Managing a Remote Workforce

December 10, 2020
12:00 p.m. – 1:15 p.m.

CT Bar Association
Webinar

CT Bar Institute, Inc.
CT: 1.25 CLE Credits (General)
NY: 1.5 CLE Credits (AOP)

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LAWYERS’ PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client’s transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party’s opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;
• I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
• I will not file frivolous motions or advance frivolous positions;
• When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

**Competency:**

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client’s interests is critical to the lawyer’s function in their community. As such,

• I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
• I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
• I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

**Responsibility:**

I recognize that my client’s interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

• Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
• I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
• I will attempt to resolve, by agreement, my objections to matters contained in my opponent’s pleadings and discovery requests;
• I will be punctual in attending Court hearings, conferences, meetings, and depositions;
• I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
• In civil matters, I will stipulate to facts as to which there is no genuine dispute;
• I will refrain from causing unreasonable delays;
• Where consistent with my client’s interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
• While I must consider my client’s decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.
Mentoring:
I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:
I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer’s conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.
Managing a Remote Workforce (ELE201210)

Agenda

12:00 - 12:05 pm  Introduction of panel and topic
12:05 - 12:10 pm  Telecommuting trends and impact of COVID
12:10 - 12:20 pm  Wage and hour implications and best practices to minimize risk
12:25 - 12:30 pm  Workers’ compensation implications and best practices to minimize risk
12:30 - 12:40 pm  ADA implications and best practices to minimize risk
12:40 - 12:45 pm  FMLA implications and best practices to minimize risk
12:45 - 1:05 pm   How to respond to telecommuting requests and telecommuting policy considerations
1:05 - 1:15 pm    Q&A
Kelly M. Cardin is a shareholder in the Stamford and New York offices of Ogletree Deakins. Her practice focuses on representing employers in a wide range of disputes, including those involving discrimination and retaliation claims, wage and hour claims, wrongful discharge claims, and claims under the FMLA. Kelly also represents employers in class action lawsuits, often involving wage and hour issues. Additionally, she maintains a commercial litigation practice, representing companies in breach of contract and trade secret disputes, among others. Kelly has represented clients before the Second Circuit Court of Appeals, in state and federal court, and in arbitration. She also regularly handles agency matters before the Equal Employment Opportunity Commission, the Connecticut Commission on Human Rights and Opportunities, and the Connecticut Department of Labor. Kelly counsels clients with respect to their employee handbooks and personnel policies to ensure compliance with state and federal law. She also conducts workplace investigations and trains employers on best practices, including harassment training. She is admitted to practice in Connecticut, New York, and Massachusetts.

Experience:

- Obtained summary judgment dismissing plaintiff's claims of race, age, sex, and disability discrimination against a large food and facility management company.

- Obtained summary judgment dismissing plaintiff's breach of contract, misappropriation of trade secrets, and unfair trade practices claims.

- Obtained summary judgment dismissing plaintiff's sex discrimination and retaliation claims against insurance company employer.

- Obtained order denying plaintiffs' request for preliminary injunction, where plaintiffs alleged misappropriation of confidential information.

- Obtained favorable judgment before the Second Circuit Court of Appeals, affirming summary judgment where case was dismissed on statute of limitations grounds.

- Obtained favorable judgment before the Second Circuit Court of Appeals, affirming summary judgment in favor of employer in a case involving claims of discrimination and harassment.

Admitted to Practice:

New York
Massachusetts
Connecticut
Professional Activities:

- Connecticut Bar Association
- SHRM
- Westchester Women’s Bar Association

Speeches:

- ACC Westchester/S. CT (formerly WESFACCA) – “The Not So Remote Risks of Navigating Leave Laws & Remote Work in the Age of COVID” – October 29, 2020
- Ogletree Deakins Podcast - "Back to School: Key Strategies for Employers as Parents Prepare for Virtual Learning" - August 11, 2020
- Ogletree Deakins Podcast - "Mastering Work from Home during COVID-19: Avoiding the Pajama Predicament and Other Pitfalls" - April 9, 2020
- The HR Roundtable - "Employment Law Update" - Norwalk - September 13, 2019
- Ogletree Deakins Podcast - "Eye on Investigations: Strategies for Investigating Employee Complaints" - September 3, 2019
- Managing a Workforce in New York, New Jersey, and Connecticut - "The Importance of Workplace Investigations in the #MeToo Era" - New York - April 4, 2019
- ACC Westchester/S. CT (formerly WESFACCA) - "Managing Social Media in the Workplace" - Old Greenwich - December 19, 2018
- National Association of Women Lawyers Fourteenth General Counsel Institute - "Playing Sherlock: Best Practices for Workplace Investigations" - New York City - November 2018
- Clear Law Institute Webinar - "Defining Hours Worked in a Digital Age" - November 2017
- CBIA - "Recordkeeping, Defining and Counting Hours Worked" - Wallingford - September 2017
- CBIA - "HR & The Workplace: The Trump Impact" - Hartford - June 2017

• WESFACCA/ACC - "Don’t Leaving Me Hanging: Understanding Complex Leave and Accommodation Issues in the Workplace" - Greenwich - November 2016

Media Quotes:

• April 7, 2020 - Bloomberg Law - “Virus-Induced Fever Checks Pose Wage Dilemma for Businesses”

• September 25, 2019 – Connecticut Law Tribune – “What Attorneys Need to Know About New Sexual Harassment Law”

Published Works:

• November 2, 2020 - Law360 - "Limiting The Pandemic’s Strain On Workplace Gender Equality"

• October 22, 2020 - SHRM Online - "What New York Employers Need to Know for the Election Season"


• October 16, 2019 – Ogletree Deakins Blog Post – “Prepping for the Polls: What Employers Need to Know as New Yorkers Get Ready to Vote”


• September 17, 2018 – Ogletree Deakins Blog Post – “More Buzz in Connecticut on Medical Marijuana in the Workplace”

• September 6, 2016- SHRM Online- “Connecticut’s Highest Court Reinstates State Employee Fired for Smoking Marijuana at Work”

• August 29, 2016 – Ogletree Deakins Blog Post – “Connecticut’s Highest Court Reinstates State Employee Fired for Smoking Marijuana at Work”


• April 14, 2016 – Ogletree Deakins Blog Post – “Second Circuit Holds HR Professionals Can Be Liable as ‘Employers’ Under FMLA”

• May 5, 2014 - Ogletree Deakins Publication – “Employee Not Entitled to Compensation for Time Spent Commuting to and from Job Sites and Home in Company Vehicle While Carrying Company Tools”

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Allison P. Dearington is an Associate in the Hartford, Connecticut office of Jackson Lewis P.C. Her practice is focused on employment litigation, including class and collective action defense, and preventive counseling.

Ms. Dearington represents employers in state and federal courts, before the Connecticut Commission on Human Rights and Opportunities, the Equal Employment Opportunity Commission, and in arbitration. She defends a variety of employment claims including discrimination, harassment, retaliation, failure to accommodate, violations of First Amendment rights, wage and hour violations including misclassification claims and tip-credit claims, breach of contract, and denial of public accommodations.

Ms. Dearington also has an active advice and counsel practice, advising employers on a wide range of employment-related issues. In addition, she has experience drafting employee handbooks and workplace policies, conducting investigations into internal employee complaints, drafting contracts, and conducting training seminars.

Prior to joining Jackson Lewis, Ms. Dearington served as law clerk to the Judges of the Mashantucket Pequot Tribal Court. She also was an associate at a boutique labor and employment law firm in Hartford, CT that focused on the representation of municipal employers. During her undergraduate studies, Ms. Dearington interned for the United States Senate’s Health, Education, Labor and Pensions Committee.

Ms. Dearington previously served as Chair of the Greater Hartford Junior League’s Career Connections for Young Women Committee (CCYW). CCYW was focused on inspiring young women in the Hartford area to focus on career planning, financial independence and improving their academic performance.
Emily A. Gianquinto
Owner, EAG Law LLC

Attorney Emily A. Gianquinto was trained at several big law firms, where she spent her time working for and defending companies big and small (and the people who own them) in various industries across Connecticut and beyond. As a business litigator focused on the resolution of general business disputes, she has developed knowledge and experience in varied areas of the law, advised clients in connection with responses to government inquiries and subpoenas, as well as government regulation and licensing matters, and practiced in front of state and federal lower and appellate courts and administrative bodies. She still serves businesses in her own practice, but now is also dedicated to representing individuals in matters big and small. She also works part-time in McCarter & English LLP’s labor and employment practice, primarily defending employers against employment discrimination claims.

Emily has been recognized by Connecticut Super Lawyers® since 2013, and was a Rising Star® in 2012. In 2015, she received the Vanguard Award, awarded to a non-officer member of the CBA Young Lawyers Section who has made significant contributions to the section. She was a member of the Hartford Business Journal’s 40 Under Forty in 2013 and was recognized as a New Leader of the Law by the Connecticut Law Tribune in 2012. Prior to entering private practice, Emily served as a judicial clerk for the Honorable Flemming L. Norcott, Jr. of the Connecticut Supreme Court. Before obtaining her law degree, Emily worked as a technical editor in the pharmaceutical industry. She has a BS in journalism from Boston University and graduated from the University of Connecticut School of Law.

Emily serves on the CBA Board of Governors, the House of Delegates and is co-chair of the CBA labor and employment section. She is president of the board of directors of KNOX, Inc., a Hartford nonprofit that uses horticulture to promote community engagement and urban greening, and is a director of the Connecticut Urban Legal Initiative, a Hartford nonprofit that operates a clinic for law students providing legal services to nonprofit organizations.
Managing a Remote Workforce

Kelly M. Cardin – Ogletree Deakins

&

Allison P. Dearington – Jackson Lewis
Agenda

- Telecommuting Trends
- Issues & Consideration for a Remote Workforce
- Best Practices
- How to Respond to Telecommuting Requests
- Telecommuting Policy Considerations
The New Workplace – What Are the Facts?

“42 percent of the U.S. labor force now working from home full-time. About another 33 percent are not working – a testament to the savage impact of the lockdown recession. And the remaining 26 percent – mostly essential service workers – are working on their business premises.

So, by sheer numbers, the U.S. is a working-from-home economy. Almost twice as many employees are working from home as at work.”

- Nicholas Bloom, the William D. Eberle Professor of Economics in Stanford’s School of Humanities and Sciences and a senior fellow at the Stanford Institute for Economic Policy Research (SIEPR) - Stanford News
Employers May Need to Redesign Current Programs and Consider New Programs

The workplace 2021 and beyond requires employers to review many areas:

- Where does the employer want to do work? Is it in the organization’s vision to embrace the virtual worker?
- Employers are realizing we do not need to bring back everyone to the office – some positions have seen an increase in performance while working remotely.
- Engagement Programs should be considered for the virtual or remote workforce.
- Recognition Programs must be re-imagined to address the needs of the teleworker and to help with retention and recruitment of the teleworker.
- Recruitment Programs must be addressed. The territory has expanded to the “world” – employers now can recruit talent without boundaries for many positions.
- Training Programs need to be updated for the virtual workforce.
Which law applies?

- Additional/different requirements under state law
- Determine what state law applies to remote worker
- City/county laws
- Tax considerations
Wage & Hour

How does telecommuting come into play with wage and hour laws?

Accurate recordkeeping of hours worked for non-exempt

State requirements for meal/rest breaks

Other state law implications (e.g., minimum wage, regular rate)
Minimizing Wage and Hour Risk

- Understand what constitutes “hours worked” in applicable jurisdiction
- Research software options for tracking hours worked
- Have clear policies re: overtime, off-the-clock, and breaks
- Include safe harbor provision in policies regarding erroneous deductions
- Conduct training on all wage and hour policies
Wage & Hour

IPHONE/PDA/Email/Texting
Many employers are revising their business expense reimbursement policies to account for equity and fairness for the virtual worker.

While federal FLSA is relatively easy to deal with, there are an increasing number of states which are regulating the payment of business expenses which can have a significant impact on your policies.

Under the FLSA, an employer should be mindful that any work-related expense incurred by an employee that would bring the employee’s pay below the minimum wage (or cut into overtime pay) should be reimbursed.

State laws can be much more of a concern. For example, in California, employees were entitled to a reasonable amount of reimbursement for using their personal cell phones in performing work when the use of those phones was mandatory, even if the use of those phones did not result in any additional cost to the employees because the employee had an unlimited plan. The CA court imposed a reimbursement requirement on the employer even though the employee had an unlimited call/data plan.
Workers’ Compensation

- Consider training to telecommuting employees regarding injury prevention and setting up ergonomically sound home offices
- Evaluate whether it’s appropriate to inspect the home offices
- Discuss with workers’ compensation carrier and counsel to provide further suggestions for minimizing risk
Workers’ Compensation

Mandatory Workers’ Compensation Coverage
  Get proof of coverage
Penalties for non-compliance
  Loss of contracts or ability to contract
Don’t forget liability insurance
Employer obligation to provide safe working environment

OSHA will not conduct home inspections
  • Reversal of position

Does not expect employers to inspect employees’ homes

May informally advise employer of reported complaint

Home-based business: employer responsible for hazards caused by materials, equipment, work processes, etc.

OSHA reporting requirements still apply
Ada

Two prongs to ADA:

No discrimination against applicants or employees with disabilities

Accommodations to perform essential functions

How Does Telecommuting Come Into Play With ADA?

Employers need to realize that the workplace has changed – even when businesses fully re-open. Employers should be looking at the current conditions and drawing upon the lessons learned.

Decision makers now understand that many jobs which “had” to be performed in the office – can be performed through teleworking or remotely.

Decision makers need to understand that more positions likely are available for disabled workers since the location of where work is performed as an essential function should be re-imagined.
Authorizing an employee to telecommute may be a reasonable accommodation for a disability. There has been a recent trend of finding in favor of employees on this issue. With modern technology, many workers can perform their jobs from alternate locations, such as a home office. So, when is physical presence at the employer’s worksite an essential function of the job? Stated differently, when is an employer required to allow an employee to telecommute as an accommodation?
Minimizing ADA Risk

Consider workflex options as possible accommodations
Take special care where employees ask to work from home as accommodation
Engage in interactive process
Communicate early and clearly with employee
FMLA

FMLA provides, among other things, up to 12 weeks unpaid protected leave for:

- Birth of child/adoption or foster care/baby-bonding
- To care for family member with serious health condition
- Serious health condition of employee
- Qualifying exigency arising out of family member has impending military service
FMLA

- 50 or more employees within a 75-mile radius
- Long-distance telecommuters may be deemed to work in the location to which they report
- Entitled to same FMLA rights
- Employees required to follow established “call in” procedures
- Prohibit “working” FMLA leaves
- Ensure leave (including intermittent leave) recorded accurately
Flexible Schedules

“Swiss Cheese” Schedule - Have you measured when work is being done by your remote employees?

- Many employers are finding that employees are performing work at different times of the day/night to deal with life’s hurdles – personal obligations, schooling from home, etc.
- Some employers are finding employees are working more at night or taking longer breaks during the day or working more on the weekends.
- One employer found employees sent 52% more communications between 6:00 p.m. and midnight since March 2020 BUT . . .
- The same employer found the employees worked four more hours a week, attended more meetings (even though shorter) and spent 10% more time in meetings.
  

- Employers should evaluate when work is being performed, productivity, other metrics important to your company and determine what schedule works best your virtual teams.
Discrimination Considerations

Potential statutes implicated:
- Title VII and state equivalents
- Age Discrimination in Employment Act
- Genetic Information Nondiscrimination Act

How do discrimination acts come into play?
- Religious accommodation requests
- Some employees, but not others, are allowed to telecommute
Remote Access to Trade Secrets & Confidential Information

Anyone with access should sign agreement restricting use & disclosure
Must show reasonable efforts to protect trade secrets
Defend Trade Secrets Act
Data Privacy/Confidentiality

- Increasing data privacy protections
  - Consequences are high
- Physical and technical security
- Electronic monitoring
  - Who supplies hardware/software?
- Address via training, policies and remote work agreements
- No mingling of company/personal information
- Destruction/shredding of documents or hard drives with confidential/sensitive information
- Obtaining timely/complete return of company property
Human Resources should evolve for the virtual workplace.

HR may consider conducting virtual visits and “rounding” with employees.

HR may consider host events for employees and their families about insurance, benefits, EAP, etc.

HR may consider schedule weekly/monthly virtual open houses – set up an open, virtual meeting employees can call into.
Posting Requirements

- Many state and federal requirements to post information to employees
- Postings can be relied upon in defense of claims
- Need to be able to show employee has seen postings
- Consider including all postings on intranet or in separate handbook for remote workers
Additional Considerations

- Wrongful termination claims
- Emphasize in policy that remote work is temporary or is a privilege, not a right
- Policy/agreement/memo to make clear that arrangement can be terminated at employer’s sole discretion
Policy Consideration

Eligible Positions or Requirements

Procedure to Request Telecommuting

Restrictions & Clear Parameters

Clear Statement Employees Must Continue Comply with all Employer Policies and Procedures
Questions?