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EMPLOYMENT LAW ALERT | NIXON PEABODY LLP

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## Rethinking the Post-COVID workforce

### Legal issues and strategies for employers seeking to emerge from the pandemic with a more adaptive and resilient workforce model

By Tara Daub

Organizations are approaching a pivotal point in the COVID-19 pandemic, as the vaccine rollout is underway in its beginning stages. The goal of employers in some industries has been to manage through the pandemic's challenges in order to survive and return to business as usual in a "post-COVID" world. However, other employers are rethinking the status quo and creatively assessing how they can emerge from the pandemic as a stronger organization with a more adaptive and resilient workforce model. In fact, most employers expect that the end of the pandemic and return to normalcy will follow an unpredictable path, and many are thinking beyond this pandemic to the possibility of future pandemics or other wide-scale societal disruptions. For these employers, this moment provides an opportunity for reinvention, rather than a return to the pre-COVID status quo.

Not surprisingly, the expansion of remote work and the structure for managing remote workers, whether on a full-time, limited-time, or contingent basis, is a key component that many employers are evaluating in their planning process. Over the past year, the work-from-home environment necessitated by the pandemic led employers to invest heavily in technology and communications upgrades. Having adapted to working from home, large contingents of employees may request telecommuting for most, if not all, of the workweek in the post-COVID world. They also may desire to move indefinitely to other states, with or without transparency regarding their work location, creating myriad issues for employers, especially if they do not already have a presence in that state. Work-from-home also sets the stage for a conflict between an employee's private home and an employer's ability to supervise and monitor the work of that employee, as home/office distinctions have been blurred more than ever.

As employers rethink how they want to emerge from the pandemic, they face the additional challenges of a legal framework in the U.S. that was developed at the federal, state, and local level largely during the pre-COVID world. Employers should consult legal counsel to ensure that their strategies for developing post-COVID workforce models and policies comply with existing legal requirements and changes in the law as they develop.

Relevant topics and legal issues for employers to consider during this process include:

- Tax and withholding rules impacted by remote work in other states or countries;
- Tax planning opportunities and benefits arising from COVID-relief measures and/or post-COVID business rationalizations;
- Foreign qualification and implications of doing business in a state;
- Coverage of state and local employment laws for workers in other states;
- Workforce restructuring, including redefining, modifying, or eliminating positions and rethinking compensation and benefits structures;
- Hybrid models for remote work within an organization;
- Defining and redefining positions and essential job functions in a flexible workforce;
- Non-discrimination and reasonable accommodation requirements, relating to vaccination and other policies;
- Wage and hour laws governing employment status, minimum wage and overtime requirements, overtime-exempt status requirements, timekeeping requirements, travel time, compensable time, and breaks;
- Policies and programs for employee education and training;
- Performance management in a remote workforce;
- Equipment and expense reimbursements;
- Worker classification, contingent workers and contractors, employees of third-party service providers and vendors, and joint employment;
- Restrictive covenants, including geographic scope and choice of law issues;
- OSHA compliance and enforcement and workers' compensation insurance issues;
- Collective bargaining obligations in unionized workforces;
- Data privacy and data security; and
- Immigration compliance and Form I-9 procedures for remote workers.

The list above is not exhaustive, but it illustrates areas where legal compliance strategies need close attention. Nixon Peabody has dedicated an inter-disciplinary Task Force that has analyzed these issues and can help create compliance solutions for employers of all types.

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