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Oh, The Places You'll Go to Find Employees: Dealing With Remote Workers In The Work-From-Home Era

Client Alert

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The pandemic forced many employers to embrace work from home like they had not previously. Now, more than two years later, the workplace may never be the same. With a tight labor market and the growing reality of remote work, many employers are seeking out of state employees, or even foreign workers, to work 100% remotely. These employees will work from home in a different state or country and potentially never step foot in the employer's home state. The question then becomes: what laws govern these remote workers?

The general rule is that remote employees are subject to the laws of the city and state where they are performing work (i.e. physically located). This is also generally true for workers providing services in another country. If this is different than the state your business is located in, then you need to familiarize yourself with the laws of the remote worker's locality before they begin employment. There are a couple of common state law issues an employer should review for its remote workers:

- **Wage and Hour Requirements** – The FLSA provides a floor for all employees in the United States, but states and even cities can create higher requirements for employees. For example, the minimum wage under the FLSA is \$7.25, the minimum in Michigan is \$9.87, and the minimum wage in San Francisco is \$15.03 as of July 1.
- **Payroll Taxes and Corporate Registration** – Many states will require payroll taxes to be withheld in the state where services are being performed, i.e. where the remote worker is sitting at his or her desk. This can also require corporate registration in that state to ensure proper compliance with state laws.
- **Hiring Rules** – Different states have different rules on hiring. For instance, some states do not allow an employer to inquire

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about an applicant's criminal background or prior salary history.

- **Leave & Break Laws** – States vary greatly in terms of what type of leave is available to employees and whether or not the employer is required to pay the employee during leave. Massachusetts has a Family and Medical Leave law that unlike the FMLA, requires the leave to be paid. Alternatively, some states allow an employee to use medical leave for domestic violence. The uniqueness of state leave laws is also true for break time required for employers. For example, North Dakota requires an employer to offer meal breaks after five hours of work, as long as at least two employees are on duty.
- **Benefits Upon Termination** – Many states have no specific requirements on what benefits must be paid upon termination of employment, which means it is left to the employer's policies. However, other states require benefits like paid time off to be awarded at the end of employment. States even have varying requirements regarding how quickly an employee must be paid their final wages upon separation. For example, in Nevada an employer must immediately pay discharged employees. While Nevada employees who quit only have to be paid on the next regular payday or seven days after resignation, whichever is earlier.
- **Worker's Compensation Coverage** – An employer should have worker's compensation coverage where the employee is localized. This should be fairly straight forward unless the employee is regularly traveling to other states for work.
- **Unemployment Insurance** – The DOL has published Localization of Work Provisions to creating a four-factor test to help determine to which state wages should be reported and unemployment insurance tax paid. Application of the four-factor test will probably mean an employer will be required to follow the unemployment insurance laws of the state where the employee is located.
- **Tax Treaties and Foreign Rules** – If a worker is to be remote in a foreign country – for instance a Michigan company hiring an employee who might work full or part-time remotely in Ontario – the employer would have to follow Canadian payroll, corporate, and labor rules for the time the employee worked remotely in the foreign country.
- **Independent Contractors** – Employees should also be wary of simply categorizing a worker as an independent contractor to avoid the complexities of multi-state or foreign employment. This is especially true after the Department of Labor has issued new proposed rules making it more difficult to classify workers as independent contractors.

Unfortunately, this is a non-exhaustive list. There are also local marijuana laws (medical and recreational), mini-WARN Acts, restrictions on non-competition and solicitation agreements, state specific laws regarding personnel records, and more. The employer should also register to do business in the location where it has remote workers, which can create some additional requirements for a business.

In short, utilizing out of state remote workers is not as simple as just applying your standard policies to the new employee. Employer's should perform an analysis of the state or country's employment laws to ensure they are compliant with the rules in the location where the employee is performing work.

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Butzel's Labor & Employment team stands ready to help you with issues that arise with remote workers in any state. Butzel is also the exclusive member firm in Michigan for Lex Mundi – the world's leading network of independent law firms with in-depth experience in more than 125 countries and all 50 states. Lex Mundi ensures that Butzel can collaborate with firms in every state and internationally to provide guidance regardless of where your remote employee is working.

If you have any questions about your remote employees or remote work generally, or any other Labor & Employment issue, please contact your Butzel Labor & Employment Attorney. Additionally, remote work will be one of many topics addressed at Butzel's upcoming Annual Labor, Employment, Benefits and Immigration Law Forum held on October 27.

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