

More remote work could mean more out-of-state employees

The success of remote working arrangements during the pandemic has made more employers warm to the notion of hiring out-of-state workers, according to attorneys who say they have clients, especially in the tech sector, expressing interest in the idea.

"Technology partners who swore they would never work from home remotely are saying, 'Hey, this actually works,'" said Bethany A. Vasquez, of Cozen O'Connor, whose clients include startups and high tech companies.

Allowing employees to work from anywhere would cut costs and create a wider talent pool for companies, lawyers said. But it would also create more complexities as companies navigate laws and regulations across multiple states and countries.

In May, Twitter and Square CEO and founder Jack Dorsey told employees at both companies they had the option to work from home permanently -- a move that could prompt employees at other companies to ask for similar options, especially if working on-site requires them to live in increasingly expensive cities. Many tech employees in the Bay Area have already moved out of state temporarily over the last few months to shelter in place with parents and friends, said Daniel J. McCoy, who mostly represents high tech and life sciences companies at Fenwick & West LLP.

Allowing employees the option to work remotely, and even from out of state, could be a smart move, McCoy said. "It's absolutely going to be a recruiting tool and a retention tool ... in terms of keeping good people who say, 'I don't want to be in the Bay Area anymore,'" he said.

In addition to attracting candidates who value flexibility, employers have other benefits to consider, Vasquez said. Chief among them are savings. By hiring talent based in other parts of the country where the cost of living is lower, employers can pay lower salaries and employee fees than they would in the Bay Area. "A salary for the same job here costs a whole lot more than if you're doing it in Tennessee," Vasquez explained.

Michelle S. Strowhiro, who represents employers at McDermott Will & Emery LLP, said relaxed labor laws in other states could also be a draw for employers. "Certainly California is one of the

most restrictive states in terms of having a lot of additional state employment laws that other states don't have -- for example, daily overtime," she explained.

But there are also potential downsides to such a policy. McCoy said if a company allows its employees to work from other states where it doesn't already have an established presence, they would be required to register their business in those states and also pay local taxes. The company would also have to comply with the employment laws of those states, which could be an additional burden, he added.

Erin Pulaski, who frequently represents tech employees as a partner at Rudy, Exelrod, Zieff & Lowe, said it's not always clear which employment laws apply to out-of-state employees.

"There is case law supporting the idea that ... where there was unlawful conduct on the part of the employer in California, an employee may be able to argue California laws apply to them even as a non-resident," Pulaski explained.

Employers "should not assume that the employee will not be able to argue that the oftentimes stronger laws in California are the laws that apply to them," she added.

There are precautions employers must take when they allow employees to work from home -- even if they stay in California. Tracking meal and rest breaks for employees who are not exempt from wage and hour requirements, making sure managers are properly trained to monitor employees remotely, and making sure employees are properly reimbursed for equipment are important considerations, Strowhiro said.

Noting the state's strict laws requiring employers to reimburse employees for business expenses, Pulaski said, "I do anticipate that as work from home workforces expand, we're going to see more lawsuits related to employers' failure to pay these business expenditures."

There's one other issue Pulaski said both employers and employees need to navigate carefully: misclassification.

"As companies are hiring more employees to work from home, they might be tempted to classify those workers as independent contractors because of the increased flexibility that employees have when working from home," she said. "That would be a serious error on the part of those employers, because in California the flexibility that an employee might have is not the only

factor in evaluating whether that employee is appropriately classified as an independent contractor."

"That is one issue that I think employers need to be very wary of, and something that employees should be on the lookout for too if they are in negotiations or in discussions with a prospective employer who is trying to classify them as an independent contractor," Pulaski cautioned.