

Article Information

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Working from Home - Legal considerations for making the transition permanent

As working from home evolves from being a reaction to COVID-19 induced government directives, to being a feature of modern workplace design, employers should begin taking proactive steps to identify and implement workplace systems and risk management frameworks that are fit for purpose and which minimise new exposures.

COVID-19 induced restrictions have been a catalyst for many businesses to implement technology and systems which allow their workforce to work remotely. Now that those systems have been in place for some time, and for many businesses have dispelled fears around lost productivity, there is already widespread reconsideration around what modern workplaces are going to look like and whether and how working from home will be a part of that plan.

As we move from working from home being a COVID-19 induced government directive, to being a feature of modern workplace design, employers should also move from having working from home systems which were created reactively in response to government restrictions, to taking proactive steps to set identify and implement systems and risk management frameworks.

In planning for this, businesses need to consider what their rationale is for those changes and to consider and implement a legal and compliance framework to reflect those. Even if from an employee perspective, it looks the same as current working arrangements.

What have been some of the key learnings about working from home?

The COVID-19 'working from home experiment' has opened many businesses' minds to the various benefits it can provide to employees and employers alike. However, it's not for every business and every role and there have been a number of issues that employers have had to grapple with including:

- Issues around employees feeling isolated and employee mental wellbeing;
- Ensuring adequate manager check-ins, as well ensuring employees are reaching out where they need support, with open lines of communication;
- Identifying and managing cases of poor performance when the capacity for face-to-face engagement and improvement is limited;
- Zoom and webinar fatigue;
- Securing confidentiality and security of IT systems; and
- Two-way consultation and co-operation in achieving a safe workplace, both in a physical sense as well as from a wellbeing perspective with reduced visibility of the risks the employees are exposed to.

Further, the Australian industrial relations system is not necessarily set up to deal with working from home 'en masse'. The restrictive nature of certain awards and enterprise agreements, particularly around the limited spread of ordinary hours of work, can limit businesses' ability to be flexible and progressive about arrangements that suit both a business and individual staff member seeking non-traditional flexible work patterns.

Key legal considerations for businesses to consider when adopting working from home on a long term scale

With the above considerations in mind, some of the key issues to consider from a legal perspective include:

- **Terms of engagement** - Do you need to update your employment contracts so that they reflect changes to your

employees' working arrangements including location of work, hours of work and changes to remuneration affected by flexible hours, for example. Have you ensured that these variations been agreed to in writing. It is also important to review any changes to applicable awards which may have been amended due to COVID-19 and to ensure that you have adequate offset clauses in your agreements to absorb any additional entitlements employees may be eligible for under the new arrangements.

You may also consider whether an individual flexibility arrangement under the Fair Work Act could be used instead.

- **Consultation** – Do any consultation obligations apply? Moving in the longer term to a working from home model en masse, would likely constitute major workplace change and there may be consultation obligations that attach to that under industrial instruments.
- **Safety** – An employer's obligation to provide a safe workplace extends to employees working from home. However, in a practical sense, complying with this obligation can be harder where control and visibility over the risk factors affecting employees is reduced and employees may be resistant to pro-actively disclosing what their home-working environment involves.

Employers need to consider the physical safety of employees for example, ergonomic workplaces, adequate security/lighting, exposure to domestic violence, as well as workers' psychological safety. As visibility of staff interactions in the office is reduced, it becomes harder to monitor risks to mental wellbeing such as excess working hours, potential bullying and isolation. Where requiring regular and detailed information from employees about their home-working environment would once have been challenged, the new-normal enables a much broader range of 'lawful and reasonable' directions to be issued around disclosure, safety and working conditions.

Also, since COVID, a significant increase in workers' compensation claims (especially of psychological injuries) has occurred. Where employer-conduct is alleged to have caused a psychological injury, the mandatory insurer will require documented information that shows only "reasonable management action" occurred if a claim is to be avoided.

- **Policies** – Are there any new workplace arrangements or issues that should be dealt with under policies. For example, do you need policies to deal with:
 - storage and ownership of company confidential information and IP accessed and stored at home;
 - criteria around submitting and assessing working from home requests and requirements to be observed by employees while they are working from home;
 - the delicate issue of how performance improvement can successfully occur when most interactions are likely to be remote; and
 - parameters around expectations of employees and managers engaging in regular communication.
- **Insurance** – Have you reassessed measures in place to deal with insurance policies? For example, do you have adequate property insurance to cover company property where company technology is being provided to employees at home. Should you consider minimum requirements around employees' own home and contents policies and how those policies would cover damage to company property?
- **Equipment** – Consider who is going to pay for equipment, will it be bring-your-own-device arrangement, will employees be paid an allowance to cover operating costs? Are there any specific working from home allowances which may apply.

A recent case in the Fair Work Commission, *McKean v Red Energy Pty Ltd* [2020] FWC 5688 (26 October 2020) involved an unfair dismissal claim by an employee who alleged that he was forced to resign from his employment as a result of his employer not having provided him with a desk to work from home with. Even though the Commission dismissed his case on the basis that the prospect of having to pay a small sum to buy a desk was not a matter that *forced* Mr McKean to resign, we are likely to see more cases involving issues arising as a direct result of increased working from home arrangements.

Enterprise Bargaining and Awards

Individual businesses should not only be looking at what will suit them best in the new-normal working from home environment, but be actively aware of how the Australian industrial relations system is responding to the pressure these changes bring.

Modern award reviews by the Fair Work Commission are foreshadowed to introduce working from home minimum conditions, and there has been a recent ACTU-sponsored 'charter' to guide unions in enterprise bargaining who are seeking to include restrictions on directions related to working from home and to include additional payments and allowances for undertaking working from home arrangements.

In dealing with those external attempts to regulate working from home arrangements, businesses will need to have a clear-

eyed view of the benefits and pitfalls of working from home arrangements and be able to identify what they are aiming to achieve in enterprise bargaining or in implementing any new Award conditions.

Whether or not working from home was in your businesses' trajectory, the 2020 'working from home experiment' has been a great opportunity to consider previously untested new ways of working on a large scale. If you want to consider implementing new business flexibility in a long term sense, it's important to use your experiences from this year to identify and review any issues or shortcomings that arose during COVID-induced working from home and consider what steps can be implemented to proactively deal with or mitigate these risks on a more permanent basis.

Don't be afraid to consult with employees about how they found the experience, whether you are required to or not. Their experiences and identification of improvements can bring different perspectives around whether or not flexible working is providing a benefit to them and also help to mitigate risks of claims arising in future.

Also remember that what works for one may not work for all so if you're looking to implement flexible workplace practices, as opposed to just working from home, it's important that you build mechanisms into your policies and processes which allow for employees to be flexible and which consider individual circumstances. From a legal perspective, it's also important to make sure that that flexibility is supported with the right legal framework and risk management consideration.

For advice on how these changes will affect your business, please contact a member of Piper Alderman's [Employment & Labour team](#).