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PERSPECTIVE

GUEST COLUMN

A remote work model may have benefits, but it has costs – including novel legal liabilities

By Robert Hudock

You've probably seen news headlines regarding post-pandemic work changes, including remote work. Headlines along the lines of "Remote Work Is the New Normal" or "Most Workers Say They'll Quit If Remote Work Is Not Offered." Typically, the story is based on a generally referenced, nondescript "survey" or anecdote involving a worker who has strong feelings about remote work going forward.

Whether this foreboding becomes reality remains to be seen, but it is something employers should consider. Will employees of businesses that require a full return to the workplace in fact seek alternative employment that has remote work options? Will businesses without such options have difficulty attracting and retaining workers?

Being competitive in the marketplace is but one of multiple issues employers should review when considering whether remote work options are appropriate for their work, workplaces and workforce. Additional questions may include: What are the benefits and costs of remote work? Will it negatively or positively impact productivity, collaboration, morale, and client service? How will management and supervision be affected? These are the types of questions that the media has most frequently discussed to date.



Emmy Ruiz, the White House's director of political strategy and outreach, works from her home in Austin, Texas, on Tuesday, March 10, 2021. | Photo Credit to go here

Costs of Remote Work

But what about the cost of conforming to the purported "new normal" of remote work? The model has unique soft and hard costs, such as home or mobile communication equipment and services. It also has unique and potentially novel legal exposures, because of its increasing prevalence, and some remote work models and rules are breaking new ground.

In a series of representative lawsuits against companies such as Amazon, Progressive Insurance and Accenture, employees claim the employers improperly failed to reimburse business expenses

that arose out of working from home during the pandemic. These cases provide an example real world context to explore compliance with existing remote work rules, deciding whether to adopt a long-term remote work model, and potential costs and legal liabilities related to it.

During the pandemic, Amazon and the other companies' office-based employees worked at home, sometimes due to public health orders, and other times due to company-elected precautions or employees choosing a company-provided remote work option. These employees allege they spent money on products and services

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they claim were necessary to perform the remote work, such as home office equipment, internet access, mobile phone plans and even electricity.

The issue in these cases is whether California law regarding business expenses required employers to reimburse employees for such expenses during the pandemic. Employers may be liable for such expenses arising from the pandemic, and they will likely be liable for some remote-work-related expenses when the pandemic is no longer an issue.

Are Employers Liable for Remote Work Expenses?

Under California law, employers must reimburse employees for expenses that are “necessary” and “reasonable” expenses, incurred “in direct consequence of the discharge of his or her duties” or “in obedience to the employer’s directions, about which the employer “knew or should have known.” Courts previously addressed whether remote work expenses are reimbursable, but in pre-pandemic cases.

In an early case, a court held that an employer of outside sales representatives who maintained home offices from which they made sales calls and entered orders was required to reimburse for representatives’ cellphone and internet expenses, where the employer expected the representatives to use personal equipment and services, and it knew they in fact incurred expenses.

In a leading California case, the court addressed whether employers must reimburse employees who use personal equipment and services for business purposes—specifically where employees also personally use the items and pay flat monthly fees for the services, which they would use regardless of whether they were required for business. The court held the employers must reimburse the employees for “some reasonable percentage” of the employees’ monthly fees. It held that the calculation of the percentage or amount is specific to the circumstances presented. This court and others note how there is a strong public policy favoring reimbursement, and the requirement’s purpose is “to prevent employers from passing their operating expenses on to their employees.”

Consistent with this holding, courts have held that where employers provide mobile phones and service, and hotspot internet access, there is no reimbursement obligation.

Are There Viable Arguments Showing Reimbursement Is Not Required?

Going forward, circumstances may allow employers to viably argue it was not aware that remote work expenses were in fact incurred and they had no reason to know. However, if an employer provides a remote work option, employers are aware that remote workers must communicate by phone and

email, or must use the company’s IT applications, all of which require equipment and services.

Employers are recurrently arguing that when remote work is not required, but instead offered as an option, there is no reimbursement. However, given the policy behind and purpose of the reimbursement requirement, and because the requirement arises not only when employees are directed to perform expense-producing work, but also when they incur expenses necessary to perform their work, that argument may not succeed.

It remains to be seen what expenses for both business and personal uses courts will find can be recognizably separated into personal versus business use, such as electricity, or can reasonably be viewed as necessary to perform remote business-related work, such as home office furniture and equipment. These questions are presented in the current reimbursement cases against Amazon and other companies. Going forward, courts will likely consider new circumstances, and given the exponential increase in volume of remote work, new laws may be enacted.

Employers should note that here, as in other employment cases the underlying liability – the amount of business expenses not paid – may not be the primary concern. An employee who showed expenses were not properly reimbursed can collect penalties for each pay period the expenses were not paid

and is entitled to recover attorney fees. The fees and penalties could exceed the amount of underlying liability. Employers would also need to pay their own attorneys to defend them.

Employers Can Take Measures to Protect Themselves

In the case of expenses, employers can provide the necessary equipment and services, which removes the most obvious basis for expense claims. It would also avoid the uncertainty and burden of determining the amount the employee should pay and the “reasonable percentage” of the total to reimburse for each employee who uses and pays for equipment and services for both business and personal purposes – which could later be found insufficient.

Regarding many legal issues potentially arising out of remote work, employers will be well-served to carefully develop a remote work policy and agreement, covering matters such as expenses, work location, workplace safety, and timekeeping. This article addresses California employers with employees who perform work only in California. If an employer has multiple locations, or employees who perform work in another state or multiple states, it must determine which state’s law applies to the specific work in question, and correctly apply the laws to the work. That is a complex analysis, and should be performed with assistance from legal counsel.