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Implementing 'work from home' policy

■ BY AJAY SINGH SOLANKI AND VIKRAM SHROFF



A new policy is finding its way in the employment handbook - 'work from home'. Also termed as 'telecommuting' or 'homeshoring', the concept is fast gaining popularity in India and is off-late finding its application in practice in many organizations across the country.

The reason is simple - freedom and flexibility, which in turn helps attract and retain talent. Considering the ever-increasing fuel prices, maddening traffic, commuting related turmoil and most importantly, the family duties and responsibilities, 'work from home' is becoming a choice among the employees and employers, alike, especially in the information technology and related sectors.

To the extent an employee is not bound by fixed work hours, he can schedule his work at the time when he feels most efficient. Also, some employees find that their productivity is higher and stress levels much lower if they work from home or from a remote location. Employees who like isolation and peaceful work environment also tend to support this way of working. With the sort of communication networks and high-tech equipment available, organizations worldwide have or are in the process of implementing this policy.

Employers are however advised to consider the legal issues that may arise when employees work from home, some of which are indicated as follows:

Right to work from home

In case of policy regarding work from home, an employee may claim it as a right to work from home. Given the fact that any

such permission should be purely at the employer's discretion, it is important to ensure that the policy is drafted in a way that it does not become a right but requires the employee to seek prior permission. In certain cases, the policy needs to define the various parameters or eligibility criteria, such as the (i) level of employees, (ii) tenure of service, (iii) health or medical reasons, (iv) working in night shifts / late hours, etc.

Hours of work and overtime

At times, the actual number of hours being put into work would be hard to track in the work from home scenario. This makes it tougher to classify whether an employee has worked on overtime basis. The concept may lead to dilution of the thin line differentiating the working hours from the non-working hours, making the process of tracking the work hours more complex and intricate.

Presently, none of the Indian labour laws, including the state specific shops and establishment Act, contain provisions in relation to employees working from home. However, ideally, by way of a work from home policy or a telecommuting agreement, which may be entered into with the employees working from home, an employer may specify the exact number of days and hours the employee is permitted to work from home. The employee should be required to obtain prior approval from his manager for working beyond the prescribed hours / days.

Data security and confidential information

There are likely to be data security related issues that an employer may face while

allowing employees to work from home. In a scenario where data theft is becoming a rampant problem throughout the corporate world, organizations need to be absolutely sure of the fool proof nature of the technologies that they are being utilized in order to make 'work from home' operational.

In the era of technological advancement, it is quite common for organizations to facilitate their employees with laptops enabled with high bandwidth Internet connections, hi-end business phones such as BlackBerry iPad, iPhone, etc. Such devices and gadgets have made it all the more easier for employees to work from anywhere and gone are the days when work could only be done by sitting within the office premises. In such a situation, data security is one primary concern that organizations must address before venturing into the world of technology to implement 'work from home' policy.

Further, employees working from home are bound to have access to a considerable amount of information belonging to their employer. Such confidential information should be adequately protected in the telecommuting agreement / policy by clear rules on the use of such information, computer systems, handheld phones, etc. Employers should implement a mechanism to keep track of the information employees are using or accessing while working from home. There are certain software and other technologies available which may assist employers in implementing such protective measures. Employers may also consider entering into separate non-disclosure or confidentiality agreements with telecommuters.

Discrimination

Employers must be cautious while attempting to make any distinction between the regular employees and those working from home. At times such attempts may be perceived as discrimination on the part of the employer which may in turn result in litigation exposure. This issue stems from a concern that was addressed in a case in the UK, British Nursing Association vs Inland Revenue [2002 EWCA Civ. 494], wherein the employer made a differentiation between the regular workers and the ones working from home in terms of the wages to be paid to them. The court held that considering both categories of employees were performing similar type of work, the 'work from home' employees should not be discriminated.

From a policy standpoint, employers need to carefully evaluate the criteria for determining who may work from home to avoid any charges of discrimination and should also ensure that the same is reflected in the telecommuting agreement or work from home policy.

Intellectual property

Another issue which may arise is that of ownership of intellectual property rights over work done by an employee while working from home. It may become

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difficult to differentiate between work done during 'work hours' and work done independently by the employee. This issue was dealt with in a US case, *JustMed Inc. vs Michael Byce* [2010 U.S. App. Lexis 6976 (9th Cir. April 5, 2010)]. While considering who held intellectual property rights over the software developed while working from home, the court was of the opinion that the employee's ability to set his own hours and the fact that he worked from home were not particularly relevant to the issue of deciding who held rights to the product developed and that the rights were still held by the employer. To avoid any issues in this regard, it may be advisable to maintain clear record of assignments of employees and to specifically and prominently define the field of technology that the employee would be delving into as a part of his assignment.

Further, telecommuting presents new threats to intellectual property to an extent, by blurring the distinction between employees and consultants. Since telecommuting gives the employee greater independence and reduces the employer's supervision over the telecommuter, there may be a risk, though remote, that the telecommuter may claim to be an independent consultant and might insist upon ownership of certain intellectual property rights to the work done for the organization while working from home. To avoid this situation to an extent, the employer should ensure that the agreement entered into with the telecommuter has water-tight clauses in respect of ownership and protection of the organization's intellectual property rights.

Employees' safety

With the developing jurisprudence through various court judgments, companies and firms may be held responsible for their employees' safety while they are working from home. This concern arises from the fact that with this concept gaining popularity, it would become

increasingly difficult to identify what would exactly constitute work premise in such cases.

For instance, consider a situation where an employee suffers injuries while working from home due to some mishap such as fire or electric short-circuit, etc. In the absence of any laws which envisage such a scenario, the courts may interpret the extant laws to hold the employer liable to compensate the employee for any such mishap or accident.

As a matter of precaution, employers may consider getting the office equipment and the worker's home insured against fire and other like hazards. Employers should also claim the right to inspect the place where the work is performed to ensure it is safe and that the employees are working in a well-maintained, hazard free environment. Further, the employer should make the employees aware that it is also the employees' responsibility to ensure that their work environment is ergonomically sound, clean, safe, and free of obstructions and hazardous materials. The employees must also ensure that their homes comply with all building/society codes and health and safety requirements.

Guidelines for SEZ units

The Indian Ministry of Commerce and Industry has issued instructions that only those employees of IT/ITES units in Special Economic Zone ("SEZ") who are temporarily de-capacitated or employees traveling, may be permitted to work from home or from a place outside the SEZ, subject to the satisfaction of the following conditions: (i) the person purporting to work from home should be an employee of the

SEZ unit; (ii) the person will carry out the work related to a project of the SEZ unit; and (iii) the resultant exports must take place only from the premises of the unit in the SEZ.

Conclusion

Considering the concerns as highlighted above, organizations must ensure that certain detailed, clear and water tight policies and agreements are in place before they implement the work from home structure within their organization. These policies / agreements must clearly address issues such as hours of work, compensation for injuries during the course of employment, data security, confidentiality, ownership of intellectual property, etc. Further, it may be ensured by the employer that an approval in respect of work from home is granted to an employee only in specific circumstances viz., peculiar medical condition, maternity, etc., on case by case basis. Such approval should be subject to discretion of the management and should be typically granted for a temporary period rather than on an ongoing basis so as to avoid any unnecessary administrative hassles. Furthermore, organizations must also ensure strict internal controls to monitor their employees who are permitted to work from home.

The work from home concept seems to present the employers with a suitable option to cut down on costs, and also in certain cases, to ensure increased productivity and efficiency from their employees. However, the employer should necessarily bear in mind the aforementioned issues and concerns before introducing its employees to this innovative concept. HC

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