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Do You Know Where Your Employees Are? The Risks of Remote Work

More than two years into the COVID-19 pandemic, for many people remote work has become not just a temporary adjustment, but a new normal. While remote work can have many benefits for both employers and employees, it also carries risks for the unwary. To properly manage those risks, employers must be able to answer two basic questions: where are your employees, and if they are in a different state from that in which they normally work, what additional legal requirements might apply?

When employees perform all of their work in their employer's workplace, the employer can be comfortable that the laws of that state apply. However, when employees work remotely, they may be doing so from a different city or state, or perhaps from different locations on different days, potentially resulting in application of the laws of the jurisdictions where the work is performed. An employer with only one location may unexpectedly subject itself to the laws of other states due to remote employees. Therefore, it is important for employers to know where their employees are working and what laws govern. Some of the key questions employers should consider are addressed below.

Are the People Who Work for You Employees?

Determining whether a worker should be classified as an employee or an independent contractor can be difficult, and the answer may be different based on where work is performed. Some states, such as Florida, use a common law test that considers the company's degree of control over the worker. Other states, such as New Jersey, use what is known as the ABC test, which examines three factors: whether the worker is free from control or direction over the performance of work; whether the work is outside the usual course of the business for which it is performed or outside the places of business of the enterprise for which it is performed; and whether the worker is customarily engaged in an independently established trade, occupation, profession or business. Workers who are properly classified as independent contractors under one state's test may not be properly classified under another's. Whether a worker is an employee or an independent contractor affects many issues, including the requirement to pay payroll taxes, coverage under unemployment and workers' compensation benefits, and the applicability of laws like the Fair Labor Standards Act (FLSA) and Family and Medical Leave Act (FMLA).

Are You in Compliance with State Wage and Hour Laws?

Minimum wages vary widely from state to state, and even city to city. Some states impose no minimum wage requirement above the federal rate of $7.25 per hour, while other areas, including New York City and the District of Columbia, require a minimum wage of more than twice that amount. An employer would likely have to comply with the law where its employees are working.

While the FLSA applies nationwide in determining whether an employee is entitled to overtime under federal law, depending on where they work, employees who are exempt from overtime under federal law may still be entitled to overtime given differing standards for exempt status under state law. For example, exempt employees working in New York City must be paid at least $58,500 annually (in addition to having the duties required to meet one of the statutory exemptions), a higher threshold than the $684 per week salary threshold under federal law.

Another aspect of overtime law also varies by state. As under the FLSA, most states require employers to pay an overtime premium only for hours that an employee works over 40 in a week. However, some states, such as California, also require employers to pay an overtime premium for any hours that an employee works over a certain threshold in a day, even if the number of hours worked during the week is less than 40 hours.

Are Your Non-Competition Agreements Enforceable?

Where employees work may determine whether their non-competition and/or non-solicitation agreements are enforceable. For example, some states ban restrictions on competition except in limited circumstances, some states enforce non-compete restrictions with longer post-employment duration or broader geographic scopes than others, some states permit courts to modify the terms of a non-compete agreement to make it enforceable while others do not, and some states require employers to provide additional consideration when entering into a non-compete agreement after the start of employment. A choice-of-law provision does not necessarily solve this problem for employers, as some states with strict limitations on non-competition agreements, including Massachusetts and California, generally prohibit parties from using choice-of-law provisions to evade those limitations.

How Much Leave Are You Required to Provide?

Different states and localities require employers to provide different types or amounts of leave, either paid or unpaid. The federal FMLA requires employers with 50 or more employees within a 75-mile radius to provide employees with up to 12 weeks of unpaid leave in a 12-month period to care for a new child, or in the event of the employee's serious health condition or a serious health condition of the employee's spouse, child, or parent, and additional leave for military-related reasons. Employers who have fewer than 50 employees, and therefore are not subject to the federal FMLA, may still be subject to family and medical leave laws of the states where their employees work. For example, the Connecticut, New Jersey and New York family and medical leave laws impose broader or differing leave requirements than the federal FMLA, and may apply to employers with at least one employee in the state. Some states—including New York, New Jersey, Massachusetts and Connecticut—also provide for paid family and/or medical leave or insurance relating to such leave, the specifics of which vary by state. Paid sick leave laws may differ by state or municipality as well.

How Is Accrued Time Off Treated?

Whether you are required to compensate a departing employee for accrued vacation or other paid time off may depend on where the employee is working. Some states, such as Massachusetts, treat paid time off as wages and require employers to compensate employees for accrued time they haven't used. Other states, like Connecticut, New York and New Jersey, require employers to compensate employees for accrued time off only if the employer has a policy of doing so.

What Notices and/or Training Are Required?

The list of employment laws that may vary based on where employees are working is seemingly endless. For example, in addition to the questions discussed above, different states may impose different notice and posting requirements, or they may require employers to provide different types of training (e.g., mandatory anti-harassment training).

Are You Complying with Requirements to Do Business in Another State?

Having even one employee work remotely from a state where the employer otherwise has no presence may impose unanticipated regulatory requirements. Employers must consider whether states where their employees work remotely require them to register to do business there, hire a registered agent in the state, register with the unemployment insurance department, provide mandatory short-term disability or other insurance benefits, and pay state or local taxes. An employer may also need to obtain workers' compensation coverage in a state where its employees work remotely, as an out-of-state policy may not cover injuries that occur there.

What Are the Tax Implications of Remote Work?

When employees work remotely from states or cities that are different from the employer's place of business, new tax obligations may arise. The tax implications of remote work can be complicated, especially if an employee's work time is split between states. It is important to know for which state(s) an employer is required to withhold payroll taxes.

Are Your Policies Up to Date?

Employers should make sure that their handbooks and policies are suited to remote work, including accurately describing the requirements that apply in each employee's location. Given the legal risks associated with remote work, employers should consider adding a remote work policy requiring employees to inform management of the location in which they are working, or to obtain written permission before working in a different state from the employer's office for any extended period. More generally, employers should have a reliable method for supervising and evaluating remote workers. Management should clearly communicate the rules and policies that apply during remote work and ensure that nonexempt employees accurately record all of their work time regardless of where the work is performed. If employees work with confidential information, handbooks or policies should make clear that employees must continue to protect such information when working remotely. Employees should be reminded that many of the policies that apply in the workplace, such as anti-discrimination and anti-harassment, apply with the same force to remote work, including to communications over telephone, e-mail or videoconference.

Conclusion

In order to comply with all of the laws that govern their employment relationships, employers first have to know where all of their remote workers are located. Since different requirements may apply in different locations, employers should make sure they consider and comply with the laws applicable to all of their employees' work locations. Employment counsel can help identify and answer all of the questions that arise as a result of remote work.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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