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PERSPECTIVE

Out-of-state remote work is all the rage, but be aware of differing employment laws

By Robert Hudock

Your client is a California employer with 56 employees – 52 in California, and four who live in Texas who may perform work outside Texas. How many employment law issues do these circumstances present? Probably many more than you think. For example, is the company required to reimburse all its employees? Must the company provide family and medical leave and if so, to which employees? If a Texas employee files a discrimination claim, is his claim time-barred?

These are just examples of the many employment law issues that arise from this hypothetical, and any multi-state employment. Here, we use these three legal subjects as a backdrop to demonstrate complexities that arise when a California employer has employees working out-of-state, which has become more common in the age of remote work.

Regarding reimbursement, California law requires employers to reimburse employees for work-related expenses, but Texas does not. Also, which jurisdictional law applies – California, Texas, federal, or some combination? Like many legal issues, it depends.

There are many facts and considerations a court may analyze here. Neither Texas nor federal law have reimbursement requirements, so if only those laws applied, there would be no reimbursement requirement. However, a court here would look at whether California's reimbursement law has "extraterritorial jurisdiction" under the example facts.

Aguilar v. Zepp, Inc., 2014 U.S Dist. LEXIS (ND Cal. 2014) presents a good example of complexities and fact-specific analyses. Regarding extraterritorial jurisdiction, the following are just some things the court considered: where the employee resided, where the work was performed, if there was work in California then how much, where did the illegal conduct occur, is the relevant conduct a policy decision made in California and/or the employee's state and does California law apply only to work in California. Courts differ on the factor(s) they consider important. In *Aguilar*, there were multiple plaintiffs, and the court reached different conclusions for different plaintiffs. The analysis would be even more complex if a California employee performed work in a municipality that had any applicable laws.

Regarding family and medical leave, the federal leave law applies to all covered U.S. employers and employees. Texas does not have its own leave law. California has its own leave law, which is more favorable to employees. Which laws apply depends on the facts. For example, the FMLA applies only to employers with 50 or more employees within 75 miles of the employee's worksite, but the California leave law applies to all "California-based" employers with 5 or more employees anywhere within the U.S., and it applies to all employees, whether working in California or elsewhere. When two jurisdictions' laws apply, the general rule is that the law providing greater employee protection prevails.

Therefore, in our hypothetical, California's leave law applies to all the company's employees, even those in Texas. Even if the company was "Texas-based," California's law would still apply to employees working in California. The analysis would be more complex if, for example, a Texas-based employer employed one person who performed only some work in California. Courts would likely analyze whether the employee's amount of work in California met California's "hours of work" coverage threshold.

Regarding discrimination claims, whether our example Texas employee's claim is time-barred will depend on which jurisdiction's laws apply and whether the employee makes a federal or Texas law claim. Both have administrative exhaustion requirements. Under federal law, an employee generally has 300 days from the time of the unlawful conduct to file an EEOC claim, then 90 days from an EEOC right-to-sue letter to file a *federal* lawsuit. Under Texas law, our example employee has only 180 days from the conduct to file a claim with the Texas agency, then has the earlier of two years from the date of filing, or 60 days from the right-to-sue letter, to file a *Texas* lawsuit. Our example Texas employee's *state* claim would be time-barred if, for example, he filed a claim with the Texas agency 200 days after the conduct, or 70 days after the Texas right-to sue letter, but his *federal* claim would not. The analysis is different, and more employee-favorable, for California employment.

There are many more multi-state employment law subjects, issues, and nuances, each depending on the specific facts relevant in each case. Your California employer clients with out-of-state employees should carefully consider each employee's circumstances to best assure compliance, and to minimize possible claims arising out of misapplication of law.

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