Employment Issues Around a Work from Home Workforce

Introduction

The COVID-19 pandemic has reshaped the employment landscape and altered the outlook of the workforce. Employees are re-evaluating the importance of job security, demanding flexibility in their work hours, suffering from increased levels of poor mental health, and when able, seeking jobs that offer remote work.

While there are clear benefits of remote work for employers, including better employee retention, profitability and savings, higher employee engagement and productivity, it also presents unique legal challenges.

This myriad of challenges employers have to consider when employing a hybrid or fully remote workforce includes (1) issues relating to an employee's work location, (2) wage and hour concerns, (3) security and privacy concerns, (4) remote work implications relating to discrimination, (5) workers' compensation issues, and (6) issues related to employees requesting remote work as a reasonable accommodation.

While many of the cases illustrating the issues we will discuss have not yet finished making their way through the litigation process, they provide important insight about what employers should proactively think about and which issues are likely to end up on a plaintiff's attorney or the EEOC's desk.

I. Issues Relating to Employee's Location

According to the Bureau of Labor Statistics (BLS) of the US Department of Labor (DOL), in 2021:

- 38.1 percent of employed people did some or all of their work at home.
- 59.8 percent of those with a Bachelor's degree or higher performed some work at home.

(*See* BLS, US DOL: The Economic News Release (June 23, 2022).

For the most part, this meant working from a home office. But the "work from anywhere" concept has been taken literally by a growing number of workers, who may now be working from a variety of locations, such as vacation homes, living with friends/relatives in other states or deciding to move across the country. However, employers might not want their employees to have the freedom to live anywhere.

Not knowing where an employee is working can cause material issues relating to meal and rest times, overtime, wage payment, pay transparency, and expense reimbursement. For example, an employee working in Texas is required to be paid overtime rates only if he or she works over forty hours in a week. If that employee moves to Nevada, he or she must be paid premium overtime rates for all hours worked in excess of eight hours in a day, even if he or she does not meet the forty-hour weekly threshold.

In general, remote employees are subject to the laws of the city and state where they are physically located and perform work.

Different courts utilize different standards to determine whether a company is actually subject to potential jurisdiction for legal claims in each state where it has remote employees.

- In ***Perry v. Nat'l Assoc. of Home Builders****,* No. TDC-20-0454, 2020 WL 5759766 (D. Md. Sept. 28, 2020), a federal court in Maryland determined that an employee working remotely was not subject to jurisdiction in Maryland. The Court noted:

> In addressing whether a court may exercise specific jurisdiction over a nonresident employer in a dispute involving remote work by an employee in the forum state, courts may find purposeful availment where the employer ***intentionally directed contact with the forum state***, such as through some combination of affirmatively recruiting the employee while a resident of the forum state, contracting to have the employee while the resident of the forum state, contracting to have the employee work from the forum state, having the employee attend meetings with business prospects within forum state, and supplying the employee with equipment to do work there.

Id. at *4 (emphasis added)

The Court instructively found that in "remote-work cases … a defendant's mere knowledge that an employee happens to reside in the forum state and conduct some work from home does not constitute purposeful availment." *Id.* at *5. Rather, an employee's decision to work remotely in a different state is considered a "unilateral decision" that the defendant merely accommodates.

- Similarly, in ***Bertolini-Mier v. Upper Valley Neurology Neurosurgery P.C****.,* *No. 5:16-CV-35, 2017 WL 4081901 (D. Vt. Sept. 13, 2017),* a district court in Vermont found no purposeful availment where a New Hampshire defendant employer's "knowledge and facilitation of occasional remote work" by radiologists who worked in New Hampshire but resided in Vermont was an "accommodation," "not a purposeful effort" to have work conducted in the forum state. *Id. at *5.*

Other courts use a "more significant relationship" test to determine which state law applies, as illustrated by the cases below.

- In ***Viscito v. National Planning Corp***. 34 F.4th 78, 86 (1st Cir. 2022), the First Circuit employed a fact-specific, "more significant relationship" test to determine whether Massachusetts law applied to a California employee, considering things like the location of the employee and employer, employee's travel frequency between states, where payroll was processed, and the extent of the benefit the employer received as a result of the employee's work in the different state. *Id.* at 86. The Court thus concluded that, because California had a more significant relationship to the parties' relationship, Massachusetts law did not apply. *Id.*

- Similarly, the Fourth Circuit in ***Fields v. Sickle Cell Disease Ass'n of Am., Inc***., 770 F. App'x 77 (4th Cir. 2019) affirmed the lower court's ruling finding no jurisdiction where the employee made the "unilateral decision" to reside in North Carolina and the employer merely accommodated the employee. The lower court found that the plaintiff's "choice to complete her work in North Carolina for her own reasons is a unilateral decision that cannot be fairly attributed to the defendant as an attempt to avail itself of the privileges of conducting business in North Carolina." *Fields v. Sickle Cell Disease Ass'n of Am., Inc.*, 376 F. Supp. 3d 647, 653 (E.D.N.C. Sept. 26, 2018). Furthermore, the Court found that the "locus of the parties' interaction" was overwhelmingly outside of North Carolina. *Id.* Accordingly, the complaint was properly dismissed.

The Fifth Circuit has made clear that "[u]nder Texas choice-of-law rules, disputes are governed by the law of the state with 'the most significant relationship to the particular substantive issue.'" *St. Paul Mercury Ins. Co. v. Lexington Ins. Co*., 78 F.3d 202, 205 (5th Cir. 1996).

In the employment context, Texas courts routinely apply this test to disputes related to the enforceability of choice-of-law provisions in employment contracts and restrictive covenants such as non-compete clauses. For example, in *Exxon Mobil v. Drennen*, 452 S.W.3d 319 (Tex. 2014), the Texas Supreme Court was asked to determine whether Texas or New York law applied to a former employee's compensation incentive program. The parties' contract included a "choice-of-law provision providing for application of New York Law, although ExxonMobil is headquartered in Texas and incorporated in New Jersey." *Id*. at 322. In analyzing which state law applied to the parties' contract, the Court evaluated several factors, including "the locations of the parties, the location of negotiations of the agreement, the location of the execution of the agreement, and the place of performance" to determine "whether the relationship of the transaction and parties to Texas was clearly more significant than their relation to the chosen state[.]" *Id*. at 325. In this case, both parties were located in Texas (due to ExxonMobil's headquarters being located in Irving and Plaintiff being a Houston resident), "the negotiations, if any, took place in Houston, as did the execution of the [parties' contract], and the performance of the contract took place in Houston[,]" the Court ruled that "the relationship of the transaction and parties to Texas is more significant than their relationship to New York." *Id*. at 326.

Tax and Benefits Implications. In addition to the issues related to employees working remotely from various states outlined above, employers should also be aware of potential tax implications when permitting remote work across state lines. For example, an employer may face additional employment tax filing obligations because of remote employees working in a state that the employer otherwise did not have a preexisting physical presence. Employers may need to consider whether the remote employee creates a sufficient economic nexus for a corporate income tax to apply to some portion of the employer's income. If a business has a nexus with a state, that business may be obligated to pay that state's franchise, income, or other business tax, remit payroll taxes to the state, and comply with other tax payment or reporting requirements in the state. Businesses should also recognize that remote work can affect group health plans and provider networks. For example, an employee working remotely in a different state may lose access to in-network care, increasing the cost of medical services. Employers should conduct a tax compliance review whenever an employee is permitted to work remote from a new location and require their remote employees to notify them when they move across state lines. This review should analyze

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