



# Managing the Legal Implications of Wandering Workers

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**Littler**

**ACC** Association of  
Corporate Counsel  
— NATIONAL CAPITAL REGION —

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# Welcome to the Post-Pandemic Workplace!

According to a 2021 report by Microsoft, 73% of employees want flexible remote work options post-pandemic.

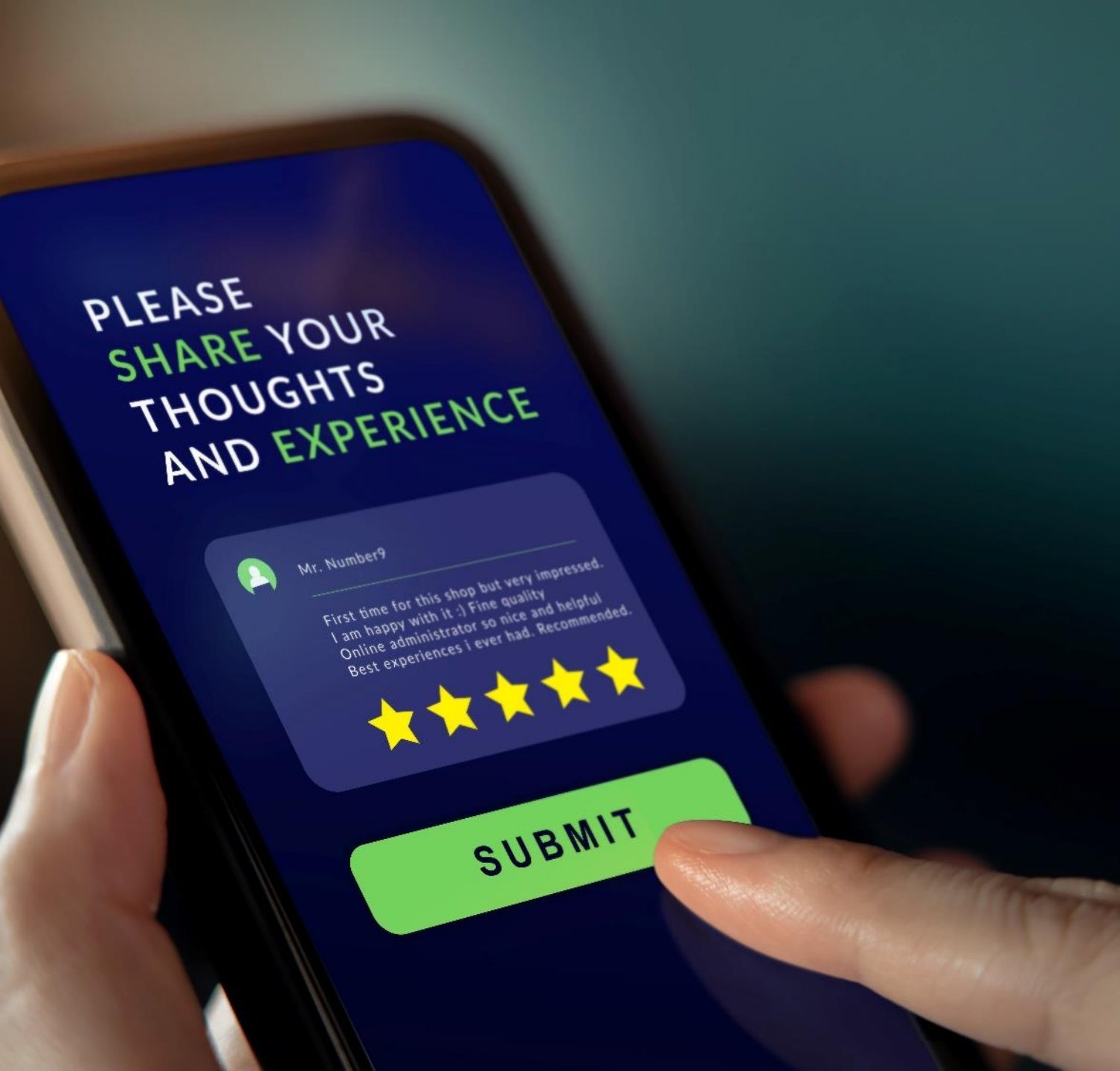


# Embracing the “Wandering Worker”

- Employees can, and do, work anywhere.
- Employers can, and do, recruit everywhere to meet their business needs.
- Does flexibility mean increased legal risk?
  - YES, unless properly managed.







Survey  
Time!

# Survey Question #1

**Is your organization continuing to allow employees to work remotely?**

## Survey Question #2

**Have any of your remote workers relocated to new jurisdictions where you did not previously have business operations?**

## Survey Question #3

**Have any of your remote workers relocated to new locations outside of the United States, or do you anticipate any of them doing so?**



# Today's Agenda

- “What’s the Deal with Wandering Workers?”
- (Some of) The Issues
  - Tax Withholding & Payroll Mandates
  - Unemployment Insurance
  - Workers’ Compensation
  - Wage and Hour Laws
  - Training
  - Leave and Benefits
  - Information/Data Privacy & Security
- Practical Advice and Tips





# What's the Deal with Wandering Workers?



# Transformation of the Global Workplace & Global Mobility

- **A LOT has changed** during the pandemic (to say the least).
- Remote and hybrid working arrangements are “**the new normal**” creating unprecedented opportunities for workers to “**wander**” to new locations and jurisdictions - **both domestically and internationally**.
- **It gets tricky** because most employment law requirements are based on a **worker’s geographic location**.
- As a result, the increased mobility – both domestically and globally – has created a wide variety of **compliance issues** that employers must appreciate and address.

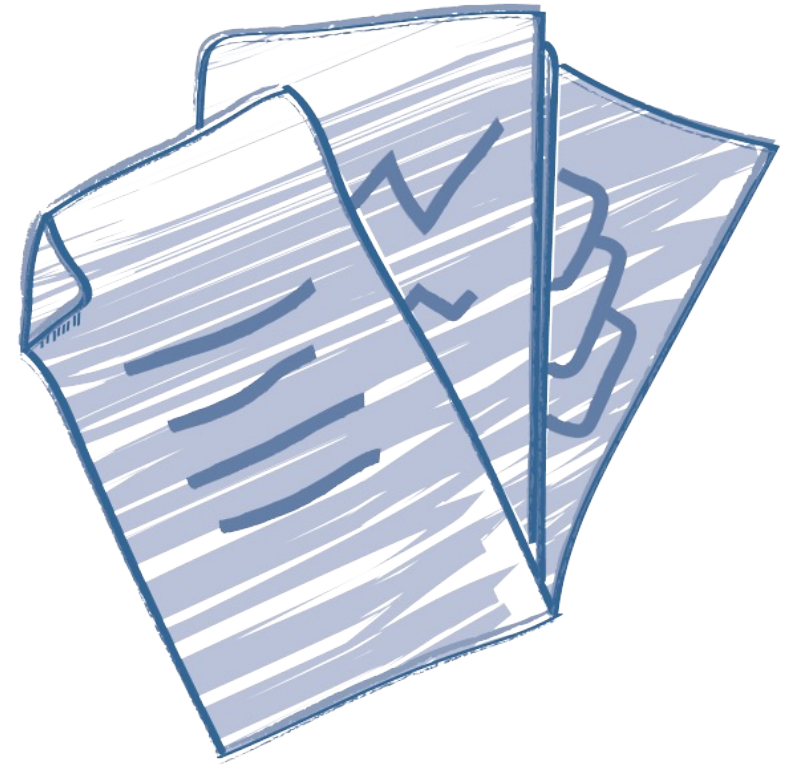


# What Laws Might Apply?

- 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
- This includes:
  - Differing wage and hour rules
  - Differing mandatory paid leave laws
  - Differing EEO protected categories
  - Differing workplace protections (*i.e.*, political affiliation, private conduct outside the workplace)
  - Differing employment tax/withholding issues
  - Differing unemployment insurance laws
  - Differing workers' compensation laws
  - Differing workspace safety standards

# You Gotta Agree!

- To address the legal liabilities associated with wandering workers, it is important that you know where your workers are and why they are there?
- You also should make sure that you have the appropriate policies and agreements in place to address these issues (*i.e.*, a remote work agreement).



# International Wandering Workers



To understand the issues, classify the relevant arrangement:

1. Overseas local telecommuter
2. Expatriate telecommuter
3. Foreign-hire telecommuter
4. **Self-directed international traveler telecommuter**
5. **Stealth self-directed international traveler-telecommuter**

# International Wandering Workers



- “International wandering workers”
  - Key group is those who had originally worked for their employer in a home country (either on employer’s site or telecommuting from a local residence) but who later, for various reasons (including personal), moved abroad.
  - Work is not (necessarily) related to host country or to employment.
- Contrast with
  - Expatriate assignment
    - “Posted worker” rules in EU
  - Business traveler



# Compliance Risk: Application of Foreign Employment Laws

- Like the different jurisdictions in the U.S., all countries impose their own employment protection laws: wage/hour, leave/time off, workplace health/safety, discrimination/harassment, dismissal/severance, etc.
- **Telecommuting-specific laws:**
  - Affirmative regulation of telecommuting
  - Example: Mexico's Federal Labor Law requires that labor inspectors verify that telecommuters — employees who work from home — register with Mexico's "Register of Employers." Employers that fail to register home workers are subject to a fine.
  - Example: Costa Rica requires an employer register "home workers" in the "sealed and authorized book" at Costa Rica's "Office of Salaries of the Minister of Work and Social Security."

# Compliance Risk: Application of Foreign Employment Laws

- After a wandering worker relocates to a foreign country and starts working from there, a **choice-of-home-country-employment-law clause tends to be unenforceable** to block the mandatory application of host-country employment protection laws.
- **Employers should generally expect that its own jurisdiction's employment law will NOT apply.**
- Rare exceptions to this general rule against the enforceability of an employee's choice-of-foreign-law clause:
  - Communist countries (China, Vietnam);
  - Some legal doctrines in some Arab countries; and
  - Certain interpretations of law in Malaysia or Indonesia.

# (Some of) The Issues





# Tax Withholding and Payroll Mandates

# State Income Tax Withholding

- An employer must determine the proper state to which unemployment and other state income taxes must be paid.
- Unlike UI taxes, which are paid to a single state, income tax withholdings may have to be paid to several states.
  - If an employee works in more than 1 state, an employer may be obligated to withhold and remit income taxes to each relevant state. The states have very different rules to when income taxes must be withheld.
  - Consider states with no income tax withholding (e.g., FL)
- Employers should consult state tax departments and tax advisors to navigate these challenges.

# United States Tax Withholding & Payroll Mandates

- U.S. state and federal laws also require American employers to comply with the following payroll mandates for international wandering workers:
  - Federal and State Income Tax Payroll Reports and Withholdings;
  - Social Security Contributions and Withholdings;
  - Worker Compensation Payments; and
  - Unemployment Insurance Payments.

# United States Tax Withholding & Payroll Mandates

- U.S. payroll mandate laws attach by the Employee's **“Place of Employment,”** rather than the Employer's Place of Payroll.
  - Example: French employer employs wandering worker or international telecommuter who works from a home in Miami, then American federal and state payroll mandate laws reach the French employer.
    - French employer breaks American federal and state laws if it payrolls a worker who is based in Miami on an “offshore” (*i.e.*, France) payroll.
  - Example: Minneapolis employer employs a wandering worker, or international telecommuter, in India.
    - Like the U.S, most countries impose their own payroll mandates on employers.
    - Once the wandering worker lives or works in India, the American employer needs to comply with India's payroll mandates.
    - Non-compliance might be a crime.



# International – Withholding & Payroll Mandates

- An employee who moves to a new country while continuing to earn income from an employer abroad probably triggers personal income tax filing and payment obligations in the host country.
- The host-country tax authority will probably consider the wandering worker's income from the (overseas) employer to be “sourced” locally — because the telecommuter earns this income by working locally, at an in-country address.
  - Example: Wandering worker who telecommutes an entire tax year from a home in Cleveland for an Italian employer owes U.S. federal and Ohio state income tax.
  - Example: Ohioan who moves to Rome and telecommutes an entire tax year for a Cleveland employer must file and pay Italian personal income tax.
- But personal income tax obligations are a wandering worker's own responsibility — not the employer's.

# International – Withholding & Payroll Mandates

- In the expatriate assignment context, employers often provide international tax equalization and international tax return preparation services.
  - But such expatriate benefits generally do not apply to a wandering worker who moves abroad for personal reasons.
- Host-country personal income tax obligations should be a concern for international wandering workers personally, but likely irrelevant to their employers.
- Employers may decide to alert their wandering workers to possible personal income tax liabilities overseas.
  - An international wandering worker who files and pays host-country personal income tax and social charges might reduce the employer's exposure to a payroll claim.
  - Telecommuter's host-country tax and social payments are unlikely to provide a defense to a charge that the employer failed to report and withhold on payroll, but as a damages-accounting measure, a host-country court might set off the wandering worker's local tax and social payments, subtracting them from the employer's liability for failure to withhold.

# International – Withholding & Payroll Mandates

- **Corporate tax exposure:**
  - “Permanent establishment” (PE)
- **Employer payroll mandates (in foreign country)**
  - Duty to register as an employer
  - Duty to withhold and remit income taxes (PAYE)
  - Duty to make employer contribution to local social security program
  - Duty to report payments and contributions

# Income Taxes: Exceptional Countries

- Exceptions in:
  - China, Ecuador, Guatemala, Japan, Thailand and possibly the UK
    - **Shut off payroll mandate laws for those foreign employers that do not trigger an in-country PE.**
  - These countries are the EXCEPTION, not the rule; **most countries, including the United States, do not except foreign employers (even employers of wandering workers) from their payroll mandate laws.**
- **A common mistake** is the employer that requires a wandering worker to agree to pay host-country income taxes and social security charges, treating that as a license to ignore host-country payroll mandates.
  - Approach is usually not compliant, because payroll mandates on employers are non-delegable duties.
- Even if a wandering worker paid all host-country income taxes and social security charges — something often unlikely to happen — that would not necessarily extinguish the employer's obligation to heed payroll mandates (although it could reduce the employer's liability later, if charged with failing to comply).

# International Wages: Legal Offshore Payrolling

- **“Offshore payrolling”** – disregard for host-country payroll mandates – tends to be **illegal** (example: in the united states, it’s a federal crime)
- So, **employers must develop a viable position to insulate home-country “offshore payrolling”**
  - **Local corporate registration**
    - Register a new corporate entity and generate a local taxpayer ID
  - **Independent contractor**
    - Sidesteps host-country payroll laws, so no payroll mandates are triggered
  - **Friendly local-business payroll**
    - Employer of a wandering worker may have a friendly relationship with an unaffiliated employer company in the host country (e.g., Supplier or customer), who “shadow payrolls” the employee and adheres to mandates
    - Downside = availability (rare)
  - **“Leased employee”**
    - Wandering workers are payrolled by a host-country business and host-country registered payrolling platform
    - International “professional employer organizations”, “employer of record companies” or temp agencies may assist with this process
    - Downside = cost



# Unemployment Insurance for Wandering Workers

# Unemployment Insurance: Multi-State Employers

- **Employee lives & works within the same state**
  - Most common and easiest to resolve
  - Worked-in state provides the unemployment compensation insurance coverage.
- **Employee lives in state “A”. Employee works entirely within state “B”**
  - Worked-in state provides the unemployment compensation insurance coverage.
  - Employer’s quarterly wage reports and contributions go to state “B”.
- **Employer transfers the employee’s work from state “B” to state “C”**
  - Employer should continue to report on behalf of the employee to the state in which the employee normally works and is covered.
  - But, permanent transfer requires that reports and contributions, beginning from date of transfer, be made to the new state—*e.g.*, state “C”.
  - Employer does not have to make a duplicate contribution to the second state, repeating the contributions already made.



# Unemployment Insurance: Multi-State Employers

- **Employee lives in state “A,” but works some of the time in state “C” and the remaining time in state “D” (and perhaps in additional states)**
  - There are 2+ worked-in states, but the employer is required to pay contributions to only one state.
  - Which state should be paid?



# Unemployment Insurance: Reciprocal Coverage

- **Reciprocal Coverage Arrangements**
  - **Under this arrangement, employer may elect to make payments to 1 specific state**
  - 45 states have reciprocal arrangements with other states.
    - Exceptions:
      - Alaska, Kentucky, Mississippi, New Jersey, and New York
      - Puerto Rico
  - Employer is permitted to elect to cover all services of Employee in any state in which:
    - any part of the worker's services are performed; or
    - the worker has their residence; or
    - the employer maintains a place of business (*NB: employer & states must obtain approval for employer to use this option.*)

# Unemployment Insurance: 5-Step Analysis

- Otherwise, employers must engage in a **5-step analysis**:
  1. Is employee's work **localized** to one state?
  2. Is the employee's **base of operations** in one state?
  3. Does the employee work at least part of the time in the State where the employer's office is located (*i.e.*, **place of control**)?
  4. Does the employee work at least part of the time in the state of the **employee's residence**?
  5. Are there **specific provisions of the law** of the states where work is performed, the employee resides, or where the employer has their place of business that will permit allocation to a specific state?

# International Unemployment Benefits

- **Cross-border commuters in the EU**
  - Employee who works in one EU country but lives in another (and returns at least once per week)
  - Impacts: unemployment, social security, healthcare, family benefits, retirement, taxes
- In **everyday life**, employee is subject to the laws of both countries.
  - **Laws where employee works cover:**
    - employment and income taxes
    - most social security rights
  - **Laws where employee lives cover:**
    - property taxes and most other taxes



# Workers' Compensation for Wandering Workers

# Workers' Compensation

- **Workers' compensation insurance typically will apply in states where the employer is physically located.**
  - When a worker travels to another state, the worker falls under the jurisdiction of a different, yet fundamentally similar, workers' compensation system
  - Many states have **reciprocal agreements** with other states allowing workers to be covered under their home state's workers' compensation law if they are injured in another state
  - Many employers have worker's comp policies that are national in scope— consult with your insurance broker and review the state programs to make sure
- Generally, an employee's injury or illness is compensable under workers' compensation only if it **“arises out of and in the course of employment,”** regardless of where the injury occurs

# International Workers' Compensation

- All countries have laws requiring employers to protect workplace health and safety.
  - Laws around the world hold employers liable for workers' on-the-job personal injuries.
- An employer that dispatches staff overseas on expatriate assignments and international business trips must heed **“duty of care” obligations**.
  - Courts will hold employers liable for expatriates' and business travelers' overseas-sustained injuries.



# Workers' Compensation & Compliance Risk

- An employer's exposure to occupational health/safety claims or personal injury claims is **probably remote** in the context of a wandering worker who sets off, for personal reasons, to work abroad.
- An injured wandering worker is not situated like either 1) a worker injured at an employer worksite or 2) an expatriate or business traveler injured while overseas on an actual work assignment
  - **In many situations, injured wandering workers may be more like workers hurt while on vacation.**
  - When workers get hurt on vacation — even if they had been keeping up with emails and doing some work remotely during vacation — the employer is unlikely to lose an occupational health/safety charge or personal injury/“duty of care” claim.

# Compliance Risk: Liability Under Local Laws

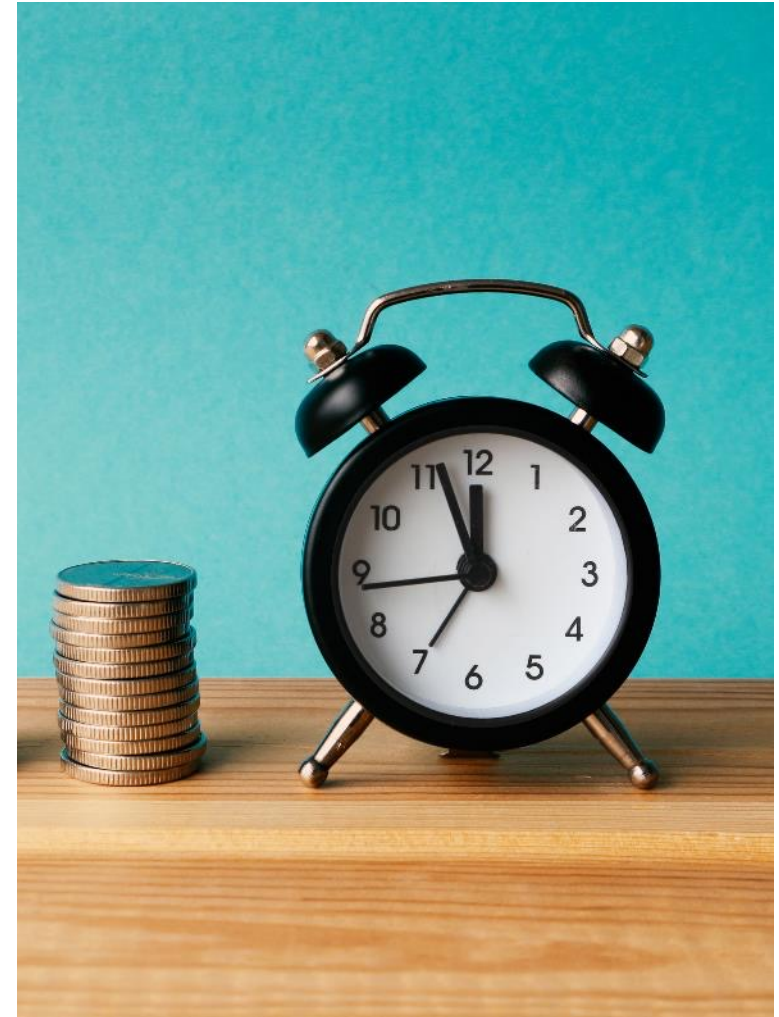
- Little (if any) real-world case law authority seems to hold employers responsible for either occupational health/safety violations or duty-of-care/personal injury claims in the context of wandering workers.
- Reasons for low employee risk:
  - The wandering worker, alone, chose to travel to the country where the injury occurred (being overseas, in the first place, was not a work assignment; instead, it likely inconvenienced the employer)
  - The employer had neither access to nor control over the foreign premises where the wandering worker worked, so the employer could neither monitor nor remedy any unsafe workplace conditions
  - The injury likely happened while the wandering worker was not actively doing a work task (telecommuters injured abroad usually suffer the injury during down-time away from the computer)
  - Home-country occupational health and safety law does not reach abroad and home-country worker compensation (workplace injury) systems tend not to cover employees based overseas
  - The wandering worker's employer is likely beyond the reach or jurisdiction of host-country occupational health/safety laws and host-country government workers' compensation/social benefits agencies
  - An international wandering worker who sues the employer for personal injuries — either in a host- or home-country civil court — will almost surely be unable to meet the burden to prove that employer negligence caused the injury (the wandering worker alone set off to the foreign country, putting himself in harm's way)



# Wage and Hour Issues for Wandering Workers

# Differing Wage and Hour Rules

- Differing minimum wage rates
- Differing reimbursement rules
- Differing available exemptions and exemption standards
- 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



# Differences in Minimum Wage Rates Even Within DMV

## DC

| Date         | Minimum Wage |
|--------------|--------------|
| Currently    | \$15.20      |
| July 1, 2022 | \$16.10      |
| July 1, 2023 | TBD          |

## Maryland

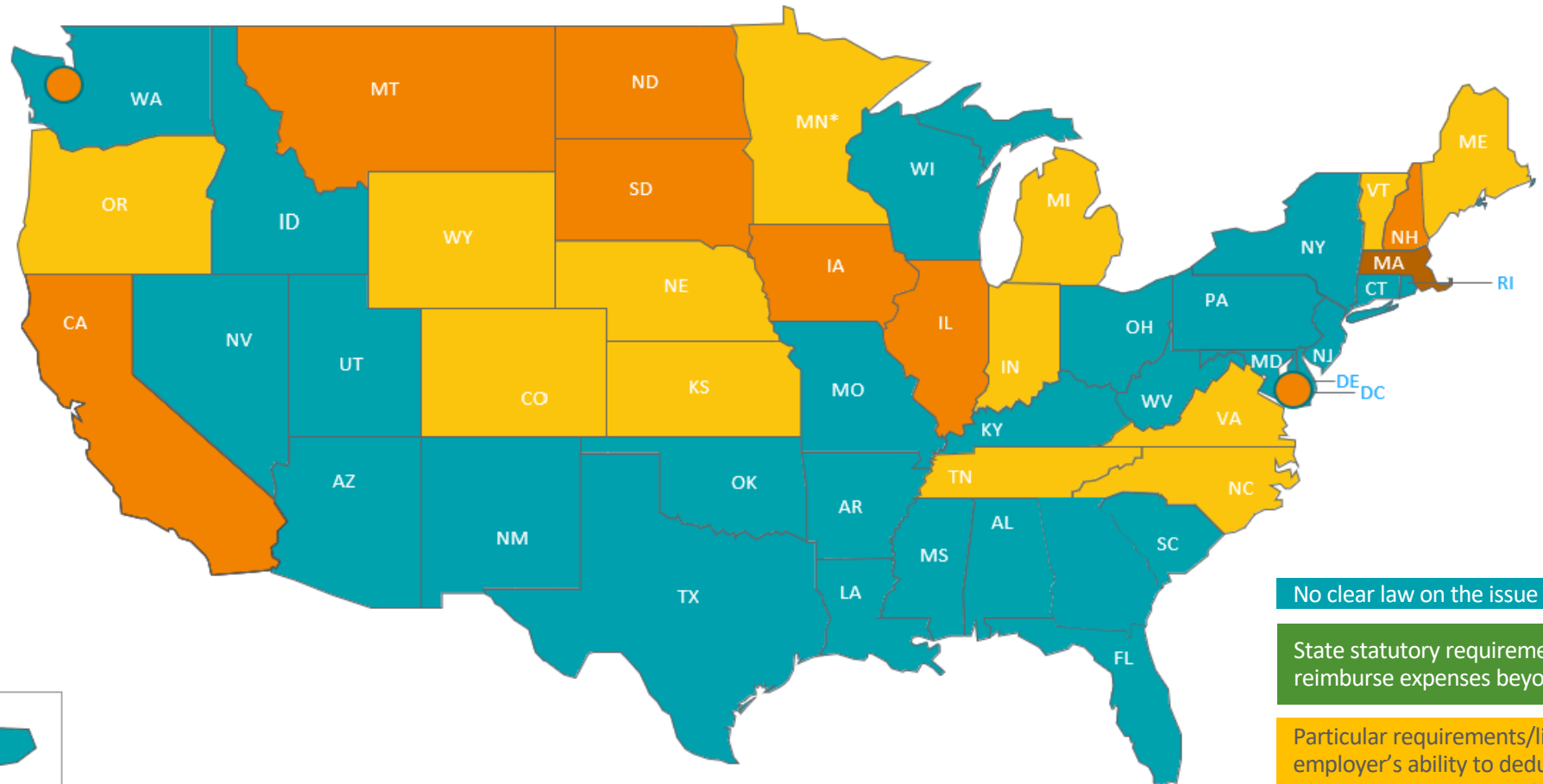
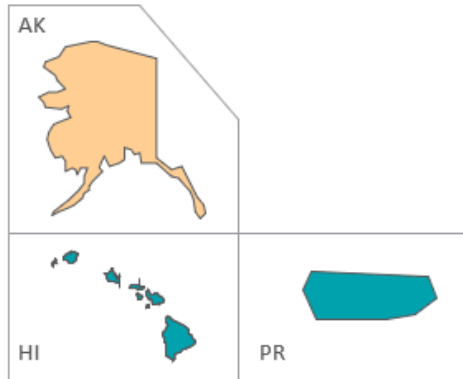
| Date            | 15 or More Employees | 14 or Fewer Employees |
|-----------------|----------------------|-----------------------|
| Currently       | \$12.50              | \$12.20               |
| January 1, 2023 | \$13.25              | \$12.80               |
| January 1, 2024 | \$14.00              | \$13.40               |
| January 1, 2025 | \$15.00              | \$14.00               |
| January 1, 2026 | \$15.00              | \$14.60               |
| July 1, 2026    | \$15.00              |                       |

## Virginia

| Date             | Minimum Wage |
|------------------|--------------|
| Currently        | \$11.00      |
| January 1, 2023  | \$12.00      |
| January 1, 2025* | \$13.50*     |
| January 1, 2026* | \$15.00*     |
| January 1, 2027  | TBD          |

# 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”?..... Is it “Reasonable”?

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**

Follow the **Goldilocks Rule**:

- NOT TOO BIG; Not too small; Just right

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.



# Worker Misclassification of Remote Workers

- 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!

# Examples of Local Exemption Differences

- **Motor carrier exemption** (29 U.S.C. § 213(b)(1))
  - Recognized in Maryland and Virginia
  - Not recognized in DC
- **Section 7(i) exemption** (29 U.S.C. § 207(i))
  - Maryland recognizes a commissioned sales employee exemption
  - Virginia has uncertainty but current may not recognize a section 7(i) exemption (though law is changing again on July 1, 2022)

# International Wage & Hour Issues

- FLSA does not have extra-territorial effect
- Need to take into account each country's distinct laws regarding wages and hours worked – foreign laws will often provide more protections to workers than U.S. law.
- Need to consider foreign laws **limiting hours**
  - Example: Mexican constitution establishes a maximum of eight hours for shift workers, a maximum of seven hours for the night shift and a maximum of nine hours of overtime per week. For every six days of work, Mexico's workers must have one day off.
- Need to consider foreign laws requiring **breaks**
  - Example: Most national legislation and EU regulations require a break when the workday is longer than six hours and after a maximum of six consecutive hours of work.
- Need to consider foreign laws requiring **paid vacation**
  - Germany & Spain: 34 days of paid vacation and holidays per year
  - Italy and France: 31 days of paid time off
  - Belgium and New Zealand: 30 paid days off
  - Australia: 28 paid days off
  - Canada: 19 paid days off



# Training for Wandering Workers

# Training Requirements

- Numerous states have training requirements for all or some employees, on a one-time or annual basis.
  - Including: CA, CT, DE, DC, IL, ME, NY, WA.
  - Examples: Both California and New York require some form of sexual harassment training.





# Training Requirements: District of Columbia

Tipped employees (paid in accordance with the tip credit provisions of section 4(f) of the Minimum Wage Act Revision Act of 1992), managers, and owners and operators of businesses with tipped employees, must receive training every 2 years. D.C. Code § 1306.01.



# Training Requirements: International

- Australia:
  - Requires training on health and safety risks, including harassment.
- South Korea:
  - Requires training to prevent harassment.
- Saudi Arabia:
  - Requires sexual harassment training.
- Many other countries (including Brazil and the United Kingdom) strongly encourage and recommend harassment training and policies, and consider them “best practices,” but have no outright requirement.





# PTO & Leave Benefits for Wandering Workers

# 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?



# Common “Sick” Time Reasons in the United States

For the employee’s or covered relation’s:

- Mental or physical illness, injury or health condition
- Medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition
- Preventive medical care
- Other medical reasons
- Travel to and from an appointment, a pharmacy, or other location related to the purpose for which paid sick leave was taken

# Common “Safe” Time Reasons in the United States

For employee or covered relation that has been the victim of domestic violence, a family offense, sexual offense, stalking, or human trafficking:

- Obtain services from a domestic violence shelter, rape crisis center, or other services program
- Participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or family members
- Meet with an attorney or other social services provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding
- File a complaint or domestic incident report with law enforcement
- Meet with a district attorney's office
- Enroll children in a new school
- Take other actions necessary to ensure the health or safety of the employee or family member or to protect those who associate or work with the employee

# Leave & Benefits: United States Examples

- Aid or care for a guide, signal, or service dog of employee or covered relation (Emeryville)
- FMLA-eligible leave (Chicago & Cook County)
- Maternity or paternity leave (Maryland, Montgomery County, & Oregon)
- Organ or bone marrow donation (San Francisco & Oregon)
- Bereavement leave (Oregon & Tacoma)
- Attend child's school-related conference, meeting, function or other event requested or required by school officials (per rules, could include sporting events, play, or similar activities) (New Jersey)
- Attend meeting regarding care provided to child in connection with child's health conditions or disability (New Jersey & New Mexico)
- Closure of covered relation's school or place of care due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected closure (Minneapolis & St. Paul, Tacoma)
  - Per the Tacoma enforcement agency, leave can be used for school closures such as snow days or weather-related late starts when the decision is made by the superintendent.

# Leave & Benefits: Local Laws – DC

- Paid sick leave (§ 32–531.01 *et seq.*)
- Required for all employers
  - Amount of leave depends on employer's size
  - Employee may begin to access after 90 days
- Family and medical leave (§ 32–501 *et seq.*)
  - DC Family and Medical Leave Act: covers employers with 20+ employees in DC.



# Leave & Benefits: Local Laws – Maryland

- **Paid sick & safe leave at the state and local level**

- Maryland Healthy Working Families Act (Md. Code Ann., Lab & Empl. § 3-1302)
  - MD employers that employ 15 or more employees must provide paid sick and safe leave
  - MD employers with 14 or fewer employees must provide unpaid leave
- Montgomery County (Montgomery County, MD Code Article XIII § 27-76-82.
  - Montgomery County, MD employers with 5 or more employees must provide employees 56 hours of paid leave per year
  - Montgomery County, MD employers with 4 or fewer employees must provide employees 32 hours of paid leave and 24 hours of unpaid leave.

- **Family and medical leave**

- Maryland Flexible Leave Act (Md. Code Ann., Lab. & Empl. § 3-1202)
- Maryland Parental Leave Act (Md. Code Ann., Lab. & Empl. § 3-1201)

- **NEW! “Time to Care Act”** (SB 275/HB8)

- Up to 12 weeks off to care for newborns, family members with serious health problems, or themselves.





# Leave & Benefits: Local Laws – Virginia

- Paid sick leave (Va. Code § 40.1-33.3, et seq.)
  - Covers home health workers who work on average at least 20 hours per week or 90 hours per month.
  - Exceptions for individual who:
    - is licensed, registered, or certified by a health regulatory board within the Department of Health Professions;
    - is employed by a hospital licensed by the Department of Health; and
    - works, on average, no more than 30 hours per month.
- No state FMLA provisions



# Leave & Benefits – International Paid Sick Leave

- Australia
  - Requires employers to cover earnings employees lost during a short-term illness.
  - If a worker is absent for 10 days, employers must provide 100% of pay to workers with no waiting period or ceiling.
- Canada
  - If employees undergo sickness, injury or quarantine, Canada provides employment insurance, which gives workers benefits for a maximum of 15 weeks.
  - If workers qualify, benefits include 55% of their salary
  - Low-income families can qualify for the Employment Insurance Family Supplement, which can increase benefits to at most 80% of their typical earnings.
- Ireland
  - Requires employers to include paid sick leave in their contracts.
- Japan
  - If workers don't have coverage at their own place of work, Japan provides Employee's Health Insurance for those eligible
  - While there is a three-day waiting period, workers can receive these benefits for a maximum of 18 months at 66.67% of their average earnings.

# Leave & Benefits – International Parental Leave

- Sweden
  - When a child is born or adopted, parents receive 480 days of paid parental leave at 80% of their average wage.
  - Both parents get a respective 90 days out of those 480, so they can individually bond with their child.
- Finland
  - Both parents are entitled to 164 days of parental leave.
    - Parents may transfer 69 days from their own leave to the other parent.
    - Parental allowance is required until child is 13 weeks old.
  - Single parents have the right to use parental leave of both parents





# Leave & Benefits – International Paid Vacation Days

- United States
  - Average employee receives 10 paid vacation days after 1 year of service
- United Kingdom
  - Mandates paid vacation leave for workers
  - Full-time employees receive at least 28 days a year.
- France
  - Mandates that workers receive at least 30 working days of paid holiday leave.
  - National Agency for Holiday Voucher is a government agency that encourages workers to indulge in leisure activities and leave.



# Intermittent Leave for Remote Workers — Suggestions

- **Goal:** Accountability.
- Likely easier with a non-exempt employee
- But what if the employee stays “on the clock” all day, and never clocks out to care for the family member?
- For exempt employees: get the job done.
- Ongoing monitoring is critical.





# Information/ Data Privacy & Security



# Information Privacy & Security Should Be a Priority



- Even when employees are remote, they still need to provide security for your organization's equipment, materials, and work product.
- This includes use of both appropriate physical security & cybersecurity measures.



# Physical & Cyber Security

## Physical Security

- Best practice is for employees to have a separate space in their remote work location, with a door that locks and/or some other ability to physically secure their work laptop/ phone/confidential information
- Employees should not 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 and properly disposed of

## 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.

# International Considerations for Data Privacy/Security

- It is important to remember that particular data protection issues can arise when an employee works remotely from overseas and where personal data is transferred between the employee and employer.
- For example, depending on the circumstances, transfers of personal data between the U.S. and Europe could implicate the **EU's General Data Protection Regulation (GDPR)**.
- It is always a good idea to ensure your information security systems keep sensitive information and data encrypted in transit and at rest.





# **Wandering Workers: Some Practical Advice**

# Example: Picture This

- Your company announces a long-anticipated return to your office in Cleveland.
- Unknown to you, one of your top employees moved to New York.
- He's currently “summering” in Florida.
  - Should you care?
  - What do you do?



# Example: Ohio-Based New Yorker in Florida

- Employee spends the “summer” in Florida – make clear that he’ll need to return to his permanent residence no later than September 1.
- For purposes of his residence in New York:
  - If you have an office there, transfer him to that office and ensure compliance like all other employees.
  - If you don’t have an office there, discuss whether he plans to return to Ohio.
  - If he doesn’t plan to return:
    - Determine how many others are in New York to determine the need to register with the state.
    - Provide all relevant New York employment notices and posters ASAP
    - Ensure compliance with New York wage-and-hour law ASAP.
    - Ensure any requests for accommodation or leave are consistent with New York law.
    - Ensure any complaints or reports of concerns are handled consistent with New York law.
- **Once a permanent residence is established, you cannot claim he is an Ohio employee: he’s now a New York employee governed by New York law.**





***So, More Broadly Speaking, What Else Can an Employer Do to Avoid Wandering Worker Liability?***



# Know Where People Are!



- 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
- 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

# Policies & Agreements



- Make sure your remote work agreements and policies and that they 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?
  - Whenever possible, require remote work outside that locale last no longer than 3 to 6 months, at the longest.

# Have an Issues Checklist

- Build and maintain your own checklist:

- ✓ State/local/international business licensing & registration
- ✓ Required notices to employees in the state or municipality, including “workplace” posters
- ✓ Payroll tax withholding
- ✓ Unemployment insurance
- ✓ Workers’ compensation
- ✓ Equal employment laws
- ✓ Accommodations, leaves of absence, and paid sick leave
- ✓ Wage and hour (Including exemption status, min. wage, meal/rest breaks, pay frequency, pay deductions/changes, expense reimbursements)
- ✓ Equal pay requirements
- ✓ Training requirements
- ✓ WARN Act
- ✓ Enforceability of restrictive covenants
- ✓ Privacy/data security requirements

# Don't Forget About International Workers



- 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)





# Concluding Remarks

# Takeaways

- Numerous city/county/state/national laws = Complex
- Unfortunately, cannot always resolve problems by applying the law that is most generous to the worker.
- Flexibility and “employer of choice” ...
- ...Versus substantial potential employer compliance risks and liabilities
- Designated place of work and duty to inform employer if work remotely
- Policy or case-by-case?
- Getting comfortable with international hiring and mobility will widen the talent pool.
- Explore alternative models: PEOs, umbrella companies, agencies, IC arrangements.





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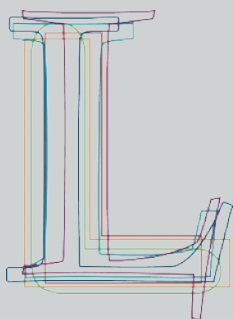
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# Questions?

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