

Telework Boom Has Employers Rethinking Hiring, Onboarding

By **Vin Gurrieri**

Law360 (February 18, 2022, 6:53 PM EST) -- The COVID-19 pandemic has forced millions of American employees to work from home, a practice that's now so entrenched it will stick around even if virus-related dangers dissipate.



Two years into the pandemic, remote work is "definitely here to stay," said FordHarrison partner Sami Asaad, and employers shouldn't assume existing policies will translate smoothly to virtual environments. (iStock.com/Tippapatt)

For workers with the ability to do their jobs off-site, remote work quickly became one of the first steps employers took in 2020 in response to the coronavirus pandemic. That included scores of employers that previously may never have allowed the practice, and had to craft telework policies on the fly as workers decamped from offices.

Now, two years later, remote work is "definitely here to stay," said FordHarrison partner Sami Asaad, and employers shouldn't assume existing policies largely designed to apply to in-person workers will translate smoothly to virtual work environments.

"It's really beneficial for employers to take a holistic approach to this topic of remote work," Asaad said. "You can't just sort of take your existing strategy for onboarding, disciplining, termination, coaching and just do it virtually. It requires a new approach."

The first of those areas, recruiting and onboarding new employees, is due for a fresh look as employers increasingly expand their reliance on remote work. Everything from the way workers are screened for virtual jobs to the format of interviews will need adjusting, attorneys say.

"I think it's important that companies reexamine all of their 'bringing an employee in the door' practices and policies and procedures," said Ellen Bronchetti, a partner at McDermott Will & Emery LLP.

Here, Law360 looks how employers may adjust recruiting and hiring practices designed when in-person work was the norm.

Track Exact Laws That Apply

One benefit of the explosion in virtual work over the past two years is that it has given employers leeway to expand their potential pool of candidates by considering applicants who don't live close to a company's offices but can perform work from anywhere.

However, that potential advantage has drawbacks — workers who virtually clock in may trigger a slew of state and local laws that employers might have never dealt with or even known about.

"The number one thing is employers need to know that if they hire somebody in a jurisdiction, they have just become an employer in that jurisdiction. And that comes with a lot of potential implications," Asaad said.

For example, employers will have to pay unemployment and workers' compensation in the jurisdiction where a virtual worker is located, comply with laws in that jurisdiction for particular employees pertaining to things such as taxes, wage-hour or training requirements, paid or family leave, mandated benefits, and a locality's specific anti-discrimination protections.

And when it comes to recruitment, Asaad said there are numerous new laws popping up, such as bans on prospective employers asking applicants questions about their salary or criminal history or laws that require details about potential salary in job advertisements.

"If your job post traditionally says, 'You're going to have to pass a criminal background check,' and you're recruiting in a jurisdiction that has [a] ban-the-box [law], you have to make sure you take that out of your job post," Asaad said. "You can end up running afoul of the jurisdiction's employment laws before you've even hired your first employee if your recruitment does not comply with the recruiting laws in that jurisdiction."

Additionally, Asaad pointed out that jurisdictions across the country have different categories that are covered under anti-discrimination laws, and employers may end up running afoul of those state or local statutes if they aren't paying attention to exactly what is protected.

While a person's place of residence isn't shielded under anti-bias laws, employers might also land in legal hot water if they exclude people from defined locations or regions for virtual jobs. A jilted applicant could potentially claim that an employer's exclusionary policy had a discriminatory impact on, for example, people of particular races or ethnicities in a particular region.

"You could find yourself in a claim that you're not hiring in specific areas of the country due to [there being] a higher group of racial backgrounds in that area," Bronchetti said. "You could have a disparate impact if you decide I'm not going to hire employees from a certain area and whether or not that's trying to exclude certain protected categories from joining the workforce."

Match Interview Format to Job Expectations

After the recruiting and screening process plays out, the growing shift toward virtual work will also require significant adjustment to employers' long-standing methods for conducting interviews.

Travis Gemoets, a Los Angeles-based partner at Jeffer Mangels Butler & Mitchell LLP, noted that there are two kinds of remote work positions — those in which there is an expectation that an employee will return to an office when it is feasible, and those that are understood to be permanently remote.

When interviewing applicants, it behooves employers to figure out which category an applicant falls under

and tailor the interview process to those long-term expectations about where a potential new hire will be located, according to Gemoets.

For some employers, that may mean using an entirely virtual hiring process even when in-person interviewing is an option.

"With ... permanent remote work, I have no problem having the entire hiring process be via telephone and Zoom," Gemoets said. "For a job that's going to be remote for the foreseeable future ... I don't see the need of having an in-person aspect of the interview process."

However, if there is an expectation that the job will eventually transition out of an initial remote work arrangement, Gemoets said it benefits employers to meet potential new hires in-person to, at the very least, let them get acclimated with a company's physical settings and the logistics of getting to work.

"I recommend that if you are going to hire [someone] for a job that at some point is going to have an in-person component to it, have at least one meeting be in person. And that doesn't even have to be the final meeting," Gemoets said.

Guard Against Inadvertent Bias

One issue that can arise specifically in the context of virtual interviews that wouldn't otherwise come up when applicants interview in person is the employer's representative potentially learning too much about an applicant's personal life when they get a peek into their home.

That might mean pictures or artwork on a job applicant's wall that tips an interviewer off to the person's religion, sexual orientation or political affiliation.

Even something as seemingly benign as an applicant's children playfully sneaking into the room shows a prospective employer that the individual has kids, and some jurisdictions include familial status as a protected characteristic, according to Asaad of FordHarrison.

Although people are usually careful in how they stage video meetings and interviews or use a filter to block out their background, many applicants either won't think to do so or may not do so to the extent they should. That potentially puts employers in a position where a discrimination claim can be made against them if they don't hire that person.

"If a worker is giving you a window into their private life, you may see, for instance, knickknacks or posters that reveal things like ethnicity, culture, sexual orientation [or] religion," Asaad said. "As a hiring manager or committee conducting an interview, you don't want to be accused of making a decision based on some protected characteristic that you just happen to see in the employee's home."

To mitigate that risk, Asaad suggested employers as a best practice could instruct applicants ahead of an interview to make sure they select a quiet spot with a clear background.

"Giving instructions for what spaces look like for an interview might be a good idea," Asaad said. "Of course, the other way to do it would be that whoever's conducting the interview relays the relevant information to the hiring to the decision makers without revealing the protected characteristics that are not relevant to the job."

Make Sure New Hires Aren't Stranded

If a virtual job candidate lands a position, employers aren't out of the woods when it comes to adjusting long-standing practices for integrating them into the workforce.

Prior to the pandemic, McDermott's Bronchetti noted that onboarding a new employee might include having them get a dayslong orientation, in-person meetings with managers to go over policies and work expectations, a tour of the workspace and introductions to new colleagues.

But virtual work doesn't allow for many of those interactions, which often help people feel comfortable in their new job.

That might be especially so if an employer distills what were once multiday orientation sessions with one-on-one meetings into a few hours' worth of PowerPoint slides and a stack of documents sent to a worker's

house that they have to return, according to Bronchetti.

"We all know that number one in retention is making the employee feel like you're engaged with them, but also that they're engaged with the company," Bronchetti said.

"My concern when you don't have the level of engagement that you used to have when you brought an employee in the door, is whether or not a company's policies and practices are adequate to instruct employees [about] the rules [and] expectations," she added.

--Editing by Bruce Goldman and Roy LeBlanc.

This is the first of a three-part series looking at the impact of the expansion of remote work. Tune in Tuesday when experts discuss post-pandemic strategies for performance improvement plans.

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