

*Original Research Article*

# Telework Regulatory and Legal Contingencies for Employers and Consultants

Majdi Anwar Quttainah<sup>1\*</sup> and William Paczkowski<sup>2</sup>

<sup>1</sup>College of Business Administration, Kuwait University, P. O. Box 5486, Safat 13055, Kuwait.

<sup>2</sup>Palm Beach Community College 3160, Pga Blvd Palm Beach Gardens, FL 33410.

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Contingency theory is used to investigate legal and regulatory constraints on telework practices. This literature review provides an important resource that helps bridge the gap between academic insight and human resources consultants' application in the establishment of telework practices that are in conformance with these rules. This literature review aims to discuss the Legal and regulatory issues associated with telework, which are: (1) employment status of teleworking employees, (2) safe and healthy workplaces, (3) the Fair Labor Standards Act, (4) teleworkers with disabilities, (5) intellectual property protections, (6) environmental impacts of telework, (7) teleworkers' privacy, and (8) telework regulations in the international setting.

**Keywords:** Telework, Employer, Employee, Consultant, Legal contingency, Regulation, Workplace, Workers.

## INTRODUCTION

Working outside of the traditional office setting in a telework arrangement has continued to be a fruitful topic of academic research. Existing literature has investigated teleworking from the perspectives of employers and employees through theoretical lenses including strategy, environmentalism, information technology, leadership, and organizational behavior. With a focus on the interrelation of academia and practice, this paper seeks to fully explore how contingency theory helps explain external constraints affecting telework and how this theoretical perspective is linked to practical applications by human resource consultants.

Telework, in general, entails an arrangement where firms allow their employees to perform required tasks in a location other than the main office. This ability to do this work is generally facilitated by technology resources for communication and productivity (Bailey & Kurland, 2002; Dewett & Jones, 2001; Guimaraes & Dallow, 1999; Haddon & Brynin, 2005; Neufeld & Fang, 2005; Westfall, 2004). The use of e-mails, internet, and telephones and any other form of electronic communication resources allows teleworking employees to exchange information with their subordinates, coworkers, superiors, and customers (Chalmers, 2008; Fisher, 2005; Gajendran & Harrison, 2007; Stanworth, 1998; Topi, 2004).

An ongoing discussion of the issues relating to telework is important because of the potential for the positive impact of

this working arrangement on employee productivity, motivation, satisfaction, and work/life balance. If properly utilized, the telework arrangement provides a multitude of benefits that have been explored in previous literature. In particular, a host of management literature has determined that telework leads to a potential increase employees' productivity and motivation (Barsness, Diekmann, & Seidel, 2005; Butler, Aasheim & Williams, 2007; Daniels, Lamond, & Standen, 2001; Martinez-Sanchez, et al., 2008; Mayo, et al., 2009; Sanchez, et al., 2007).

Work satisfaction has been found to be impacted by the nature of the telework relationship. Some authors have determined that, in general, satisfaction is enhanced for those who are allowed to telework (Ahuja, et al., 2006; Bailey & Kurland, 2002; Belanger, 1999; Sanchez, et al., 2007; Virick, Dasilva, & Arrington, 2010). Further, a goal that is often cited is the ability of telework to facilitate work/life balance including those achieved through a more flexible work schedule (Bailey & Kurland, 2002; Baruch, 2000; Higa & Wijayanayake, 1998; Hilbrecht, et al., 2008; Kossek, Lautsch, & Eaton, 2006; Lautsch, Kossek, & Eaton, 2009; Major, et al., 2008; Sanchez, et al., 2007).

Clearly, many of the issues associated with telework are applicable irrespective of whether employees work within or away from the traditional office setting. However, it is critical to recognize that certain issues and complications are augmented

by the total reliance that teleworkers have on technology to perform their jobs. This absolute dependence amplifies the implications of existing regulations and generates issues that are unique to the teleworking relationship. Those legal and regulatory contingencies that are unavoidable in the telework setting and create constraints imposed on human resources managers and consultants alike are the focus of this paper.

The goal of this paper is to discuss the legal guidelines and constraints that influence teleworking arrangements. Human resources managers and consultants must adhere to not only explicit legal requirements set forth in statutes and regulations, but also those actions that can lead to litigation from their employees and customers. Further, care must be taken to identify international telework legal considerations that intertwine United States issues with those of Europe and Asia.

Contingency theory provides important insight into how decisions regarding telework are made within an organization by human resources managers, HR consultants, and consultants. Contingency theory proposes that there is no best way to make decisions regarding strategy, policies, or practices in a business environment. Instead, the optimal course of action is dependent upon external influences and constraints.

Constraints based on cultural norms, social values, and managerial practices all influence the means by which a firm's employees can be treated (Ferris, Hochwarter, & Buckley, 1999; Mayo, et al., 2009). Legal and regulatory constraints are encompassed within the sphere of influences. Those influences create contingencies that must be addressed by employers and consultants in creating and maintaining a teleworking relationship.

This paper contributes to the existing telework literature in four important ways. First, it extends the analysis of the legal considerations associated with telework in the academic management literature, using contingency theory as a structure of analysis. Second, it updates the scope of literature that had been collected in a previous telework articles, particularly the review article Bailey and Kurland (2002) and the telework research meta-analysis from Gajendran and Harrison (2007). Third, this paper provides a review of the current management literature that directly addresses legal issues of telework as a preliminary resource for future telework research. Finally, it provides a resource to help bridge the divide between academia and consultants in terms of recognizing unavoidable constraints on the teleworking arrangement.

This paper proceeds as follows. First, I will discuss legal issues relating to specific statutes and regulations, including (1) legal status of teleworkers, (2) workplace safety and conditions, (3) workers with disabilities, (4) intellectual property, (5) environmental impacts, and (6) monitoring. Next, I will review issues that can become the basis for litigation, particularly those involving broad areas of the invasion of privacy. Fourth, I discuss telework legal issues in the international setting. I will then conclude with implications of this literature review and the importance of further research regarding the management implications of telework under a legal framework.

## LEGAL AND REGULATORY IMPLICATIONS OF TELEWORK

### *Employment Status of Teleworkers*

Only when a telework is deemed to be equivalent to full time employment, as that which is performed in a traditional office setting will protections afforded by laws and regulations apply. Contingency theory dictates that the constraints on human resources managers and consultants understand the constraints imposed by the legal status of their teleworking employees. The treatment of those who telework cannot diverge from the human resource practices that are applied to employees in a more traditional work setting.

A threshold legal consideration is whether a teleworker is an employee of the firm or acts as an independent contractor. Those who are deemed to be employees are generally entitled to compensation, legal, and regulatory protections commensurate with those who work in a more traditional setting in accordance with the telework agreement (Baruch & Smith, 2002; Harris, 2003; Hartstein & Schulman, 1996; Moon & Stanworth, 1997; Nunes, 2005; Potter, 2003; Shin, Sheng, & Higa, 2000). Further, legal and regulatory protections afforded employees hinges on this determination of employment (Kurland & Egan, 1999; Swink, 2001).

A substantive test of employment is the degree of control that the employer holds over the employee (Baruch, 2000; Swink, 2001). Indicia of the level of control includes the type of work that is performed, the degree of permanence of relationship, repercussions if the individual fails to complete work, the ability to terminate the arrangement, withholding of income tax, and whether equipment for the completion of required tasks is provided by the employer (Swink, 2001; Townsend & Bennett, 2003).

The provision of equipment by the employer is a clear indication of employment and control in the context of telework. This is not a point of contention in the traditional work arrangement. Employers provide workspace, equipment, and facilities to perform required work for employees at a physical office. However, teleworkers who work away from the office, at home or otherwise, generally do not receive remuneration for this alternative physical space. When employers provide the means of communication that facilitates the telework arrangement, such as a computer and/or internet access, a finding of employment is difficult to circumvent.

Determinations of employee status are more ambiguous in some countries. For example, Ellison (1999) outlines the standards of the type of work that can be performed in a worker's home to ensure the status of employee under German statutory guidelines. Part-time telework under German law is also discussed by Hornung & Glaser (2009). Both articles state that despite these rules, teleworking arrangements do not adhere to the control standard that is prevalent in the United States. Telework employment in India is also unclear because the use and utility of this type of arrangement is largely unregulated by the government (Mitter, 2000). Once the determination that a person engaged in telework is indeed an employee, the legal implications of the arrangement can be easily ascertained.

## WORKPLACE CONDITIONS AND SAFETY OF TELEWORKERS

### *Occupational Safety and Health Act (OSHA)*

Standards of safety in the workplace are set forth in the Occupational Safety and Health Act (OSHA) that was enacted in 1970, which created the Occupational Safety and Health Administration. Under OSHA, covered employers are required to ensure that all employees must be afforded safe and healthy conditions in which to work (Mello, 2007; Raiborn & Butler, 2007; Swink, 2001).

An OSHA Directive, CPL 2-0.125, which was promulgated in February of 2000, specifically addresses home-based worksites relating to the telework arrangement. In this directive, the Department of Labor explicitly states that it “strongly supports telecommuting and telework. Family-friendly, flexible and fair work arrangements, including telecommuting, can benefit individual employees and their families, employers, and society as a whole.” While OSHA will not inspect the work areas of telework employees nor require employers to do so, safe working conditions must be maintained and can lead to regulatory violations if a complaint is made (Farmer, 1995; Mills, et al., 2001; Potter, 2003; Swink, 2001). Accordingly, conditions of healthy work under OSHA ultimately remain under the purview of the employers.

Complications associated with computer use that is prevalent with teleworkers can result in musculoskeletal disorders (Harrington & Walker, 2004). Ergonomically appropriate conditions for these disorders are a potential requirement for a healthy work environment (Harrington & Walker, 2004; Hislop & Axtell, 2007; Ozcelik, 2010; Sharit, et al., 2009). Further, emotional stress that results in unhealthy working conditions associated with the telework arrangement may give rise to OSHA or other health condition violations (Konradt, et al., 2000; Macik-Frey, Quick, & Nelson, 2007; Mann & Holdsworth, 2003). In order to ensure compliance with OSHA, employers may be compelled to inspect the location where telework occurs, even if doing so would potentially constitute an invasion of privacy (Fairweather, 1999).

### *Workers' Compensation Law*

Work-related injuries are covered by an amalgam of laws generally grouped as “Workers’ Comp”. Under these statutes, employees who suffer work-related injuries are entitled to employer-provided replacement of income and some measure of coverage of attendant medical expenses (Martinez-Sanchez, et al., 2008; Mills, et al., 2001; Stone, 2006). As a result of this coverage, employees are excluded from bringing additional legal action against their employers for the injuries. These laws are not reliant on OSHA provisions, although these regulations may give rise to potential claims (Hartstein & Schulman, 1996; Potter, 2003) nor is there any federal standardization. Each state designates the definition of covered employees and the types of injuries that will generally be covered.

The definition of who will be considered an employee under these statutes tends to be quite broad. For example, New York State Workers’ Compensation Law, Sec. 203, defines a covered employee as a person that “performs any work for remuneration or profit” and is “engaged in the service of an

employer ... in any trade, business, or occupation.”<sup>1</sup> The workers’ compensation law in Texas is similarly far-reaching, in that it covers all activities that are undertaken in the “course and scope of employment” for activities “conducted on the premises of the employer or at other locations” (Hartstein & Schulman, 1996). Most states have similar course-of-employment language that generally includes the telework arrangement (Stone, 2006).

Teleworkers may become injured at work for a variety of reasons. As with any working arrangement where individuals use computers extensively, repetitive stress caused by continued computer use can cause result in carpal tunnel syndrome or other ergonomic-related injuries.

The likelihood of these types of injuries is greatly increased for those who telework since they must use a computer almost exclusively in their work requirements (Swink, 2001; Harrington & Walker, 2004; Ozcelik, 2010). Injuries caused by falling at home, traveling for work-related purposes, or during activities that may also generally occur in a traditional setting (e.g., while eating lunch), are also subject to workers’ compensation claims (Martinez-Sanchez, et al, 2008; Mills, et al., 2001; Swink, 2001). However, it is unresolved as to whether injuries at home will result in workers’ compensation claims (Budworth, 1997; Stone, 2006). Accordingly, consultants are required to incorporate these unknown potential factors of liability as contingencies of telework policies and practices.

### *Emotional Stress as an Unsafe Working Conditions*

The ability to work away from the traditional office under a teleworking arrangement may result in negative consequences and increased emotional stress. Family relationships, job requirements, managerial trust, and other external influences can generate conflicts (Golden, Veiga, & Simsek, 2006; Greenhill, A. & Wilson, M. 2006; Kelliher & Anderson, 2010; Sanchez, et al., 2007; Sorenson & Cree, 2000; Standen, Daniels & Lamond, 1999).

Turnover intentions and decreased organizational commitment can result from these stresses (Ahuja, et al., 2006; Bailey & Kurland, 2002; Crossan & Burton, 1993; Golden, 2006; Hunton & Norman, 2010; Mann & Holdsworth, 2003; Ory & Mokhtarian, 2006; Sanchez, et al., 2007). The divide between work and family roles may become blurred. Especially when employees are enabled to work from home, which can cause strain (Breaugh & Frye, 2008; Desrochers, Hilton, & Larwood, 2005; Fenner & Renn, 2010; Fisher, 2005; Hecht, T. D. & Allen, N. J. 2009; Johnson, Andrey, & Shaw, 2007; Sharit, et al., 2009; Shumate & Fulk, 2004; Tietze, 2005; Tietze, Harris, & Musson, 2003; Tietze & Musson, 2005).

A reduction in a trusting relationship among employees and their managers can ensue in the teleworking environment (Adler, Noel & Ambrose, 2006; Gajendran & Harrison, 2007; Kasper-Fuehrer & Ashkanasy, 2001; Kurland & Bailey, 1999; Raghuram & Wiesenfeld, 2004) and can be a considerable problem in affecting overall productivity and emotional stress. Traditional employees may feel that teleworkers are afforded preferential treatment (Felstead, et al., 2002; Golden, 2007). Conversely, teleworkers may observe that those who work in a more traditional setting are granted more resources and opportunities for success (Chiaburu & Harrison, 2008; Chidambaram & Jones, 1993; Gajendran & Harrison, 2007)

<sup>1</sup> New York Workers' Compensation Legal Library.  
[http://www.workerscompensation.com/regulations/statedepartment.php?ID=9712&Parent=9712&state=new\\_york](http://www.workerscompensation.com/regulations/statedepartment.php?ID=9712&Parent=9712&state=new_york)

A challenge that is of particular concern to managers is the feeling of isolation felt by teleworkers (Cooper & Kurland, 2002; Golden, Veiga, & Dino, 2008; Kurland & Egan, 1999; Thatcher & Zhu, 2006; Vega & Brennan, 2000). This detachment from others who are at a main office and from others who telework encumber teleworking employees' capabilities for enhanced productivity (Kamerade & Burchell, 2004).

These emotional stressors that are specifically related to telework may result in a determination that the working arrangement is unsafe and can generate viable workers' compensation claims (Taylor, Fieldman, & Altman, 2008). Consultants and their client firms must look at the contingency tradeoffs between the benefits of telework and the possibility of emotional stress that can be suffered by the teleworking employees.

### **FAIR LABOR STANDARDS ACT**

The number of hours that an employee is allowed to work before overtime must be paid is set forth in the Fair Labor Standards Act (FLSA) in 1938. The law is directed only at those firms that engage in interstate commerce and have gross revenue in excess of \$500,000 per year. The Department of Labor provided regulatory guidelines in the "homeworker's exception" (29 CFR Section 785.23) which allows for compensation agreements that do not follow strict hourly wage guidelines. However, this regulation does not specifically apply to the teleworkers arrangement (Hartstein & Schulman, 1996; Stone, 2006).

Under this statute, employees that are not specifically exempted from statute (i.e., are not salaried) must be compensated for work in excess of forty hour in a given week. However, the fact that an employee is salaried does not automatically excuse the employer from paying overtime in adherence with the FLSA. Salaried employees must also participate in "white collar" executive, administrative, professional, computer, and outside sales activities in order to be exempted under the law (Potter, 2003; Steward, 2000; Swink, 2001).

The burden is on the employer to demonstrate that accurate time records have been maintained so as to assure compliance with the FLSA (Mills, et al., 2001; Ozelik, 2010). This requirement is particularly challenging in that determining the amount of work performed by teleworkers is extremely difficult (Ellen & Hempstead, 2002). Monitoring teleworking employees is a tenuous requirement, particularly when it is unclear to the employer whether they are "on the clock" (Kurland & Egan, 1999; Rustad & Paulsson, 2005; Stone, 2006).

Human resource managers and consultants are required to evaluate how to determine and measure the amount of work undertaken by teleworkers has been a source of extensive research. For example, employers may expect their teleworking employees to be available to work at any time (Bailey & Kurland, 2002; Chalmers, 2008; Hartstein & Schulman, 1996; Mirchandani, 1998; Sanchez, et al., 2007). The pressure of this unrelenting ability to engage in work that may be explicitly imposed in the telework arrangement can cause undue stress and work exhaustion (Golden, 2006; Hornung & Glaser, 2007; Mann & Holdsworth, 2003; Shin, Sheng, & Higa, 2000). Employers may not be specifically bound to the provisions of the Fair Labor Standards Act regarding the number of hours an employee may engage in telework. However, recognizing the need for defining the scope and limitations of how much work must be undertaken is

important to avoid the challenges of excess workload that can be prevalent in a teleworking arrangement.

### **FAMILY MEDICAL LEAVE ACT**

The Family Medical Leave Act (FMLA) was enacted in 1993 by the federal government so that individuals would be enabled to care for family members or address certain health considerations without risking the loss of their employment. Employers are required under the provisions of the law to allow employees to have up to twelve work weeks in a twelve-month period of unpaid leave and then return to work.

Those employees who do not work in excess of 1,250 hours or those businesses with fewer than fifty employees are not covered by the FMLA (Department of Labor, Wage and Hour Division, 2010; Colopy & Dielman, 2009; Hartstein & Schulman, 1996; Kelly, et al., 2008; Stone, 2006.).

Employers must attempt to find a position that is substantially equivalent upon the individuals' return to work, which may prove problematic if the teleworking arrangement is no longer suitable for the position that had been vacated during this twelve-week period of time. Teleworkers who are fit the contingency that designates them as full-time employees must be afforded this statutory protection in the same manner as those who perform work in the traditional office setting (Kelly, et al., 2008).

### **TELEWORKERS WITH DISABILITIES**

The Americans with Disabilities Act of 1990 prohibits discrimination based on a person's disability that limits the ability to performance of major life activities (Ludgate, 1997; 42 U.S.C. 12111). Under this law, employers must attempt to make a reasonable accommodation to enable their employees to continue to work despite their impairment.

Teleworking allows employers to continue to benefit from the skills of their employees as a reasonable accommodation to their disability. This arrangement alleviates the potential need to reengineer a workspace in the traditional work setting (Alimandi, Andrich, & Porqueddu, 1995; Gemignani, 2000; Potter, 2003; Schopp, 2004; Further, employees may prefer the facilities that are available in their own homes to facilitate their needs (Bricout, 2004).

The Equal Employment Opportunity Commission (EEOC) and courts have been the arbiters of disputes whether reasonable accommodations have been attempted (Emens, 2008; Hartstein & Schulman, 1996; Kaplan, Weiss, Moon, & Baker, 2006). Telecommuting is not directly identified in legislation or regulations as to whether it is a reasonable accommodation, but has been found to be an appropriate means by which the needs of an employee may be facilitated (Baker, Moon, & Ward, 2006; Cassam, 1995; Kaplan, et al., 2006). Similar determinants as those from the EEOC regarding the viability of telework as an accommodation for the disabled have been made in Portugal (Nunes, 2005) and Canada (Montreuil, & Lippel, 2003; Moos & Skaburskis, 2010).

Employers are not required to allow their employees to telework as a reasonable accommodation of disability (Howard, 1997; Ludgate, 1997). This is particularly the case where the effective performance of the scope of employment does not readily translate to the use of telework. For example, manufacturing or service industries may require physical presence at a work site. Telework may not be used as an alternative working arrangement when a disability is not highly restrictive. For example, Peters, et al. (2004) found that those employees whose impairments were not completely restrictive

(e.g., requiring a wheelchair), the telecommuting option was neither offered nor accepted at a statistically significant level greater than that of a non-disabled individual. Finally, employers may not force disabled employees to become teleworkers. That is, employers cannot avoid the legal requirements of making reasonable efforts to provide an appropriate work environment (Ludgate, 1997).

## **INTELLECTUAL PROPERTY PROTECTIONS AND TELEWORK**

The technological capabilities of email allow for the risk of transmittal of sensitive company information with relative ease. Access to companies' information may be critical to teleworkers' ability to perform their job functions, but necessarily require the information to be disseminated away from the traditional office (Barlow, et al., 2007). The susceptibility of key processes, patentable technology, trade secrets, and other strategic information to circumvent security measures is of critical concern to managers.

Clearly, intellectual property may be vulnerable regardless of where employees work. However, the constant access that is generally afforded to those who work outside of the office enhances the risks that this information could be improperly transferred (Mills, et al., 2001; Raiborn & Butler, 2007; Smith & Tabak, 2009). Proprietary data is constantly at risk with the continuing use of electronic communication inherent in telework, which could severely damage firms' competitiveness and could potentially lead to legal challenges.

Employers are held liable for infringement of intellectual property laws that occur as the result of teleworkers' activities that occur under the scope of their employment (Martinez-Sanchez, et al., 2008; Mills, et al., 2001; Swink, 2001). Accordingly, consultants cannot ignore the potential legal liability that can ensue if teleworkers are granted a great deal of leeway over the information that is transmitted in the course of their work away from the firewall or other security precautions that may be more prevalent in a traditional office setting.

## **ENVIRONMENTAL IMPACT OF TELEWORK**

One of the benefits related to telework is the reduction of commuting and the associated avoidance of polluting emissions of automobiles (Andreev, Salomon, & Pliskin, 2010; Aundhkar, et al., 2000; Baruch, 2001; Kitou & Horvath, 2008; Mokhtarian, Collantes, & Gertz, 2004; Safirova, 2002; Zhou, Su, & Winters, 2009). These environmental protection influences are tangentially linked to business purposes, such as the generation of goodwill and corporate responsibility. The external influences of the regulatory requirements of pollution reduction are another contingency factor that is included in the practice of teleworking.

Statutory support has been created to reinforce this benefit. The Clean Air Act (42 U.S.C. 7401) was passed in 1963 in attempts to limit those activities that generate airborne pollution. Under this statute, the Environmental Protection Agency (EPA) is tasked to develop and enforce regulations that will prevent exposure to hazardous levels of airborne contaminants. To the extent that teleworkers are enabled to work from home or an alternate locate that allows them to avoid a daily commute, the associated pollution that would otherwise be generated by the use of their means of travel will be avoided (Aundhkar, et al., 2000; Baruch & Smith, 2002; Harstein & Schulman, 1996; Kitou & Horvath, 2008; Rhee, 2009; Safirova, 2002).

The environmental benefits of telework were more fully recognized as a response to the significant amendment to the Clean Air Act in 1990 (42 U.S.C. 37411). Under these new provisions, corporations were explicitly required to reduce work-related traffic congestion (Guimaries & Dallow, 1999; Handy & Mokhtarian, 1996; Hartstein & Schulman, 1996). Those states with the worst air quality were specifically identified. Corporations with more than 100 employees in these targeted states were required to reduce the number of daily commuters by at least twenty-five percent (Pearce, 2009). However, the enforceability of legal requirements to reduce greenhouse gasses is tenuous, particularly where there is an absence of public transportation, and states are reticent to institute an unattainable mandate (Hartstein & Schulman, 1996).

Companies that operate internationally must contend with pollution constraints as well. International regulations for pollution reduction directly require that telework be considered as a means of traffic control (Larsen & Andersen, 2007; Schweitzer & Duxbury, 2006; Telework in the European Union Report, 2010). Irrespective of the degree of enforcement of pollution standards, the reduced travel resulting from teleworking effectively reduces pollution relating to a daily commute. Further, the current trend to reduce carbon footprints and ozone-depleting impurities may lead to a greater to commitment to enforcing these provisions (Kitou & Horvath, 2008).

## **PRIVACY AND TELEWORK**

### ***Constitutional Protection***

The right to privacy, free speech, and protections from unreasonable search and seizure are not specifically covered by the United States Constitution. In fact, private-sector teleworkers are not afforded constitutional protections with respect to the actions of private firms (Nord, McCubbins, & Nord, 2006; Smith & Tabak, 2009). Governmental action is required. As such, teleworking employees of the federal, state, and local governments are able to rely on the U.S. Constitution for statutory reinforcement of these rights. Federal agencies are highly cognizant of the rights that accrue to governmental teleworkers.

In 2001, the U.S. government's General Accounting Office (GAO) prepared a report specifically to identify the potential barriers to telecommuting that private companies face, including privacy issues, intellectual property, health and safety, and international legal considerations. (General Accounting Office, 2001). It is clear, however, that those teleworkers who work for private firms must rely on other statutes or, more frequently, litigation using common law tort actions to seek privacy protections (Nord, McCubbins, & Nord, 2006; Smith & Tabak, 2009).

### ***Electronic Communications Privacy Act***

The Electronic Communications Privacy Act of 1986 (18 U.S.C. 2510) is the only federal statute that specifically addresses surveillance of electronic communications by employers and the associated privacy protections that can apply to teleworking activities. The statute encompasses virtually all communication facilitated by the use of technology in the course of interstate or international commerce. The law specifically allows an employer to survive privacy claims if it satisfies any one of three specifically delineated exceptions (Smith & Tabak, 2009).

First, if the employer is the “provider” of the equipment used for communication, then the employer is fully able to monitor internet activity. The provider exception includes the employer providing or reimbursing the costs of internet service. Second, the employer is allowed to monitor if there is “consent.” Where at least one party to the communication provides consent to be monitored, then there is no violation of the Act. Employee consents are prevalent with initial logon to employer-provided internet servers (Smith & Tabak, 2009). Third, monitoring can occur in the “ordinary course of business.” The employer may monitor employee communications to ensure quality control, prevent inappropriate usage, inhibit excessive usage, and deter usage not related to authorized purposes (Lasprogata, King, & Pillay, 2004; Rustad & Paulsson, 2005; Smith & Tabak, 2009). Of particular concern in the teleworking environment is the prevention of sexual harassment and discrimination (Beasley, Seubert, & Lomo-David, 2001). Monitoring of electronic communication is often the only way to detect and prevent this highly inappropriate behavior.

Electronic communications are not only capable of being monitored by supervisors, but also are subject to recording and/or archiving for future scrutiny by employers. These memorialized conversations are also subject to discovery in legal proceedings. In fact, those who use email in the course of their employment do not enjoy the protection under the Fifth Amendment to be protected from self-incrimination (See, e.g. United States Supreme Court Case, *Braswell v. United States*, 487 U.S. 99 (1988); Barker, Cobb, & Karcher, 2009). Maintaining the integrity of electronic documents, including employee emails and recorded telephone conversations may be critically important for continuing operations, but the exposure to potential liability is of concern to employers.

### **Litigation of Privacy Concerns by Teleworkers**

Litigation has the impact on constraining managers in the implementation of telework arrangements so that future lawsuits can be avoided. Absent the legal precedents enforced by the court system, the best interests of teleworking employees could suffer potential infringement. The ability of teleworkers to commence lawsuits under common law provides an important recourse against employers who are believed to have acted improperly.

In general, employers are responsible for ensuring that their employees and customers avoid an invasion of privacy, theft of identity or other personal information, or exposure to a hostile working environment (Ambrose & Gelb, 2006; Cohen & Cohen, 2007). Most states recognize the common law cause of action for invasion of privacy. In general, the act of intentionally intruding upon the privacy of an individual if that intrusion would be highly offensive to a reasonable person (Cohen & Cohen, 2007; Nord, McCubbins, & Nord, 2006).

The challenge for human resource managers and consultants who need to protect the firm from suit for invasion of privacy must overcome the presumption that either (1) the employee had a reasonable expectation of privacy or (2) that the intrusion was in fact highly offensive. As indicated above, there are statutory exemptions from this reasonable expectation. For example, where the employer provides the means of engaging in telework, then the Electronic Communications Act precludes a breach of privacy claim. Another example where a privacy claim will not withstand dismissal is when the employee must actively accept the employers' conditions of use of telework-related technology.

Teleworkers' use of electronic communication allows managers to easily monitor all communications to the extent they deem appropriate. This monitoring can occur without the knowledge or consent of the employees and is completely technologically feasible (Baruch, 2000). Such control mechanisms may give rise to an invasion of individual privacy of teleworkers in the home environment to the extent that it may be reasonably construed to be an inappropriate intrusion beyond allowable business purposes (Baruch, 2000; Nord, McCubbins, & Nord, 2006; Swink, 2001). Employers can overreach the “business purpose” exception to the Electronic Communications Privacy Act and intrude into employees' privacy (Smith & Tabak, 2009). Employers can monitor telephone conversations, but only to the extent that they can determine whether the conversation is personal. There is no definitive standard as to when this determination must be made (Nord, McCubbins, & Nord, 2006).

Monitoring of teleworking activities may cause employees to feel that their employers are not acting ethically or morally in how they are treated (Guthrie, 1997; Moon & Stanworth, 1997). Teleworking employees may determine that they are not trusted by their employers (Alder, Schminke, & Noel, 2007; Zweig & Webster, 2002). Accordingly, monitoring of teleworking employees may give rise to privacy concerns, even if these considerations of privacy do not reach the level of legal liability (Potter, 2003).

Employees may determine that employers that act in a manner that is a perceived invasion of privacy are acting unethically (Alder, Schminke, & Noel, 2007; Baruch, 2000; Guthrie, 1997). In addition, monitoring of performance, activities, and communications in conjunction with teleworking activities may heighten the feelings of perceived unethical behavior by employers (Baruch, 2000; Daniels, Lamond, & Standen, 2001; Ellison, 1999). Accordingly, overall productivity can suffer when teleworking employees conclude that the employers' monitoring of activity and/or communications is excessive.

The legitimate purposes of employers to engage in activities that infringe on teleworkers' privacy is rife with challenges. Legal liability may result from excessive monitoring of communications or behavior. Even the threat of liability, even if unfounded, can have repercussions on the employers' reputation outside of the firm. Moreover, teleworkers may perceive that the employers are acting beyond their appropriate capacity and are therefore engendering a lack of trust of those who are working outside of the traditional office environment. Accordingly, privacy considerations require a delicate balance of business purposes that would not exceed a reasonable expectation of privacy that teleworkers maintain in their work environment.

### **GLOBAL TELEWORK LEGAL CONSIDERATIONS**

Regulations, laws, and treaties among countries outside of the United States give rise to additional considerations regarding the teleworking employment relationship. Irrespective of the precedents and guidelines that have been established in the United States, firms that have a multinational presence are subject to many potential variants of telework issues (Baruch & Yuen, 2000; Darbishire, 2000).

The 2010 Telework in the European Union report commissioned by the European Foundation for the Improvement of Living and Working Conditions sets forth specific definitions, guidelines, and requirements regarding telework (Deakin & Koukiadaki, 2007; Larsen & Andersen, 2007; Telework in the European Union Report, 2010). This

report involves the laws and regulations of European Union countries relating to issues of telework including (1) voluntary work arrangement, (2) employment safety and work conditions, (3) privacy, (4) data protection, (5) organization of work, (6) accommodations for disabled workers, (7) telework training, (8) collective bargaining rights, and (9) the interrelation of legal and regulatory requirements specific to individual countries that are members of the European Union (Telework in the European Union Report. 2010).

All of the countries that are members of the European Union have taken part in this agreement and incorporated some or all of its precepts into formal teleworking guidelines. Many authors have explored the legal and regulatory implications of teleworking practices in various individual countries. These analyses do not directly stem from the European Union Report of 2010, but rather explore the unique legal requirements that are imposed in each country with respect to the teleworking arrangement. The international telework literature includes broad-based global legal issues (Deakin & Koukiadaki, 2007; DiMartino & Wirth, 1990; Lasprogata, King, & Pillay, 2004; Smith & Tabak, 2009), throughout Europe (Bilevičiūtė & Bilevičienė, 2010; Dimartino & Wirth, 1990; Kamerade & Burchell, 2004; Rustad & Paulsson, 2005), or Asia (Gordon, & Peterson, 1993).

Journal articles also have directed a focus on particular countries including: Canada (Montreuil, & Lippel, 2003; Moos & Skaburskis, 2010; Solomon & Templer, 1992), Egypt (Abdel-Wahab, 2007); India (Aundhkar, et al., 2000; Irani, Gothoskar, & Sharma, 2000; Mitter, 2000; Mitter & Sen, 2000), Italy (Baroncelli, 1998; Valsecchi, 2006), Japan (Higa & Shin, 2003; Higa & Wijayanayake, 1998; Hori, 2007; Mitomo & Jitsuzumi, 1999), Norway (Hjorthol, R. J. 2006); Portugal (Nunes, 2005), Spain (Obra, Camara, & Melendez, 2002), The Netherlands (Peters & Van Der Lippe, 2007), Turkey (Iscan & Naktiyok, 2005), and United Arab Emirates (U.A.E.) (Aboelmaged & Elamin, 2009). All of these countries adhere to many of the principles and guidelines as set forth in the United States laws and regulations. However, each country may have unique considerations that require close inspection when engaging in telework arrangements within its borders.

## CONCLUSION

As legislation, regulation, and litigation relating to telework continue to expand, management research must consider their implications. Further studies can develop the impact of the legal constraints on managerial and employee behavior. The extent to which the performance at the firm and/or employee level is impacted by the continuing threat of legal repercussion can be determined over time. It behooves management scholars to consider how legal challenges act as ever-present external influences on managers' and employees' ability to reap the benefits of the teleworking arrangement.

The literature review set forth in this paper seeks to shed light on the issues associated with telework as viewed through the lens of contingency theory and those guidelines set forth by law and regulation. Telework research has continued to investigate the means by which telework can increase productivity and provide a means to enhance the work experience of teleworking employees. Policies and practices must conform to the protections engendered by existing law in order to avoid exposure to criminal and/or civil liability. Prudence dictates that employers and managers identify those legal issues that may arise when the teleworking arrangement is considered.

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