

It's 2021—Do You Know Where Your Employees Are?

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The pandemic has shifted the convention of a static workplace to a virtual paradigm. If the “workplace” only requires a laptop and a stable internet connection, employees can perform their jobs from any place—indeed many places—without notice to, or consent from, their employers.

While anecdotes of employees traipsing around the country (think tiny home office on wheels) are just that, employers must still account for their workers’ whereabouts in addition to the many other workplace challenges the pandemic has posed. So, what are the legal implications of a pandemic-created nomadic workforce?

Why Work Location Matters

The physical place where an employee performs services generally governs the employment relationship. This locality rule results in part from the significant interests states and many municipalities have in protecting the health and safety of workers as well as ensuring fundamental work rules and rights. The red-blue chasm in our country to some extent impacts policies underlying state and other local-based employment regulations in scope and substance.

Wage-and-hour laws are, in fact, among the most distinctly local for employment compliance. Many states have their own minimum wage and overtime regulations and even municipalities have gotten into the regulatory act, requiring significantly higher minimum wages for hourly workers within city and regional areas.

San Francisco, for example, will, effective July 1, require employers in the city and county to pay hourly employees a minimum wage of \$16.32, nearly \$10 more per hour than the federal \$7.25 hourly mandate. The San Francisco regulation is not an outlier. Many municipalities and states have equally beneficial wage-and-hour regulations.

Wages are not the only subject of local regulation. Other laws, such as sick leave, disability leave, and even parental leave, are distinctly regional as well.

State taxation schemes for income and payroll taxes are also imposed based employee work locations. If an employer does not know where its employees are located, the employer cannot calculate, withhold, and pay over to the applicable regulatory authorities the correct amounts for income taxes, and assessments for unemployment, disability, and other state-specific schemes. State licensing laws may also impact where employees may lawfully perform services.

How to Identify Work Locations

The pandemic has caused many employees to relocate, some temporarily, some permanently, to locations considered safe or convenient. Some displaced employees moved without notifying their employers—either because they were unaware of a notice obligation, they weren’t certain if the relocation was temporary, or they didn’t want the employer to know their whereabouts for fear of job loss.

In some instances, the lure of affordable housing and the evident ease with which the employee could perform work remotely made the decision to relocate not only natural, but obvious. Given the obligation to comply with state and local-imposed employment regulations, however, employers remain obligated to ensure that they are complying with local regulations.

Indeed, employers are now faced with a somewhat unprecedented quandary: How do you know where your employees are working?

One approach is to ask employees to identify their work locations and implement a work rule requiring employees to notify the employer when they change their place of employment. Some employees may refuse to comply or may provide false or misleading responses. But it is prudent at a minimum to regularly to ask the location question, and to require certification of the response.

Auditing expense reimbursement requests and asking managers to elicit specific information are also acceptable procedures. While it is the employer's burden to comply with wage and hour regulations, in the context of a pandemic, the employer has in many cases no choice but to rely upon the truth of its employees' responses.

It would seem unfair to impose penalties (some of them quite severe for non-compliance) on employers who genuinely attempt to discern the proper work location information and report that information to the regulatory authorities.

Will Work 'Location' Have Continued Relevance?

The evolution of the workplace from fixed to virtual is undoubtedly a permanent feature of the employment landscape. Many tech and other companies have already announced that they will allow employees to work remotely on a permanent basis.

In addition, a recent survey by **BCG** found that 89% of Americans expect to continue to work remotely at least some of the time post-pandemic.

It remains to be seen if and when our regulatory paradigm for location-based wage-and-hour and employment taxation will be modified to address the new reality. But employers are obligated, even before that happens, to prepare for the new paradigm of a wandering workforce.

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