

Complying with Employment Laws Applicable to Remote Employees

By Mordy Yankovich

The Covid-19 pandemic has compelled many employers to employ remote workers for the first time. Managing remote employees can be challenging and employers may be exposed to substantial liability if they do not have an understanding of how federal, state and local employment laws apply to remote employees. The following are three areas of potential exposure for employers and how to best mitigate such exposure.

Tracking remote employees' hours worked

The Fair Labor Standards Act ("FLSA") and New York State Labor Law require employers to pay employees at least the minimum wage for all hours worked and time and a half for all hours worked over 40 during a work week. Employers are responsible for tracking employees' hours worked and can face substantial liability if they fail to do so. 29 U.S.C. § 211(c); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *Moon v. Kwon*, 248 F. Supp.2d 201 (S.D.N.Y. 2002) (holding that where employers fail to maintain the appropriate records, a presumption arises in favor of the employee's statement as to the hours allegedly worked).

Tracking the hours, a remote employee works and preventing them from work-

ing "off the clock" is difficult. To avoid having to pay employees for "off the clock" work, an employer must institute clear directives to employees as to how to report work that was not scheduled. If an employee nevertheless fails to report the hours worked per the employer's policy, the employer does not have to compensate the employee for those hours. In addition, employers should instruct employees that permission must be requested and granted by the employer prior to the employee working overtime hours.

Workers Compensation laws

Employees' injuries are compensable pursuant to the New York State Workers Compensation Law if they "arise out of and in the course of employment." However, the nature of remote work makes it difficult to decipher whether an employee's injury "arises out of and in the course of employment." For example, if an employee leaves his or her home office to take a break and fractures his or her leg while tripping over a toy left in the middle of the hallway by the employee's toddler, is the injury covered?

The New York State Workers Compensation Board ("Board") recently limited the scope of covered injuries for employees



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working remotely. The Board held in two separate cases that only injuries occurring when employees are actually performing their work during work hours are compensable, while injuries occurring during personal activities are not compensable. *See Aftercare Nursing Services, Inc.*, 2019 N.Y. Wrk Comp LEXIS 9653 (employee's injury was not compensable, even though it occurred during a work call, because it was sustained by dropping a can on her foot while she was simultaneously preparing dinner); *Matrix Absence Management*, 2019 N.Y. Wrk Comp LEXIS 4888 (employee's injury, which occurred while employee was installing furniture he purchased for his home office, was not compensable).

Employers must, thus, implement clear policies as to remote employees' work hours, job duties and provision of office equipment to mitigate exposure.

Compliance with discrimination laws

It is important that employers determine which employees are permitted/required to work remotely solely based on legitimate business reasons (e.g., which jobs can be performed effectively at home, which employees are unable to socially distance in the office, etc.). None of these decisions should be

made based on race, gender, disability, age or any other characteristic protected under federal, state or local labor laws. For example, an employer may not generally prohibit older employees from working onsite because they are more likely to be symptomatic if they contract the virus. In addition, employers should ensure they have a policy in place for individuals to request a reasonable accommodation (e.g., working remotely or moving employee from cubicle to office) because they have a disability which increases their exposure to Covid-19. Upon receipt of a request, an employer must engage in an "interactive process" with the employee to determine if the employee can perform the essential functions of his or her job with a reasonable accommodation. If such an accommodation is available, an employer may only deny the accommodation if the employer can show an "undue hardship." 42 U.S.C. 12112(b)(5) (A); *Graves v. Finch Pruyn & Company, Inc.*, 457 F.3d 181 (2d Cir. 2006).

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