



**Lowenstein Sandler's Employee Benefits & Executive Compensation Podcast:
Just Compensation**

**Episode 27 –
WFH: How to Set Expectations for a Remote Workforce and Comply with Disparate State Employment Laws**

By [Megan Monson](#), [Julie Levinson Werner](#), [Taryn Cannataro](#), [Amy Schwind](#)

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Taryn Cannataro: Welcome to the latest episode of Just Compensation. I'm Taryn Cannataro, counsel in Lowenstein's Executive Compensation & Employee Benefits Group, and I'll turn it over to my colleagues to introduce themselves.

Megan Monson: Hi. My name is Megan Monson and I'm a partner in the same practice group as Taryn.

Julie Werner: My name is Julie Werner. I'm a partner in the Employment Practice Group.

Amy Schwind: I'm Amy Schwind and I'm counsel in the Employment practice group.

Taryn Cannataro: Today's discussion will focus on a topic that affects many companies since the pandemic in light of technological advances and as a remote work or hybrid arrangement increases, and that's work from home consideration. Whether it be a formal remote work arrangement or a hybrid office environment, these days, many companies have some form of work from home arrangement for their workers.

Work from home arrangements have many benefits for both companies and employees. For example, reducing overhead and operational cost, helping to retain and attract top talent and reduced commuting costs and stress. However, it also comes with a number of legal considerations. We will discuss some of these considerations in today's episode.

As always, this is not intended to be an exhaustive discussion, so we encourage you to consult with your legal counsel to discuss the impact of remote work on your workforce.

Let's start at the beginning. If a company allows working from home or has remote workers, what are some key considerations they should be mindful of?

Julie Werner: So Taryn, I think one of the main areas to start is just being clear about a company's expectations, and so it's not unusual to have some type of base policy that explains and lays out what those things are. It's typical to have a policy that, and we can go into a little more detail about what type of content would be in a policy, but basic

things around hours and expectation and availability and other things that we'll spend some more time discussing.

I would also say that restrictive covenants is a very much a state specific consideration in terms of the ability for an employee to be subject to a non-compete. Increasingly, employees in a remote environment are inclined to relocate and move to different areas around the country, and what that may mean is that employers may be subject to state laws and areas that they weren't even aware that they were subject to or that there were distinctions.

And so being aware of your confidentiality agreement, your non-compete agreement, which state's law applies, is definitely something to be mindful of in a remote working environment.

In terms of benefits, that's another area. Different employees depending on where they live, may have entitlements to parental leave, other types of paid time off as well as vacation laws will vary depending on the state in terms of an employee's ability, for example, to roll over unused time from year to year, or even be entitled to a payout of unused vacation upon termination.

Wage and hour is also an area where the law may vary by state. So having remote workers, firstly, if the worker is non-exempt, that is if they're an hourly employee, making sure that there are time records that are kept because over time obligations will vary. California, for example, measures overtime on a day basis whether or not the employee works eight hours or more in a day, for example, compared to federal law and virtually every other state that will look at it just on a weekly basis.

And as well as whether or not if somebody is working from home, what does that mean to be working and what does it mean to be taking a break and what does it mean in terms of hours worked? If they're doing their work, they run to go move a load of laundry from the washer to the dryer. If they're an exempt employee, that may mean nothing if it's a non-exempt employee, just all of those things require closer consideration. So those are a number of the areas. There certainly are others that Amy can explain further as well.

Amy Schwind:

Yeah, so additionally, the employer would want to consider its employee handbook. And so as Julie mentioned, employees will be subject to employment laws in whatever state they're in and may be entitled to additional benefits as well. So oftentimes employers will update their handbook, particularly if there are several employees in one state to include a state specific addenda for that state. Employers should also consider insurance requirements. So some states require workers' comp and short-term disability insurance like New York for example. Then there can be significant penalties for not having these insurances in place on day one.

Also, there are reporting obligations that the employer may now have if they have new hires in new states, and this is often required within 20 days from hiring someone to report them to the state where they are. And that's for wage garnishment purposes if they don't comply with a child support order.

Also, the state where a new hire is being made might have an expense reimbursement statute. In California, for example, employers are required to reimburse their employees for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of their duties. And there's a similar statute in Illinois, so that's also something to think about that there might be expense reimbursement requirements for the employee.

Megan Monson: One of the key takeaways based on what Amy and Julie have said in my view, is a lot of state laws are going to vary across the board. And so if you're having a workforce located in a variety of states, it really is important to be checking the employment laws for that specific state because it can be so variable. And so if you are again expanding into states that you are not currently operating in, or if you have a completely remote workforce and your entire employee population is all across the US, there are a lot of different requirements that you may be subject to. And by not checking the appropriate states laws, you could be running afoul of those without even realizing it.

So Amy or Julie, can one of you talk a little bit about what a potential work from home policy may include?

Amy Schwind: Sure. So essentially it would outline the guidelines for employees who will work from a location other than the company office. And so typically the employer is going to want to specify that the employee needs to receive advanced approval to work remotely. The policy would state the expectations for the employee to maintain the same level of work quality and productivity as when they are in the office.

Also, it would be good to include that the employee will maintain regular contact with the employee's colleagues. Often there would be components in there related to internet usage, particularly if the employer doesn't have a standalone internet usage policy. So something that would speak to the proper use of the company systems and also that they will be monitored.

It should also state that while working remotely, employees are subject to all company policies and procedures. So all of the policies in the employers handbook including anti-harassment policies because it certainly is possible for harassment to occur in the remote work environment and digitally.

It also should address costs and equipment. So whether the employer is going to be supplying equipment like laptop and phone if it's needed, or whether the employee is expected to provide that. And also keeping in mind that there might be requirements under a business expense law, as we previously talked about, that the employer needs to cover those.

And it should also discuss ongoing operating costs, so things like telephone service fees, data plans, internet fees, those sorts of things.

Megan Monson: So Amy, is it fair to say that while certainly not legally required, it would be best practices to have a work from home policy if you are going to be utilizing a remote workforce remote, just to set forth kind of the expectations and guidelines around the arrangement?

Amy Schwind: For sure. I think it's definitely ideal, especially as for a lot of companies, more and more employees are working remotely to lay out what the expectations are.

Taryn Cannataro: So what if there's no formal work from home policy in place at your company, but an employee requests to work from home is a reasonable accommodation for a disability. Is the company required to honor them?

Julie Werner: So what's always been the case in general is that if an employee has a protected disability, the employer generally speaking is required to reasonably accommodate so long as the employee can perform the essential functions of the job. That's a general standard under the Americans with Disabilities Act. Some of the language may slightly vary depending on state law, but that's the gist of it. And so even prior to

COVID, it wasn't unusual for employees in certain situations to ask for working from home as a reasonable accommodation. And again, any request by an employee, typically it's not just what the employee is asking for, they need to provide medical documentation. It's the medical professional who needs to make the proposal or essentially make the recommendation as to how if the employee has a disability and in what way the employee may need an accommodation.

So historically, it wasn't unusual, although it was less common, and it seems like there was more resistance. What happened during COVID clearly was so many employees were working remotely that it became harder. It has become more difficult for companies to reject that type of request. While in the past a company may have said, "Oh, we can't really do that. You can't perform the essential functions and various other things, it would cause us a hardship." I think what COVID has shown us is that in not all, but in many situations, it was workable and that employees could do it. So it definitely is a case by case situation. It's very fact specific. But yes, if an employee has a protected disability, but again, they still have to perform the essential functions of the job. Clearly, if you are a waitress in a restaurant, you cannot perform the essential functions of the job working at home.

And even jobs that typically are office related work that one might say could be done from home. If the employee requires a certain level of supervision that perhaps can't be done in the same way if they're working from home, if there's a level of productivity that they've shown that they're not meeting, if there are other reasons why their physical presence is necessary, then certainly an employer can reject the request. But an employer would still have to engage in what's called an interactive dialogue and essentially try to come up with an alternative. And that could include for example, even a flexible schedule or a partial schedule. It may not be an all or nothing. It might be certain days of the week. So it really is, again, very fact specific.

Megan Monson: Are there any type of tax considerations that a company should consider when it allows employees to work from home?

Amy Schwind: It's a good question to raise. The employer would want to speak to their accountant and payroll provider as there would be state tax considerations, and also, it's a corporate consideration. But the employer would want to determine whether it needs to register to do business in the state where it has employees.

Megan Monson: That makes sense. And I would expect from the employee side, they would also need to speak to their accountant to understand really, or they would be subject to state income tax.

Is there anything else that a company that allows for remote workers should be aware of that we haven't touched on already?

Julie Werner: I think it's a good question, and I think it'll be interesting when we look back at this time. In another generation from now, when people look back, they'll notice that this was obviously a significant time and what the impacts really are. Either we'll look back at it and we'll say, "What a revolutionary thing. Can you imagine people had to go to offices and go sit and wear a suit and a tie, whatever, when they could be sitting home?"

Or likewise, people may come back and look and say the comradery, the morale, all the things, the company culture that companies have spent so much time and so much in terms of resources and energy trying to develop. People may come back and look at this time and say, "Can you imagine that's all gone now? We used to have that and now we don't because everybody's working remotely. We don't even know each other. We haven't met."

Look, I think we're living this in real time. We don't know how this is going to play out. That's less of a legal issue than it is more of just a workplace sense of things and culture. And so I think just having all these considerations in terms of assessing the cost, obviously housing and commercial real estate is being impacted in the cities by this.

But I guess periodic retreats, companies you see are being more mindful when employees are getting together. So if they organize company retreats or they come up with an evolving schedule of certain days or times each month or week that they want employees to be present in the office, I think we're all still figuring this out.

It'll be interesting when we look back at this time and to see what are actually the lessons learned. But I think those are the main considerations that I know people are struggling with as they're figuring out their policies and practices in this area.

Amy Schwind:

This is becoming more and more common, and I think after COVID-19 and people relocating, there were some employers who didn't even know initially where they had employees. So I think at the outset, it's important to understand where all of your employees are and then that there may be additional and new legal requirements on you as an employer if you do have employees in areas where you did not have them before.

Taryn Cannataro:

Many companies now offer their workers the opportunity to work from home at one time or another or engage fully remote employees. The laws regarding work from home practices both at the state and federal level will continue to change as more and more companies adopt a hybrid or fully remote work environment.

It's important for companies to be mindful of the employment law and tax considerations when developing their work from home policy and understand the related implications.

This episode is intended to be a high-level overview but is by no means an exhaustive discussion of all considerations that may apply to your company. We encourage you to consult with counsel to discuss your company's work from home policy. Thanks for joining us today, and we look forward to having you back for our next episode of Just Compensation.

Kevin Iredell:

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