Key considerations when employees work remotely outside the state

COMPLIANCE CORNER

Julie Preciado

COMMENTARY

Telecommuting rose dramatically last spring as employers adapted to the COVID-19 pandemic and government guidance by directing employees to work from home if their jobs allowed. As the lengthy duration of the pandemic became clearer, some of these employees began telecommuting from a state other than their employer's home state or their prior location.

Faced with many more such workers than ever before and little certainty as to when they may return on-site, employers find themselves navigating difficult compliance issues, especially in regard to remote workers who have chosen to relocate to a new state. Although such an arrangement may not be difficult from a technological standpoint, there are significant legal issues and risks. Employers are wise to consider the implications and develop appropriate policies to address this unique work environment.

1. Different employee protection laws

Employment laws in the other state likely differ from those in an employer's state. Some laws that may be implicated include:

- wage and hour laws, such as those relating to state and local minimum wages, overtime calculations, and meal and rest period requirements;
- paid and unpaid family, medical, and sick leave;
- unemployment insurance;
- workers' compensation;
- noncompete agreements; and
- administrative concerns such as what information must be included on paystubs, payday frequency requirements, and rules for when last paychecks must be paid.

An Oregon employer could unknowingly find itself in violation of overtime laws when an employee works remotely in California for nine hours per day, four days in a row. Under Oregon law, overtime would not be implicated; an employer only needs to pay its employees for any hours worked over 40 in a week. In California, however, an employer owes its employee overtime when the person works more than eight hours in any one day. The different laws present both withholding and reporting concerns for the employer, as well as eligibility concerns for the employee.

2. State and local tax liabilities

The traditional rule regarding income tax has been that a state may tax: (a) a nonresident individual only with respect to income that is generated by, or earned from, sources within that state; and (b) a resident for income taxes on any and all income earned or received worldwide. A state may tax a nonresident employee's wages to the extent such wages are attributable to services rendered by the nonresident employee within the state.

There are other payroll tax deductions to consider, like the Washington paid family and medical leave. Some HR and payroll experts advise employers to immediately begin payroll withholdings in the state from which the employee is remotely working when the telecommuting begins. While this may be easy enough for a multistate employer that is already set up with another state's tax entity, it is not as simple for many employers that otherwise operate in only one state.

3. "Doing business" in the other state

Telework could establish a physical business presence in a state where a company previously had no business presence. Under some state business statutes, an employer with remote employees teleworking from the state is "doing business" in that other state based on the presence of teleworking employees there. Employers could face, at a minimum, an inquiry from a state agency if the business registered with the state's department of revenue to withhold a resident employee's state income tax, but did not register for a business license. Many considerations go into what constitutes nexus for purposes of business taxation or registration as a foreign (out-of-state) entity "doing business" in another state, and the inquiry is fact intensive.

If an employer is determined to be "doing business" in another state, that also opens it up to legal action in that state under traditional notions of personal jurisdiction. The fewer contacts with the foreign state that the business makes, the stronger the argument that the employer is not doing business in a foreign state that would require registration with state agencies.

4. Other concerns

Benefits: Employers may want to think about the implications of benefits they offer to their employees. Coverage of a regional health care provider may be limited and may not adequately meet the needs of an out-of-state remote worker. For public employers, there may also be implications for employees' eligibility for retirement or other benefits under PERS.

Labor: If an employer has unionized workers, it will need to consult the collective bargaining agreement, as it may define the principal place of employment or implicate other important issues. Be sure to engage union leaders in the process.

Best practices: Understand the complexity of laws and how and when they apply. The best advice for an employer with remote workers is to be proactive:

- Know where employees are working.
- Become familiar with the wage and hour, health and safety, and other employee protection laws of the state from where remote employees are teleworking.
- Create policies for remote work. Require approval before an employee may begin teleworking in another state. Set expectations for working hours and define work space.
- Implement telework agreements for each remote employee. Ensure the employee knows that his or her duties, compensation, benefits, work status, responsibilities, and amount of time expected to work will not change.

There are many issues involved and employers may have to strike a balance. Rules of territoriality, conflict of laws, and choice-of-law analyses come into play. Contact employment counsel for help navigating this complex frontier.

Julie Preciado is an attorney with Barran Liebman LLP. She advises and represents employers in a variety of employment and labor law matters. Contact her at 503-276-2126 or jpreciado@barran.com.