

# NEW AND RECURRING ISSUES WITH REMOTE WORKFORCES

**Michael J. Gentry**

414-298-8715

[mgentry@reinhardtlaw.com](mailto:mgentry@reinhardtlaw.com)

**Reinhart Boerner Van Deuren s.c.**

1000 North Water Street, Suite 1700, Milwaukee, WI 53202

[www.reinhartlaw.com](http://www.reinhartlaw.com)

# Disclaimer

This presentation provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this presentation. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.

# Roadmap

1. Is Remote Work the Future?

2. Confidentiality and Data Security

3. Wage and Hour

4. Reasonable Accommodations

# Is Remote Work the Future?

- Remote work statistics
  - 41.8% of the American workforce continues to be remote
  - Trending upward before the pandemic, but only about 30%
  - Double of pre-pandemic levels by 2025
- More productivity; fewer distractions
- Demographic trends

# Is Remote Work the Future?

- Crossing state lines
  - Workers who live in another state
  - Workers who have relocated during the pandemic
- Federal coverage issues: FLSA
  - Enterprise coverage
  - Individual coverage
- Your policy

# Technology, Confidentiality and Data Security

- Remote working environments are more vulnerable
- Secure and efficient means of communicating and sending a receiving encrypted and confidential data
- Provisioning computers and devices vs. BYOD policy
- Securing endpoints and data
- Monitoring and support; Reporting and feedback
- Expectation of privacy?

# Technology, Confidentiality and Data Security

- Vendor and customer contracts and confidentiality agreements may not allow your employees to access or use your confidential information at home on their own devices
- Enforceability confidentiality agreements and intellectual property agreements differ from state to state
- Data breaches: definitions and penalties differ state-to-state

# Technology, Confidentiality and Data Security

- California Consumer Privacy Act (CCPA)
- Protects California residents' “personal information” – Broad definition
- Applies to any company that receives California resident personal information, and meets one of the following criteria:
  - Annual gross revenues of 25 million dollars
  - Obtains “personal information” on 50,000 residents
  - Receives at least 50% of annual revenue from selling California resident “personal information”

# Technology, Confidentiality and Data Security

- “Reasonable security measures”
  - Nineteen states (including Illinois) now require employers (of residents of their states) to implement “reasonable security measures” with regard to their maintenance or destruction of employee data.
  - Requirements when data breached: enhanced notification requirements, fines. Less frequent: private right of action.
- ADA: remote managers and supervisors must keep separate any employee medical information received

# Wage and Hour Issues

- Minimum wage and overtime issues
  - State and local laws differ regarding minimum wage
  - State laws regarding who is an employee vs. independent contractor differ
- Overtime policy?
- Payroll and reporting policy?

# Wage and Hour Issues

- Expense reimbursements
  - Some state laws require employers to pay for work-mandated travel but also general expenditures incurred in performance of job: *cell phone and/or internet expenses*
  - California, Illinois, Iowa, Massachusetts, Minnesota, Montana, New Hampshire, North and South Dakota, Washington D.C.
- Class action litigation risk where failure applies to a broad swath of employees: Missteps can be costly

# Expense Reimbursements - cont.

## California Labor Code § 2802

- All necessary expenditures
- Direct consequence of the job
- Or out of obedience to the directions of the employer
- Applies to all employees (broadly defined)
- *Required regardless of whether employee requests*

## IL Wage Payment and Collection

- All necessary expenditures
- Incurred within the employee's scope of employment and directly related to services performed for the employer
- *Subject to the terms of the employer's expense reimbursement policy*

# Reasonable Accommodations

- Accommodating employees in the context of remote work
- ADA: Employers must provide reasonable accommodations to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship
- Wisconsin Fair Employment Act: Similar for our purposes. However, LIRC: No limit on what may be required so long as reasonable and not a hardship to employer's business. (*Waldera v. CESA 11*, ERD No. 199901079, 10/31/02).

# Reasonable Accommodations and LOAs

- Accommodations requested by *workers who are working remotely*
- Neurodiverse employees with mental disabilities (e.g., anxiety, depression, PTSD) may need different or different levels of manager involvement or there may be programs that they request to assist with managing workflow or processes
- Leave laws (e.g., FMLA, WFMLA, Chicago PSL, etc.) still generally apply to remote worker who meet the eligibility requirements for the law if it applies to the employer

# Reasonable Accommodations

- Requesting *to work remotely* as a reasonable accommodation
- EEOC: *“The period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information”*
- Peeples v. Clinical Support Options, Inc., 2020 BL 353479 (D. Mass. Sept. 16, 2020): District Court issued temporary restraining order preventing company from requiring disabled employee to return on site

# Concluding

- *What we have covered:*
  1. Trends show likely more remote work from more locations in the future
  2. Statutory and contractual data security requirements should impact your policies and practices with remote workers
  3. Remote workers in different states might need higher pay or reimbursements, or may be misclassified under state law
  4. Remote workers may need reasonable accommodations and may be entitled to work remotely for the same reason

# Questions? Use Zoom chat feature or e-mail.

## Thank You!

**Michael J. Gentry**  
414-298-8715  
[mgentry@reinhartlaw.com](mailto:mgentry@reinhartlaw.com)