

Not Your Grandfather's Workplace: Today's Trends and Tomorrow's Challenges In Employment Law & Practices

Lori Marco	Hormel Foods Corporation Senior Vice President, External Affairs & General Counsel Austin, Minnesota
Reagan Wilkins Oden	U.S. Bank National Association Senior Vice President, HR Strategic Planning Manager Minneapolis, Minnesota
Rebecca Bernhard	Dorsey & Whitney LLP Partner Minneapolis, Minnesota bernhard.rebecca@dorsey.com (612) 492-6186
Aaron Goldstein	Dorsey & Whitney LLP Partner Seattle, Washington goldstein.aaron@dorsey.com (206) 903-5434
Ryan Mick	Dorsey & Whitney LLP Partner Minneapolis, Minnesota mick.ryan@dorsey.com (612) 492-6613

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1. PowerPoint Presentation

For more information on **Labor and Employment** matters, see Dorsey's *Quirky Questions Blog* at <https://quirkyemploymentquestions.com/>.

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Lori Marco, *Senior Vice President, External Affairs & General Counsel, Hormel Foods Corporation*

Reagan Wilkins Oden, *Senior Vice President, HR Strategic Planning Manager, U.S. Bank*

Rebecca Bernhard, Aaron Goldstein and Ryan Mick,
Dorsey & Whitney LLP

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Overview

- The “Gig Economy”
- Retention challenges & options
- Flexible working arrangements – legal & practical risks
- Protecting proprietary information in a mobile economy
- Diversity & inclusion – a critical retention issue

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The “Gig Economy”

- **An accelerating shift toward a workforce defined by short-term, independent-contractor based engagements**
 - Driven by greater digitalization, the transition from Baby Boomers to Millennials, and overall changing attitudes towards work
 - Greater employee mobility, greater demands for worker flexibility
 - The Freelancers Union and gig platform, Upwork, recently released an annual survey
 - 36% of workers get at least some of their income from freelance jobs
 - More than half (53%) of those workers did freelance work in addition to holding down more traditional jobs

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The Retention Challenge

- **Strategies & tactics**
 - Motivation-focused rewards philosophies
 - Effective evaluation and feedback
 - Work-life balance / flexible working relationships
 - Changing work spaces
 - Diversity & inclusion

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Flexible Working Relationships

- **Mobility and flexibility**
 - **Work locations**
 - Working at different employer locations
 - Working from home
 - Work performed during travel
 - **Work time**
 - Compressed work week
 - Flexible start and end to the day
 - Make up time on weekends
 - **Work devices**
 - Company owned computer or device
 - Employee owned computer or device

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Flexible Working Relationships – Practical Considerations

- **Company culture**
- **Productivity impacts**
- **Face time and creativity**
- **Coworkers and perceived fairness – must flex work be offered to everyone?**
- **Nature of the work – can the type of work performed support remote work or flexible start and stop times?**

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Flexible Working Relationships – Legal Issues

- **Wage and hour**
 - **Federal**
 - Wage and hour concerns under the FLSA
 - Reasonable accommodations under the ADA
 - Pregnancy Discrimination Act
 - FMLA issues
 - Discrimination issues under Title VII
 - Union activity and Section 7 Rights under the NLRA
 - **State**
 - Wage and hour
 - Discrimination laws
 - Workers compensation
 - Other protective leave
 - **Local**
 - Minneapolis and St. Paul sick leave accrual

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Flexible Working Relationships – Legal Issues

- **EEOC Guidance**
 - **Employers aren't required to have a telecommuting policy ... but**
 - If they have one, they must offer it to disabled employees
 - Telecommuting may be a reasonable accommodation even if the employer does not allow telecommuting
 - **Employers must engage in the interactive process**
 - **Employers must look at a job's essential functions**
 - **Employees are not entitled to telecommute if there is another workable accommodation at the office**

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Flexible Working Relationships – Legal Issues

- **Telecommuting is only required if it would allow employee to perform essential functions**
 - Even if employee could perform more functions or perform better, if employee cannot perform certain essential functions remotely, telecommuting is not a required accommodation
- **Additional issues**
 - Has employee requested an accommodation?
 - Have similarly situated employees been allowed to telecommute?
 - If you grant an accommodation for disabilities or pregnancy, must you grant it for everyone?

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Flexible Working Relationships – Legal Issues

- **Non-exempt employees**
 - Telecommuting creates wage and hour risks
 - Policies prohibiting working overtime can help but ...
 - Employers are liable if they know or reasonably should know that an employee is working overtime
 - Sending emails such that the total work time exceeds 8 hours in a one day
 - Volume of work being performed
 - Statements from the employee regarding when they are working

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Flexible Working Relationships – Legal Issues

- **Non-exempt employees**
 - Employees must carefully track all time worked at home
 - Time tracking software can help
 - Have employees sign off on their time cards each week
 - Employers must strictly enforce policies against working overtime
 - An actual practice of letting employees work overtime will trump policy prohibiting overtime
 - Even if employees violate the policy against working overtime, they still must be paid

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Flexible Working Relationships – Legal Issues

- **Travel time and non-exempt employees**
 - Walking to your home office is not compensable, but ...
 - What if employee who works from home has to travel to a meeting in middle of day?
(probably compensable)
 - What if employee usually works from home, but has to come into the office one morning?
(probably not compensable)
 - What if employee starts work at home, but commutes in around noon?
(probably compensable)
- **Exempt employees**
 - Must be paid full day's pay if any work is done during day

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Protecting Proprietary Information In a Mobile Economy

- **Compliance with regulatory obligations**
 - Companies can face stiff liability for failing to protect information protected by statute such as financial or medical records
- **Compliance with agreements with third parties**
 - Even companies not subject to HIPAA often have contracts with HIPAA covered entities that require them to protect medical information
 - A similar issue arises in regard to banks and PII – Personal Identifiable Information
- **Trade secrets**
 - If company fails to take steps to protect information, it can lose trade secret protection

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Protecting Proprietary Information In a Mobile Economy: Know Your Assets

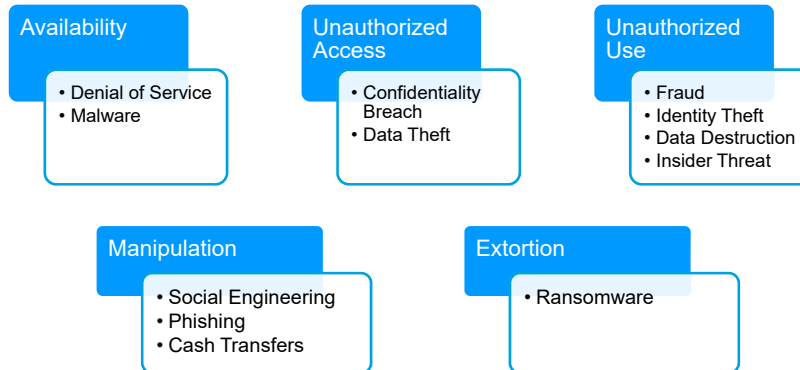
- Customer information
- Account numbers
- Financial information
- Intellectual property
- Health information
- Social Security numbers
- Password details



- **Understand where they are held**

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Protecting Proprietary Information In a Mobile Economy: Know the Threats



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Protecting Proprietary Information In a Mobile Economy: Simple First Steps

- **Identify your trade secrets and take all reasonable steps to protect them**
- **Amend your employment agreement and/or policies to include whistleblower immunity**
- **Review on-boarding process**
 - Review of rules
 - Update new risks
 - Encourage reporting
- **Review exit process**
 - Employees must return all company property
 - Explain post employment obligations

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Protecting Proprietary Information In a Mobile Economy: Privacy Considerations

- **BYOD**
 - Expressly reserve right in policy to monitor and access employee-owned devices, as well as ability to wipe/delete employer's proprietary and confidential information from employee-owned devices
- **Social Media**
 - Prevent and address discrimination, harassment, and offensive comments by employees
 - Protect confidential information and trade secrets
 - Protect employer's reputation
 - Comply with laws related to advertising, insider trading, and privacy
 - Ensure employees are complying with work rules and policies
 - *BUT* . . . the NLRB . . .

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Protecting Proprietary Information In a Mobile Economy: Privacy Considerations

- . . . and increasingly active states and cities . . .
- Some employers have required employees to provide username and passwords to social media accounts (Facebook, Twitter, LinkedIn, etc.)
 - More than 20 states have enacted password protection laws that prevent employers from requiring employees to disclose username and password information for social media accounts
 - Arkansas, California, Colorado, Illinois, Louisiana, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, Nebraska, Nevada, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin

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The Critical Role of Diversity and Inclusion

- **Flex work helps include disabled workers**
 - Compliance with ADA but also
 - Keeps disabled workers integrated into workforce if company embraces their skills and helps them succeed
- **Attract Millennials and others desiring flexible work arrangements**
 - Early-adopters of technology expect certain types of tools to be able to work in a flex arrangement
 - Younger/new parents prefer flex start and stop times to address childcare needs
 - Older workers with parental care responsibilities embrace flex work arrangements

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Wrap up . . .

Trends & prognostications!

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