55. However, Langon’s request to work at home was denied. *Id.* at 1055. Although the employer had a policy that allowed severely disabled employees to work at home, Langon’s supervisor claimed that he lacked sufficient information to determine whether Langon’s disability was severe enough to merit such an accommodation. *Id.* Langon provided additional information, as requested, but her request to work at home again was denied because the employer concluded that her job did not lend itself to working from home. *Id.*

When Langon complained of the decision, both her employer and the Equal Employment Opportunity Commission found that allowing Langon to work at home would have imposed an “undue hardship” on her employer. *Id.* at 1056. Langon then brought suit in federal court. *Id.* The district court granted summary judgment for Langon’s employer, and Langon appealed. *Id.*

The Court of Appeals considered whether Langon’s employer had failed to make “reasonable accommodations” that would not “impose an undue hardship.” *Id.* at 1058. The court noted that in appropriate cases, employers are required to consider working at home as a potential form of accommodation. *Id.* In evaluating whether working at home was a reasonable accommodation, the court found a genuine dispute as to whether Langon had supplied her employer with sufficient information to make such a determination. *Id.* at 1058. The court also found a genuine dispute regarding whether Langon’s job could be performed at home without causing her employer “undue hardship.” *Id.* at 1060-62 (reversing grant of summary judgment and remanding case back to district court for further proceedings). *See also Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994) (U.S. Attorney’s office properly rejected request for flexible work schedule, including allowing plaintiff to work from home, when it was undisputed that plaintiff’s job duties could not be performed at home).


Plaintiff Misek-Falkoff worked for defendant IBM, first as a programmer and later as a “staff systems analyst.” *Id.* at 217. Misek-Falkoff had a condition that caused her, at unpredictable times, to be unable to work; even when she could work, she was emotionally volatile and difficult to get along with. *Id.* at 218. Because of Misek-Falkoff’s excessive
absences and numerous incidents at work, IBM placed her on medical disability. *Id.* at 221. She then sued. *Id.* at 222.

In analyzing Misek-Falkoff’s claims, the court first found that IBM could establish that Misek-Falkoff was not “otherwise qualified” for her job due to her absences and failure to get along with co-workers. *Id.* at 226-27. The court then considered whether allowing Misek-Falkoff to work at home would be a reasonable accommodation. *Id.* at 228.

The court noted that, if an employee is otherwise qualified and working out of her home would enable the employee to perform the “essential functions” of her job, then allowing the employee to work at home could be a reasonable accommodation. *Id.* at 228. The court also stated, however, that the accommodation would not be reasonable if the employer would have to alter the fundamental nature of the job to allow the employee to work at home. *Id.* The court found that, initially, allowing Misek-Falkoff to work out of her home appeared to be a reasonable accommodation because the employer’s business seemed to lend itself to work that could be done at home. *Id.* at 228. However, it was undisputed that an essential part of Misek-Falkoff’s duties included collaborating with other employees and attending training sessions. *Id.* The court therefore found that IBM was not required to allow Misek-Falkoff to work at home because to do so would require IBM to alter the nature of the job. *Id.* at 227 (“[a]n employer may certainly require an employee’s presence at the workplace when interaction with others is essential to the task to be performed”), but see Hernandez v. City of Hartford, 959 F. Supp. 125, 132 (D. Conn. 1997) (holding that allowing employee who was suffering from “pre-term labor” to work out of her home for two days each week was a reasonable accommodation).


In this case, plaintiff Norris suffered a back injury while working as a sales manager and left her job on disability leave. The injury rendered her unable to perform heavy lifting or to drive her car for long periods of time. *Id.* at 1428. Shortly after she was injured, Norris was offered and accepted the position of “Brand Manager.” *Id.* at 1427. According to Norris, she asked her employer to allow her to work as a Brand Manager from her home. *Id.* at 1425. Norris was then terminated, and she commenced an action against her employer under the ADA.

A jury found that Norris’s employer violated the ADA and awarded her $300,000 in compensatory damages. *Id.* at 1421. Thereafter, the employer moved for a judgment as a matter of law, arguing that the jury improperly determined that the employer failed to offer Norris a reasonable accommodation. *Id.* In denying the employer’s motion, the district court explained that the evidence at trial indicated that the essential functions of the Brand Manager position were administrative and clerical in nature, involving mostly paperwork and talking on the telephone. *Id.* at 1431-32. The court concluded that “a jury could have reasonably found that Norris could have been reasonably accommodated by being permitted to work from home (part-time, if necessary), where she could have performed the administrative duties of the Brand
Manager job on the computer and over the telephone.” *Id.* at 1431. Citing *Langon*, the court held that “[a]llowing an employee to work at home may also be a reasonable accommodation.”


The Ninth Circuit recently held that a California hospital that permitted other employees to work at home was required to provide a work-at-home option to a medical transcriptionist who had been struck with an obsessive compulsive disorder that severely interfered with her ability to arrive at work on time.

Humphrey worked for the hospital from 1986 to 1995, and had a record of excellent performance. *Humphrey v. Memorial Hospitals Association*, No. 98-15404, 2001 WL 118432 at *1 (9th Cir. Feb 13, 2001). Beginning in 1989, Humphrey began to engage in a series of obsessive rituals that interfered with her ability to arrive at work on time. *Id.* Then, in 1994, Humphrey received a written warning that required her to contact her supervisor before the beginning of her shift if she was going to be late or absent. *Id.* Six months later, following four tardy arrivals and one unreported absence in a two week period, Humphrey received a second written warning and was required to participate in an Employee Assistance Program. *Id.* Ultimately, Humphrey obtained psychiatric and psychological assistance and was diagnosed with obsessive compulsive disorder. *Id.* She requested a reasonable accommodation and was offered a flexible start-time arrangement. *Id.* at *2.

This accommodation did not alleviate the problem as Humphrey’s rituals extended up to eight hours. *Id.* Humphrey then requested a second accommodation of working from home. *Id.* at *2-*3. The hospital extended this option to other employees who did not have a disciplinary record, but denied Humphrey’s request due to her disciplinary record. *Id.* at *3. The hospital did not offer any further alternative accommodations and ultimately terminated Humphrey in 1995, when her late arrivals and absences continued. *Id.* at *4.

The court criticized the employer for its refusal to offer Humphrey the opportunity to work from home, since this option was offered to other employees. “It would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated. Thus, Humphrey’s disciplinary record does not constitute an appropriate basis for denying her work-at-home accommodation.” *Id.* at *7.

The court relied on the Equal Employment Opportunity Commission (EEOC) Enforcement Guidance in reaching its conclusion. The EEOC takes the position that working at home is a reasonable accommodation when an employee can perform the essential functions of his or her position and a work-at-home arrangement would not cause an employer undue hardship. See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, FEP (BNA) 405:7601, at 7626 (March 1, 1999).

With the foregoing cases in mind, an employer that is negotiating a reasonable accommodation for a qualified employee with a disability will need to determine whether the employee’s essential job functions include personal contact, interaction, and coordination with
customers, or other employees or supervisors. A receptionist, for example, clearly could not perform the essential function of his or her job while at home. On the other hand, a telemarketer probably could. If the employee’s essential job functions can be performed at home, then working at home may be a reasonable accommodation as long as it does not impose an undue hardship on the employer.

B. The Home Office: A “Public Accommodation” with Public Access Requirements?

Unlikely as it may seem, the decision to permit an employee to telecommute from home may transform at least part of the employee’s home into a “public accommodation,” thereby requiring the employer to consider whether structural changes should be made to the employee’s home to make it accessible to the disabled. A “public accommodation” under the ADA is defined to include various specified types of businesses, including “sales or rental establishments” and “service establishments,” that affect commerce. See 42 U.S.C. § 12181(7); Carparts Distrib. Ctr. v. Automotive Wholesaler’s Ass’n, Inc., 37 F.3d 12, 19 (1st Cir. 1994) (finding that public accommodations are not limited to businesses with “actual physical structures”); see also Cal. Health & Safety Code § 19955(a) (defining a public accommodation as any “building, structure, facility, complex, or improved area which is used by the general public”); N.Y. Exec. Law § 292 (definition of public accommodation similar to ADA’s definition). Therefore, if an employee were to see customers and clients at her home office, there is the possibility that the employer would be subject to a myriad of laws designed to make public accommodations accessible to the disabled. See, e.g., 28 C.F.R. § 36.207 (discussing under what conditions private residence could become public accommodation); see also 42 U.S.C. § 12182 (requiring removal of barriers when “readily achievable”); Cal. Health & Safety Code § 19959 (requiring modifications to public accommodations to comply with accessibility requirements); Cal. Civ. Code § 54.1 (“physically disabled persons” are entitled to “full and equal access” to “facilities . . . of all . . . places to which the general public is invited”); N.Y. Exec. Law § 296(2)(a) (providing that owner of place of public accommodation may not “refuse, withhold from or deny to [a disabled individual] any of the accommodations, advantages, facilities or privileges” of that public accommodation).

VI. AN EMPLOYER’S POTENTIAL LIABILITY FOR CUSTOMERS OR CLIENTS INJURED IN THE EMPLOYEE’S HOME

If a telecommuting employee meets with customers or clients in his or her home office, the employer could be held liable should those customers or clients be injured during their visit to the employee’s home. Although there is little case law on point, one case arising in New Jersey demonstrates the difficulty the courts may face in determining whether an employer can be held liable for a third party’s injuries occurring outside a telecommuter’s residence.

In Wasserman v. W.R. Grace & Co., 656 A.2d 453 (N.J. App. Div. 1995), the court considered whether W.R. Grace & Company (“Grace”), which allowed an employee to work out of his home, should be held liable for injuries to the plaintiff (“Wasserman”) who was not an
employee or client of the employer. Wasserman was injured when she fell on the sidewalk outside of the employee’s home. *Id.* at 454. Wasserman sued both the telecommuting employee and his employer under a theory that they were liable as owners or tenants in control of commercial property. *Id.* at 455. (Under New Jersey law, if the employee’s home were considered commercial property, then there could be a basis for holding Grace liable for failing to maintain safe conditions.)

The trial court held that the defendants could be held liable for Wasserman’s injuries. In reaching this conclusion, the trial court recognized that Grace had no possessory interest in the property, Grace did not reimburse its employee for the cost of using the property, the employee did not see customers at the property, and the percentage of the property used as an office was “de minimis” compared to its overall use as a residence. *Id.* at 455. However, because Grace held itself out as “being present” at the residence, due in part to a business phone number being listed for the residence and the home office address being printed on the telecommuting employee’s business card, the trial court held that the employee’s residence should be considered commercial property for the purposes of determining whether defendants could be held liable for the plaintiff’s injuries. *Id.*

Defendants appealed and the appellate court reversed the trial court’s decision. The appellate court began its analysis by stating that “[b]ased upon commonly accepted definitions, [the employee’s] home . . . is a residence.” *Id.* The court also found that the predominant use of the employee’s property was for residential purposes. *Id.* at 456. The court then found that business cards and phone numbers listing the residence as a business do not invite the public to the premises. *Id.* at 455. However, even if they did, this fact alone, according to the court, would not transform the employee’s residence into commercial property, although if the public were invited to the premises the property owner might have a greater duty to warn of dangers. *Id.* at 456. The court also noted that whether a property is commercial cannot be based on the profit generated from that property because then the classification “would depend on the vagaries of the marketplace.” *Id.*

As the trial court in *Wasserman* found an employer potentially liable for injuries sustained by a third party who did not even visit a telecommuter’s home office and who was not a customer of the telecommuter’s employer, then it is quite possible that another court could reach a similar conclusion, particularly if the third party was a customer of the employer and was injured while visiting the telecommuting employee at home.

**VII. CONCLUSION**

The “virtual office” presents numerous complex employment law issues that employers need to address. The materials presented in this paper will assist in that effort. In addition, employers may also wish to consult the following sources:

1. The Telecommuting Advisory Council (located at http://www.telecommute.org).
MEMORANDUM

TO: [Employee]
FROM: [Employer]
DATE: [Date]
RE: Telecommuting Agreement

This memorandum sets forth the terms of your telecommuting arrangement with the company.

1. **General.** We are providing you with this opportunity to telecommute from your home instead of always requiring your presence in the office based on our current ability to accommodate your desire to work from home. Whether we will be in a position to permit your telecommuting in the future will depend on various business-related factors. Accordingly, nothing in this agreement is intended to, or will, guarantee your right to telecommute indefinitely. Similarly, the company is not requiring you to telecommute and you are free, upon reasonable notice to the company, to end this arrangement and return working at our offices.

2. **Hours of work and responsibilities.** Your at-home work hours will be as follows: [Insert specific work schedule or number of hours to be worked daily, allowing for breaks required by law.] [If non-exempt employee, specify method of hours-reporting and means for submitting reports to company.] During your work hours, you will devote your full-time energy, skill and attention to your job duties. You will report to [insert], who will give you assignments, evaluate your work and performance, and otherwise serve as your supervisor. You will return to the office as required to attend meetings or conduct other in-office business as we may require. You will not accept any other employment or engagement during your work hours at home. You also will not provide primary care for a child or other dependent person during your work hours. If such individuals will be home during your work hours, another responsible adult must be present to provide primary care.

3. **Compensation and benefits.** Your existing compensation and benefits (including [bonus potential, profit-sharing, stock options, vacation, health insurance, etc.]) will remain in place, subject to adjustments pursuant to the company’s personnel policies and procedures.

4. **Company rules and procedures.** While working at home, you will remain bound by the company’s rules and procedures generally applicable to its employees except in
those few instances in which they are expressly made inapplicable because of your location at home [give examples].

5. **Equipment and supplies used at home.** To facilitate your telecommuting, the company has provided you with the following equipment and supplies: [specify or attach addendum]. This equipment will remain the property of the company and will be returned to the company at its request. You will maintain the equipment in good working order and you will allow reasonable access to your home to company technicians to effect required maintenance and repairs. In the event of an equipment or system malfunction, you will immediately notify [specify], who will direct whether replacement equipment or an alternative system should be used or whether you will be required to return to the office. Use of the equipment and related systems, as well as the data stored or accessible by means of the equipment and systems, will remain subject to the company’s Electronic Communications Policy and Trade Secrets and Confidential Information Policy, copies of which are attached. [If employee-provided equipment and/or supplies to be used, replace with: “To facilitate your telecommuting, the company is permitting you to use your own equipment and supplies, in return for which the company will pay a monthly stipend of $______ to cover the reasonable wear-and-tear of the equipment and cost of the supplies. You will maintain the equipment in good working order and you will allow reasonable access to your home to company technicians to ensure that the equipment remains in good working order and is properly configured to access the company’s information systems. In the event of an equipment or system malfunction, you will immediately notify [specify], who will direct whether replacement equipment or an alternative system should be used or whether you will be required to return to the office. Use of the equipment and related systems for business purposes, as well as the business data stored or accessible by means of the equipment and systems, will remain subject to the company’s Electronic Communications Policy and Trade Secrets and Confidential Information Policy, copies of which are attached.”]

6. **Work space.** You will designate at your home a workspace that is conducive to the performance of your work. You will maintain this space in a condition that is safe and free from hazards and other dangers. You also will allow reasonable access to your home to company representatives to ensure that the workspace is acceptable. The company assumes no responsibility for injury to you in your workspace during non-working hours or for injury to non-business-related guests at any time.

7. **Reimbursement of expenses.** The company will reimburse you for any reasonable and necessary expenses that you incur in the performance of your work duties from home, including long-distance telephone and postal or expedited delivery charges. On at least a monthly basis, you will submit requests for reimbursement on the company’s [specified form].

If the foregoing correctly sets forth the agreement between you and the company, please sign and date the enclosed copy of this memorandum and return it to me prior to commencing...
your telecommuting. The company is glad to be able to provide this unique work opportunity and hopes it proves mutually beneficial.

Employee ______________________________ Date __________________
# The Virtual Office and the Employer’s Duty to Comply with Statutory Standards

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