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The Hottest COVID-19 Employment Issues

**Working Remotely: Key Employment Issues
and Employee Benefits Issues That Employers
Should Address *Now***

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Presented by



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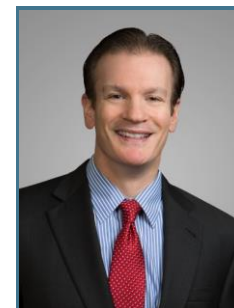


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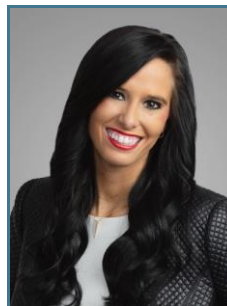


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Agenda



1. Considerations for Remote Work Policies
2. Wage and Hour Issues Related to Remote Work
3. Impact of Remote Work on Restrictive Covenant Enforceability
4. Employee Benefits Issues Related to COVID-19
5. Frequently Asked Questions

Considerations for Remote Work Policies

Permanent WFH and “Hybrid” RTW:

The New Normal?

*Remember, “home,” as in “WFH”, can be anywhere,
which may create a whole other set of legal headaches*

- **This year, 1 in 4 Americans will work remotely**
- By 2025, will rise to 1 in 3 or 36.2 million people – a staggering **87% increase** in remote work from pre-pandemic levels
- **Recent survey:** 90% of respondents will allow employees to work remotely at least part of the time, even after vaccination; 65% reported that their organization will continue to offer employees flexibility on when they work
- **Another recent survey:** 55% of employees stated that if their employers didn’t consider allowing them to continue to work from home, they’d start looking for a new job

Remote Work

Creating/Updating a Remote Work Policy

■ Remote Work Can Be

- Completely remote
- Hybrid

■ Considerations

- Is there an existing policy?
 - If so, is remote work an employee benefit, permitted as a privilege, able to be taken away if performance declines? If so, assess:
 - Is this still the case?
 - Or are we requiring our employees to work remotely?
 - If so, focus will need to change
- If no current remote work policy and remote work will be necessary/mandated, a policy is recommended

■ What should a Remote Work Policy include?

- safety/health protocols
- wage/hour and timekeeping rules
- confidentiality/privacy concerns protections
- expense reimbursement practices
- Anti-discrimination, anti-harassment, and accommodation measures
- Any applicable geographic restrictions on permissible remote locations
- ability to require in-office work if performance suffers

■ What documents are helpful to facilitate Remote Work?

- Request forms
- Agreements



Remote Work

State and City Laws and Other Implications

■ Tax Implications

- Payroll Tax
- Corporate Tax

■ Immigration/Foreign Law Implications

- Work from other countries
- Social Security and other rules
- Severance
- Contractual obligations (13th month bonus)

■ Insurance Obligations

- Workers' Comp
- Short-term Disability/PFL
- UI

■ State and Local Employment Law Implications

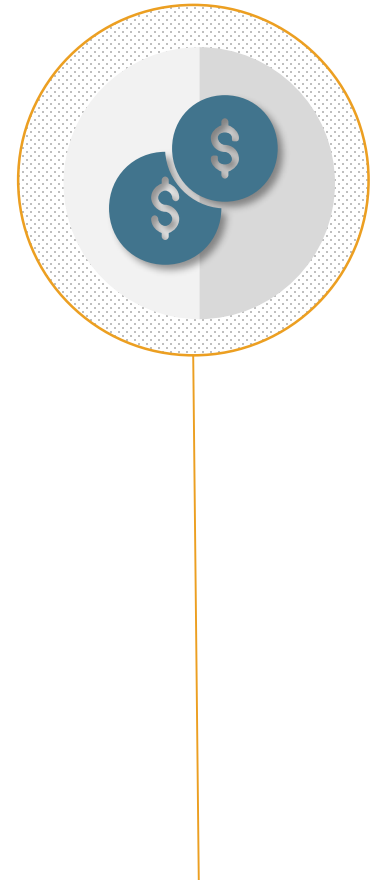
- Anti-Discrimination Laws
- Harassment Laws (including training requirements)
- Wage Theft Laws
- Notice/Posting Laws
- Minimum Wage/Overtime Laws (e.g., daily OT in CA)
- Paid Family Leave Laws
- Ban the Box/Credit Check Laws
- Salary History Laws
- Differences in enforceability of restrictive covenants
- Employment at will (Montana)

Remote Work

Expense Reimbursement

■ Different rules for different states

- **Federal government and most states:**
 - No specific expense reimbursement rules
 - But **required expenses cannot drop employees' wages below the minimum wage or overtime compensation due in any workweek**
- Other states have specific expense reimbursement laws
 - Most states simply require reasonable reimbursement (e.g., stipend)
 - Sometimes required even where employee does not incur additional expense
 - E.g., using personal cell phone (or Wi-Fi) for work purposes too
 - May still be entitled to a “reasonable percentage” of the expense
- **Some states have even more specific laws/rules**
 - CA, for example, is very specific – if employee can show that a particular expense was, indeed, work-related, even a rich monthly stipend may not be sufficient
 - IL – must reimburse for “necessary expenditures or losses incurred by the employee within the employee’s scope of employment” – BUT – employer can limit via written policy



Expense Reimbursement: Best Practices

- **Understand the law in the applicable jurisdiction(s)**
- Develop a legally compliant expense reimbursement policy
- **Policy considerations:**
 - Written and clearly communicated to employees
 - Specific as to what expenses are reimbursable, based on what is “necessary” to perform job remotely
 - Consider providing a flat sum or percentage for certain recurring expenses, e.g.:
 - 50% of monthly cell phone bill, up to a set maximum
 - \$50/month stipend for cellular/data use
 - Provide a maximum reimbursement amount for required one-time purchases, e.g., printer, webcam, etc.
 - Assess pros and cons of providing a monthly stipend and, if necessary, supplementing stipend for one-time purchase of more costly equipment, e.g., scanner
 - Ensure any stipend is reasonable in each jurisdiction

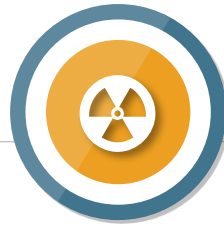


A blurred background image of a modern office hallway with warm lighting and glass partitions.

Wage and Hour Issues Related to Remote Work

Wage and Hour Issues Related to Remote Work

Wage and hour risks brewing while working from home



■ FLSA overtime exemption provisions apply to remote workers

- Statutory job duties tests still apply to exempt remote workers
- Salary basis test still applies and must be maintained to preserve overtime exemption
 - DOL Q&A (Revised 04/26/2021): “Salaried exempt employees must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. “

■ FLSA overtime provisions apply to remote workers

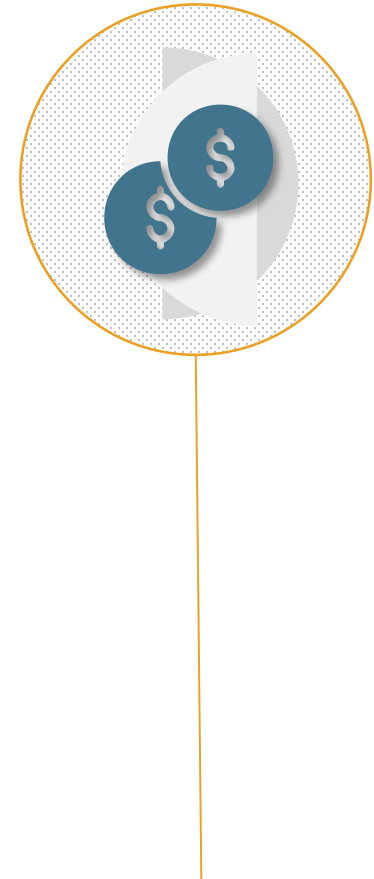
- Remote non-exempt workers are still entitled to time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek
- DOL charges employers with actual or constructive knowledge a reasonably diligent employer should have acquired through reasonable diligence

Wage and Hour Issues Related to Remote Work

Wage and hour risks brewing while working from home

U.S. Department of Labor COVID-19 and the FLSA Questions and Answers

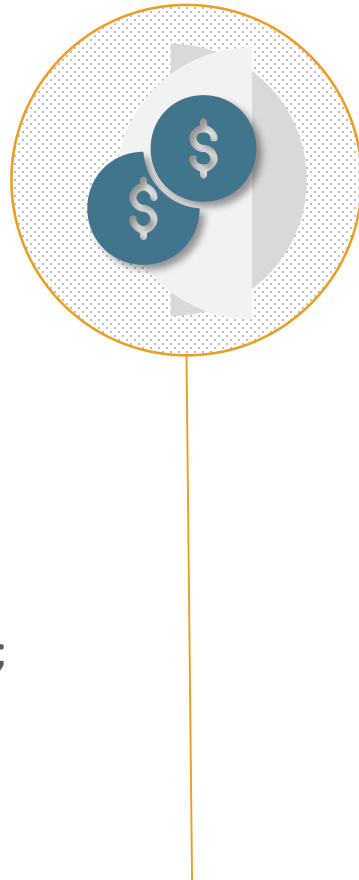
- **Question 10. Because of the pandemic, I am required to telework and perform my normal work duties. Does my employer have to compensate me when I telework?**
- A. Yes, under the FLSA, your employer is required to pay you for all hours that you work, regardless of whether the work is performed at home, at a location other than your normal workplace, or at your office. If your employer knows or has reason to believe that work is being performed, the time must be counted as hours worked. This is true even for hours of telework that your employer did not specifically authorize. For more information see [Field Assistance Bulletin No. 2020-5](#).



Wage and Hour Issues Related to Remote Work

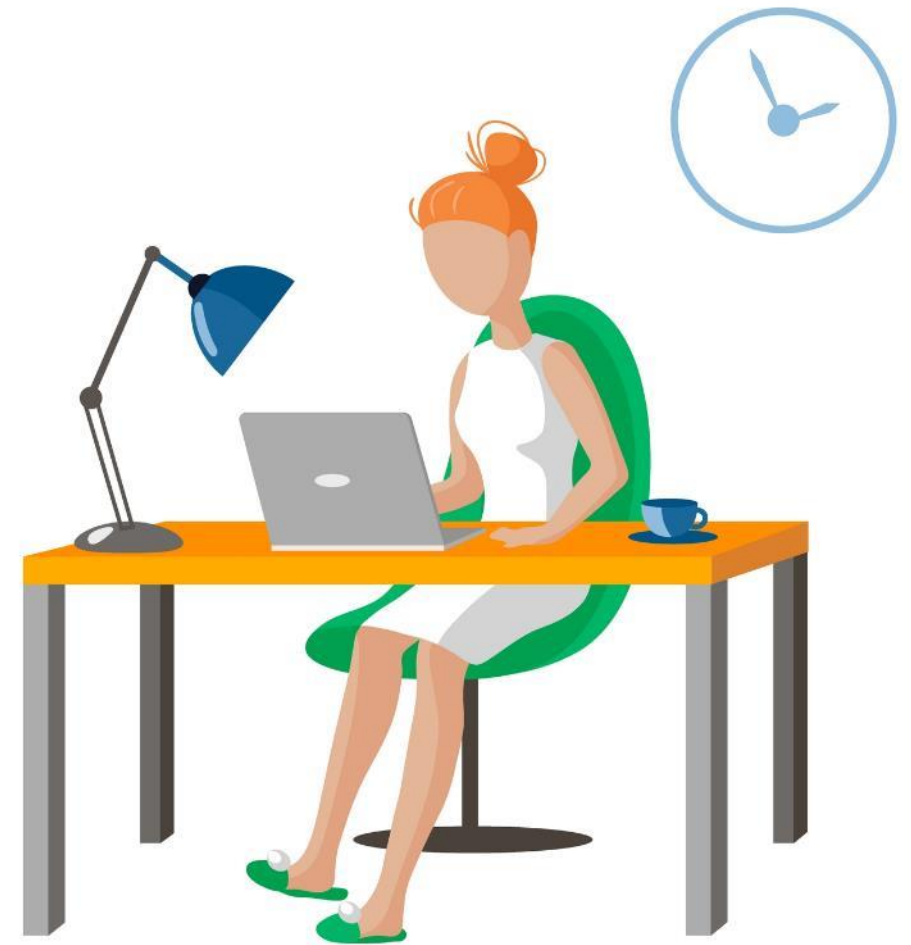
Wage and hour risks brewing while working from home

- **DOL Field Assistance Bulletin No. 2020-5 (Aug. 24, 2020)**
- Guidance in response to COVID-19 and applies to remote work arrangements
- Employer required to pay its employees for all hours worked, including work not requested, but suffered or permitted, including work performed at home.
- If employer knows or has reason to believe that work is being performed, the time must be counted as hours worked.
- Employer obligation to compensate employees for hours worked is based on actual knowledge or constructive knowledge of that work.
 - For remote workers, employer has actual knowledge of the employees' regularly scheduled hours; it may also have actual knowledge of hours worked through employee reports or other notifications
 - Employer may have constructive knowledge of additional unscheduled hours worked by their employees if the employer should have acquired knowledge of such hours through reasonable diligence



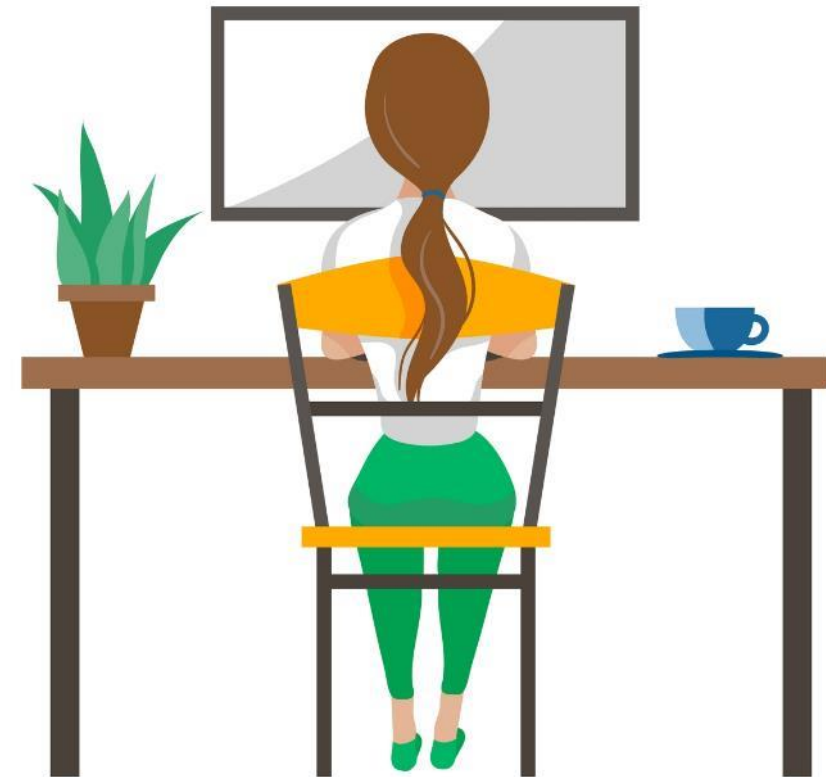
Fact Pattern: Patti the non-exempt paralegal is working from home during the pandemic

- Patti is a non-exempt paralegal
- Patti is helping with filing a motion for summary judgment that is due on Monday
- Attorneys text and call Patti early in the morning and late at night and Patti responds
- Patti prepares documents for the filing over the weekend





Fact Pattern: Ellen the exempt human resources manager is working from home during the pandemic

- Ellen is an exempt human resources manager who has been working from home during the pandemic
- While working remotely, Ellen has decided to take on other job duties. She now spends her day dropping off mail at her co-workers houses, picking up deliveries at the office, sending around daily trivia questions and planning weekly virtual happy hours.



Wage and Hour Issues Related to Remote Work

Takeways

- 
- ✓ Review wage and hour practices of remote workers
 - Consider retaining outside counsel
 - Address any instances of unauthorized work by non-exempt employees and compensate employees for all hours worked
 - ✓ Send reminders to non-exempt employees of timekeeping policy and procedures
 - ✓ Encourage non-exempt employees to accurately report all hours worked
 - ✓ Consider rolling out timekeeping training for non-exempt remote workers and their supervisors this summer
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Impact of Remote Work on Restrictive Covenant Enforceability

Remote Work And Restrictive Covenants

The law regarding restrictive covenants is state specific

- CA, ND, OK, and now – DC – ban noncompetes
- Many states ban them for employees earning less than a certain salary threshold (e.g., WA - \$100,000, VA- \$62,500, ME - \$45,000)
- Likely IL salary thresholds as of 1/1/22: \$75,000 for non-competes; \$45,000 for non-solicits



Remote Work And Restrictive Covenants

Can an employee's remote work place determine choice of law?

- Issue is unresolved
 - Is it a permanent remote work place? If not, for how long has it existed?
 - Did the employer consent?
 - Where was the employee working when the agreement was signed?
 - Should an employee be able to invalidate a noncompete by deciding to work from Malibu?
- Employee could bring a declaratory judgment in their “place” of work
- Do you want to be the test case?



Remote Work And Restrictive Covenants



What can an employer do to minimize risk of unwanted forum/choice of law?



Know/control where remote employees are working.



Have clear choice of law and mandatory forum selection clauses.



Consider using “garden leave” clauses instead of noncompetes.

COBRA During COVID – New IRS Authority

General COBRA Rules Prior to COVID



- Who is eligible?
- What are “qualifying events”?
- How long does COBRA generally last?
- What are common COBRA implications for severance arrangements?

New COBRA Rules for COVID



- What are the general rules and purposes of premium assistance?
- What is the duration of the premium assistance?
- Who is eligible for the assistance?

New COBRA Rules for COVID



- What type of employment terminations count?
- Mechanical issues abound
 - Notices, insured plans, calculations, third-party administrators
- Employer going forward actions

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Frequently Asked Questions Related to COVID-19 and Remote Work

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What (if any) special training should we provide to employees and managers as we prepare to return to the workplace?

What laws apply when my employee is working remotely in a different state?

Frequently Asked Questions Related to COVID-19 and Remote Work



How can my Company address performance issues with a remote employee?



What are some options for how an employer may elect to reimburse expenses?



How can my Company prepare to address discrimination and/or harassment complaints from an employee working remotely?

Or will these claims go away if employees are not in the office?

Epstein Becker Green Coronavirus Resource Center

Epstein Becker Green Coronavirus News and Updates

Employers throughout all industries, and particularly those within health care, are now grappling with how to deal with the various implications of the coronavirus (COVID-19) on their businesses and workforce.

Please see below for our latest news, [subscribe for email notifications](#), and revisit for updates.



OVERVIEW	ALL TOPICS	BENEFITS	CORPORATE/BUSINESS/RETAIL	DATA/PRIVACY/HIPAA		
EMPLOYMENT AND LABOR		FDA	FFCRA/CARES ACT	GLOBAL WORKFORCE MANAGEMENT		GOVERNMENT RESOURCES
HEALTH CARE	IMMIGRATION	OSHA	RETURN TO WORK	WAGE AND HOUR	VIDEOS & PODCASTS	
EBG EVENTS						

<https://www.ebglaw.com/coronavirus-resource-center/>



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Questions?