

Blog Post

Work From Home – SOS! Post-Pandemic Legal Hazards

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The pandemic has revolutionized the workplaces and remote workforces will almost certainly survive the end of the pandemic. A [Gallup poll](#) last fall indicated that 61 percent of workers expect to work remotely at least part of the time in the future, and just 9 percent expect to work from home only minimally or not at all. With that in mind, employers and HR professionals must consider how to properly navigate the legal hazards stemming from our new normal. The following provides some key considerations in successfully managing a remote workforce.

Tax Issues

Remote workers can create a host of potential tax issues for employers. When an employee works outside the state or city where the employer has its normal business operations, the physical presence and activities of remote workers in another location may result in the employer becoming subject to:

- State income tax withholding and remittance requirements with respect to wages paid to employees for work performed while they were physically present in that state;
- State unemployment taxes;
- Sales and use taxes;

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- Gross receipts, business privilege, business income, and/or franchise taxes; and/or
- State or local business licensing or registration requirements (which may or may not be tax-related).

Each taxing jurisdiction establishes its own rules about what activity triggers a particular type of tax, and the rules vary significantly between jurisdictions. Potential application of tax requirements must be evaluated in light of the specific facts and circumstances of each employer and its workforce. During the pandemic, some states issued guidance that workers who were *temporarily* telecommuting due to the pandemic did not create nexus with the state for certain tax purposes; however, most of that guidance has expired and many employees are seeking to *permanently* perform some or all of their work on a remote basis.

Fundamentally, the critical first step for any employer is knowing where its workers are when performing their job duties. In this regard, some employers have elected to use software that tracks the physical location of an employer-provided device (usually a laptop) or allows the employee to set their physical location upon logging in each day. Once an employer knows the location(s) of its remote employees, it can then evaluate each jurisdiction's tax laws to determine whether, as a result of its employees' activities, the employer is subject to additional tax requirements.

Consistent Application of Remote or Telework Policies

Employers should ensure work-from-home policies are applied equitably and consistently. Arbitrary decisions can lead to claims of unfair treatment and impact successful talent management.

Implementing a robust remote work or telework policy and procedure is the first step to ensuring that those who are in charge of administering telework

policies do so in a consistent manner. The guidelines should have objective, business-related criteria and those administering the remote or telework policies should be trained on consistent application of these evolving workforce rules. Ad hoc decisions and application of remote or telework policies can lead to discrepancies which can create the appearance of inequitable treatment.

Employers should also make sure that Equal Employment Opportunity laws are properly considered when evaluating an employee's request to work remotely. For example, such request could be based on a medical condition that would trigger obligations under the Americans with Disabilities Act, Family and Medical Leave Act and similar state laws.

Wage and Hour Considerations – Off-the-Clock Work

Under federal law, non-exempt employees must be paid for all time spent working, even for work that was not requested but was “suffered or permitted.” According to the United States Department of Labor Wage and Hour Division, “constructive” knowledge of unscheduled hours worked is sufficient to impose liability. Courts consider whether employers “should have acquired knowledge of such hours worked through reasonable diligence.”

Employers are thus well advised to establish reporting procedures for non-scheduled time worked. These policies should be both well publicized and thoroughly explained to remote employees and those supervising remote employees. But policies alone are insufficient to prevent liability for unscheduled hours worked. The employer could be liable for wages regardless of policies where the employer “either prevents or discourages an employee from accurately reporting the time he or she has worked.” This standard may vary and be even more burdensome in certain states, so proper

hours worked management is critical to mitigate risk.

Unreimbursed Expenses

Hefty penalties and class and representative actions loom for employers who fail to reimburse for business expenses, and what is legally reimbursable becomes more blurry with a remote workforce. Federal law requires employers to reimburse employees for business expenses when the expenses reduce the employee's wages to below the required minimum wage or overtime rate. Certain states (including California and Illinois) go further, requiring employers to reimburse for *all* reasonable and necessary expenditures or losses. Employers should ensure remote employees are compensated for or provided with any supplies needed and allow employees to seek reimbursement for supplies purchased. "Necessary" supplies will often include payment of some proportion of internet and cell phone costs. Recent class actions seeking work-from-home business-related reimbursements remind employers to stay vigilant in enforcing reimbursement policies.

Home-Based Working Conditions

The Occupational Safety and Health Administration (OSHA) will not hold employers liable for employees' home offices and does not require employers to inspect the home offices of their employees. However, OSHA has stated it will conduct inspections of other "home-based worksites" such as home manufacturing operations when a complaint is received. Additionally, employers may have workers' compensation obligations should an employee injure him or herself while carrying out his or her job duties in a remote setting.

Conclusion

The evolving workplace landscape presents new legal risks for employers, but exposure can be mitigated with carefully considered policies and

procedures. For assistance with these issues, contact your Akerman attorney.

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