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INSIGHT: Key Legal, Tax Considerations for Relocated Long-Term Remote Workers

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Employees who are working remotely from other states and jurisdictions to which they relocated for the long term because of Covid-19 raise some important legal issues for employers. Morgan Lewis & Bockius attorneys examine these issues.

As the number of Covid-19 cases continues rising throughout the country, many employers and employees are exploring not only how to work remotely, but how to handle new long-term remote working arrangements in new locations while mitigating unintended consequences and liability.

Following are some legal issues to consider in these situations involving ongoing remote work arrangements.

Tax Payments

Businesses should be aware that remote working arrangements where the employee works in a different state (or locality) than they worked prior to the pandemic, particularly if it is a location where the employer is otherwise not operating, may inadvertently trigger state payroll tax registration and filing requirements. These requirements can include having to adjust tax payments for an individual employee and potentially may subject an employer to another state's payroll tax regime.

Generally, in jurisdictions that have a personal income tax, businesses are required to register and withhold taxes on wages of employees in that location if they meet the applicable threshold to register and if an employee performs services in these states. However, there are exceptions that apply in certain states, including reciprocity agreements, convenience of employer rules, and Covid-19 payroll-tax relief laws.

Remote working arrangements where employees are working in locations where an employer was not otherwise operating may also provide the jurisdiction with enough nexus to impose corporate income/franchise tax filing obligations and a potential corporate income/franchise tax liability.

Businesses should also be aware that arrangements where employees are working remotely in countries where an employer was not otherwise operating may trigger a permanent establishment or

“taxable presence” in that country and give rise to corporate income tax or other taxes on business activity in that country or tax jurisdiction.

Leave and Wage Replacement Entitlements

Many jurisdictions have general use paid sick leave laws or Covid-19 leave laws that apply based on the employee’s work location, some of which require companies to provide employees with notice of their sick leave balances on pay stubs.

Similarly, some states have extensive time off provisions mandating leave for a variety of reasons, including pregnancy, disability, bereavement, or to do school visits, among others, that must be considered.

Wage-and-Hour Issues

Off the Clock/Timekeeping/Breaks. There can be significant liability if an employee is working “off-the-clock,” particularly as managers may be less able to control and closely monitor remote worker hours. Additionally, some jurisdictions have strict rules on when employers must provide meal and rest breaks to employees, including remote workers.

Minimum Wage and Overtime. Certain states and cities have specific wage-and-hour laws that apply to remote workers in that jurisdiction, including higher minimum wage rates, daily overtime/split-shift pay laws, laws that prohibit last-minute schedule changes, or that require mandatory rest days.

Expense Reimbursement. Certain jurisdictions have statutes that require employers to reimburse employees for workplace expenses, potentially including phone and internet for remote workers.

Exempt Employee Issues. For exempt employees, some states require that employees primarily perform exempt duties and earn a certain fixed salary to maintain their exempt classification.

Wage Statement Requirements. Many jurisdictions have specific requirements for information that needs to be included in employee wage statements or pay stubs as well as substantial penalties for non-compliance.

Training Requirements

Certain jurisdictions require that employees and/or managers working in that location receive mandatory training, including on safety considerations or sexual harassment prevention. These laws can be triggered when an employee is working remotely from a new location.

Immigration Compliance

Workers on certain immigration visas may have an assigned work location. If the individual is working from a different location, potentially even including working from home, it could impact their work visa.

Work-from-home arrangements and relocation for employees working under visa status should be carefully reviewed in advance.

Business Certification and Licensing

Employers in industries that require either business certifications or have employee registration and licensing requirements should confirm that all appropriate certifications and registrations are in place before approving long-term remote work for an employee in a new jurisdiction.

Confidentiality

In addition to being a best practice, maintaining confidentiality is often required by statute, such as under HIPAA, state law, or under various fiduciary and financial obligations. Failure by an employee working remotely to keep covered information confidential could potentially create liability for a business.

Performance Management Concerns

In addition to the legal concerns, many employers struggle to effectively manage the performance of employees who are working remotely full-time.

Employers should consider taking proactive steps to foster the productivity of teleworking employees. These steps could include sending communications (or entering a formal agreement) to clarify remote working expectations and parameters including specific guidelines on the duration of the arrangement; productivity metrics; work-hour expectations; rest and meal break requirements; record keeping requirements; workers' compensation/OSHA issues; confidentiality requirements, benefits available to employees; and expense reimbursement obligations.

Employers also should consider training managers on how to effectively manage and review the performance and timekeeping of employees working remotely.

In conclusion, though there is research showing remote work (or partial remote work schedules) can increase worker productivity and well-being, employers who have implemented or expanded long-term remote work programs during the Covid-19 pandemic should be proactive in addressing the ways that remote work can create workplace complications and litigation risk.

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