

# Considerations for Remote Working Policies

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We occasionally field questions from law firms about policies permitting lawyers to work remotely. It has become an increasingly important issue to address at a time when technology makes it easy for lawyers to work anywhere there is a high-speed internet connection.

In the war for talent, law firms are finding that their commitment to employees' work-life balance is critical to attracting and retaining millennial lawyers. According to the 2018 *What Millennial Attorneys Want* study by the architectural firm Gensler, 83 percent of millennials at Am Law 100 firms would like to work remotely one or two days per week and 86 percent agreed that it was important to them to have flexibility in when and where to work. Respondents in a 2019 *Millennial Attorney Survey* by Major, Lindsey & Africa ranked a law firm's commitment to fostering work-life balance as the most important consideration in evaluating a prospective employer (compensation ranked second).

It is not just millennial lawyers who value the ability to work remotely. In its 2017 *State of the American Workplace* report, Gallup reported that 43 percent of employees in law or public policy worked remotely at least some of the time. In 2017, Working Mother magazine reported that all 50 firms on its Best Law Firms list offered remote working arrangements and that 53 percent of all lawyers in those firms exercised that option. In 2018, the percentage of lawyers working remotely in those firms rose to 74 percent. Liane Jackson, *Slow Growing: More Firms Join 'Best for Women' Lists, But Statistics are Stalled*, ABA J (October 2018), abajournal.com.

A single standard for law firm remote working policies has yet to emerge. In many firms, there is no formal policy, but it is understood that lawyers may occasionally work remotely or that requests to work from home will be granted on an ad hoc basis. Other firms are establishing formal policies that make clear who is eligible to work remotely, how often lawyers may do so, and what is expected of both the lawyers who work remotely and those who supervise them. The reasons firms commonly cite for developing a formal programme are to provide uniform guidance and training and to help eliminate the "flexibility stigma" that has historically attached to lawyers who pursue flexible work options, branding them as less productive, less accessible, less able, or less committed than their peers.

Nor has a standard emerged for how often remote work should be permitted. Law firm policies featured in the legal press have ranged from twice a month, to once a week, to "as needed." There are also no studies suggesting a golden ratio between remote and office work for lawyers, and there likely never will be given the variability of lawyers' practices.

Regardless of how a firm approaches the option of remote work for lawyers, there are certain risk management issues and best practices that we recommend firms consider.

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## Eligibility and expectations

First, to help avoid employment-related disputes over the ability to work remotely, the terms of eligibility for remote work should be clearly stated, along with what the firm expects of lawyers who select that option. As for eligibility, we favor a combination of an experience element (eg, third-year associates and above) and a performance requirement (eg, a score or ranking of at least X on an associate's most recent evaluation). We also recognise that any policy must have some play in the joints and permit exceptions on a case-by-case basis (eg, permitting more junior lawyers to occasionally work from home with supervisors' approval).

We recommend that policies expressly state that lawyers working remotely are expected to work the same number of hours and be as accessible and responsive as they would if in the office and that client or firm needs may at times require the physical presence of the lawyer on days when the lawyer would normally work remotely. The firm should also make clear that its remote work policy is separate from any arrangements made with lawyers for health reasons or as a reasonable accommodation under the Americans with Disabilities Act.

## Supervision

Second, the firm's policy should address best practices for supervision and oversight of junior lawyers while they are working remotely. Partners and shareholders have duty to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct," and supervising attorneys are required to specifically ensure that the lawyers they supervise practice in conformance with the ethics rules. *Model rules of prof'l conduct r. 5.1(a) & (b) (2019)* [hereinafter *model rules*].

Suggestions for supervising attorneys include scheduling team meetings that lawyers may attend via audio or video conference; clearly communicating to lawyers when responses to inquiries are expected; and checking in with remote lawyers on their work via intrafirm instant messaging platforms, emails, or calls. Junior lawyers should be trained to use the same methods of intrafirm communication, and to regularly and proactively communicate to colleagues and supervisors their location, the status of projects they are working on, and how they can best be reached, and to promptly return colleagues' messages.

## Communication

Third, lawyers should be reminded of their duty to communicate with clients under *model rule* 1.4 and be trained on protocols that make lawyers' location irrelevant to their ability to serve clients. Many firms utilise a form of Voice Over Internet Protocol (VoIP) that allows calls to lawyers to reach them via their laptops or smartphones. Automatic call forwarding is also available. Lawyers' assistants should be trained on how to automatically forward calls to them out of the office and to take messages from callers without saying that the lawyer is working from home, which can be interpreted as a euphemism for "he's not working today" and does not in any case let the caller know whether the lawyer is available.

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## Data security and client confidentiality

Fourth, a remote work policy must ensure data security and client confidentiality. In large part, fulfilling these duties comes down to the competent use of technology and up-to-date security protocols to access, manage, and protect client and firm data. For remote access, most firms require lawyers to either use firm-issued laptops that connect securely to firm servers through a private cloud or virtual private network (VPN) or utilise personal computers solely to connect to secured firm servers and firm email accounts through services such as Citrix. Lawyers should be instructed not to use their personal email accounts for any communications relating to client matters and not to save client communications or materials to personal devices; doing so removes the data from the security measures in the firm's systems. As additional data security precautions, many firms also restrict the ability to save data to external drives or to copy files from a Citrix environment onto the drives of a user's personal computer.

Lawyers should be trained on and keep abreast of the firm's technology and data security protocols and be competent in using them to shield confidential information from inadvertent or unauthorised disclosure.

Lawyers who work remotely and their supervising attorneys should also review any outside counsel guidelines issued by clients that may include restrictions on access to data in environments outside the firm's offices.

## Unauthorised practice of law

Finally, firms should assess unauthorised practice of law ("UPL") concerns if a lawyer intends to work remotely in a jurisdiction in which the lawyer is not licensed or otherwise authorised to practice. For example, a lawyer may work in the firm's New York office and be licensed in New York, but wish to work once or twice a week, schedule permitting, from her home in Connecticut, where she is not licensed. The firm must decide whether the lawyer should become licensed in Connecticut before beginning to work from home on a regular basis. Most jurisdictions have enacted a version of, or functional equivalent to, *model rule* 5.5 that provides certain safe harbors for multijurisdictional practice.

Under *model rule* 5.5(c)(4), a lawyer admitted in another U.S. jurisdiction may "provide legal services on a temporary basis in [the state in which the lawyer is not admitted] that . . . arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." Given this allowance and the fact that the lawyer's physical presence in her home is likely the only connection to the jurisdiction in which she is not authorised to practice, the great majority of instances where lawyers work from home are unlikely to raise UPL concerns. Nonetheless, the firm should review the planned remote work arrangement through the lens of the relevant state's UPL case law, rules of professional conduct, and ethics opinions to be comfortable that licensing in that state is unnecessary.

The concern, of course, is that the lawyer's regular practice of working remotely will allegedly constitute a systematic and continuous presence in the state where he or she is not licensed and thus might be considered UPL.

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## About Aon

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