

Checklist

Employment Law Implications of Remote Work

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Employment Law Implications of Remote Work

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The pandemic brought with it a fundamental shift from the traditional office to what many experts call the “hybrid workplace,” where more employees work from home more of the time. While various technologies have made the transition seamless, things are not as simple from an employment law standpoint.

To understand why, let's consider an employer with office locations in New York and Washington, D.C. Before the pandemic, all its staff worked from those two locations; the employer was thus subject to New York and D.C. employment laws. Following our collective shift to the hybrid workplace, certain employees who were based in the New York office may now work from home in Connecticut, New Jersey, and Pennsylvania, while certain employees who were based in the D.C. office now work remotely in Virginia, Maryland, and Florida.

The issue with this very common scenario is that remote employees trigger compliance obligations in the states from which they work, rather than the state(s) where their employer is based. This means that our hypothetical employer, once subject to the employment laws of two states, is now subject to the employment laws of six states.

This checklist is intended to familiarize attorneys with the compliance obligations that may be triggered when remote employees work in a state or city that is different from the employer's.

1. Employee Locations

- The starting point of the analysis is determining where each employee works. What is the location of each remote employee?

Practice Tip: Without knowing the states, cities, and localities (“work locations”) from which employees complete their jobs, implementing a comprehensive multistate compliance program is impossible.

2. Minimum Wage and Overtime

- What are the minimum wage obligations in each work location?
- What are the overtime obligations in each work location?
- Are federal minimum wage and overtime obligations sufficient?

3. Miscellaneous Pay, Notice, and Rest Break Considerations

- What are the meal and break requirements in each work location?
- Do any work locations require pay rate notification forms? Do they require any other specific documentation at the time of hiring?
- What is the timing of pay at separation in each work location?
- What are each work location's notice requirements in the event of a change in compensation?

4. Family, Medical, Pregnancy, and Covid-19 Leave Entitlements

- What leave entitlements do employees have in their work locations?
- If more stringent state obligations do not apply, is the employer subject to federal Family and Medical Leave Act requirements?

Practice Tip: Many states and cities require paid time off for short-term health needs, preventative care, serious illnesses, caring for ill family members, welcoming new children, and/or Covid-19.

5. Home Office Expense and Technology Reimbursements

- Does any work location require reimbursement for home office expenses such as phone, internet, and other equipment used for work?

Practice Tip: Under federal law, employers must reimburse non-exempt employees for business-related expenses that would effectively result in a pay rate that is lower than the minimum wage.

6. Antidiscrimination Laws

- Does any work location have antidiscrimination laws that provide broader coverage than the federal antidiscrimination laws?

Practice Tip: Federal antidiscrimination laws may not include certain employers to which state and local antidiscrimination laws still apply. Likewise, federal antidiscrimination laws may not protect certain characteristics that are specifically protected by state and local laws.

7. Mandatory Policies and Trainings

- Does any work location require specific employee trainings or workplace policies?

Practice Tip: Some states require employers to provide sexual harassment prevention training to each employee, along with a sexual harassment prevention policy and reporting procedure. Other states require members of certain professions to receive certain hours of training.

8. Workplace Notices

- In addition to federal posting requirements, what are the workplace notices that must be posted in each work location?
- Can the posting requirements be met online, or should employers mail each remote employee an actual poster of the relevant notices?

Practice Tip: The combined approach—online posting and mailing each remote employee a poster—leaves the least room for challenge. Workplace poster manufacturers that take federal and state requirements into account make this a relatively simple task.

9. Unemployment Insurance

- Does the employer maintain unemployment coverage in each state in which a remote employee works?

Practice Tip: Employers only need to obtain coverage in one state per employee, but it should be the state in which the employee works. If the employer has been paying into the wrong state's policy, the issue should be corrected before an employee raises a claim.

10. Workers Compensation

- Does the employer have workers compensation coverage in the states where each employee's work is localized?

Practice Tip: Employers should ensure they have coverage in each location where a remote employee may work, which may require a multi-state policy.

11. Other Insurance Obligations

- Does any work location require additional insurance coverage beyond unemployment and workers compensation?

Practice Tip: Some states mandate disability insurance, and others require specific riders such as paid family leave coverage.

12. Tax and Corporate Considerations

- When remote employees establish a business presence in a new location, is the employer obligated to withhold state and local payroll taxes, corporate income taxes, franchise taxes, and sales and use taxes in those locations?
- Do remote employees trigger an obligation for the employer to register as a foreign corporation in certain states? If so, does this require maintaining a registered agent in the state, an office location, and a local mailing address, among other obligations?

Practice Tip: While this checklist concerns employment law considerations, it would be remiss not to mention certain tax and corporate law considerations that should be assessed in consultation with tax/corporate counsel.

13. Approaches to Compliance

- Should the employer implement workplace policies that meet the most stringent requirements of each work location?

Practice Tip: The benefits of having uniform policies for all employees are twofold: first, the simplicity of one set of policies for all employees, and second, the positive HR implications of giving employees more entitlements than are legally required.

- Should the employer implement separate workplace policies that depend on work location?

Practice Tip: While this is a common approach, especially for burdensome policies that may only apply in a single state, the downside is that it creates the administrative challenge of having to apply different policies to different employees.

This checklist is intended as an educational starting point to make a comprehensive compliance plan and does not include every legal area to consider. Employers should consult with a qualified attorney to make a plan based on their specific circumstances.