

REMOTE WORKERS: A Broad Range of Challenges



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From January 1 through April 30, 2023, I had four recruiters and ads on Indeed looking for attorneys. I received two resumes, both from attorneys who were approaching 70 (not that that was relevant to me). I made an offer to one of them, but she had already signed with another firm. That was it. Clearly, workers, especially younger workers, wanted remote work. On May 1, I decided to bite the bullet and agree to remote work. I received 10 resumes the next day. We have since hired three people, two of whom are remote, and we are likely going to hire a third remote worker. I had previous experience with remote attorneys even working in different states, but they were known quantities who had worked in my office for years before they moved. It is now a different reality on the employment landscape, which presents a new set of challenges. Thank you, Covid.

So, to those challenges...

Employers must set up a payroll account in the state in which the worker resides, to pay into the local unemployment system. If the employee is going to participate in the employer's medical plan, will there be local providers that are in the plan's system? Employers should check with their medical insurance broker or provider.

Employers should talk to their workers' compensation carrier to ensure that these out-of-state workers also are covered and whether any special premium or policy enhancements apply.

Hourly workers who work in another state will be subject to that state's wage and hour laws, as well as any leave laws. Thankfully, California is probably the most restrictive and comprehensive state on both of these issues, so if you handle things like you do in California, you will likely be fine. Nevertheless, you will need to be aware of any local or state rules that affect your remote workers. Also, if those workers come to California to work temporarily, they will be subject to California law during their time here (Oracle found this out in a reported case a few years ago).

Don't treat these workers as independent contractors just because they reside out of state. Federal law is a little more lenient than California law, but not by much. Some states may have their own rules, like California. It's safest to treat them as employees. This has been an issue for years when companies hire sales representatives in remote territories around the country. It is tempting to treat them as independent

contractors, but if they are selling for one company exclusively, and don't represent any other lines, it will be virtually impossible to establish an independent contractor relationship.

Expense reimbursement is another hot topic since Covid. We have seen claims for home-based workers' extra use of air conditioning, heating, wear and tear on couches and tables, and expanded internet bandwidth. When reimbursing employees, pick a reasonable amount and reference every possible category, including computer, tablet, phone, Internet, heating/cooling, wear and tear, etc. At least in California, the law requires that you reimburse employees at a "reasonable amount," as agreed upon between employer and employee. Usually, if the company picks a reasonable number, it won't get pushback from the employee. There is no suggested fixed number or maximum allowable like there is with IRS mileage rates.

If employees work remotely, and then occasionally are expected to come into the office, that can be handled in a couple of ways. First, the employer can indicate that the office environment is also an expected worksite on occasion. This would perhaps allow the employer to avoid paying for travel time to hourly people when they come into the office on a special occasion. Otherwise, travel time is fully compensable, as is the mileage that goes with it. If it is "commute time," then neither wages nor mileage is compensable. This is likely an issue when employees work remotely but are close enough to the regular worksite that they could come to the office without too much effort. Remember also that mileage would apply to salaried people who otherwise work remotely.

Employers are also responsible for employee injuries at their home-based worksite. Employers need to decide whether they will incur the added expense of checking the work area for safety issues (multiple electrical plugs, e.g.). At a minimum, employers may want to have employees provide pictures of their work areas to help ensure that safety is maintained. If they slip and fall going from office room to kitchen, the employer likely is on the hook.

We have had clients who had employees living in another state as their formal residence, but ended up working abroad for long stretches. The client didn't really want to know about that "ultra-remote" because it might have created foreign tax issues. All the employer wants to know is the employee's formal residence. If the employee chooses to go to Spain for a month, that may be fine because it's short duration, but generally that's not something the employer needs to know about. The country may have restrictions on how long an employee can stay or work in that country, but that's not necessarily the employer's problem. Nevertheless, the employer doesn't want to get into a situation where they owe foreign taxes, so employers don't necessarily want someone establishing residency in a foreign country if the employer had assumed that the employee was going to be living in the states. Those issues get into details beyond the scope of this article, so employers should check with their CPA or immigration attorney on potential issues with employees working abroad on a regular basis.

Lastly, consider logistics issues, such as time zone problems, when scheduling meetings. I found that when I was out of the country and working early in the morning, it was at the same time that our system was shut down for a daily backup, which created issues for me being able to get some work done in our system. I would plan ahead and pull information into my desktop to work on outside the system until I could log in. Employers usually want people in their system at all times, so this isn't a typical work-around condoned by employers.

There are a broad range of issues when employers hire remote workers, so they should consider creating a checklist of these issues to ensure as much compliance as possible in these situations.