



Reducing workers' compensation and OSHA liability during COVID-19 and beyond

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As the world navigates work-from-home opportunities in the post-COVID era, health care companies are considering their options too. This article provides a practical look into workers' compensation and OSHA considerations so that health care providers can determine whether the benefits of remote working outweigh any potential risks. If it is decided that a remote working arrangement is desirable, health care employers will be able to assist in creating safe work environments to prevent workers' compensation claims and OSHA violations.

Introduction

When the COVID-19 pandemic began, many workplaces transitioned to a remote work environment at warp speed in an effort to keep their employees safe. Nobody knew how long this would be the new "normal," but some businesses and employees have grown to like it. Global Workplace Analytics¹ estimates that 75 million U.S. employees, or 56% of the non-self-employed workforce, could work from home at least part of the time, and over one third would take a pay cut in exchange for the flexibility of working from home.

While work-from-home may work for many employers, it is not as easy for those in health care—or is it? Prior to the pandemic, telemedicine was starting to make its arrival, and there were many other telehealth jobs behind the scenes too, such as phone triage nurses, medical transcriptionists, medical coders, pharmacists, case managers, and nurse educators. Work-from-home

was new to most of us, but it was not new to the health care industry. Telehealth is expected to be used even more widely as we move into the post-COVID-19 era.

Employer hesitation about employees working from home

Employer reservations around working from home may lie in the unknown: How will I know if my employees are working? What happens if there is an injury . . . is it work-related? If the employee gets injured at home, does the Occupational Safety and Health Administration (OSHA) get involved? While the first question is a topic for another day, the last two questions will be answered in the remainder of this article.

What qualifies as a remote injury, and is it work-related?

While this may be a new way of operating for some employers, remote working is not a new concept when it comes to workers' compensation laws. Workers' compensation laws vary from state to state, but most revolve around the concept that in order for a remote injury to be work-related, it must occur in the course of and arising out of the employee's employment. Employers should ask themselves: "Did the injury occur when the employee was doing a task to benefit the employer?" If there was no benefit to the employer when the injury occurred, the remote injury is less likely to be compensable.

Tips for a safe remote work environment

Determining whether a remote injury is work-related is oftentimes more difficult for employers because witnesses are not usually present; an on-site investigation cannot be performed; and, put simply, the actions of remote employees cannot be monitored directly. The best way to prevent an injury is to ensure that home offices are safe work environments to begin with. A few tips for implementing safe remote work practices are:

- Create a remote working policy and review it with remote employees to ensure expectations are understood by all parties;
- Set fixed work hours and break sessions to better define the "in the course of" requirement;
- Clearly define each employee's scope of work;
- Establish standards for home offices, such as requiring a dedicated work area; and
- Check in with your remote employees often, or consider tracking equipment.

While these measures may not have been possible when the pandemic began, the above tips, and others, should be implemented for employers utilizing work-from-home arrangements post-pandemic.

Occupational Safety and Health Act: Remote injuries

One question that health care companies must consider is to what extent are they required to keep their employees safe in their own homes? The most direct answer is: It depends on the type of work the employee is doing remotely.

Under the Occupational Safety and Health Act, all employers are bound by the General Duty Clause,² which requires employers to "furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

This duty applies to employers, regardless of where their employees are working, including at home. However, the duty does not apply to furniture in home offices.

OSHA strongly supports work-from-home arrangements and as such, has provided guidance³ related to "home offices" and "home-based worksites." OSHA defines a "home-based worksite" as the area of an employee's personal residence where that employee performs work for the employer, and "home office" as office work activities in a home-based worksite, which may include the use of office equipment. OSHA's guidance, while similar, differs depending on which work-from-home arrangement is in place.

"Home office" guidance

- OSHA will not conduct inspections of employees' home offices;
- OSHA will not hold employers liable for employees' home offices; and
- OSHA does not expect employers to inspect an employee's home office.

If a complaint is received regarding a home office, the employee will be advised of the above policy. OSHA will informally let the employer know of a complaint regarding a home office, but it will not follow up with the employer or the employee.

"Home-based worksites" guidance

- OSHA will conduct inspections of home-based worksites when a complaint indicates that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, including work-related fatalities.
- If an inspection at an employee's home occurs, it will be limited to the employee's work activities and does not apply to an employee's housing condition or furnishings.
- Employers are responsible for hazards caused by materials, equipment, or work processes that the employer provides or requires to be used in an employee's home.

Health care employers should take note of any chemicals or other hazardous materials being utilized during work-from-home work processes, including any special equipment being used. All employer-provided equipment must be maintained by the employer. Further, health care employers who are otherwise required to keep records of work-related injuries and illnesses are still responsible for keeping such records even when the injury or illness occurs in a home office.

The bottom line is that employers still have an obligation to keep their employees safe whether they are onsite or working from home. It is in the employer's best interests to ensure that his/her employees know what a safe working environment looks like at home.

Best practices to consider in order to keep employees safe at home may include:

- Developing an instructional video or written handout that provides, for example, demonstrations and explanations of how to set up a home office ergonomically, the proper way to use specific equipment, or how to properly cover cords to prevent a tripping hazard;
- Instructions on how to establish a mechanism for your employees to report concerns. This can be done through one's intranet or by use of a hotline number;
- A safety checklist for employees to follow daily; and,
- Regular training for employees regarding remote working obligations, such as reporting safety concerns, injury, and illness.

Examples

Example 1: Clara, your case manager, received a box containing a hardcopy of a client's file in her daily mail delivery to her home. She opened the box with an employer-provided box cutter during work hours (9:30 a.m. to 5:30 p.m.), and she cut their hand.

Compensable under workers' compensation?

Because the activity arose out of Clara's employment (the contents of the box were work-related) and occurred in the course of her employment (during her regularly scheduled work hours), the injury is likely to be a compensable remote injury.

Example 2: Consider the same scenario, but the box was not from her employer. Clara opened the box during work hours and cut her hand with the employer-provided box cutter.

Compensable under workers' compensation?

The act of opening the box was not for the benefit of the employer; it therefore did not arise out of her job duties and is likely not compensable. It does not matter that the injury occurred during her work hours or that the box cutter was supplied by the

employer.

Example 3: Now, consider the first scenario, but Clara opens the box to the client file after work hours (i.e., she stops working, has dinner, and opens the box at 10:00 p.m. before going to bed).

Compensable under workers' compensation?

While opening the box benefits the employer, and opening the box is part of her job (i.e., arises out of her employment), the injury is not compensable because she opened the box outside of work hours. Note that the claim in this scenario is not compensable only because she opened the box outside of her clearly defined work hours. If Clara was told to work eight hours per day, without the 9:30 a.m. to 5:30 p.m. parameters, this would likely be compensable.

Example 4: Kyle is a medical coder for Best Healthcare System. His hours are 6:00 a.m. to 2:00 p.m., and he works out of a dedicated office in his home. The employer-provided scanning machine used for scanning insurance codes from medical records is malfunctioning. Sometimes, when he manually feeds the paper, the guard pops off and it quickly pulls his hand in towards the machine. While he has not been injured, he has had multiple near-miss incidents. Kyle has not informed his employer of this issue but calls OSHA to report his concerns.

How will Kyle's complaint be handled by OSHA?

OSHA may conduct an inspection of the scanning machine at Kyle's worksite at home because there is concern of imminent physical harm. However, as there is not a clear violation of a safety or health standard, the agency could choose to simply notify the employer, especially since Kyle has not yet notified the employer. Regardless of whether an inspection takes place or not, if Kyle sustains an injury because of the malfunctioning machine, his employer is responsible for the hazard and can still be cited.

Example 5: Jamie is a pharmacist for Select Meds, and he reviews prior authorization requests from his home office. He has developed lower back pain from sitting at his desk for long periods of time. He asks his employer for a new chair and desk that are ergonomically correct. Select Meds denies the request and Jamie contacts OSHA.

How will Jamie's complaint be handled by OSHA?

Jamie will be advised of OSHA's policy that it does not perform inspections of home offices. If Jamie requests, his complaint can be escalated to his employer but ultimately, Select Meds is not responsible for providing, replacing, or inspecting the furniture in Jamie's home office. In addition, if Jamie were to file a workers' compensation claim related to his lower back pain, it will likely be denied because the cause of his pain is being caused by furniture that he provided for himself. The alleged injury, while sustained while working, did not arise out of the working conditions provided by the employer.

Conclusion

A far greater number of health care employers are having to answer this question due to COVID's impact on almost every aspect of our daily lives, including how and where we work. While working remotely may bring on new challenges for employers, there are many advantages as well. Flexibility, cost savings, decreased burnout, increased productivity, increased employee satisfaction, and retention just to name a few. At the end of the day, however, each organization must decide for itself whether the benefits of allowing its employees to work remotely outweigh any identifiable risks.

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¹Global Workplace Analytics, Work-At-Home After COVID-19 – Our Forecast, <https://globalworkplaceanalytics.com/work-at-home-after-covid-19-our-forecast> (last visited July 12, 2021)

²29 U.S.C. § 654 (1970), https://www.osha.gov/laws-regs/oshact/section_5

³Occupational Safety and Health Admin., CPL 02-00-125, OSHA Instruction Home-Based

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