

Work from anywhere and the associated risks

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Introduction

Prior to COVID-19, work consisted of working in an office. In a brave new world that has followed COVID-19 much has been written about the benefits of remote work. A number of companies are even offering employees the opportunity to work from anywhere. But what is little understood is the risks of working from anywhere (remote work) particularly for employees. What are the implications for the broader organisational risk management framework?

Remote working has become common practice in business both internationally and nationally. There is much literature on the benefits of remote working from flexibility, higher productivity, cost savings, time saved on commutes to name a but a few. According to the *Australian Financial Review* the change from office work to remote working has made Australians happier and wealthier. The average Australian saved an average of \$10,000 a year as a result of remote work.

On the face of it, remote working seems like it is working for all stakeholders. In fact, some organisations highlight that they are 'remote' in their recruitment advertisements. See for example, Apple, Spotify, Twitter and Microsoft.

Yet, what about the risks to the organisation. Most if not all organisations consider risk as part of standard business operations. The five most common business risks faced by all organisations are -

- Security and fraud risk;
- Compliance risk;
- Operational risk;
- Financial risk;
- Reputational risk.

In Australia, organisations are required by law to manage some types of risks for example -

- Accidents and injury under Workplace Health and Safety (WHS) laws;
- Customer complaints by treating customers fairly under Australian Consumer Law;
- Injury or harm to employees by having workers compensation insurance;
- Potential environmental damage by meeting environmental laws.

For the purposes of this article I will focus on WHS laws in the State of New South Wales.

So what does this actually mean?

In NSW, directors and managers have personal liability (or responsibility) under WHS laws. The obligation is on the employer to ensure the safety of the work environment. This means that directors and managers are held legally responsible for any breaches that may occur under WHS laws.

There has been substantial case law in this area to state that directors and managers have a positive duty to be proactive to ensure that WHS laws are being met. See for example *James v Paul (No 2)* [2011] NSWIRComm 117. The definition of 'officer' under the WHS Act is the same as 'officer' in the *Corporations Act 2001* (Cth).

Officers are required to exercise 'due diligence' to ensure that the company is meeting its obligations under the WHS Act. This *positive duty* requires officers to -

1. Acquire and keep up-to-date knowledge of work health and safety matters;
2. Gain an understanding of the nature of the operations of the business and the hazards and risks associated with those operations;
3. Ensure that the person conducting the business uses appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business;
4. Ensure that the person conducting the business has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information.

Officers who breach their duties under the WHS Act may attract penalties that include fines ranging up to \$600,000.00 and five (5) years' imprisonment. *WHS is clearly a serious matter.*

But what about working from home or anywhere?

At the date of writing there is little case law in this area. But as an acceptable rule of practice, WHS risks present in the workplace can be present in an employee's remote place of work. See for example, the information provided by Safe Work Australia available here at <https://www.safeworkaustralia.gov.au/safety-topic/managing-health-and-safety/working-home>

The WHS risks or hazards typically present in a workplace can also be present in an employee's home. These risks may be physical or psychological. Physical risks include:

- Slipping, tripping or falling;
- Risks posed by working with electrical items;
- Risks posed by manual handling;
- Risks posed by incorrect or inadequate equipment (not ergonomic).

Unsafe or unhealthy working conditions can also lead to psychological risks, including -

- Being tasked with an excessive workload;
- Contending with organisational change;
- Managing conflicting demands;

- Experiencing a lack of role clarity;
- Feeling uninvolved in decision-making processes;
- Contending with inadequate communication practices;
- Experiencing loneliness and/or isolation.

Is it just the working area itself that needs to meet WHS standards?

It is not just the working area that needs to be safe when an employee works from home. Facilities that the employee uses in the course of their working day are also subject to WHS standards - such as the kitchen and bathroom.

What are the employer's WHS obligations if an employee is injured while working from home?

If an employee sustains an injury while working at home, it would need to be determined whether the injury arose out of, or in the course of, the employee's employment. In recent years there have been several cases where an employee has been injured at home and has been entitled to receive workers' compensation.

A case that considered this issue was in regard to a Telstra employee who slipped down the stairs while working from home. See this case *Hargreaves and Telstra Corporation Limited* [2011] AATA 417 (17 June 2011). The worker fell twice in two months, while wearing socks to get cough mixture from the fridge. Telstra argued that they should not be liable as the worker was not at her designated workstation when she fell. Still, the tribunal found that both falls arose out of her employment with Telstra, and they were required to offer compensation.

In another case in NSW, a teacher brought student workbooks home after school to finish marking them. The books were in a cane basket, and the teacher slipped and fell on the stairs at her home while carrying them inside. She fractured her ankle and it was determined that her injuries arose out of her employment and compensation was awarded. See for example *Catherine Mary Hopkins v Department of Education and Communities* [2014] NSWWC25.

A sad case that also considered this issue was that of the Supreme Court of NSW with respect to workers compensation. See the case of *Workers Compensation Nominal Insurer v Hill* [2020] NSW CA 54. The court found that a woman killed by her partner (also her supervisor) at home which was her normal place of work. Therefore her children were entitled to workers' compensation. While, this case rested on some unique facts, employers need to be aware of domestic violence.

What about visitors?

Visitors - including children - who visit during working hours may be exposed to risks in the work environment the same as the employee. And employers may find themselves exposed to liabilities. A good risk management plan will be able to assist employers to reduce WHS risks outside the office. SafeWork NSW has published a number of risk templates to assist employers see <https://www.safework.nsw.gov.au/safety-starts-here/easywhs/managing-risks/template>.

What about mental health?

Employers, under current WHS laws, must also manage mental health risks at work. The things that can harm mental health are known as 'psychological hazards'. These can include things such as bullying, harassment, poor support, low job control, job demands and isolation. Psychological risks can be managed using a risk management process.

Good communication with employees is important to determine realistic deadlines, clear instructions and monitoring of tasks.

Steps you must take to manage risks to an employee's mental health - where reasonably practicable - may include -

- maintaining regular communication with employees;
- eliminating or minimising physical risks;
- providing employees with a point of contact to discuss their concerns;
- providing information about mental health and other support services available to employees - *for example, Beyondblue has set up a freely available mental health support website or you may have an existing employee assistance programs;*
- staying informed with information from official sources and sharing relevant information with your workers;
- informing employees of their entitlements if they become unfit for work - or have caring responsibilities.

How can employers make sure an employee's home is a safe working environment?

The best way for employers to make sure an employee's home is a safe working environment is to conduct a safe work risk assessment. This risk assessment considers physical risk but also psychological risks. An issue that arises is who completes this risk assessment? Some employers ask employees to do self-assessments. However, can an employee be objective? In addition, employees may not have full understanding of WHS requirements. Some employees may consider it invasive for a third party to visit their home. The issue remains that it is the employer's responsibility to ensure that the 'at home' or 'remote environment' is safe.

Conclusion

While working from anywhere has become common practice globally and while it may improve flexibility, there are some risks that need to be considered for both employees and employers. These need to be considered when looking at remote work.

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