



Can't You Be More Flexible? Alternative Workweek Schedules and Remote Work Options for Employees

By Karen L. Gabler, Esq.

With technology growing in leaps and bounds and the economy beginning its slow return to normalcy, employers are faced with increasing requests for flexible work options from employees doing everything they can to find work-life balance. Whether or not to provide such options, how to avoid resulting liability, and how to be productive with a remote workforce, remain challenging questions for employers.

The most formal flexible work option is the Alternative Workweek Schedule (“AWS”), developed with the return to daily overtime in California to permit employers to grant alternative workday options to employees without increasing overtime costs. By developing an alternative work schedule, such as the “4/10” or “9/80,” employers can permit employees to work more than eight hours on less than five days per week, without paying overtime rates.

Unfortunately, despite the legislature’s attempt to permit “flexibility” with this option, the AWS process is cumbersome and easily mishandled. Employers must develop written memoranda describing the proposed AWS and its impact on pay and benefits. Meetings must be held with employees to discuss any questions. A secret ballot election must be held, and workers must approve the AWS with at least a 2/3 vote. Written notice of an approved AWS must be provided to the state. Workers who cannot work the approved AWS must be accommodated, and specific timelines must be met throughout this process. With any misstep in the process, the entire AWS is invalid and the employer risks wage and hour liability. Given these requirements, the AWS can be anything but “flexible,” and assistance from qualified legal counsel is a must.

Of course, if employers are willing to pay the increased overtime, they can skip the AWS process altogether and allow employees to work alternative schedules and pay accordingly. In most cases, there is no legal restriction on overtime work, as long as it is coupled with overtime pay and appropriate meal and rest periods.

As another option, employers may provide requested flexibility by allowing employees to work remotely, while maintaining a standard work schedule. Remote work options provide employees with more autonomy, control and independence, while (hopefully) maintaining satisfactory productivity. Benefits may include happier employees, reduced overhead costs and less illness/injury. Drawbacks may include loss of productivity, inability to properly supervise and evaluate employees, and loss of teamwork and camaraderie in the workplace.

Employers who permit their employees to use telecommuting options should consider several issues often overlooked when an employee is not physically in the office:

1. **Equipment:** what equipment are you providing to the remote worker? Permitting employees to use their own computer or phone may cause a loss of confidentiality and trade secret protections, as well as posing security risks via unsecured electronic access. Providing laptops and cell phones will typically be more costly than desktops and office phones, but also will provide a greater level of control for the protection of the employer's equipment and information.

2. **Safety:** What about the safety of the work environment? Employers have the option of inspecting the employee's home office to ensure it is ergonomically correct and safe, but to what extent do employers want to take on the burden of investigating the employee's private home? An employee injured while on remote duty is still covered by the employer's workers' compensation policy; consider setting standards for workplace setups to reduce the risk of safety issues. Check with your workers' compensation carrier about any restrictions or recommendations before implementing a remote work option.

3. **Productivity and supervision:** How will you track your employee's output? Is there any tangible work product you can review or track to determine whether your employee is completing projects and producing necessary deliverables? Can you have your employee keep a telephone log of calls with notes of the content discussed? How will you know if your employee is performing satisfactorily, and what feedback can you request to ensure that is happening? With remote workers, you may want to have more supervision, rather than less, since you are limited in your ability to randomly observe their activities in your home office. Ask to be copied on customer communications, and request reports of the employee's anticipated and actual activities for the day or week.

4. **Customer service:** How will you determine whether your remote employee is responsive to your customers and providing quality service? Consider using "secret shoppers" to test interactions with your employees. Review the employee's email account and telephone records to ensure that work product is promptly delivered with a satisfactory level of quality control. Consider also whether you are providing adequate coverage of customer needs – with multiple remote workers, it can be more challenging to determine which employees are actually available. Setting specific standards and schedules for when even remote workers must be available by phone or email can be critical.

5. **Legal compliance:** For remote non-exempt employees, ensure that accurate time records are kept of all work performed, and all meal and rest breaks are taken. Remote workers do not lose their right to such breaks or to overtime pay, nor are employers freed from those restrictions. Instead of assuming that the remote worker has full control over his workday and "can take a break anytime he wishes to do so," document in writing the fact that breaks are mandatory and expected, and must be recorded on time sheets each day.

6. **Documentation:** A detailed written agreement is critical for any telecommuting situation. Address issues such as those outlined above: what equipment will be provided? What schedule of work will be performed? What security measures have been implemented? What reports must the employee provide to his supervisor? In any telecommuting agreement, document the fact that this arrangement is at

the employer's discretion, and may be discontinued at any time at management's choice. Make it clear that working remotely is a privilege, not a right, and that the employee must meet designated standards to remain eligible for that privilege.

Workplace flexibility will continue to be a hot topic, as employers and employees alike look for creative ways to reduce costs and increase productivity. Unfortunately, California employment law has yet to catch up (and will never be able to keep pace) with technological options in the workplace. By considering the issues above and implementing specific (and documented!) procedures to protect the business, employers can grant much-desired flexible options to employees, while ensuring continued protection of trade secrets and business success.

For questions regarding flexible workplace options and documents, or any other employment law issues, contact Karen Gabler (www.lightgablerlaw.com).



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