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Telework in Executive Agencies: Background, OPM Guidance, and 116th Congress Legislation Following Coronavirus

Background

The Telework Enhancement Act of 2010, enacted on December 9, 2010 (P.L. 111-292, 124 Stat. 3165), and codified at Chapter 65 of Title 5 of the *United States Code*, authorizes telework in executive agencies, defines *teleworking*, and establishes requirements for telework programs. The law (at 5 U.S.C. §6504(d)(1)) requires that the telework policy of each executive agency “incorporate telework into the continuity of operations [COOP] plan of that agency.” A COOP plan ensures that essential functions continue to be performed during disruption of normal operations. Furthermore, Section 6504(d)(2) requires that “[d]uring any period that an executive agency is operating under a continuity of operations plan, that plan shall supersede any telework policy.”

The U.S. Office of Personnel Management (OPM) is required to report annually to Congress on the status of telework in the federal government. In January 2019, OPM published the most recent report, which provided data for FY2017. According to the report, 1,013,975 employees were eligible to telework, and 436,732 employees were teleworking in a federal workforce that includes 2,193,400 employees. Therefore, 43% of eligible employees were teleworking. Agencies reported that 50% of employees who were teleworking did so on a situational or ad hoc basis, 32% teleworked three or more days per two-week period, 28% teleworked one to two days per two-week period, and 6% teleworked no more than once per month. Some 80% of agencies reported that telework was emphasized as part of its COOP. OPM noted that telework data collection remains a challenge for several reasons, including the limitations of technology to track employee participation.

COVID-19 Telework Guidance

Coronavirus Disease 2019 (COVID-19) is prompting a review of the telework law in the 116th Congress. According to the U.S. Centers for Disease Control and Prevention, COVID-19 is a respiratory disease caused by a novel (new) coronavirus first detected in China and now detected in the United States. On January 31, 2020, Secretary of Health and Human Services Alex Azar declared a public health emergency for the United States in responding to COVID-19. On March 7, 2020, OPM issued additional guidance to federal agencies on COVID-19 that stated, in part:

Agencies are strongly encouraged to continue reviewing and updating their emergency and COOP plans, as needed.... Agency COOP plans should have telework fully incorporated so that as many employees as possible are working during a COOP

activation. Agencies should immediately review their current telework policies and ensure that written telework agreements are in place for as many employees as possible. Agencies are strongly encouraged to sign situational (ad hoc) telework agreements with all telework eligible employees currently without a signed telework agreement. Further, agencies should reassess their factors for determining telework eligibility to determine if additional categories of employees may be classified as telework eligible. Finally, OPM encourages agencies to take steps to prepare all telework-ready employees to effectively telework and have access to agency IT systems and networks, as may be necessary, should the conditions from COVID-19 so warrant a Federal office closure.

The OPM guidance also attached responses to frequently asked questions that reiterated policies on various matters, among them that

[a]n agency [must] have a solid technology infrastructure established to support a high level and volume of connectivity, so employees can work seamlessly from their alternate locations (e.g., home) and maintain established records and security requirements.

During an agency closure due to COVID-19 ... telework program participants will generally be expected to continue working from home.... They must telework for the entire workday, take other leave (paid or unpaid) or other time off, or use a combination of telework and leave or other paid time off.

On March 15, 2020, the U.S. Office of Management and Budget (OMB) issued “Updated Guidance for the National Capital Region on Telework Flexibilities” (M-20-15). OMB stated:

All Federal Executive Branch departments and agencies within the National Capital Region (NCR), consistent with OMB’s recent guidance (OMB M-20-13), are asked to offer maximum telework flexibilities to all current telework eligible employees, consistent with operational needs of the departments and agencies as determined by their heads. In addition, we encourage agencies to use all existing authorities to offer telework to additional employees, to the extent their work could be telework enabled. If employees are not eligible for

telework, agency heads have the discretion to offer weather and safety leave, or the agency's equivalent, including for employees who may not have been considered "at higher risk" under OMB M-20-13. Furthermore, agency heads should develop an operational plan that maximizes resources and functional areas to most safely and efficiently deliver these mission-critical functions and other Government services (including but not limited to staggered work schedules and other operational mitigation measures).

The earlier OMB M-20-13 guidance noted, "In determining their telework and leave decisions, agencies should consider the mission-critical nature of their work." Furthermore, OMB M-20-14 guidance provided that "only mission-critical travel is recommended at this time."

116th Congress Legislation and Actions

In March 2020, the Telework Metrics and Cost Savings Act (H.R. 6108 and S. 3428) was introduced in the House of Representatives and the Senate. The legislation was referred to the House Committee on Oversight and Reform and the Senate Committee on Homeland Security and Governmental Affairs, respectively. It would amend the telework law to improve federal agency teleworking programs and included the following provisions.

H.R. 6108 and S. 3428 would amend current law to specify that an employee's duties could be performed on a periodic or full-time basis. Under current law, the terms *telework* and *teleworking* are defined to refer to "a work flexibility arrangement under which an employee performs the duties and responsibilities of such employee's position, and other authorized activities, from an approved worksite other than the location from which the employee would otherwise work."

The legislation would add new requirements to Title 5, Section 6502(b), of the *U.S. Code* related to teleworking participation in executive agencies. First, an agency's telework policy would be required to include annual goals to increase the percentage of employees who are teleworking three or more days per pay period; one or two days per pay period; once per month; and on an occasional, episodic, or short-term basis. Second, that policy would be required to include methods for collecting telework data, setting telework goals, and reporting telework cost savings.

H.R. 6108 and S. 3428 would add a new subsection (d) to Section 6502 requiring an agency head to provide written notification to OPM, the House Committee on Oversight and Reform, and the Senate Committee on Homeland Security and Governmental Affairs within 30 days before the agency implements or modifies a telework plan that would reduce the percentage of employees who telework. The notification would have to include a justification for the reduction in telework participation and describe how the agency will pay for any resulting increased costs.

The bills would add a new subsection (e) to Section 6502 stating that agencies could not prohibit any teleworking period that has been delineated (including three or more

days per pay period; one or two days per pay period; once per month; and on an occasional, episodic, or short-term basis) for all employees. In addition, an agency would be required to make any teleworking determination with respect to an employee or group of employees on a case-by-case basis.

H.R. 6108 and S. 3428 would amend Section 6506(b)(2) to add two new content requirements for OPM's annual report to Congress on the status of telework. First, the report would have to include information on agency cost savings achieved through teleworking. Second, it would have to include a detailed explanation of a plan to increase the government-wide teleworking participation rate to a rate above that for FY2016.

The legislation would require OPM, in collaboration with the Chief Human Capital Officers Council, to establish uniform guidance for agencies on teleworking data collection, goal setting, and cost savings reporting within 90 days after the act's enactment. The guidance would have to provide for an accounting of cost savings related to travel, energy use, and real estate.

On March 6, 2020, eight Senators urged OPM Director Dale Cabaniss to take several actions related to the COVID-19 guidance, including clarifying "that federal employees and contractors who follow such guidance will not be at risk of income insecurity, disciplinary action, or any adverse employment actions" and making "clear that federal employees and contractors will not be expected to work while they or a loved one are ill ... even if they have exhausted all of their available paid leave."

The House and Senate reports (H.Rept. 116-122, S.Rept. 116-111) that accompanied the Financial Services and General Government appropriations bills for FY2020, respectively, urged OPM to "direct Federal agencies to continue to track telework successes, compile best practices, and expand telework programs" and encouraged OPM to "work with agencies to continue to improve data collection methods and provide training for employees and managers to be effective teleworkers" and "work with agencies on establishing outcome goals for telework and to assess progress towards achieving those goals."

Possible Oversight Issues for Congress

The House and the Senate may wish to review whether executive agencies have fully implemented the requirement in P.L. 111-292 that telework be incorporated into their telework COOP plans and consider if agency certifications of such action would be warranted. In addition, Congress may wish to review required OMB guidelines for ensuring that "information and security protections for information and information systems used while teleworking" are adequate and that agencies purchase computer systems that support telework. It may also wish to review the extent to which executive agency policies are in accordance with the OMB standards.

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