

School's Out For...A While: Flexible Work Arrangements in the Era of Ongoing School Closures

By Matthew Tripp

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As the 2020-2021 school year approaches, it is becoming clear that many students will not return to full-time, in-person learning in a classroom environment, at least not initially. That means employers must prepare for the reality that many employees will have to continue balancing their work obligations with the need to provide childcare.

At the same time, the widespread shutdowns that occurred this past spring as a result of the COVID-19 pandemic have shown that, for many organizations, flexible work arrangements can be offered without compromising productivity. Such arrangements can also enhance employee morale and retention, assist in recruiting efforts, and allow for continuity of business operations during emergency workplace shutdowns.

Employers should consider implementing or continuing to offer flexible work arrangements as a way to help employees cope with the challenges associated with ongoing school closures. This article provides a summary of the common types of flexible work arrangements, as well as a list of best practices for employers to consider in connection with offering such arrangements.

COMMON TYPES OF FLEXIBLE WORK ARRANGEMENTS

Generally speaking, a flexible work arrangement is any work structure that alters, whether temporarily or permanently, the customary time or place that work is performed. That broad definition can be further broken down into three categories of flexible work arrangements: (1) flex time, (2) flex location, and (3) flex hours.

Flex time includes changes to customary start and end times, compressed workweeks, self-scheduling, shift trading, and changes in job duties.

Flex location includes [telecommuting](#) and other changes to the ordinary work location.

Flex hours involves changes to an employee's typical work schedule that alter the employee's ordinary number of work hours, including reduced hours, phased return to work, and job sharing. This can be done in conjunction with paid leave the employer may be required to provide. For more information on various paid leave options related to schools being predominately online this fall, please see this article [[hot link](#)].

The considerations outlined below generally apply to all three categories of flexible work arrangements. But it is critical that employers tailor their approaches to these issues to their unique business characteristics and goals as well as the specific flexible work arrangements that they offer.

FLEXIBLE WORK ARRANGEMENTS BEST PRACTICES

- Standardize the Process for Administering Flexible Work Arrangements. As with all employment practices, employers can mitigate the risk of discrimination claims by memorializing flexible work arrangements in clear written policies that are acknowledged by employees and by making eligibility determinations based on objective, consistently-applied criteria. Eligibility criteria often center on employee job duties and performance as well as the business needs of the organization. Flexible work

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arrangement policies should also clearly communicate to employees how to request a flexible work arrangement and management's right to unilaterally modify or discontinue the arrangement. Such policies should also clearly state that satisfactory job performance is a condition of continuing to be allowed to work under a flexible work arrangement.

- Regularly Evaluate Existing Flexible Work Arrangements. After implementing a flexible work arrangement, employers should consistently check in with employees utilizing the arrangement and their supervisors to ensure that it is effective for both the company and the employees. The employer should also periodically assess whether modifications are needed to make sure that the arrangement is achieving its intended goals. Any modifications should be documented and acknowledged by employees to whom they apply.
- Beware of Wage-and-Hour Issues. Non-exempt employees should be reminded to accurately record work time and to take required rest and meal breaks to ensure compliance with minimum wage and overtime requirements. Such employees should also be required to obtain authorization to work overtime, and as is always the case, off-the-clock work should be prohibited. State laws mandating daily overtime may also pose unique challenges for certain non-exempt workers. Employers should also be aware that placing exempt employees who participate in flexible work arrangements on a "fixed schedule" could arguably undermine the exempt status of those employees and be cited in support of an argument they are not actually exempt. The best practice is to remind exempt employees that they are expected to be available during certain hours, but not monitor or discipline them for failing to work a fixed schedule.
- Be Mindful of Disability Accommodation Obligations. Employers are generally required to provide reasonable accommodations to qualified applicants and employees with disabilities, unless doing so would pose an undue hardship. A flexible work arrangement can be a type of reasonable accommodation. If an employee requests a flexible work arrangement in connection with a medical condition, the employer should separately process the request under its disability accommodation policy and engage in an interactive process with the employee to identify potential accommodations. For example, employers should generally allow employees with underlying health conditions that render them more susceptible to complications from COVID-19 to telework if the employees' job duties can be performed from home.¹ Because offering a flexible work arrangement to some or all of the workforce may cause employees to later contend that remote work is a per se reasonable accommodation, employers should create in advance clear written policies on flexible work arrangements (see above).

The above is just a snapshot of some of the key issues associated with alternative work arrangements. Employers should review our [COVID-19 resource page](#) for more information on these and other issues. And as always, employers are encouraged to work with counsel as they implement new work arrangements within their organizations.

¹ In Washington, Governor Inslee issued a proclamation providing that employees determined by the CDC to be at high risk from COVID-19 due to their age or other conditions as identified by the CDC, referred to as High Risk Employees (HREs), must be provided any feasible accommodation, not just a reasonable accommodation. There are numerous flexible work arrangements that might be considered a feasible accommodation.

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