



Telecommuting Issues for Today's Remote Workforce

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Littler

ACC Association of
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— NATIONAL CAPITAL REGION —

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THE NEXT NORMAL

Working from home is here to stay, even when the economy reopens

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Covid-19 could cause permanent shift towards home working

Tech firms will benefit, but some companies could find employees don't want to return to the office

UP FRONT

Telecommuting will likely continue long after the pandemic

Economy | Coronavirus pandemic

As new wave of COVID-19 cases hits, remote work becomes the norm

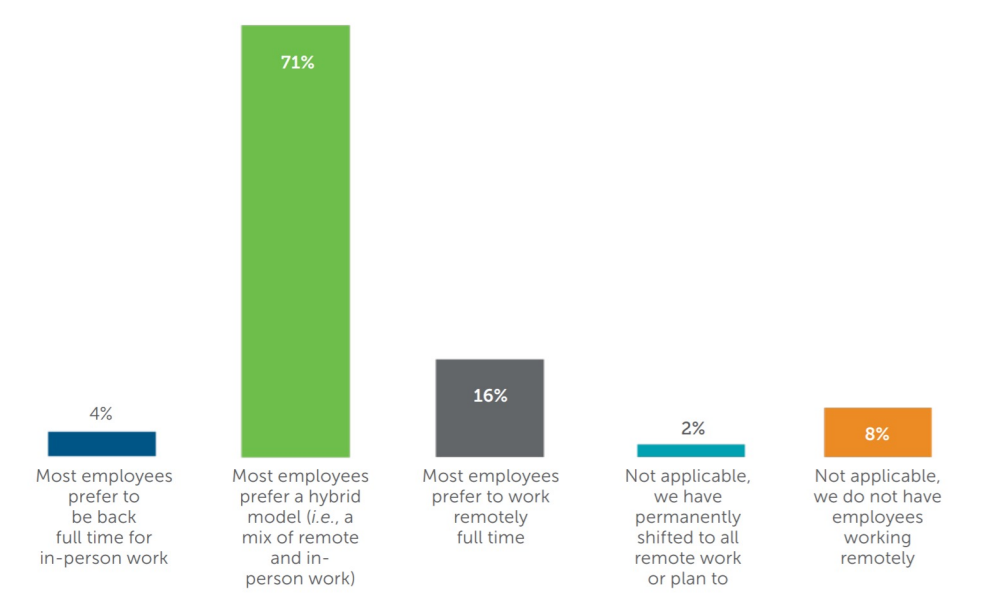
What for many workers started as a temporary break from the office to stop the spread of the coronavirus has turned into a new way of life.

U.S. Workers Discovering Affinity for Remote Work

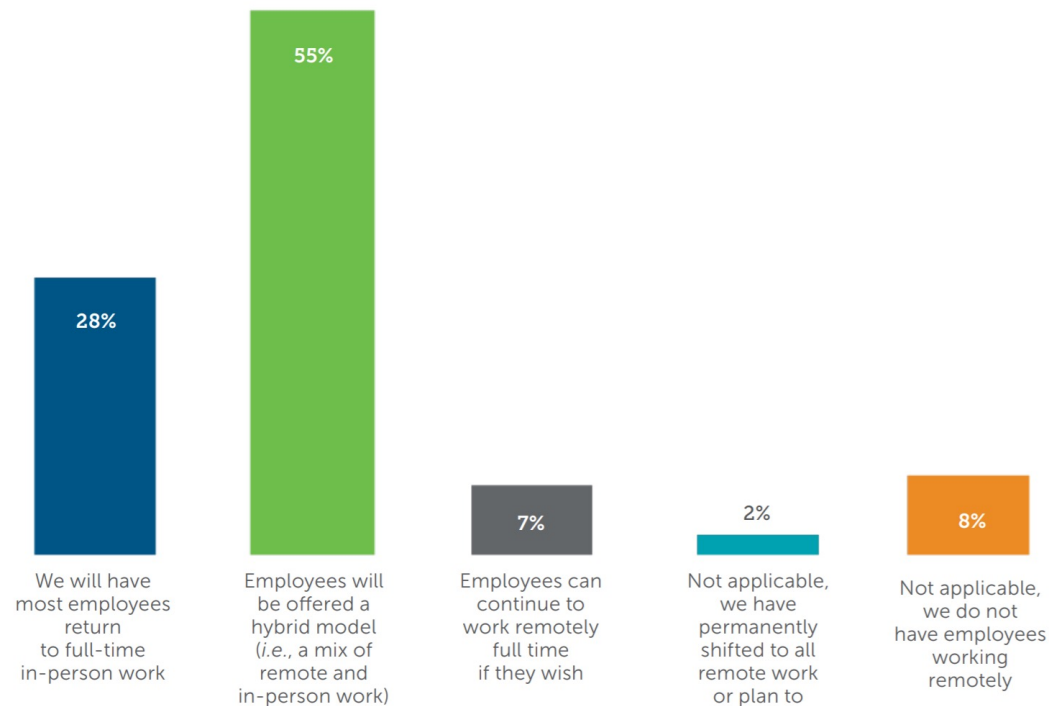
BY MEGAN BRENNAN

Return to the Physical Workplace/Remote Work

For your employees who can work remotely, to the best of your knowledge, which of the following most accurately describes their preference for a return to in-person work as it becomes safer to do so?



For your employees who can work remotely, which of the following best describes how your organization plans to approach work schedules once it is safer to return to in-person work?



Welcome to the Party!

- Not only are we seeing a new openness to remote work, we also are seeing changes in the **types** of employees offered remote working opportunities.
- Traditionally, remote work was confined largely to certain categories of exempt employees.
- Employers are now considering making remote work available more broadly, including to **non-exempt** personnel, such as administrative and support staff.





Agenda

Telework Policy and Agreement

Hours Worked

Expense Reimbursement

Preserving Exempt Status

“Wandering Worker”

Practical Advice



You Gotta Agree

Common Questions Asked by Telecommuters

- How do I clock in?
- Who pays my electric bill?
- What happens if I get sick?
- What happens if I slip and fall?
- What should I do with all this top-secret work stuff?
- Can I keep doing this forever?



Telework Policy and Agreement

- Eligibility for telework
- Not a Substitute for Family Care, PTO, or Leave
- Communication
- Availability
- Location, Location, Location
- Confidentiality and IT Capability
- Workspace Safety
- Equipment and Reimbursement
- Timekeeping
- Reasonable Accommodations
- Subject to Revision

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How do I clock in?



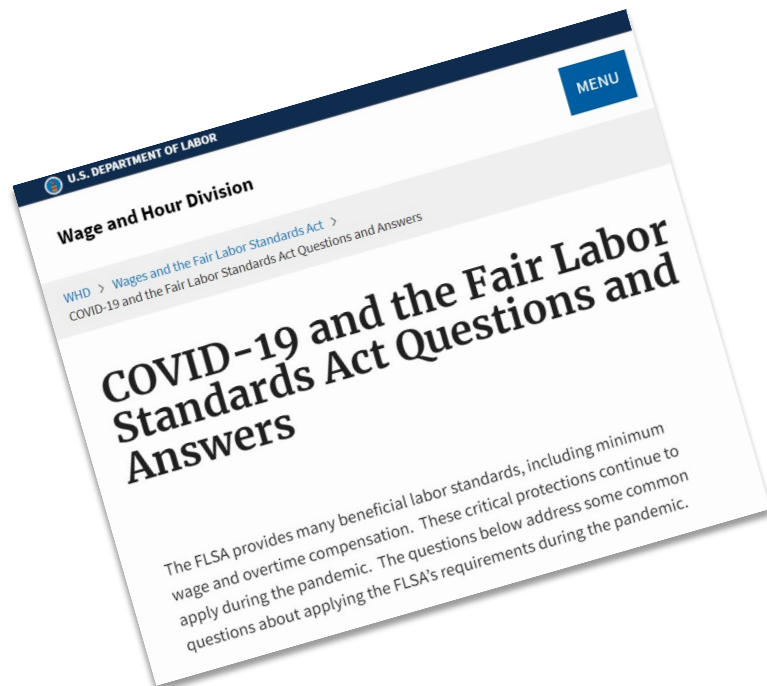
Hours Worked

Tracking Time for Employees Working from Home

- Off-the-Clock Work
- Actual or Constructive Knowledge of Hours Worked
 - Work not requested but suffered or permitted is work time. 29 C.F.R. § 785.11.
 - The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours work. 29 C.F.R. §785.12.
- Interruptions
- Trust but Verify



U.S. DOL FAQ re COVID-19 and the FLSA



- <https://www.dol.gov/agencies/whd/flsa/pandemic#21>
- Originally published July 20, 2020, but answers revised April 16, 2021
- “[Y]ou must be paid for all hours of telework actually performed, including overtime work, in accordance with the FLSA. Your employer must pay you for all reported and unreported hours of telework that they know or have reason to believe had been performed. This is true even for the hours of telework that your employer did not authorize.”
- “It is an employer’s obligation to exercise control to prevent unwanted work from being performed.” **BUT “[i]n most cases, your employer may satisfy their obligation to pay their teleworking employees by providing reasonable time-reporting procedures and paying employees for all reported hours.** For more information, see Field Assistance Bulletin No. 2020-5” (emphasis added).



UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210



Field Assistance Bulletin 2020-5 (8/24/20)

- Actual or constructive knowledge
- Reasonable diligence
- Reasonable reporting procedure
- Do not prevent or discourage reporting
- Employee reports or other notifications
- Impractical efforts not required

Is This Work?

- **Volunteering**
 - DOL Fact Sheet 71, <https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships> (DOL adopts primary beneficiary test for volunteers, trainees, and interns)
 - *Benjamin v. B & H Education, Inc.*, 877 F.3d 1139 (9th Cir. 2017)
- **Mixing Personal and Work Time**
 - “Continuous workday doctrine”
 - Off-duty time (29 CFR § 785.16(a); DOL WHD Op. Ltr. FLSA2020-19)
 - State law split-shift rules (*e.g.*, D.C. Mun. Regs. tit. 7, §§ 906.1. 999.2.)
- **Travel Time**
 - 29 CFR § 785.38 (travel that is all in a day’s work)
 - 29 CFR § 785.37 (special one-day assignment in another city)
 - 29 CFR § 785.39 (travel away from home community)
- **Meal and Rest Breaks**
 - Federal law: rest breaks compensable (29 CFR § 785.18); meal periods non-compensable (29 CFR § 785.19)
 - But what about state laws?



Working Off the Clock: Mitigating Risk

Adopt a clear timekeeping policy and user-friendly time keeping systems

Adopt a protocol for email approval (or another method) of overtime work in advance

Training!

Consistently enforce telework and timekeeping policies

Pay for any time worked, regardless of whether it is authorized

Practical Considerations for Remote Work Policy

- ***Non-exempt*** employees:
 - Hours worked and timekeeping policy
 - Clear work schedule
 - Include breaks
 - Prohibit work outside schedule
 - Set expectations regarding interruptions; short interruptions = work
 - Schedule options
 - Maintain regular schedule (8-12, 1-5)
 - Block schedule (7-8, 9-3, 10-11)
 - Consider “core hours” (10-12 and 1-3)
 - Include reasonable reporting procedure



Practical Considerations for Remote Work Policy

- ***Non-exempt*** employees:
 - Avoid “continuous workday”
 - Work blocks ≥ 1 hour
 - Blocks ≥ 30 minutes apart
 - Split shift and spread of hours
 - Prospective changes
 - One-time adjustments
 - Timekeeping
 - Defining “work”
 - Meal periods and rest breaks



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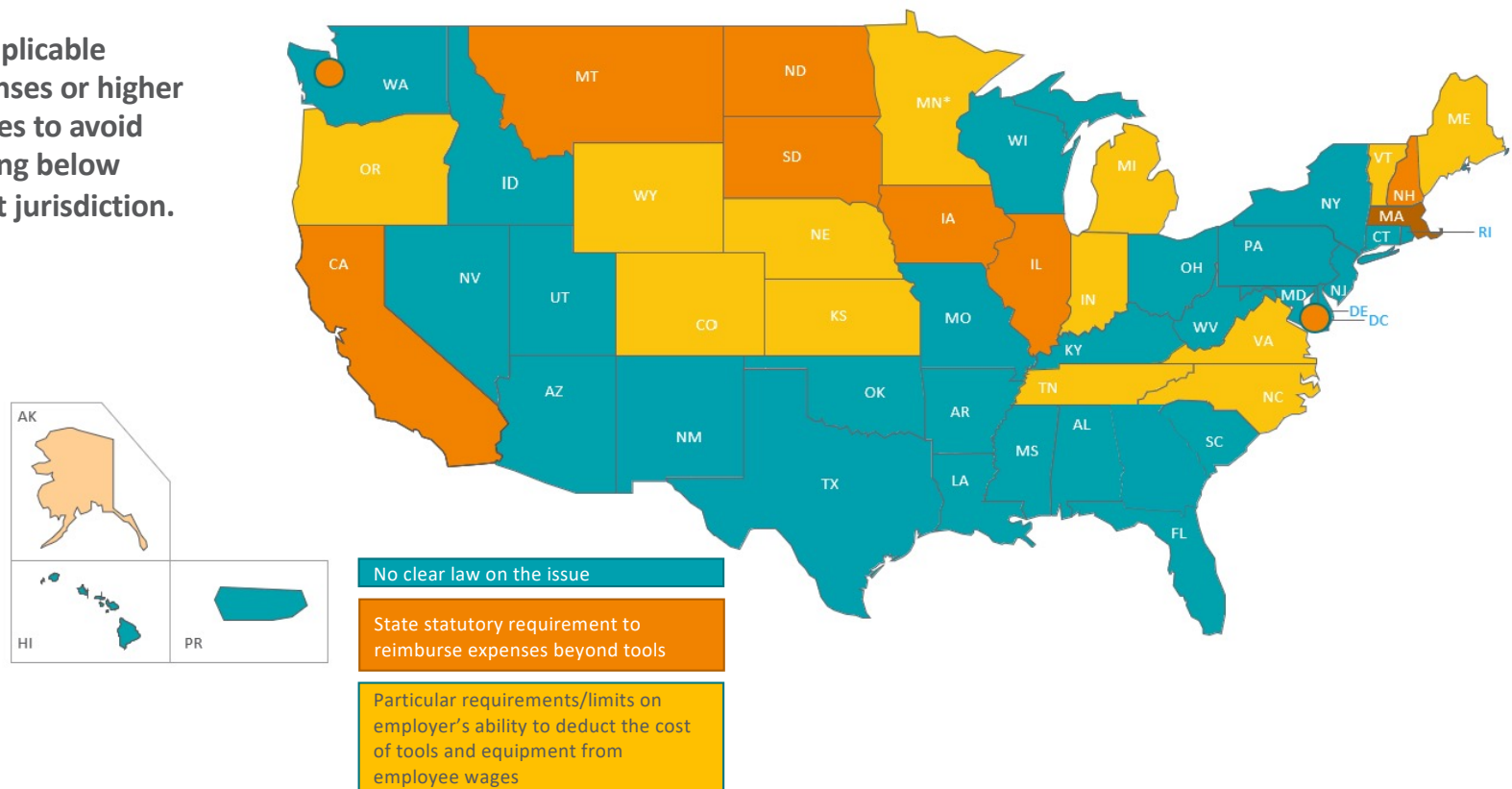
Who pays my electric bill?



Expense Reimbursement

All Over the Map: Reimbursement Regulations & Interpretations

Employers must pay applicable minimum wage + expenses or higher wages to offset expenses to avoid employees' pay dropping below minimum wage for that jurisdiction.



State Expense Reimbursement Variation – Washington DC

- Washington, D.C. – In addition to paying employees the state minimum wage, an employer must pay the cost of purchasing and maintaining tools the employee is required to use to perform the employer’s business. (D.C. Mun. Regs. tit. 7, § 910.1.)
- Municipal regulation without any official agency guidance or interpretations and no case law to rely upon
- Unclear what this requires:
 - How broad is “tools” – *i.e.*, tools used by construction worker **or** all expenses incurred by any employee working at home?
 - **One possibility:** if employee is paid close to the minimum wage, employer must reimburse employee additional work expenses to ensure the employee does not fall below minimum wage
 - **Another possibility:** Employers must reimburse all work expenses incurred by any employees regardless of hourly rate paid

Is it “necessary”?

E.g., California Labor Code § 2802(a):

An employer must “indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties...”

Expenses associated with telework are not “necessary” if:

- Participation is **optional**; *and*
- Employer **makes workspace and necessary equipment available.**

Is it “reasonable”?

E.g., I.R.S. Pub. 15 (2021):

For reimbursements to be excludable from taxable wages employees must substantiate expenses and return amounts in excess of substantiated amounts.

E.g., 29 CFR § 531.35

Payments must be “free and clear.”

E.g., *Cochran v. Schwan's Home Services, Inc.* 228

Cal. App. 4th 1137 (Cal. Ct. App. 2014) :

Employer must pay “reasonable percentage” of employee’s bill for personal cell required to be used to take work calls.

Follow the **Goldilocks Rule**:

- NOT TOO BIG;
- Not too small;
- Just right.

Practical Considerations for Remote Work Policy

- Make clear: voluntary or involuntary
- Identify equipment/supplies and resources
- Specify which are employer-provided
- Clarify expense reimbursement
 - What
 - How much (reasonable cost/percentage)
 - Prior approval for purchases
 - Allow appeals
- Plan for lost or damaged property, and return of equipment upon separation

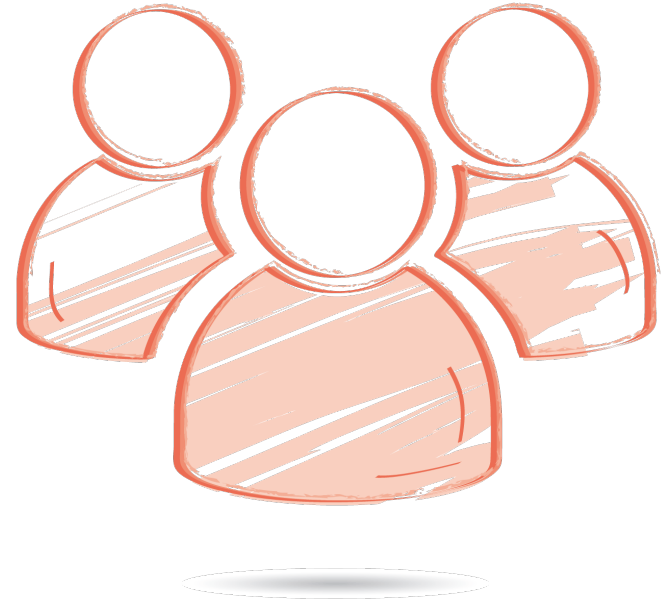




Preserving Exempt Status

Worker Misclassification

- Potentially Tricky Exemptions for Remote Workers:
 - Executive (29 CFR § 541.100)
 - Outside Sales (29 CFR § 541.500)
- Combination Exemption as a Solution? (29 CFR § 708)
- Be Aware of Potential Variations in Exemption Requirements Under State Law!



Duties Tests

- Exempt employees performing non-exempt work
 - DOL Regulation on “Emergencies” (29 CFR § 541.706)

“An exempt employee will not lose the exemption by performing work of a normally nonexempt nature because of the existence of an emergency. Thus, when emergencies arise that threaten the safety of employees, a cessation of operations or serious damage to the employer's property, any work performed in an effort to prevent such results is considered exempt work.”
 - Relying on this regulation, DOL issued FAQ last year indicating otherwise exempt employees can perform nonexempt duties during emergencies that could not reasonably be anticipated, including the COVID-19 pandemic.
 - But we now are moving beyond the emergency situation presented by COVID-19.
- Does remote work change any duties? (*See, e.g.,* outside sales employees.)



Practical Considerations for Remote Work Policy



- Reconsider exemption status
- Take state law exemption requirement variations into account
- Don't leave this to chance!
 - *Document!*
 - *Training!*
 - *Don't forget the supervisors!*

“

***What should I do with all
this top-secret work stuff?***



Information & Property Security

Information & Property Security Still Should Be a Priority



- Being remote should not change an employer's expectations for information and property security, safety or ownership.
- Even when they are remote, employees should provide the same level of security for your organization's equipment, materials, and work product.

Physical & Cyber Security

Physical Security

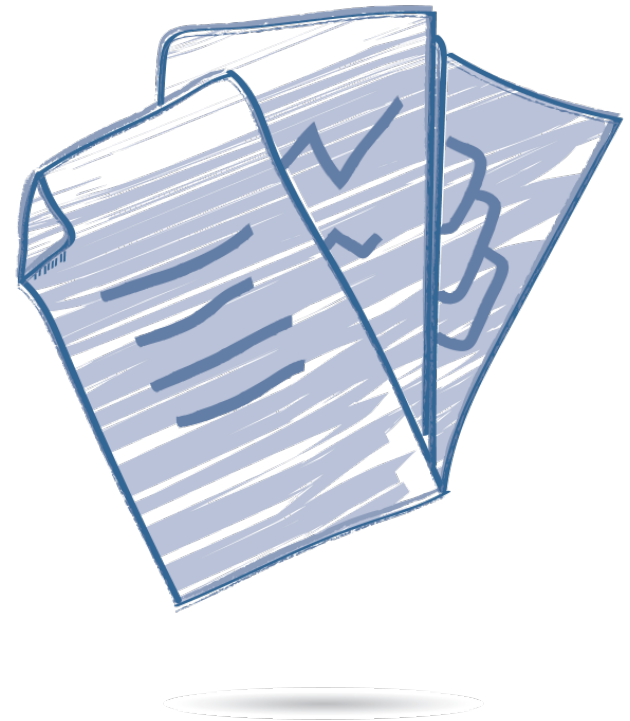
- Best practice is for employees to have a separate space in their home, with a door that locks or the ability to put their work laptop/phone/confidential information in a drawer that locks.
- Employees should be instructed not to leave work equipment visible in vehicles or other public/semi-public spaces where theft is possible.
- Printed materials should not be disposed of in normal household trash – they should be shredded or taken to physical office for proper disposal.

Cybersecurity

- IT departments should set out clear rules on use of equipment (*i.e.*, minimal personal use of devices).
- Virtual Private Networks (VPNs) should be used to access employer computer systems. If your organization has a Bring Your Own Device (BYOD) policy for mobile devices, consider mandating use of a mobile VPN.
- No use of personal email for work related communications.

Practical Considerations for Remote Work Policy

- Information/property security rules and expectations should be part of remote work policy.
- Although it is difficult to separate work and personal time for remote workers, significant effort should be given to separate work and personal *equipment and materials*.



“

What happens when your remote employee is in another city, or state, or country?...

“

***...And what happens if they
start meandering around?***



Wandering Workers

What Laws Might Apply?

- Biggest issue with wandering workers is how the applicable legal standards may change based upon the jurisdiction where the employee is working
- Most jurisdictions tend to take an expansive view regarding the applicability of the protections they afford employees under their local laws



Differing Wage and Hour Rules

- Differing reimbursement rules
- Differing available exemptions and exemption standards
- Differing minimum wage rates
- Differing rules on availability of overtime (*i.e.*, daily OT)
- Differing meal and rest break rules
- Differing split shift and reporting time rules
- Differing continuous workday standards
- Differing availability of different methods of compensation

“

***What happens if I get sick?
What happens if I slip and fall?***

Differing Mandatory Paid Leave Laws

- Does a state, county, or city law apply?
- When does my employee begin to accrue leave under these laws?
- Are there local rules about how employees can use that accrued leave?
- Are there rules about segregation of leave under local laws?
- Are there special or unique paid (or unpaid) leave laws?



Other Differing Workplace Laws

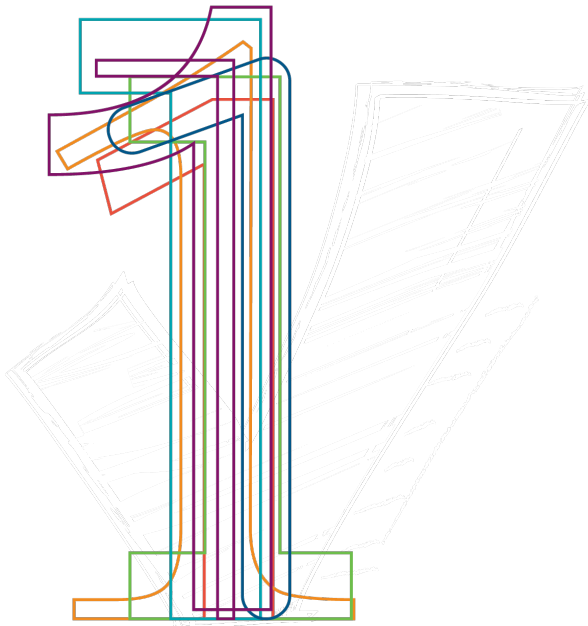
- Differing EEO protected categories
(Compare, e.g., D.C. Code § 2-1402.11 (personal appearance, family responsibilities, political affiliation); Va. Code § 2.2-3900(B)(2) (veteran status))
- Differing workplace protections
(i.e., political activity, private conduct outside the workplace)
- Differing employment tax/withholding issues
- Differing unemployment insurance laws
- Differing worker's compensation laws
- Differing workspace safety standards





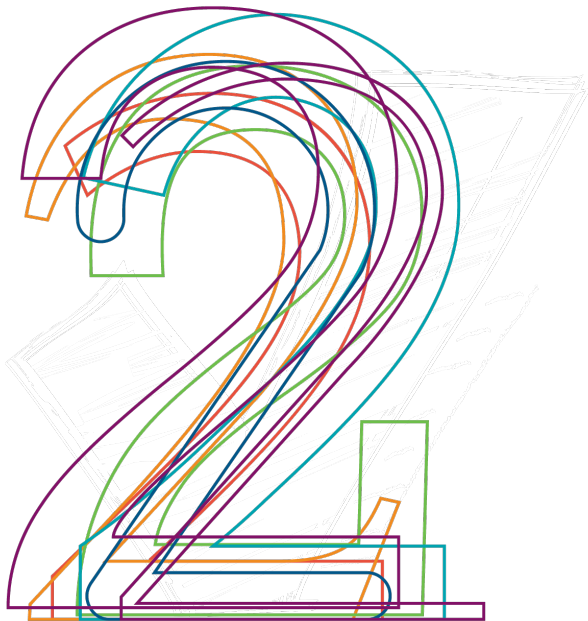
So, What Can
an Employer
Do to Avoid
Wandering
Worker
Liability?

Practical Suggestion For Dealing With Wandering Workers: Number 1



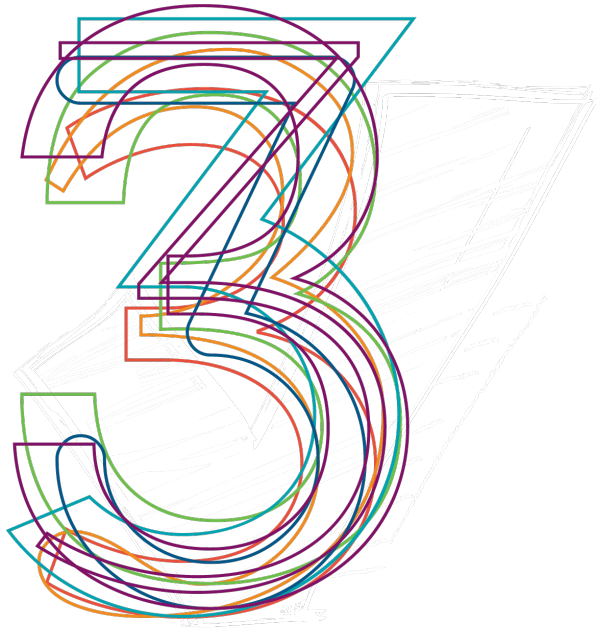
- **Ignorance ≠ bliss**
 - Step one: **WHERE?**
 - **Where** is everyone?!
 - **Who is not where we thought they were?**
- Ignorance of the law is no excuse; ignorance of the work location of your employees also is no excuse.

Practical Suggestion For Dealing With Wandering Workers: Number 2



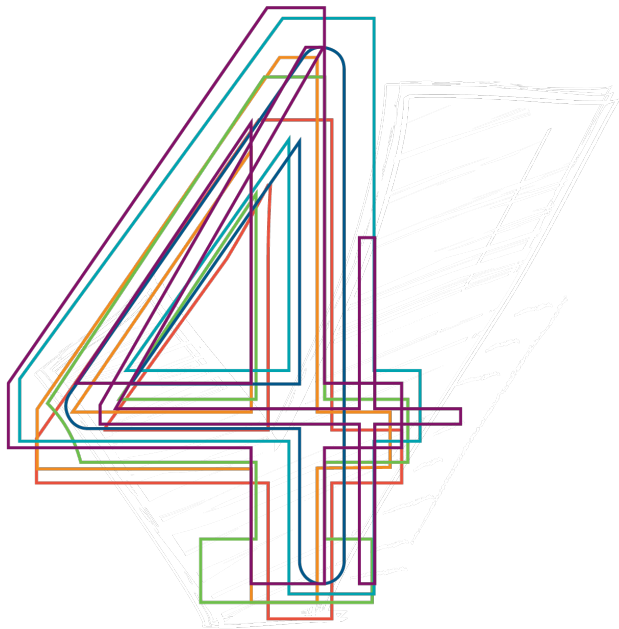
- Should you care about **WHY**?
 - Does it matter if the employee chose to move to a different state, or whether the employer asked the employee to move?
 - Sometimes.

Practical Suggestion For Dealing With Wandering Workers: Number 3



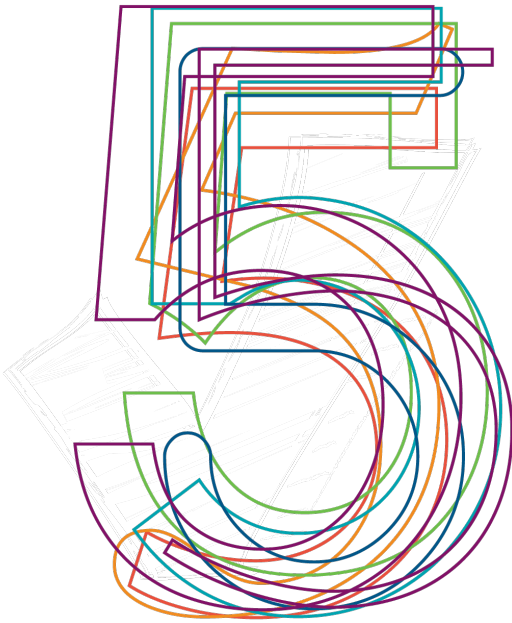
- Make sure your remote work agreements and policies address location
 - “Tell us where you are” is probably not enough.
 - Lay out some basic understandings and parameters
 - What about a “*You Can’t Move*” policy?
- Should you embrace flexibility?
 - “Where you **can** work” vs. “where you **can’t** work”
 - When does a vacation become a relocation?

Practical Suggestion For Dealing With Wandering Workers: Number 4



- For International Wandering Workers:
 - Revise your global mobility policy
 - Beef up your insurance
 - Evaluate creative alternatives to reduce liability:
 - Independent Contractor
 - PEO
 - Global Employment Companies (GEC)

Practical Suggestion For Dealing With Wandering Workers: Number 5



- Build and maintain your own checklist:
 - ✓ State/local/international business licensing
 - ✓ Payroll tax withholding
 - ✓ Wage and hour
 - ✓ Leaves of absence
 - ✓ Unemployment insurance
 - ✓ Workers' compensation
 - ✓ WARN Act

Concluding Remarks

Why is this so complicated?

- Ten years ago, we didn't have so many state and all these city and county laws.
- When you add the “from” state/city to the “to” state/city, it instantly creates a complex matrix of several employment laws which might/might not apply.
- Unfortunately, you can't always solve the problem by just applying the law which provides the most generous benefits to the worker.



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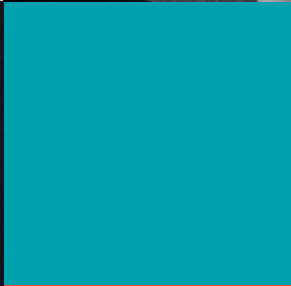
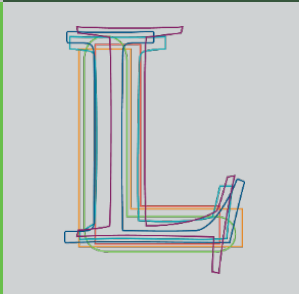
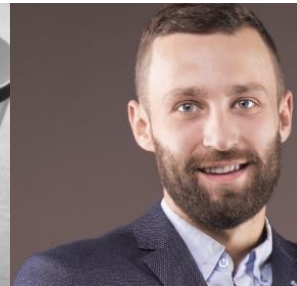
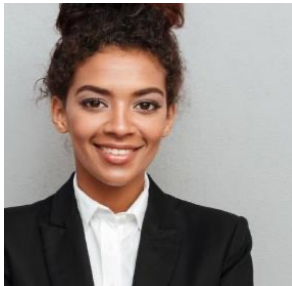
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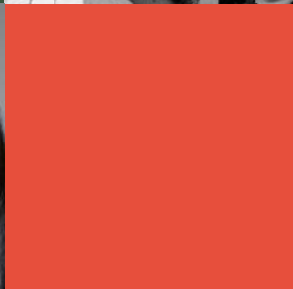
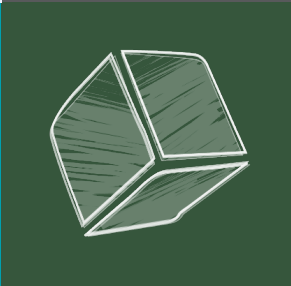
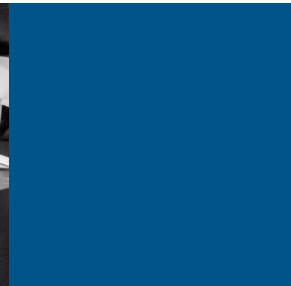
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