

Today's Remote Workplace: Navigating Labor & Employment Issues in a Hybrid Environment

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Remote work already was a growing trend before the COVID-19 pandemic, and that trend rapidly accelerated when the pandemic hit in early 2020. Even as conditions have improved and restrictions have been lifted, many employers and employees have found benefits in remote work, while others welcomed the return to in-person. A third group prefers a hybrid approach, blending remote and in-person working. But remote and hybrid work bring new legal and compliance challenges for in-house counsel.

Atrium Senior Associate General Counsel [Beth Mabe Gianopulos](#) and Womble Bond Dickinson Partner [John Pueschel](#) joined moderator and WBD Partner [Mark Henriques](#) to discuss these business trends and the labor and employment compliance considerations employers need to be aware of. This article is based on their presentation.

For many organizations, labor and employment is the most highly regulated part of the business. Hiring practices, pay, absences, disabilities, employee insurance, and safety are just some of the employee-focused compliance issues that in-house counsel must monitor.

“These practices don’t go away just because an employee isn’t in a company facility,” Pueschel said. Fundamental legal compliance still must be met on a daily basis—even in a remote, hybrid or flexible work environment.

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At the same time, workers have come to expect flexibility, and a historically strong job market has given them leverage to make that expectation a standard function of doing business. A record [47 million people changed jobs in 2021](#), showing the intense pressure employers are under to maintain

staffing levels.

The combination of a changing working environment and a highly competitive employment market mean that in-house counsel are more vital than ever in managing both legal and business needs related to labor and employment. Some of those issues relate to vaccine mandates, labor law compliance, employee privacy concerns, and creating the workplace setting that works for both the employer and the employees.

“It is important to understand the company’s human resources philosophy and where the company wants to go,” Gianopulos said. “I think that’s more important than ever.”

COVID-19 Vaccination Rules Less of a Concern

In 2021, COVID-19 vaccine mandates, while supported by medical and public health officials, were highly polarizing in the sphere of public opinion. In some places, such mandates had an impact on employee retention; at a minimum, they required time and focus on the part of employers.

“I think we’ve seen a little relaxing of that,” Gianopulos said. “There are different views of vaccine mandates based on political ideology and it was difficult for employers to manage.”

But the [courts largely rejected](#) the Biden Administration’s efforts to mandate vaccinations for workers under federal authority (except in certain healthcare settings.) The Biden Administration also says it will not enforce proposed vaccination rules for federal contractors, Gianopulos said.

All private employers are permitted to mandate vaccination if they wish, subject to state law and federal religious/disability discrimination law.

“There’s not much talk about mandates surrounding COVID boosters or anything like that among employers,” she said.

The Many Challenges of Remote Work

“When you have a remote workforce, what law applies? The general rule is that for most labor and employment issues, the law in the state where the worker is providing services is the law that applies,” Pueschel said. For example, if a California-based business has a remote employee working in North Carolina, then North Carolina law will apply for most labor and employment issues relating to that employee.

This puts a far greater compliance onus on in-house counsel, particularly at smaller companies that have a more local or regional focus.

“In-house counsel always have had to balance the need to be proactive with responding to day-to-day, reactive issues related to their business,” Gianopulos said. “Now, in addition to managing current legal and compliance issues, they must also keep in mind the need to monitor compliance with laws and regulations in an increasing number of jurisdictions and have a deeper understanding of the compliance obligations in order to better serve their organization as a strategic partner.”

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Such compliance-related obligations include:

- **Tax and authority to do business.** Companies need tax counsel to help them with tax issues relating to employees working remotely in multiple states. A process for onboarding new employees needs to be in place to track and manage tax issues. “This was a big eye-opener for companies in 2020,” Pueschel said.

Gianopulos also noted that some employees may split their time between states—a primary residence in one state and a vacation home in another, for example. In these cases, there is no one-size-fits-all answer, since tax laws vary greatly by state.

- **Wage and hour compliance.** “This is a big one; there are a lot of variances from state to state,” Pueschel said. If an employee moves out of state, the state where they are located is the state that governs wage and hour compliance. Some states have a daily overtime requirement, for example. Other locations have a minimum wage higher than the federal minimum.

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For hourly employees, meal and break period rules vary by state and are a frequent—and often easy—target in class and collective action lawsuits.

“The big challenge is ‘How do you track time for non-exempt employees working remotely?’” Pueschel said. Companies need a process in place to record and verify hours worked, he said, and employees must be paid for all hours worked.

- **Pay equity.** Pay scales may vary from one location to another. Companies need to be mindful of these differences in determining pay rates that are fair and equitable. One question employers struggle with is how to compensate workers in different markets with different local pay scales and costs of living.

“This is that intersection between what the law requires and the reality that you need to be

able to recruit,” Gianopulos said. “Companies that have a lot of resources may be able to pay top dollar to employees in high cost-of-living areas. But most companies may not be able to afford to do that. You may have to make some tough choices.”

- **State sick, vacation, and other leave laws.** These laws are almost exclusively state-specific, so a company’s leave time policies may not work for every state. States may have specific rules that govern accrual of vacation, forfeiture or “use it or lose it” policies, or mandated sick time. For example, California, Colorado and several other states have laws stating that once time off is accrued, it may not be taken away. Family and Medical Leave Act (FMLA) compliance includes whether a remote employee who meets the service requirement of the FMLA is located in a place that has 50 or more employees within a 75-mile area. So many remote workers may not be covered by FMLA. But an increasing number of states have similar state laws that often cover more employees and employers than the FMLA.

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- **Workers’ compensation and insurance.** Companies need to make sure that their workers’ compensation insurance policy covers each employee in every state in which they have workers (including remote employees). Depending on the insurer and state, a company may need a specific endorsement from the insurer, or a state may require that the insurer be approved in that state.

“One of the interesting challenges is, ‘Does workers’ compensation apply in the home?’ And it might in some cases,” Pueschel said.

- **Employee expense rules for remote work.** Do companies have to reimburse at-home employees for internet service, printer paper, cell phones and other work-related expenses? California, without question, requires reimbursement of certain remote working expenses. But Illinois, Iowa, Massachusetts, Montana, New Hampshire, South Dakota and Washington, D.C. also have laws which Gianopulos and Pueschel believe likely would be interpreted by courts to require such reimbursements.

“Not only is that a lot of state laws, federal laws and local ordinances that in-house counsel has to deal with, but it’s also a lot of topics,” Gianopulos said. “That’s one of the big challenges for in-house counsel, particularly for companies that weren’t sourced with big in-house teams.”

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Privacy Considerations in Remote Work

Since 2020, Gianopulos and Pueschel say they have seen significantly increased focus and efforts directed to monitoring employees' activities on company systems.

Employers generally have broad latitude to monitor company equipment, devices, emails, systems activities and access, online activities, and productivity. But it also is important to note that third-party monitoring of phone calls is limited by federal and state wiretap laws. Also, some states require participants to obtain the other party's permission before recording a phone call.

"It is critical to have clear policies on monitoring which convey no expectation of privacy in company systems," Pueschel said. "Disclosure of monitoring reduces risk of legal claims and may help ease the level of mistrust employees may have about being monitored."

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Choosing Remote vs. Hybrid vs. In-Person Work

Legal compliance is one key consideration in the current workplace environment. But there are important business considerations as well. In choosing a remote, hybrid or in-person work environment, employers must consider the demands of the business as well as the expectations, wants and needs of the workforce.

"A lot of this is going to vary depending on your workplace culture and how spread out your employees are," Gianopulos said. But she said companies need to have an end goal in mind before making any decision.

Some surveys have shown that gender, age and race can impact the type of work environment that employees choose. "You need to be thoughtful that you aren't setting up a situation where some people are disadvantaged, where remote workers are 'Out of sight, out of mind,'" she said. But on the other hand, Gianopulos said that mandating a certain number of in-office hours too strictly may eliminate the flexibility that many workers want.

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The panelists say that at a minimum, employers should have a remote work policy that addresses:

- The positions that are eligible.
- How requests are to be made and processed.
- Expectations and job requirements (such as need to be productive and perform assigned duties, daily schedule, being available for calls/meetings, childcare, etc.)
- Reporting of time for wage payment purposes.
- Reimbursement of expenses.
- Workplace safety.
- The company's right to end the arrangement at any time.
- IT and information security.

Gianopulos said “compassionate accountability” is vital during this time of transition. Remote or hybrid workers may feel disconnected from their co-workers, or they may have trouble keeping work from spilling over into their home lives.

“Managers need to strike a balance between holding people accountable and also recognizing the struggles employees may be having,” she said.

All of these considerations put a tremendous responsibility on in-house counsel, making an already challenging career even more difficult. But at the same time, an in-house counsel's voice is more important than ever in guiding a company to success in a fast-changing environment.

“It's an exciting time for in-house counsel and a time they can rise to the occasion,” she said.

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National Law Review, Volume XII, Number 335

Source URL: <https://natlawreview.com/article/today-s-remote-workplace-navigating-labor-employment-issues-hybrid-environment>