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We're Still Trying to Figure It Out: Best Practices and Legal Compliance in the Evolving World of Remote Work

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Introduction

The Pandemic had profound impact on work in the United States. While many employers in the pre-pandemic era had implemented flexible work policies allowing employees to work remotely at least some amount of time, the pandemic forced the issue. With lockdowns and closures, many employers who had never envisioned allowing remote work were forced to change. Remote work became a requirement for continued operations for many employers and they struggled to adapt.

The Old Remote Problem

Dealing with remote work brought a multitude of new challenges for employers and employees. From the legal perspective, remote work created new issues for everything from wage & hour compliance to workplace safety. But the far bigger challenge was created by employees who relocated and sought to work remotely from a different location, frequently in another state.

For several years, we have talked about the myriad of state law traps for the unwary employer who has employees working in a different jurisdiction. State and local regulation of the employment relationship varies widely throughout the country and can lead to issues that are nonintuitive, counterintuitive, or downright unfathomable for employers unaccustomed to operating in those jurisdictions.

For employers who continue to allow free movement of employees and permit remote work from other jurisdictions, those concerns remain.¹ However, the trend is moving against remote work, creating new challenges for employers.

The Lawyer's Role in the Old Remote Problem

If a Texas employer has allowed employees to work remotely from anywhere, the employer will eventually face employment law issues under the law of another state. When that happens, can a lawyer licensed only in Texas (a Texas lawyer) represent the employer? Can a Texas lawyer represent the employee of the Texas employer?

Rule number 1 is actually Rule 1.01:

Rule 1.01. Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

¹ Employers who continue to allow remote work from other jurisdictions should review Audrey E. Mross's comprehensive paper from last year's conference that identifies a multitude of state and local law issues that require attention in those circumstances.

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

Unless it is an emergency or the Texas lawyer is affiliated with local counsel, the lawyer must determine whether they are competent to render legal advice in the foreign jurisdiction. Lack of familiarity with the intricacies of the foreign law need not be an obstacle because the commentary to the rule contemplates the acquisition of competence through research and analysis.

When simple counseling of the client does not resolve the issue and a contested dispute ensues, can the lawyer continue representation?

Assume Wendy Worker is an employee of Texas Local Corporation (TLC). Wendy has relocated out-of-state and works remotely from her home. Wendy believes she is a victim of sex discrimination. At which stage of the dispute can Wendy be represented by a Texas lawyer? At which stage can TLC be represented by a Texas lawyer?

Rule number 2 is actually Rule 5.05, Unauthorized Practice of Law.

Rule 5.05. Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

The Texas rule does not provide much guidance. Comment 5 to the rule recognizes that “the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by individual states.” True, but it puts the onus on a Texas lawyer to learn the other state’s rules regarding unauthorized practice of law (UPL).

Does the Texas lawyer need to research the state’s UPL rules before agreeing to the representation? Rule 1.02(b) allows a lawyer to limit the scope, objectives and general methods of representation if the client consents after consultation. Therefore, the lawyer must know any limitations imposed on the representation by the state’s UPL regulations before accepting the representation to ensure the client can give informed consent. Will the Texas lawyer be able to represent the client if the matter is not resolved during pre-dispute negotiations? Can the Texas lawyer even engage in pre-dispute negotiations?

There is simply no substitute for familiarity with the jurisdictions UPL rules. In Ohio, for example, an opinion letter stated that an out-of-state licensed “lawyer may also advise out-of-state clients on Ohio law and prepare documents to be given legal effect in Ohio, assuming he or she has the requisite competence to do so.” *Bd. of Commrs. on Grievances & Discipline* (Aug. 17, 1990), Op.

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