



Whiteford|Taylor|Preston^{LLP}

Legal Implications of Remote Employees

ASAE Reston-Loudoun Idea Swap

February 7, 2019

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Telework/Telecommute/Remote Work

If you want to make a distinction:

Telework/Telecommute – may be used to refer to employees who are in the same vicinity of employer but do not always work in the office

Telework/Telecommute/Remote Work

Remote Work – may be used to refer to employees who live outside of the employer's geographic region and therefore need to work outside of the employer's office

But can be used interchangeably

Independent Contractors v. Remote Employees

Independent contractors are not employees.

Obligations of the employer are usually contractual and determined by the independent contractor agreement.

Telework Trending Upwards

A 2017 Gallup Report shows:

- Not only did more employees work remotely
- The amount of time worked remotely increased per employee

Some Benefits of Telework

- Boosts morale
- Reduces some overhead costs
- Good for environment
- Increases pool of potential employees
- Increased productivity

Legal Implications

- Policies and Procedures
- Managing Remote Employees
- Remote Employee and State Nexus
- Business Use of Home Tax Considerations
- Types of Liability

Telework Policy

Benefits:

- Provides consistency and prevents discrimination
- Puts employees on notice about rules in case disputes arise later

Telework Policy

Things to consider:

- Language that makes clear telework is made available on a case by case basis at the discretion of the employer
- Eligibility requirements – satisfactory performance review, supervisor consent, nature of the work, etc...

Telework Policy Cont.

- Trial period for new telework arrangements
- Teleworker remains subject to company policies while teleworking
- Teleworker should adhere to a schedule that allows timely response to email and phone and participation in meetings or other events like training

Telework Policy Cont.

- Telework is not a substitute for dependent or child care
- Teleworker will be responsible for income tax implications
- Teleworker should designate a work space that is appropriate and safe

Other Policy Considerations

- Who will provide equipment?
Employer or employee
- Do your other policies contemplate telework situations? IT policies? Communication policies? Data Security?

Telework Agreements

- Consider utilizing telework agreements in conjunction with telework policies
- Good for defining special circumstances
- Can provide more detail on expectations of employee such as schedule and how employee will report to supervisor

Telework Agreements Cont.

Things to include:

- Clarify that telework agreement is not an employment agreement and employee status is still at-will
- Reserve the right to modify or cancel the telework schedule to meet requirements of the position

Telework Agreements Cont.

- Define when the teleworker needs to be in the office, if applicable
- Define who is responsible for providing and maintaining the equipment
- No use of the home office for hosting meetings

State Laws

- Income Tax – generally employees pay income tax in the state in which they reside regardless of where they work
- However, a few jurisdictions (not the DMV) require employees to pay income tax on income earned from a company of that state regardless of employee's residence

“Telecommuting Tax”

New York Tax Law, Article 22 Section 601(e)

“Nonresidents and part-year residents. (1) General. There is hereby imposed for each taxable year on the taxable income which is derived from sources in this state of every nonresident and part-year resident individual and trust and every nonresident estate a tax which shall be equal to the tax base multiplied by the New York source fraction.”

NY Dept. of Taxation and Finance Memo

TSB-M-06(5)I, May 15, 2006

“Under this rule, days worked at home are considered New York work days only if the employee’s assigned or primary work location is at an established office or other bona fide place of business of the employer in New York State.”

Exceptions to NY Tax

New York Tax Law, Article 22 Section 601(e)

- Also applies to regular commuters working in New York that live out of state
- Some exceptions including for full-time, remote employees whose *bona fide employer office* has been established to be outside the state

State Corporate Registration Requirements

- Companies are required to register in every jurisdiction where they transact business
- Does having a remote employee equate to transacting business in that employee's state?

Transacting Business in Virginia

- State law does not define what constitutes transacting business
- Rather state law defines some activities that do not constitute transacting business

(VA Nonprofit Corporation Act Section 13.1-919)

Not Transacting Business

- State law does not define what constitutes transacting business
- Rather state law defines some activities that do not constitute transacting business

VA Code Section 13.1-919

It is not transacting business to:

Among other things, hold meetings of the board of directors or members or carry on other activities concerning internal corporate affairs

Internal Corporate Affairs

Courts have defined this as:

- Steps taken in the course of the original incorporation
- The adoption of by-laws
- The issuance of corporate shares

State Unemployment Regulations

As has been discussed earlier:

- Remote employees are responsible for income taxes where they reside
- That usually means employers are subject to unemployment regulations in that jurisdiction
- Depending on the jurisdiction, that may entail registering to do business

Remote Employees Likely Trigger Registration Requirements

- The recommended approach is to register in those jurisdictions where you have remote employees because:
 - The employee's activity likely constitutes transacting business
 - The jurisdictions unemployment regulations will require registration

Employee Tax Deductions

Beginning with FY 2018 returns, employees can no longer claim deductions for business use of the home such as:

- Insurance
- Utilities
- Maintenance and repairs

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Employee Tax Deductions Cont.

However, some deductions for furniture and equipment used in the home for business are still available whether or not the taxpayer qualifies to deduct expenses for the business use of the home.

IRS Form 4562 Depreciation and Amortization

Employee Tax Deductions Cont.

Deductions may be available for property bought solely for business use.

However, if employee converted property previously used for personal purposes or the employer reimbursed employee for property then **the employee cannot claim any deduction.**

See IRS publication 587 for more information.

Liability – Workplace Injury

Hypothetical:

Employee has a home basement office.

Employee decides to get up a get a cup of coffee from the kitchen. Suddenly, employee hears the basement phone ringing and goes to answer it.

While descending the stairs to the basement office, employee falls and suffers an injury.

Is employer liable?



Verizon v. Worker's Comp. Appeal Board 900 A.2d 440 (Pa. Commw. Ct. 2006)

Employer argued that employee left the employer's "premises" during an authorized break for personal reasons unrelated to the job duties, therefore employee was not within the course of the employment when the employee sustained the injury.

Thoughts?

Verizon v. Worker's Comp. Appeal Board 900 A.2d 440 (Pa. Commw. Ct. 2006)

Court ruled in favor of employee under the
“personal comfort doctrine.”

“An employee who sustains an injury during an inconsequential or innocent departure from work during regular working hours, such as going to the bathroom, is nonetheless considered to have sustained an injury in furtherance of the employer's business.”

Liability – Workplace Injury

Employers should presume that an injury to a remote employee may be compensable.

However, each case will depend on the state laws/regulations and the specific facts and circumstances.

Vicarious Liability – Torts by Employee

Hypothetical:

Employee often works remotely at a client site and was at the client site for most of the day. At the end of the day, as employee is driving home, employee falls asleep and collides head-on with another vehicle resulting in other driver's death.

Is employer liable?

Barclay v. Ports America Baltimore 427 Md. 270 (Md. 2016)

“Respondeat Superior”

“An employer is ordinarily responsible for the tortious conduct of his employee committed while the servant was acting within the scope of the employment relationship.”

Was employee acting within the scope of the employment relationship?

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Court ruled in favor of employer.

“Ports had no control over [employee] in regard to its operation nor was its use ‘of such vital importance in furthering the master's business that his control over it might [be] reasonably inferred.’”

Remote Employee Checklist

- Have written policies and procedures
- Document expectations and guidelines via an telework agreement
- Check on state employment and registration requirements
- Talk with insurance broker about liability and coverages

QUESTIONS?

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