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W A G E A N D H O U R

Avoiding Wage-and-Hour Pitfalls in the Post-Pandemic Workplace

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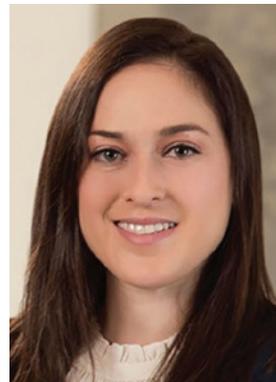
Special to the Legal

A little over a year into the COVID-19 pandemic, progress in mass vaccination across the country has raised new hopes of a return to some semblance of normalcy, including in the workplace. While many employers and employees crave a return to the pre-pandemic “normal,” COVID-19 has ushered in changes that will have a long-lasting impact on the modern-day workplace. The pandemic saw large numbers of employers and employees transition to working from home virtually overnight. These same employers now are weighing whether to permit or encourage remote work going forward. Yet the many federal, state and local wage-and-hour laws were enacted in a pre-COVID world where the complexities



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created by remote work of course were not envisioned or addressed. According to a PwC US Remote Work Survey, the “shift to remote

work” has been mostly positive for companies, with 83% of surveyed employers agreeing that remote work has been successful

for their organizations. The same survey also showed that over half of the employees (55%) surveyed said they would like to remain remote at least three days a week. Most of the executives surveyed (68%) believe that employees should be in the office at least three days a week once the pandemic is over to maintain a distinctive company culture.

While remote work began by necessity, employers that are considering making remote work a permanent feature of their workplaces will need to assess and address multiple wage-and-hour challenges that can arise from remote work.

WHERE ARE EMPLOYEES PERFORMING REMOTE WORK?

It is not uncommon in certain geographic areas for employees to live in one state and commute to an assigned office in a different one. Now that many commuters have worked remotely for the past year, their out-of-state residences have morphed into home offices, with potentially significant legal implications. Employers that are exploring the possibility of allowing such remote work post-pandemic need to ensure that they are complying with wage-and-hour laws in the various states where employees are working remotely.

To mitigate against potential liability related to state and local wage-and-hour laws, employers that are exploring the possibility of a permanent remote workforce should perform an audit to determine where their remote workers are working and then put in place measures to track this information going forward. Employers also should consider what, if any, restrictions they may want to place on where employees can work. If not, employers could unknowingly employ

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employees located in California, for example, with its significant wage-and-hour requirements.

Once it is determined who will be working remotely and where they will be working, employers should pay special attention to notice and posting requirements, as well as paid leave laws, including paid sick leave, disability

leave, and meal and rest break laws, as many states and cities have their own versions of these laws that may now apply.

For example, the New Jersey Family Leave Act applies to employees working from home in New Jersey if the employee has worked at least 12 months in New Jersey for the covered employer and has worked at least 1,000 base hours during the immediately preceding 12-month period. This is a lower threshold than the federal Family and Medical Leave Act that requires employees to work 1,250 hours in the preceding 12 months. Employers also need to be mindful of other New Jersey laws such as the Earned Sick Leave Law, the Family Leave Insurance Act and Temporary Disability Insurance Program as they explore having employees who live in New Jersey work from home on a permanent basis.

Employers also need to ensure compliance with varied state wage payment laws. For example, Delaware's Wage Payment and Collection Act defines an employee as any person suffered or permitted to work by an employer "under a contract of employment either made in Delaware or to be performed wholly or partly therein." While Pennsylvania's

Wage Payment and Collection law requires employers to pay all wages earned in any pay period in accordance with a written contract of employment, or if not specified, within the standard time lapse customary in the trade or within 15 days from the end of such pay period, Delaware law requires, with certain exceptions, payment of wages within seven days from the close of the pay period in which wages were earned.

Another potentially complicating factor is the fact that many employers are contemplating “hybrid” models where employees may split their time between the employer’s jobsite in one jurisdiction and remote work in another. This option could provide employees with desired flexibility while also potentially reducing commercial real estate costs for employers considering shared workspaces and offices. Determining whether the laws of the employee’s state of residence apply or those of the employer’s base of operations is not straightforward. Whether an employer must change the employee’s payroll tax deductions, make contributions to unemployment and temporary disability programs in a different state, or potentially provide additional family leave time are just a few examples of questions that

employers will need to consider when an employee works in two different states.

The pandemic’s impact on employers and employees alike cannot be overstated. The pandemic has not just changed where people are working, it also has changed when and how people work. Now that many of us have been working remotely for over a year and the worst of the pandemic is hopefully subsiding, employers should take the time now to assess what the future of their workplaces should look like. In order to set their workplaces up for success, there are steps employers can take now to mitigate against the risk of potential liability, including:

- Determining whether they will allow their employees to continue to work remotely after more individuals are vaccinated and the infection rate has decreased. Many organizations are surveying employees to gather input on their preferences for remote work going forward. If the future of the workplace will include permanent remote employees, employers should endeavor to determine as soon as possible which employees will be allowed to continue to work remotely, how often they will be required to come into the office (if at all),

and from where they will be permitted to telework. Employers also should put in place a process to track where employees are working from.

- Implementing and revising formal remote-work policies and keeping an open line of communication with employees in order to set clear expectations as to what is compensable work time, requirements for meal and rest breaks, and tracking for applicable sick, medical and disability leave laws.

Although the post-COVID workplace is still evolving, clearly as remote work becomes a more permanent component of the modern workplace, employers will face a whole host of new legal and regulatory challenges. Employers should stay tuned as the legal frameworks for analyzing these complex challenges (hopefully) catch up with our reality of remote work. •