


# COVID Season Three:

## *NAVIGATING THE FLEXIBLE WORKFORCE MODEL*



By: Bob Dunlevey Shawna Sorrell

**A**s we enter 2022, employers are still learning and evaluating best practices for operating in the continued COVID-19 pandemic. The pandemic, along with the ever-changing COVID-19 restrictions, have drastically changed the workplace and the way employers interact with their employees. Listed below are some considerations all employers should have on their radar as we enter the new year.

A photograph of a person with short brown hair, seen from the side and back, sitting at a desk. They are looking at a large computer monitor that displays a code editor with a dark theme. A laptop is also open on the desk, showing a similar code editor. The person is resting their chin on their hand, appearing to be in deep thought or focused on their work.

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**Working From Home:** A significant change resulting from the COVID-19 pandemic is the transition to remote work for those whose jobs will permit such. The pandemic taught companies that its workforce may be just as effective working remotely. Some employers have chosen hybrid plans which permit employees to alternate working from home and the office a few days a week. Studies suggest that work from home plans are not just a temporary fix, but a permanent solution. In September 2021, a record-high 4.4 million people, or 3% of workers, quit their job signaling a “Great Resignation” throughout the United States. Employees are looking for flexibility in their work schedules and employers that offer remote work options. Some individuals are also willing to take a pay cut to work from home permanently. For example, an Owl Labs survey found that 23% of employees are also willing to take a 10% pay cut to work from home permanently. As the pandemic continues, we predict more employers will look to create remote work plans. Developing these plans can be a big undertaking.

**Wage and Hour Considerations:** With employees working from home, employers must also consider issues involving tracking work hours for nonexempt employees. The Fair Labor Standards Act (FLSA) requires employers to compensate an employee for all hours worked, including those worked away from the office. Even work that is not requested by the employer but “suffered or permitted” is work time. When an employee works from home, the line between working time and non-working time is not always clear. However, if an employer knows or has a reasonable belief that work is being performed by a nonexempt employee, the employer must count the time as hours worked and compensate the employee appropriately. It is the employer’s responsibility to ensure that the employee does not perform any work the employer does not want to be performed. The FLSA also requires employers to keep records for nonexempt employees, including records of hours worked each workday and workweek. While employers must maintain accurate time records for all nonexempt employees, this is especially important for remote

employees because their physical presence at work is not monitored.

Additionally, the Great Resignation discussed above has triggered another turning point employers should anticipate in 2022 – an increase in minimum wage which some experts have lamented as “The Great Raise.” Under the FLSA, minimum wage, which is unchanged from 2009, is set at \$7.25 per hour for covered non-exempt workers generally. On November 22, 2021, the Department of Labor (DOL) published a final rule implementing the Executive Order increasing the wage floor for federal contractors to \$15 effective January 30, 2022. While the Executive Order is limited to federal contractors, we predict a push for an increase to the federal minimum wage for all employees in the future. Earlier this year, the House of Representatives passed a bill to raise the federal minimum to \$15 per hour by 2025, but the legislation has not advanced in the Senate. As we enter 2022, employers will need to monitor DOL activity in relation to wage and hour law in light of the Biden Administration’s agenda and stated goals.

**COVID-19 Accommodations:** Absent adopting full or hybrid remote work policies, an employer still may be obligated to offer telework as an accommodation under the Americans with Disabilities Act (ADA) to eligible employees. Under the ADA, if a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job, or enjoy benefits and privileges of employment, the employer must provide it unless the accommodation would pose an undue hardship. Depending on the circumstances, employers will be hard pressed to argue that telework is an unreasonable accommodation if employees successfully teleworked during the COVID-19 pandemic and the company suffered little or no burden.

**Data and Privacy Issues:** As working from home continues, employers must also be mindful of the privacy and data security concerns involved with safeguarding employee data and company systems. Hackers and other bad actors capitalize on

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the chaos of states of emergencies or other crises like COVID-19 and the distraction that comes with them to either take your data or otherwise induce employees to give up such data. Employers with an online and remote workforce should consider implementing (1) a secure connection to the company network, (2) clear employee guidance and expectations regarding data privacy and security, and (3) offer employee training on the topic.

The pandemic has shown that employers must adapt to the changing landscape. Navigating COVID-19 initially was challenging, and now employers must gear up to operate in a new environment which involves changing common practices to comply with the law, and considering flexible options to remain competitive. Use your Legal Services Plan if you confront legal issues related to navigating this "COVID-19 World." Contact Bob Dunlevey, Taft Law at (937) 641-1743 or email [rdunlevey@taftlaw.com](mailto:rdunlevey@taftlaw.com).

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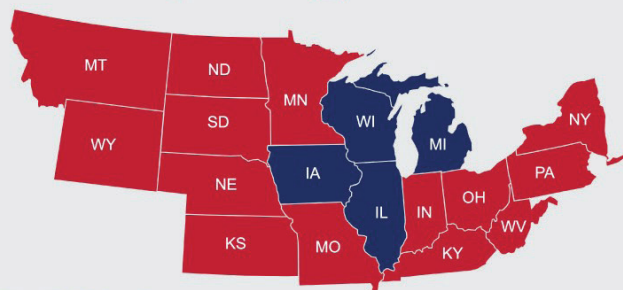
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