Telecommuting—also known as working from home, working remotely, or telework—is a work arrangement in which the employee works outside of the office. With the COVID-19 outbreak spreading across the United States and a number of states issuing “stay home” or “shelter in place” orders, many employers have effectively been forced to transition to temporary telecommuting arrangements with their workforce in order to continue operations. In locations where state or local governments have not mandated that people stay home, allowing employees to work from home during the COVID-19 outbreak is one step employers can take to protect the safety and health of its workforce while still maintaining productive operations. The following are some of the relevant questions that should be considered by employers when deciding whether telecommuting is feasible. Given that the response to the COVID-19 outbreak is rapidly developing across the country, some of the considerations addressed in this article may be inapplicable to an employer that has no choice but to require employees to stay home pursuant to the orders of state or local government.

**Is telecommuting feasible for our workforce?**

The Centers for Disease Control and Prevention (the “CDC”) recommends that employers adopt flexible worksites (i.e., telecommuting) as one social distancing strategy to prevent the spread of the COVID-19 outbreak. The CDC recommends that employers encourage employees who are able to work from home to telecommute instead of coming to the
workplace. If the employer is going to allow employees to telecommute, the employer should require that employees do so in their own home, rather than in other remote settings, such as coffee shops or cafés, where employees are still exposed to others who may be spreading the virus. Whether an employee is able to work from home depends largely on the nature of the work performed by the employee and the technology needed to perform the job remotely. If the employee's job duties are portable and could be performed effectively outside the office, at least temporarily, then the employee's position is likely appropriate for telecommuting. Where the employee's position entails regular access to and use of materials that cannot be removed from the worksite, then telecommuting may not be feasible for the employee. In deciding whether employees can telecommute, employers must not make decisions based on protected characteristics, including, but not limited to, race, color, national origin, disability, gender or age.

What should we do in response to the COVID-19 outbreak for employees whose positions are not feasible for telecommuting?

If it is not feasible for an employee to telecommute due to the nature of the employee's job duties, and assuming your state or local government has not issued “stay home” or “shelter in place” orders, the CDC recommends that employers still take steps to increase the physical distance in the workplace among employees and between employees and others. Employers should consider staggering or altering employees’ schedules or moving or reassigning work stations for employees in essential positions in order to facilitate social distancing measures. For non-essential positions, employers may want to consider reductions in schedules, relaxing restrictions in use of paid time off, or allowing unpaid leave for a temporary duration. Employers should be prepared to provide cross-training and coverage in response to a shortage of workers. The foregoing considerations assume that federal, state or local laws, regulations or executive orders do not dictate a different response or action by employers to the COVID-19 outbreak (for example, states or regions with “shelter in place” requirements). In such circumstances, all employees may be required to remain at home.

When should we begin requiring employees to work from home?

With the rapid spread of the COVID-19 outbreak, employers should consider implementing temporary telecommuting arrangements as soon as practicable to mitigate the impact on employee and community health and safety and on business operations.

Before implementing the telecommuting arrangement, the employer should ensure that it has the infrastructure and information technology needed to support many employees working from home. Employers must provide the workforce with the tools required to work from home, which may include making necessary technology and equipment available to employees to take home and also ensuring appropriate security measures are in place before such technology and
equipment leaves the office. The employer’s information technology department must be involved when evaluating the telecommuting arrangement to ensure the same level of security exists for employees working remotely as when such employees work in the office.

**How do we monitor performance when the employee is telecommuting?**

Employers must clearly communicate the expectations of an employee during a telecommuting arrangement. Frequent communication between employees and supervisors may lessen the burden that telecommuting could have on productivity. Employers could consider monitoring employees’ work communications (so long as such monitoring is consistent with the employer’s established policies and the employees do not have a reasonable expectation of privacy in using the employer’s systems) to confirm employees are appropriately performing their job duties during any period of telecommuting. Requiring exempt employees to record working time (in addition to nonexempt employees) is another method to ensure exempt employees are performing job duties.

Due to the circumstances involved with the COVID-19 outbreak, employers should be understanding of the challenges employees are facing, such as lack of childcare, and be flexible in expectations as to employee performance.

**How do we ensure compliance with wage and hour laws when employees are working from home?**

Employers with telecommuting employees must still ensure payment to nonexempt employees for all time worked, including time spent responding to phone calls and emails. Accordingly, the employer should establish protocol to confirm that all nonexempt employees accurately record their remote working time. If the employer’s normal timekeeping system is unavailable to employees working from home, the employer should utilize other methods for employees to self-report working time (for example, an Excel spreadsheet). Telecommuting nonexempt employees still must be paid overtime in accordance with applicable federal and state wage and hour laws. Employers should also continue to comply with and enforce applicable meal and rest break requirements when employees are working from home. Other federal, state and local laws may apply to employees working from home, so employers should consult with counsel about the application of any specific federal, state or local laws to a telecommuting workforce.

**What about safety concerns with employees working in their home environments?**

Employers should also consider safety and health laws even when employees are working from home. Employees should be encouraged to ensure their home workplace is free from hazards that might pose a danger to the employee. Employers should also review their workers’ compensation and liability coverage with their brokers or carriers to ensure applicable coverages
Considerations for a Telecommuting Workforce During the COVID-19 Outbreak

apply when employees work from home.

**Should we adopt a policy addressing telecommuting?**

An employer considering telecommuting should review and update existing telecommuting policies or craft a new temporary telecommuting policy specifically tailored to the circumstances of the COVID-19 outbreak. The telecommuting policy should address (i) the responsibilities of both the employer and the employee when telecommuting, (ii) which employees are eligible for telecommuting, (iii) the temporary nature of the telecommuting arrangement, and (iv) the employer’s maximum discretion to change, modify or revoke the policy at any time, with or without notice. As with any employment policy, employers should have employees review and sign the telecommuting policy if possible and the employer should retain copies of employees’ signed policy.

Koley Jessen continues to monitor the situation and stay current on the issues facing employers in light of the COVID-19 outbreak. If you have additional questions or concerns as the situation develops, please contact a member of the Koley Jessen Employment, Labor and Benefits Practice Group.