

Legal and Practical Considerations for Remote Employees

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It has become increasingly common for employers to offer remote work arrangements to employees who work from home in states outside of the state where the employer's offices are located. These arrangements can be beneficial to both employees and businesses alike. Employees get additional flexibility and save the time and money associated with commuting. Employers expand their available talent pool while saving money on office space and supplies. New technology has made it possible for employees to work from home without sacrificing productivity and accessibility. However, prior to hiring remote workers, there are various legal and practical implications that employers should consider.

Privacy and Security

Employees may have access to a wide range of sensitive information such as financial data, proprietary information, employee names, addresses and compensation, confidential communications between employees or between employees and customers. Sensitive information is constantly being exchanged over wireless networks, which can expose a company to unwanted vulnerability. Are the employee's home files and equipment secure? Are all computer and mobile devices password-protected and are those passwords required to be changed regularly? Is the employee's wireless Internet connection safe from unauthorized persons? Remote employees should be reminded of any company policies regarding confidential and proprietary information and of their obligation to protect that information and secure it properly. A company should enlist its information technology (IT) department's support to coordinate remote employees' use of appropriate malware and a third-party virtual private network (VPN). Staff training on privacy and cyber security subjects, including phishing, ransomware and social engineering methods designed to trick email recipients into serving unknowingly as entry points into a company's information and data system, should not be overlooked.

Non-compete Enforcement

The enforcement of a covenant against competition is a state specific matter. A hodge-podge of laws exists around the country which imposes different obligations upon employers seeking to restrict employees from working for a competitor upon the conclusion of their employment. For example, with very limited exceptions, California prohibits the enforcement of noncompetes upon employees at all, while New York courts generally will enforce a noncompete against an employee if the employer can show that the restrictions are reasonably necessary to safeguard a

legitimate protectable interest and that the employer will suffer irreparable harm absent enforcement. States like Massachusetts, Washington, and Oregon require certain information be provided at the outset of employment and potentially that "garden leave" while still remaining on the payroll be paid upon termination for a noncompete to be enforced. The net result of these varying laws is that two sales representatives, for example, working remotely from their respective homes and covering different territories may have different post-employment legal obligations to their employer.

Classification of Remote Workers

Frequently, employers wish to classify remote workers as independent contractors to reduce payroll taxes and other labor costs. However, an employer should not mistakenly assume a remote worker is an independent contractor simply based upon the worker's autonomy or the fact that the employee works out of state. An employer's lack of control over a remote worker's daily activities is generally only one of many factors that a court will consider when determining a worker's status as an employee or independent contractor. Rather, courts look at the economic realities of the relationship and also may consider the extent to which the services rendered are an integral part of the employee's business and the amount of initiative or judgment the worker routinely exercises. There is no single test to evaluate independent contractor status for all purposes and compliance is often complicated by the fact that different tests may apply under federal and state law.

Wage and Hour Issues

Employers with remote workers in multiple states need to ensure they are paying employees in accordance with both federal and applicable state laws.

The federal Fair Labor Standards Act ("FLSA") requires employers to pay employees for all hours worked and to keep accurate information regarding hours worked. FLSA applies to "work performed away from the premises or the job site, or even at home" and requires employers to count the time as hours worked "[i]f the employer knows or has reason to believe that the work is being performed." It is often difficult to know how many hours remote employees are working. This is not a problem when the employees are exempt salaried employees; however, companies must be careful to track hours for their non-exempt hourly employees and to pay overtime (1.5 times the regular rate of pay) for all hours worked above forty (40) hours in a given workweek. Employers are advised to implement and enforce policies

that require employees to record all hours worked and to prohibit unrecorded work time. Further, employees should be required to obtain authorization from a supervisor before working overtime.

State law may vary when it comes to overtime pay obligations and exceed federal requirements. For example, in California employers are required to pay overtime to employees who work more than eight (8) hours in a single day and for the first eight hours worked on the seventh consecutive day of work in a workweek. California further requires double time payments to employees who work over 12 hours in any workday or more than eight hours on the seventh consecutive day of work in a workweek.

State and local law may also vary when it comes to minimum wage requirements, permissible payroll deductions, the information that must appear on paystubs, payday frequency requirements, whether unused accrued vacation must be paid out upon termination of employment and pay rules as they relate to the timing of payment of final wages. An employer should check with its payroll department or payroll service to ensure compliance.

Withholdings for State Income Tax, Disability, and Paid Family Leave Insurance and Foreign Registration Requirements

Income taxes vary by state, with some states like Florida and Texas (among others) not requiring them. The general rule for withholding state income tax (known as the “physical presence rule”) is for employers to withhold income tax according to the location where the work was performed. However, in some states, the law differs, and remote employees are subject to income tax in both the state in which they reside as well as the state in which the employer operates. The analysis can become further complicated in the case of remote workers who split their work time between home and office in two different states. Determining whether deductions are required for remote employees for temporary disability and paid family leave insurance benefits (where state mandated) can also prove tricky. California, Hawaii, New Jersey, New York and Rhode Island have state-mandated disability insurance requirements. The number of states requiring paid family leave insurance is also on the rise.

Hiring remote workers may necessitate registering to do business in a state other than the state in which the company was incorporated/formed (referred to as a “foreign” state). A company that has filing obligations in a state in which it does not have a physical presence may need to hire a registered agent (i.e., an authorized third party located within the state designated to receive correspondence on the company’s behalf) and to file annual reports. Some municipalities require workers who work at home obtain a home occupation permit.

An employer must have a clear understanding of its tax, withholding, and business registration obligations with respect to remote employees.

Communication and Oversight

An employer needs to effectively communicate with remote employees regarding work assignments, deadlines, and the employee’s job performance. It is advisable to create a regular schedule of meeting or check-in dates to ensure that any problems from either the employer’s or employee’s perspective are addressed as early as possible. Companies often overlook supervision of remote employees. This can become particularly problematic when the company seeks to fire the employee and there is insufficient documentation or evidence of communications relating to deficient job performance.

Training and Required Notices/Postings

Employers should not forget remote employees when it comes to legally mandated training or required job notices. Several states or localities now require that employees receive annual or bi-annual sexual harassment training. Various federal, state and local laws require certain job postings in the workplace (e.g., postings related to wage and hour laws, anti-discrimination provisions, and laws prohibiting sexual harassment). In many cases, these requirements can be satisfied by providing notice via email or within an employee handbook. However, some notices must appear in a required format or in additional languages. It is important to ensure these requirements are met for remote workers.

Business Property and Reimbursement of Business Expenses

Upon hire, an employer should be clear as to who will pay for office equipment and supplies and should specify in writing what equipment or property belongs to the employer. Does the company supply company-issued smartphones or computers? What happens if company property is lost, stolen or damaged – who is responsible for paying for the loss? What items are employees required to return upon termination of employment? Answers to these questions should be stated in writing. When issuing devices or equipment to employees, the employee should sign an acknowledgment of receipt, affirm they are responsible for safeguarding the items against damage or theft, and specify who is responsible for the cost of maintaining or replacing damaged equipment.

Discrimination Concerns

Remote employees who perform the same work as on-site employees are arguably entitled to be treated the same when it comes to the terms and conditions of employment. Companies should ensure that remote workers are being exposed to the same opportunities for training, mentoring, and advancement as others to avoid claims of discrimination. Equal pay laws require that employees who are performing the same work be paid the same. Concerns of disparate treatment may arise if, as is often the case, the company’s remote workforce is primarily comprised of women caring for children at home or disabled employees who have requested to work from home to accommodate their disability.

In addition, an employer who offers remote working opportunities to some employees, must be careful to offer those opportunities fairly to all. For example, an employer who offers remote work access to working mothers should offer the same to similarly situated working fathers or risk allegations of unlawful discrimination.

Earlier this summer, the New Jersey Appellate Division held that an employee who lived and worked in Illinois could still sue his employer under the New Jersey anti-discrimination law. The court held that because the job promotion that the employee sought was in New Jersey, and because the company's decision-makers were in New Jersey, the Illinois-based employee could avail himself of the expansive reach of New Jersey's anti-discrimination law.

FMLA and State Law Eligibility

Employers must be careful to ensure that eligible remote employees be permitted to take any required leave under the federal Family and Medical Leave Act and applicable state law. The FMLA regulations state that an eligible employee under the FMLA must be "employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite." Some employers incorrectly believe that remote employees are not eligible for FMLA leave when they work from home or a site that is not within a 75-mile radius of 49 other company employees. However, according to the regulations, an employee's personal residence is not a "worksite." Rather, an employee's worksite "is the office to which the employee reports and from which assignments are made." For employees with no fixed worksite, the worksite is the site to which they report and from where they receive their work assignments. So, for example, the lone Massachusetts employee who works from her home, but who receives all of her work assignments from her supervisor in New York where the company employs more than 50 employees, may be eligible for FMLA leave. State leave laws may impose additional leave obligations upon employers. Analysis of both federal and state law is required.

Health and Safety Concerns

Employers are still required to comply with health and safety laws when it comes to remote workers. Before authorizing

an employee to work from home, an employer should make sure it is a safe environment and one conducive to getting the job done, free from significant distractions. Most states require employers have workers' compensation coverage for employees that provides coverage for work-related injuries. To avoid dispute as to what is or is not a work-related injury, it is advisable to define in advance a remote employee's normal work hours and designate a particular area of an employee's home as his or her home office.

Conclusion

Remote workers can be an integral part of a company's workforce. As companies place greater reliance upon these workers, it is imperative that they be proactive in considering the many practical and legal issues associated with hiring remote employees.



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