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REMOTE WORKING 2022

Global interview panel led by Lindsay F Ditlow of McDermott Will & Emery LLP

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Lindsay F Ditlow of McDermott Will & Emery LLP, this Remote Working volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Compensation packages
Remote hiring
Data privacy
Tax implications

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About the editor



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Lindsay F Ditlow is an employment adviser on a variety of domestic employment law matters. She is one of the leaders of McDermott's COVID-19 Employment Task Force and advises employers on a wide range of covid-19 measures, including federal, state and local leave obligations, furloughs and layoffs, cost-cutting measures, accommodations, health and safety obligations, return-to-work procedures and policy review and implementation.

Lindsay provides trusted counsel to US and multinational companies on all aspects of the employment relationship. She regularly advises on employment structures, onboarding requirements, employment agreements, non-competes, international assignments, handbooks and policies, employee leave, workplace accommodations, furloughs and individual and collective dismissals. She assists employers with these matters in the US and when they are expanding abroad. She partners with clients in a wide range of industries, including healthcare, life sciences, technology, energy, manufacturing and communications.

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INSIDE TRACK

United States

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Lindsay has extensive experience handling employment issues in the US market involving mergers and acquisitions, compliance, divestitures, carve-outs, spin-offs, corporate reorganisations, post-acquisition integrations and outsourcings. She provides strategic advice to clients on HR-related deal issues, coordinates due diligence teams, negotiates transaction agreements and supports implementation and post-acquisition integration.



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1 What are the most consequential issues that an employer should consider when determining its post-covid-19 remote work policies?

A critical issue for employers to consider when evaluating post-covid policies generally is how the viability of the new 'remote' workplace will impact business operations, including competition for top talent, going forward. Throughout the pandemic, many employers have learned that their prior assumptions on the viability of remote work were not necessarily correct. Assuming the tight job market trend in the United States continues post-pandemic, employers will need to be ready for continued remote work requests. One of the more difficult legal challenges remote work arrangements raise for employers is compliance with a myriad number of federal, state and local leave of absence laws, such as the Family Medical Leave Act and any similar local sick leave or medical leave laws. These can not only differ from state to state, but also from state to city. Another aspect that can unfortunately catch employers in a tough situation is ensuring compliance with wage and hour laws for each given state. For example, if an employer has an exempt remote worker earning the minimum allotted salary in Illinois, but then moves to California to begin remote work, the employee's salary may no longer meet the minimum threshold for a correct exempt classification. In the same vein, for non-exempt employees it is critical to make clear off-the-clock work policies so as not to expose the employer to unpaid overtime issues.



Lindsay F Ditlow

2 Pragmatically speaking, is there a threshold to determine when working remotely (from home or otherwise) requires local rules to apply?

Not surprisingly, it depends. In the context of wage and hour laws, an employee avails themselves of those protections almost immediately. Using our example in question 1, if the employee now working in California is no longer properly exempt because of a salary threshold issue, the employee could pretty quickly bring a dispute under wage and hour laws. Alternatively, the threshold for tax implications (such as income withholding) may be longer as discussed in question 7. Finally, with leave laws, the threshold could be amount of money earned from the employer in a state, or an amount of time working in that state (ie, 12 months).



“What we have seen throughout the pandemic (in a positive light) is that employees are getting to see more of their families, travel more and have the flexibility to run to the grocery store on a lunch break rather than rush after an exhausting work day. ”

3 If employees voluntarily move away from their main work location, can employers unilaterally impose locally appropriate compensation packages?

Probably, yes. The employer can likely unilaterally change an employee's compensation package, provided they are employed at-will and not on a contractual basis. For example, living in San Francisco has a higher cost of living than living in St Louis.

Historically, part of salaries are based on cost of living. So, where an employee has unilaterally determined where they will live, the employer will have the opportunity (at the appropriate time, say annual reviews) to make a change in compensation. If an employer is contemplating a compensation change, it should also consider non-legal factors, such as the job market. As mentioned above, the US is currently experiencing a war for talent, and therefore this may influence an employer's decision to change (or not change) an employee's compensation due to work location changes.

4 Do you anticipate a rising trend of employers hiring remote workers as opposed to managing office-based employees who subsequently go remote? What practical issues should employers bear in mind when considering remote hiring?

Practically speaking, it depends on whether the hiring employer is allowing the potential employee to fully work remote or whether it will expect some amount of face-time in the office. However, we have seen a trend in some industries, such as tech, where employers are allowing employees to voluntarily work remotely. Additionally, in these same industries, we are seeing initial job offers with an opportunity to work fully remote without ever stepping foot in an office. But we do not expect a trend to complete cessation of in-person office work,



which is why the hybrid model has been alluring to many employers during the pandemic. Despite whether an employee is fully remote or in a hybrid office setting, the laws apply evenly. That is to say, even if a hybrid employee spends Monday, Thursday and Friday at their lake house in Wisconsin, but commutes into a commercial office into Chicago Tuesday and Wednesday, the laws do not discriminate based on days in the office versus remote.

5 Do local laws provide remote employees with more generous leave entitlements, such as sick leave? Can employees avail themselves of leave entitlements in both the primary work location and the remote work location?

An employee's mere status as 'remote' does not per se entitle them to more generous leave entitlements. However, if an employee is performing services in a location that provides more generous leave entitlements, then similarly situated remote workers may be entitled to different local leave benefits based on the location where they are performing work. It is likely remote employees can only avail themselves of the leave laws of the jurisdiction they are currently occupying, and not both the primary work location and remote work location. Thus, it is critical that in an employer's remote work policies there are mechanisms in place for employees to frequently report the location, including city and state, they are performing work in at any given time so the employer may track whether they are entitled to statutory leave of absence under the laws of the location where they are working. For example, if an employee is remotely working in Illinois for two months and then travels to Massachusetts for two months (but earns more than \$5,400), and during that time was injured or became ill, the employee would be entitled to leave under Massachusetts rules, and therefore the employer must be aware of and in compliance with those local laws.

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Critically, under the federal Family Medical Leave Act, however, an employee's residence (the most likely remote work location) is not a worksite. Rather, the work-site is the office to which he or she reports and from which assignments are made.

6 What are some best practices for protecting confidential and proprietary information in a remote work environment?

The first thing an employer will want to do is implement a fulsome telework or remote work policy that outlines exactly what is expected of the employee as it relates to protecting confidential and proprietary information. This policy should include the standard instructions such: as working in a private area within the home where third parties cannot view the work (one could provide screen privacy protectors that shield the view of the screen unless directly in front of it), locking the workstation when not in use, implementing a VPN log-in, consistently updating computer software, providing shredders to



employees at their remote location, and (if available under the law) having employees sign confidential and proprietary non-disclosure agreements. It is also important to have a specific and readily available list of what the employer deems confidential information so that the employee has a full understanding of where their duties and obligations lie for nondisclosure of the same.

7 How does a remote employee affect the employer's tax obligations? Do the employee's activities render the employer to be 'doing business' in the remote location? Will these activities create a taxable presence for the foreign employer in the local jurisdiction?

One tax obligation that remote work affects is income tax withholdings. For Illinois, tax withholding is based on where the employee is working. In 2020, Illinois adopted a rule that employers must withhold Illinois income tax for out-of-state employees who work in the state for more than 30 days. Importantly, employers with remote workers need to track these local requirements. For example, in Illinois, an employer may need to register with the Department of Revenue and withhold Illinois income taxes for a resident employee that spends more than 30 days working from home in Illinois. Finally, Illinois has what are known as reciprocity agreements for income tax, which means that two states allow its residents to only pay tax on where they live – instead of where they work. In Illinois, if an employee is working in Iowa, Kentucky, Michigan or Wisconsin, the employer can, but is not required to, withhold income tax for both states. However, if the employee is working in Massachusetts but is paid in Illinois, the law may require the employer to withhold under both state laws.

Given these complexities with tax compliance, employers should have robust systems in place for tracking remote employees, including their physical work locations and times spent in all work locations.

8 What are some best practices for tracking remote work arrangements?

Track, track, track your remote workers, and when in doubt, write it out. In addition to having robust systems in place for tracking remote employees, employers should implement comprehensive remote work programmes, including best practice policies, remote work agreements or policy acknowledgements. Finally, employees (including managers and supervisors) should be trained on the remote work policies and arrangements, including how these policies are the same or different from the organisation's normal workplace protocols.

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The Inside Track

What do you think are the most exciting and promising opportunities of remote working? How do you think it will affect the future of work?

The availability of remote work offers employers many benefits. Some that come to mind are curbing the classic burnout. What we have seen throughout the pandemic (in a positive light) is that employees are getting to see more of their families, travel more and have the flexibility to run to the grocery store on a lunch break rather than rush after an exhausting work day. These small factors can play a big role in an employee's ability to remain positive and continue to produce excellent work product. It also allows employees to learn and engage with coworkers or supervisors they may not have otherwise been exposed to, which is critical for creativity, strategy and company growth. Sometimes, the same team in a conference room may not generate as many ideas over the years. When you mix up the groups (which is easier via a platform like Zoom) an employer not only allows employees to re-engage with others, but it allows diversity of thought where it may not have otherwise occurred

In your view, what are the most difficult challenges raised by the rise of remote working? How do you think employers should tackle these challenges and adapt accordingly?

Some of the more difficult challenges include the speed at which we are seeing so many changes in laws and guidance (which also can be refreshing). When there are varying work locations with different laws and guidance, it becomes crucial

to track compliance with the state and local laws for each work location, physical and remote. It is also important not just to know about the laws, but consistently and promptly implement policies and procedures to remain in compliance, whether that be making sure an employer's human resources and payroll department is on top of payroll withholdings or accrued leave under specific laws. These changes can occur month to month, so it is critical that an employer has mechanisms in place to quickly adapt, and engaging employment counsel can relieve such a heavy burden.

What do you enjoy most about practising and advising in this area?

Being at the forefront of emerging advice and counsel for our clients and developing new strategies relating to the ongoing, and ever evolving, covid-19 pandemic.