SECTION 1

TELEWORK ENHANCEMENT ACT OF 2010

CHAPTER 1
HISTORY AND OVERVIEW

Work is something you do, not someplace you go. There is no magic to strapping yourself in a metal box and driving, sometimes up to an hour and a half to our workplaces, and sitting in front of our computers all day.

—Congressman Frank Wolf (Virginia) in his remarks before the House of Representatives during the November 18, 2010, hearing on the Telework Enhancement Act of 2010.

I. HISTORY AND OVERVIEW OF THE TELEWORK ENHANCEMENT ACT OF 2010

Telework is a federal workforce strategy to cost savings, a better work-life balance for its employees, greater flexibility in managing its workforce and achieving continuous government services in times of emergency. It also is said to lend a greater competitive advantage to the federal government as an employer to attract and retain talent. Other benefits include reduced energy consumption, environmental concerns, and traffic congestion.

A. HISTORY

The federal government allowed for telework long before President Obama signed into law the Telework Enhancement Act of 2010. As early as 1991, federal agencies were authorized to pay for telephone lines and equipment related to telework. Pub. L. 101-509, Section 624 (Nov. 5, 1990). Public Law 106-346, Section 359 (Oct. 23, 2000), required agencies to "establish a policy under which eligible employees of the agency may participate in telecommuting to the maximum extent possible without diminished employee performance." The measure ambitiously also required that "[n]ot later than 6 months after the date of the enactment of this Act, the Director of the Office of Personnel Management shall provide that the requirements of this section are applied to 25 percent of the Federal workforce, and to an additional 25 percent of such workforce each year thereafter." With participation still low, in 2003, Public Law 108-7, Section 623, granted funding to certain agencies to implement telework and required each agency to report on their programs every six months. More of the same came in years 2004 and 2005.

Nine years after Public Law 101-509, a report by the Committee on Oversight and Government Reform found that telework was still underutilized. H.R. Rep. No. 111-474 at 7 (2009). Only five percent of federal employees participated in telework programs. OPM, *Status of Telework in the Federal Government* (Aug. 2009). Lack of participation was due, in large part, to management resistance, with managers citing to productivity issues and lack of control over employees. H.R. Rep. No. 111-474 (2009) at 7; S. Rep. No. 111-177 (2010). Definitions, implementation, and tracking strategies of telework also varied from agency to agency. *Id.* The Senate's Committee on Homeland Security and Governmental Affairs noted the need for additional legislation to bolster the use of telework in the federal government, citing some of the benefits:

> Management considerations, such as productive and satisfied workers; environmental considerations, such as reduced traffic congestion and improved air quality; and quality of life considerations, such as accommodating the short- or long-term health problems or family responsibilities of employees, have been offered as justification for telework programs. Some believe that the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon, and the discovery of anthrax in Washington, DC, and other cities have fundamentally changed the workplace and demonstrated the practical application of telework to the continued operation of the government. Issues of security, crisis management, disaster recovery, and remote access to office computer systems are prompting some federal executive and legislative branch agencies and their employees to expand existing telework programs or to consider telework.…

The Telework Improvements Act of 2009 was introduced and, after some changes, became what we now know as the Telework Enhancement Act of 2010, H.R. 1722.

B. HIGHLIGHTS OF THE ACT

President Barak Obama signed the Telework Act into law on December 9, 2010. The purpose of the statute is "[t]o require the head of each executive agency to establish and implement a policy under which employees shall be authorized to telework." To make telework more consistent among agencies, the Act sought to transform the federal government's approach to telework by providing a framework for executive agencies to follow in implementing telework. Also driving the Act was an effort to bring about consistency among federal agencies as to participation in and frequency of telework. Highlights, some discussed in detail in the chapters to follow, include:

- Statutory definitions to the terms "employee," "executive agency" and "telework."
- Each Executive agency must establish a telework policy and determine eligible employees. The policy must include a written agreement between the teleworking employee and the agency as a condition to participation.
- Limitations on participation are established.
- Each Executive agency must provide a telework training program for supervisors, managers, and employees.
- Agency development of telework policies must include consultation with the Office of Personnel Management.
- OPM is required to provide policy and guidance and "assist each agency in establishing appropriate qualitative and quantitative measures and teleworking goals." 5 USC 6504.
- The Office of Management and Budget, in coordination with the Department of Homeland Security and the National Institute of Standards and Technology, must issue security guidelines to secure government information and information systems.
- Each agency must appoint an employee of the Office of the Chief Human Capital Officer or comparable office as the Telework Managing Officer.
- OPM must, on an annual basis, submit a report on the telework programs of each agency.
- OPM must establish and maintain a central telework website.

II. TELEWORK AND COVID-19

A. HISTORICAL GUIDANCE

COVID-19 brought about pandemic-forced telework for federal employees and an emphasis on COOPs (continuity of operations) and emergency planning programs to ensure continued functioning of federal operations. As the world was trying to understand the risks and health concerns posed by COVID-19, on February 3, 2020, OPM issued CPM 2020-01, 2019 Novel Coronavirus—a short memorandum encouraging agency leadership to "consider implementing social distancing, including the use of telework."

Four days later, OPM released CPM 2020-02, Human Resources Flexibilities

Available for Federal Employees Impacted by the 2019 Novel Coronavirus, announcing various work-related flexibilities including telework:

> The Federal Government uses telework, among other things, to promote continuity of operations by allowing Federal employees to continue their work at an approved alternative worksite. The Telework Enhancement Act of 2010 defines "telework" or "teleworking" as a work flexibility arrangement under which an employee performs the duties and responsibilities of his or her position, and other authorized activities, from an approved worksite other than the location from which the employee would otherwise work. Telework is a critical tool during emergency situations.
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> Agencies should maximize their telework capacity by entering into telework agreements with as many telework-eligible employees as possible and by conducting exercises to test employees' ability to access agency networks from home. Managers should ensure that there are effective processes in place for communicating efficiently with employees who are teleworking.

OPM Memorandum (CPM 2020-04), Preliminary Guidance to Agencies During Coronavirus Disease 2019 (COVID-19) (March 3, 2020), instructed agencies to "immediately review their current COOP plans to ensure that telework has been fully incorporated and that as many employees as possible have been identified as telework employees in the plan, and are telework capable (or 'telework ready')." One day later, OPM published "Additional Guidance for Coronavirus Disease 2019 (COVID-19)" and included answers to frequently asked questions regarding telework and other COVID-related flexibilities.

On March 12, 2020, the Office of Management and Budget issued Updated Guidance on Telework Flexibilities in Response to Coronavirus, encouraging agencies to maximize telework flexibilities for CDC-identified high-risk employees, e.g., immunocompromised, pregnant workers. On March 16, President Trump announced the "15 Days to Slow the Spread" nationwide effort, calling for social distancing at all levels of society.

B. REENTRY

On April 16, 2020, President Trump issued "Opening Up America Again" wherein employers were encouraged to continue to allow employees to telework. Though guidance regarding a return to in-person work began shortly thereafter (OPM Frequently Asked Questions Regarding the Resumption of Normal Workforce Operations (April 23, 2020)), it wasn't

until July 23, 2021 that OMB issued "Additional Guidance on Post-Reentry Personnel Policies and Work Environment. M-21-25, Memorandum for the Heads of Executive Departments and Agencies, Integrating Planning for A Safe Increased Return of Federal Employees and Contractors to Physical Workplaces with Post-Reentry Personnel Policies and Work Environment (June 10, 2021), called for leadership to take "prudent steps to plan for an effective, orderly and safe increased return of Federal employees…to the physical workplace ("reentry"). The official telework position was "Open with maximum telework flexibilities."

In anticipation of a return to in-person work, on January 20, 2021, Executive Order 13991 established the Safe Federal Workforce Task Force, announcing guidance that agencies should require vaccinations of their employees. Executive Order 14043, issued on September 9, 2021, required all agencies to enforce vaccination mandates for all Federal employees.

OPM's 2021 *Guide to Telework and Remote Work in the Federal Government: Leveraging Telework and Remote Work in the Federal Government to Better Meet Our Human Capital Needs and Improve Mission Delivery* was issued on November 12, 2021, discussing the "Future of Work" and calling on agencies to update their telework and remote work policies. Acknowledging that "the COVID-19 pandemic has transformed the federal workplace" and the imperative of flexible work arrangements to maintain business continuity, the guidance "provides agencies with practical resources and information to help contextualize the continued evolution of telework as a critical workplace flexibility, including a new section providing Federal agencies with policy guidance on remote work."

In its "Status of Telework in the Federal Government Report to Congress Fiscal Year 2020" (December 2021), OPM wrote:

> Where appropriate, agencies throughout the Federal Government expanded telework to the maximum extent possible to protect the health and safety of the Federal workforce and the American people. Indeed, 90 percent of eligible Federal employees participated in telework—a significant increase compared to previous years…. As we look to the future, OPM is encouraging agencies to strategically leverage workplace flexibilities such as telework to help attract, recruit, and retain the best possible workforce, as well as leverage telework as a way to ensure greater resiliency and emergency preparedness through the Federal government. Through measurable progress towards enhanced telework eligibility and participation, and data reporting practices detailed in this report, agencies are better positioned to revisit how they were operating before the pandemic

began and leverage lessons learned to integrate telework into their strategic workforce plans.

In 2022, OMB Memorandum M-22-14, FY2024 Agency-wide Capital Planning to Support the Future of Work (July 22, 2022), addressed capital planning requirements for agencies with an eye toward "post-reentry… work environments."

On April 13, 2023, OMB provided further guidance calling upon agency heads to assess their work environments. "It is the expectation that as part of these assessments agencies will continue to substantially increase meaningful in-person work at Federal offices, particularly at headquarters and equivalents, while still using flexible operational policies as an important tool in talent recruitment and retention." M-23-15, Memorandum for the Heads of Executive Departments and Agencies, "Measuring, Monitoring, and Improving Organizational Health and Organizational Performance in the Context of Evolving Agency Work Environments."

In April 2023, President Biden signed a joint resolution announcing an end to the COVID-19 national emergency. On April 18, 2023, OPM announced the removal of governmentwide operating status of "open with maximum telework flexibilities." Memo to Chief Human Capital Officers entitled "Removal of the COVID-19 Governmentwide Operating Status Announcement"

In its "Status of Telework in the Federal Government Report to Congress Fiscal Year 2022" (December 2023), OPM wrote:

> With COVID-19 no longer the primary driver in workforce decisions Federal agencies are closely examining the balance of in-person and virtual work to maximize mission delivery—including making increases to meaningful in-person work while also utilizing flexible work arrangements as a strategic tool to enhance organizational performance.

Finally, as it relates to this book and telework, on April 12, 2024, President Biden issued an Executive Order revoking the vaccination mandates on the Federal workforce. Executive Order on COVID-19 and Public Health Preparedness and Response.

The pandemic proved what many were reluctant to concede: Telework can be a viable long-term working arrangement. "[A]genices should make any ongoing determinators of telework eligibility based on job functions, and not managerial preference *per se*." CPM 2021-17, Memorandum for Chief Human Capital Officers, Additional Guidance on Post-Reentry Personnel Policies and Work Environment (July 23, 2021).

C. REENTRY GUIDELINES

OPM addressed some of the telework policy considerations for agency reentry guidelines:

A. Telework policy considerations that may help guide agencies in crafting their post reentry policies include:

1. Make telework determinations based on the functions of the job, and not mere managerial preference;

2. Treat employees with similar work functions across work units similarly when determining telework eligibility;

3. To the extent possible, try to align telework programs with employee needs and the business goals of each work unit to avoid a one-size fits all approach to telework participation;

4. When possible, have consistent telework policies across locations;

5. When possible, consider restructuring jobs so that all employees, theoretically, could be eligible for at least situational or occasional telework;

6. Make all employees aware of the agency's telework policy and criteria for telework participation;

7. Require all teleworkers and supervisors of teleworkers complete appropriate training before entering into a telework agreement;

8. Provide adequate telework training to supervisors on how to assess and manage the performance of teleworkers; and

9. If appropriate, allow some or all teleworkers to meet emergency operations or COOP duties through telework rather than reporting to the normal or designated COOP site. Encourage mission essential and non-mission essential employees to practice telework to help the agency prepare to meet emergency situations.

CPM 2021-17, Memorandum for Chief Human Capital Officers, Additional Guidance on Post-Reentry Personnel Policies and Work Environment (July 23, 2021).

III. PROPOSED LEGISLATION: TELEWORK REFORM ACT OF 2023

In 2023, the Telework Reform Act was proposed to codify OPMs definitions of telework and remote work. It includes language that would commit teleworkers to in-person work at least twice per pay period and requires agencies to:

- Adhere to new reporting requirement;
- Renew telework and remote work agreements every year;
- Annually review employees' duties and performance and the needs of the agency to determine changes that would impact the arrangement;
- Train managers of teleworking and remote employees;