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Remote Workers and The Law: Critical Tips for Employers

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Employment law for a Utah business can be ... tricky. On one hand, you are trying to find, recruit and retain the best and brightest to help your customers and clients. On the other hand, you are trying to navigate morale and HR issues, reduce costs, and weed out workers who are hurting your business.

But for all that is good and holy, you also want to stay out of court.

For many Utah companies, remote workers cut costs and improve employee morale — a certified win-win. But, misunderstandings of employment laws (or complete ignorance of them) can grind a thriving, growing business to a halt. Some of the most pressing legal issues to consider for employers with remote workers include FMLA eligibility, FLSA and overtime, and freedom of speech.

FMLA eligibility

The Family and Medical Leave Act (FMLA) grants eligible employees up to 12 weeks of unpaid leave in a 12-month period with a qualifying reason, such as medical issues that may arise for the employee or the employee's family. Remember, FMLA is unpaid leave. The employer doesn't have to grant an additional week of PTO for FMLA compliance, but they do need to ensure the job (or an equivalent) is there for the employee when they return from leave.

Most of the headaches come when determining who is eligible for the leave. Eligible remote employees are those who:

- Have worked for the company for a year.
- Have worked for a total of 1,250 hours in that year.
- Have a “worksite” within 75 miles of 50 other employees' worksites.

Many employers assume that the home office (or Starbucks Wi-Fi) is the “worksite” for that third point.

Wrong.

The Department of Labor has issued clarification, stating that a remote worker's worksite is (1) the location to which the employee reports; or (2)

the location from which the employee receives “day-to-day instructions” and assignments.

An example can be useful here: Employee A works remotely from Littleton, Colorado (the perfect name for a Hallmark setting), but routinely checks in with a manager in Salt Lake City (SLC) who gives Employee A assignments and to whom the employee reports. Employee B works remotely in Hershey, Pennsylvania, and primarily receives assignments from the same Salt Lake City manager. For purposes of the FMLA, both employees have a Salt Lake City “worksite.”

Therefore, it isn't particularly useful to track the number of employees within 75 miles of the worksites in Colorado and Pennsylvania. Instead, it is crucial to track and count the total number of employees who have a worksite within 75 miles of Salt Lake City; if there are more than 50 employees in a 75-mile radius, FMLA compliance should be an urgent priority.

Again, do not assume that because an employee lives and works in the Seychelles, far from any other employee, they do not have a worksite within 75 miles of other employees; if they report to or receive assignments from a manager within 75 miles of 50 employees, that employee might be FMLA eligible.

FLSA and overtime

The Fair Labor Standards Act (FLSA) requires employers to pay the federal minimum wage and overtime for non-exempt employees. Astute employers are generally aware of the potential exemptions to the overtime requirement, which include an administrative exemption, executive exemption, and the so-called outside sales exemption, among others.

Exempt employees are not entitled to overtime pay. However, for non-exempt employees, overtime pay (1.5 times the normal pay) must be paid out anytime the employer lets the employee work beyond 40 hours in a week.

This can get tricky for remote employers who might not be as aware of employees' working hours as employees who are in the office five days a week. Accurately recording hours for non-exempt remote workers, including unscheduled or after-hours work that is “suffered or permitted,” is not only a core challenge, but is also a statutory mandate.

Does your company understand when employees are working and for how long they are working? If not, you might be missing critical wage information in addition to being noncompliant with the FLSA. Late-night emails, requiring weekend responses, and other “always on” policies might creep into FLSA noncompliance. State meal/rest break rules still apply remotely.

Another challenge is that remote staff can trigger differing state wage-and-hour, overtime and break rules based on the employee's work location. Having a one-size-fits-all policy can be risky and costly, so state-specific policies and staying up to date on state law updates is crucial (this is

where a good attorney comes in).

Liability for FLSA noncompliance is not as simple as just paying the employees their overtime due. Instead, the FLSA permits backpay, attorneys' fees and costs, and liquidated damages (which essentially doubles what the company would have to pay). Some states' wage laws might permit even more recovery by the employee.

Free speech

Is firing an employee for a hateful, hurtful social media post OK? The First Amendment means that the government can't silence your speech, but as for business owners and employee speech, you might have a bit more flexibility.

Private actors (like Utah businesses) are generally not held to constitutional standards, including First Amendment protections. Business owners with remote employees, however, are not given carte blanche to punish employees for their speech. "Broader" authority over employee speech does not mean "unlimited" authority.

Some states, like New York, have laws that prohibit adverse actions against employees who participate in political speech. Other states, like Nevada and South Carolina, have protections for employee speech that are narrower.

Utah is somewhat of a middle ground for employee free speech protections. The Utah Antidiscrimination Act prohibits employers from punishing an employee for lawful political speech that takes place outside of work hours and away from the workplace, but there is an exception that allows employers to take action if the off-duty speech directly conflicts with their "essential business-related interests."

This patchwork nature of speech in the workplace makes compliance difficult for remote employers. Many states do not distinguish an employee's rights based on where the employer is located. The employee's location is what matters. An employer who fires an employee because of their speech (even if it is heinous or particularly offensive) might end up paying for a costly court defense despite the lack of constitutional protection of employee speech. Proper training and state-specific policies and procedures are critical.

In sum, remote workers can be an incredible asset to Utah businesses. Remote work arrangements can reduce overhead costs, increase employee morale, and increase the potential talent pool from which to hire.

These remote positions carry with them a lot of legal risk, especially for employers who assume that hiring across the country is the same as easily dodging fundamental employment laws. FMLA compliance, FLSA overtime pay, and state-specific free speech laws are examples of legal issues that don't go away with remote work — they become more complex. Avoiding or neglecting these issues isn't just ignorant or unwise; it is extremely costly, and your business deserves better.

Stay out of court, keep your employees happy, and grow your business by complying with and staying abreast of the legal requirements of your remote workforce.

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