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LABOR & EMPLOYMENT

If the remote workplace is here to stay, how will that impact employment law?

By Gina Miller

As the world slowly reopens, it has become abundantly clear that many employees are not rushing to get back into the office anytime in the near future. In some instances, if the employer will not agree to some or all remote work, employees are simply cutting ties with their current employers and moving on to a business that will allow them to work from home. Indeed, working remotely has now become a key negotiated term within a new employment contract alongside health care benefits, hours, salary, and job duties. At a delicate time when companies need all hands on deck and as the country digs itself out of the chaos of the pandemic, it may be wise to listen to employees and consider whether a long-term remote work environment is workable for the business and if so, how to structure it effectively. Otherwise, an employer may risk short-term and possibly long-term hiring shortages because of competitors offering remote work options to entice new workers into the fold.

If remote work is here to stay, how will this impact the legal landscape for labor and employment law? The answer is that the claims brought by employee side attorneys may shift because there will likely be much less physical, face-to-face interaction between individuals with a remote or hybrid workforce. For example, if there is less in-person interaction, there is less opportunity for an employee to engage in some forms of harassment while at the worksite. This does not mean an employee cannot bring a harassment claim because harassment comes in different forms – verbal, physical and visual. However, a harassment claim could be more dif-

icult to prove if the employees involved rarely worked in-person together and there is no documentation (e.g., emails, texts, social media postings) to support a claim for harassment.

Due to the potential for reduced in-person interaction, the legal claims and theories of liability may shift. For example, under Labor Code Section 2802, California requires employers to reimburse for reasonable and necessary business expenses. Under federal law, employers generally are only required to reimburse for work-related expenses when the expenses drop the employee's earnings below minimum wage. Now that many employees are working remotely, employers should be diligent to ensure that the business expenses an employee incurs from working remotely are reimbursed where appropriate to do so. For example, if the employer requires the employee to have a locked cabinet for confidential files, the locked cabinet may be a necessary business expense. Now, if the employee purchased a top of the line cabinet, the full price, over and above a reasonable cost, arguably would not be reasonable. Other potential expenses that likely fall into the partial/full reimbursement category would be a portion of internet access expenses, printer, office supplies, cell phone charges, a computer, a web camera, a headset and software. As employee side counsel look for hooks for liability, they will certainly ask the employee whether they have been obligated to incur unreimbursed expenses stemming from working remotely.

Wage and hour claims have also spiked with the increased remote work force. Under California law, employers have a general duty to provide an unpaid meal period of at least 30 uninterrupted minutes

starting no later than the end of the fifth hour of work. In addition, nonexempt employees must be paid for all hours worked. In the remote work context, the home life and business life have now often blended into one. Employees may capitalize on this merger and argue that they are always expected to be online and responsive to calls and emails. They may also argue that they do not have time for meal and rest breaks because the emails and calls keep coming even while they attempt to take a meal break or rest break. The dangerous part about these theories is that the employee may be able to easily point to emails and other documentation to show that they were not off of their computer for an uninterrupted 30 minutes during the workday. The point is that the employee has a clean, simple argument, supported by documentary evidence that the employee worked through the meal break. In addition, there likely may be no witnesses to counter the employee's argument because the employee is working remotely. Faced with documentary evidence, employers may be left only to argue that the employee voluntarily chose to ignore the company meal and rest break policies and work through their meal break.

Another area of law that has come under the spotlight due to the pandemic is employee disability or medical conditions and subsequent requests to be accommodated by working remotely. Employers should consider engaging counsel to work through these requests because disability discrimination cases can be highly factually dependent cases that can be difficult to get dismissed by a judge short of trial.

To avoid arguments under Labor Code Section 2802, wage and hour claims, and any requests for accommodation, employer

should consider investing in a sound remote-work policy. This policy should address such topics as: which workers may work remotely or what work functions may be performed remotely, whether working remotely is on a permanent or temporary basis, time-keeping mechanisms for non-exempt workers, employee efficiency and monitoring, attendance records, time-off protocols, schedule and availability expectations, protection of trade secret information, and reimbursement of business expenses. Having a detailed remote work policy that is not just in writing but also is put into practice and enforced, will assist the employer in defending a remote worker's employment claims. It will also contribute to clarity and consistency in the workforce.

Finally, employers wanting to entice employees back into the office should consider assembling COVID-19 Preparedness Plan — a requirement under Cal/OSHA since November 2020. The plan has 11 sections including training which may put employees at ease when contemplating a return to in-person work. ■

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