

MONDAY, MARCH 21, 2022

PERSPECTIVE

Employment law's future in the remote-controlled workplace

By Rob Hudock

Along with all the other social impacts, the COVID-19 pandemic has significantly reshaped the workplace and much of employment law. While some concepts remain unchanged, others have been so altered that they're nearly unrecognizable — even the concept of a “workplace” itself.

And although the pandemic is beginning to show signs of abating, many of these changes will continue indefinitely. Employers should consider rethinking their policies (especially) and approach to managing many common employment law issues.

The pandemic prompted entire workforces to move to remote operations almost entirely overnight. Establishments emptied and gave way to offices based in living rooms, spare bedrooms and kitchens across the country. The employment law changes necessary to support this suddenly shifted workforce were near endless, and they remain ongoing.

A few highlights, however:

- Someone working from home may be in an entirely different jurisdiction for legal purposes, and subject to laws of a different municipality, state or even country. These laws can be about anything from wage and hour requirements to work breaks, taxation, workplace safety, accommodation (and definition) of disability, benefits, and more.

- There may also be legal issues connection with the cost of equipping an employee for remote work. Employers may be required to provide (or pay for) office furniture and equipment, internet access, mobile phones and plans, and more.

- Workers' compensation and OSHA regulations may vary for a worker who's located at home.

- Discrimination and harassment claims can take new forms. Consider, for example, the manager who is on camera with an image of a bikini-clad woman visible on the wall behind him. A jury could well consider that as part of a hostile work environment. Regarding discrimination, it still must be based on a protected category, and remote work provides plenty of opportunity to discriminate.

In addition to new legal issues, the advent of the remote workforce has also presented employers with complex management challenges. One of the most significant is application of employment law to a distributed workplace.

How does a set of legal principles created for people working face-to-face apply when they're now working through a WebEx screen? And for employers, what changes need to happen to protect themselves from liability?

The first and most important change needs to be conceptual. It's tempting to think of law as a series of rules, backed up by courts, judges and the legal system. Break a rule, get caught, get punished, right? But in employment law, and especially when charting new territory, it pays more than ever to think about policies, and their effect on behavior.

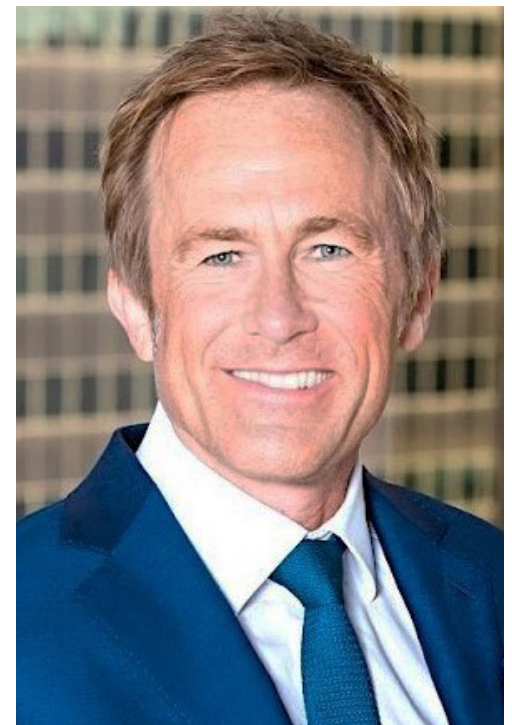
Let's back up for a second. In employment law, it's incredibly important, and smart, to prevent problems rather than reacting to them. You do this by setting up systems and policies that incentivize people in the right direction. For instance, suppose you have a policy in place that any kind of harassment is required to be reported immediately. This may or may not have meaning in the courtroom, but it's a powerful influence in the workplace. If you're considering calling your administrative assistant “honey” for the

fifth time, awareness that she'll be required to report it is a major disincentive. By shaping behavior, you can prevent problems.

Policies, in other words, act as remote management when you're not around to personally supervise your employees. Now, imagine a world where you can't supervise anyone because they're working from home. Policy becomes a big, big deal. The key to minimizing employment-related liability with a remote workforce is, to a large extent, policy.

Here's an example: unlike in the physical workplace, which is a specific, known location with one set of laws, remote workers can be scattered all over the region, the state,

Rob Hudock is founder of Hudock Employment Law Group.



the nation or the world. If you have a Zoom meeting with one person in South Africa, one person in Fresno, two people in L.A. and one person in Reno, you may be dealing with four different sets of applicable laws that cover everything from wage and hour requirements to overtime, taxes, workplace safety, you name it. This is complex enough to begin with, but suppose your Fresno employee decides, without informing you, to work from Reno for a few days? You're potentially liable for a whole new set of workplace regulations, despite the fact that you don't, and can't, know where your employee is working.

The key is policy. Put a policy in place that your employees must either consistently work from their own homes, or obtain specific permission from management to work remotely somewhere else. In the case

of many workplace regulations, again, a policy will have limited legal effect. However, it's sometimes a significant deterrent, and provides valuable evidence in case of a dispute. A key element of an employer's liability for any kind of workplace activity, including a remote workplace, is frequently whether an employer "knew or should have known" something untoward was taking place. If you've put a policy in place requiring employees to inform you of such activities, and an employee deliberately violates it, there's not much more you could have done. Juries, and plaintiff's attorneys, recognize this dynamic on sight.

Policy is not a panacea. Each situation is different, each workplace is unique, and to manage your workplace liability properly, it makes sense to walk through potential issues with an attorney and get a bespoke

opinion. However, it also makes sense to be thinking of the workplace as a dynamic system you're trying to influence rather than a logical problem you're trying to solve. That's not how human beings work, and that's not the best approach to this ever-changing, high-stakes problem.

Accordingly, employers should approach employment law issues in the COVID and post-COVID era as an ongoing management challenge. In addition to changes in the law itself, remote work has altered the nature of employment, management, supervision and liability.

Managing liability is an ongoing process. Risk is a moving target. Regular, careful evaluation makes sense. And in that environment, along with expert counsel and a knowledge of the legal landscape, policy has an ever more important role to play.