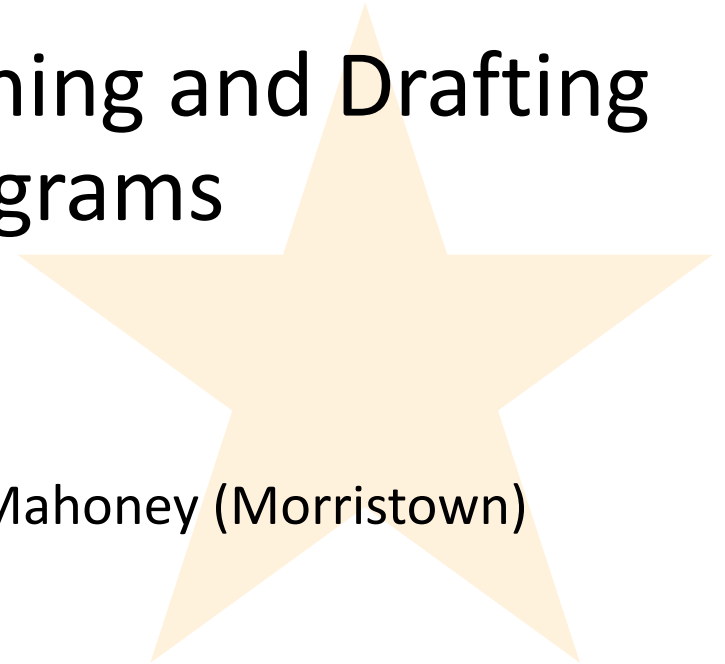


# Wandering Workers: Designing and Drafting Effective Remote Work Programs

## Presenters

Gregg M. Lemley (St. Louis) and Michael K. Mahoney (Morristown)



# Agenda

- Statistics
- Employment law considerations
- Tax issues
- Program design
  - Action items before drafting
  - Tips for drafting policies and related documentation
- Implementation and rollout

# Remote Work Statistics as of Jan. 2021

- 40% of people feel the greatest benefit of remote work is the flexible schedule.
- 16% of companies exclusively hire remote workers.
- Companies allowing remote work have 25% lower employee turnover than those that don't.
- 76% of workers would be more willing to stay with their current employer if they could work flexible hours.
- People who work remotely at least once a month are 24% more likely to be happy and productive.
- The number of people who work from home has increased by 140% since 2005.
- 4.3 million people in the United States work from home at least half the time.

Source: <https://www.smallbizgenius.net/by-the-numbers/remote-work-statistics/#gref>

# Impact of COVID-19 on Remote Work

- 7 in 10 workers who say their jobs can mostly be done at home say they are teleworking all or most of the time (55%)
  - 16% say they are teleworking most of the time
  - 12% say they are teleworking some of the time
  - 17% say they are rarely or never teleworking
- Prior to COVID-19 outbreak, 62% said they rarely or never worked from home.

# Primary Employment Law Considerations

- Wage and hour
  - Exempt v. non-exempt
  - Off-the-clock work/recording hours worked/overtime
  - Meal and rest break laws
- Workplace safety
  - Workers' compensation
  - OSHA

# Primary Employment Law Considerations

- Data protection/privacy
  - Home wireless networks v. virtual private networks
  - Company-owned equipment v. BYOD
  - External device attachments or use of cloud storage
  - Hard copies of confidential information
  - Videoconferencing and “Zoom bombing”
  - IT support for remote workers
- Federal/state laws impacting monitoring of remote employees

# Primary Employment Law Considerations

- Business expense reimbursements
  - Ten (10) states prohibit an employer from passing on a business expense to the employee:
    - California
    - Connecticut
    - District of Columbia
    - Illinois
    - Iowa
    - Massachusetts
    - Montana
    - New Hampshire
    - North Dakota
    - South Dakota

# Primary Employment Law Considerations

- Leave issues
  - FMLA
  - State/local paid sick leave laws
- Anti-discrimination provisions
  - ADA
  - ADEA
  - GINA
  - Title VII
  - State/local anti-discrimination laws
- NLRA considerations



# Tax-Related Issues

- Payroll taxes
- Unemployment contributions
- Corporate taxes
- Business expenses under Internal Revenue Code
  - Stipends v. reimbursements

# Remote Work – Income Tax Requirements

- Generally speaking, employers are obligated to withhold income tax based on the location where services are performed by an employee
- Increase in work from home or other flexible arrangements may trigger an employer's withholding obligation in a different state

# Remote Work – Income Tax Exceptions

- Reciprocal agreements between resident and work states
- States with convenience of the employer tests
  - Long-arm statutes providing that days spent working outside of an employee's assigned primary office state will be treated as working within the primary office state

# Remote Work – Income Tax COVID Relief

- Some states:
  - Issued guidance indicating they will not impose withholding requirements based on remote work OR
  - Relaxed penalties and interest for late deposits
- Other states kept the status quo

COVID-19

# Remote Work – State Unemployment Insurance

- An employer must use the following factors in consecutive order until a specific state is identified as the correct state for SUI tax purposes:
  - *Localization*
  - *Base of operations*
  - *Place of direction and control*
  - *Residence*
- An employee's SUI state may or may not change due to working from home

# Remote Work – Practical Tax Withholding Considerations

- Payroll registrations in states where the business is not otherwise registered
- Tracking employee work locations
- Potential corporate tax issues



# Remote Work – Expenses

- Remote work has caused many employees to incur costs in carrying out their work
  - Internet
  - Cell phone usage
- Certain state labor laws require reimbursement of such expenses



# Remote Work – Expense Reimbursement

- Working condition fringe benefit
  - Any property or service provided to an employee where if the employee paid for the property or service, the amount paid would be allowable as a business or depreciation deduction
- Allowable deduction for property or service that are both an ordinary and necessary business expense



# Remote Work – Principal Place of Business

- In order for home office expenses to qualify as ordinary and necessary, the home office must be the employee's principal place of business
  - Home office area used exclusively and regularly; and
  - No other fixed location where the employee conducts substantial administrative or management activities



# Remote Work – Cell Phone

- Taxation dependent upon whether there is a “substantial noncompensatory business purpose” for reimbursing an employee for cell phone expenses, such as:
  - The employer’s need to contact employees at all times for work-related emergencies;
  - The employee’s need to speak with clients at times when the employee is away from the office; or
  - The employee’s need to speak with clients at times outside of the employee’s normal work day
- Cost must be:
  - Reasonably related to the needs of the employer’s business;
  - Not likely to exceed the actual expenses incurred; and
  - Not a substitute for regular wages

# Remote Work – Practical Expense Reimbursement Considerations

- Many employers do not have the information needed to determine whether an employee's home office meets the principal place of business requirements
- May need to consider providing tax gross-up on home office expense reimbursements
- Best practice to have written cell phone expense reimbursement policy

# Program Design

- Pre-drafting action items
  - Review/update job descriptions
  - Review/update employment law policies (data privacy, BYOD, business expense reimbursement, etc.)
  - Coordinate with important stakeholders
    - IT
    - Payroll
  - Consider data collection

# Program Design

- Provisions to include in Remote Work Policy
  - Objectives
  - Eligibility factors (both for individual and role)
  - Workplace safety expectations
  - Data privacy/protection
  - Recording hours worked (if extending to non-exempt)
  - Application process/procedure (and appeal process, if any)
  - Equipment/stipends/reimbursements
  - Tax implications
  - Other disclaimers (at-will; policy not applicable for ADA accommodation requests)

# Program Design

- Other Documentation/Materials to Consider
  - Remote work request form (and acknowledgement to adhere to remote work policy if no stand-alone remote work agreement)
  - Internal guide for managers evaluating remote work requests (and training for managers)
  - Appeal paperwork for denied requests (if applicable)
  - Separate safety acknowledgement/checklist
  - Data protection/privacy checklist

# Implementation and Rollout

- Obtain review/input from stakeholders prior to finalization (key managers/supervisors, IT, HR, Payroll)
- Identify contact person to field questions
- Communicate upcoming policy (typically Company-wide email with note from head of HR or other high-level executive)
- Prior to effective date, train managers/supervisors and/or any other decision-makers on policy language, factors to consider when approving/denying requests
- Maintain database of information related to remote work arrangements (e.g. remote work request forms, signed policies/acknowledgements, etc.)

**THANK YOU!**