



Problems With Hybrids, And We're Talking About Your Employees, Not Your Car

By Ashley Halberda and Todd Wulffson

In this post-pandemic era, many California employers are transitioning back to the traditional, in-office work model, given its perceived benefits in employee productivity, morale, and workplace logistics (emphasis on the word "perceived"). In furtherance of this goal, many California employers are implementing a "hybrid" in-person/remote model. Many employees, however, believe that their jobs can be performed 100% remotely. This conflict presents new challenges in recruitment and retention, as well as legal compliance. So what is the prudent, post-pandemic California employer to do?

Establish Clear Job Expectations For Work Location

Employee retention hinges strongly on workplace culture and environment. If employers want to entice candidates and retain their current workforce, a hybrid work schedule providing for employee autonomy is increasingly in demand. However, there are many positions that simply cannot be done as efficiently remotely. If a company expects a newly-hired employee to report to an office on a regular or hybrid basis, that expectation should be clearly communicated and identified in the offer letter. Now more than ever, work locale is crucial to a candidate's decision to accept a job offer, and removing any ambiguity from the outset helps to avoid future issues.

Implement Proper Work-From-Home Policies

With the increased mobility provided by WFH arrangements, comes increased compliance obligations with employment laws. Employers with employees working from home should strongly consider implementing a policy requiring that (1) remote employees cannot work in another state or country for more than thirty (30) days without advanced written approval, and (2) that the exact location of all work performed remotely be communicated to them in writing. It is critical that employers know the state or country from which their employees work at any given time for a multitude of reasons.

Most notably, the wage and hour laws of every state are different. Some more employer-friendly states, like Arizona and Texas, require overtime rates to be paid only if the employee works over forty hours in a week. If that employee moves to Nevada or California, the employee must be paid overtime for all hours worked in excess of eight hours in a day, regardless of the workweek. Even within California, wage and hour laws vary by city and municipality.

The employee's work location, also affects issues such as reporting time (*i.e.* "show up") pay, expense reimbursement, sick leave, severance, and meal and rest breaks. Further, most other states (and other countries) require payroll taxes to be paid if an employee is working in their jurisdiction for more than a specified period of time or for temporary work. Employers are responsible for knowing these laws and complying with them, even if they are a California-based company.

California employers should implement written WFH policies that require approval of any change in work location. Any work-from-home policy should also contain provisions addressing use and privacy of electronic devices and equipment, security of data, safety, and expense reimbursement rules.

Reimbursing Business Expenses

California is experiencing a surge in lawsuits from employees seeking reimbursement for expenses incurred while WFH. These lawsuits seek a wide variety of expense reimbursement for things such as increased utility costs and office equipment. Some of these claims are based on laws unique to California, such as *Labor Code* section 2802, which requires reimbursing employees for reasonably necessary expenses incurred in the discharge of their duties, and California's Private Attorneys General Act ("PAGA"), which permits representative actions for reimbursements.

California employers are required to reimburse employees for things such as mileage, travel, cell phone usage, parking and business-related meals. The key inquiry is the reasonableness of the requested expenses, which is determined on a case-by-case basis. A hybrid work model has affected this requirement in unanticipated ways. While commuting to and from work is typically not a reimbursable expense, if an employee works fully remote, the company is required to reimburse the employee for commuting time and mileage anytime the employee is required to come to the office for meetings. Employees voluntarily working from home may not be entitled to reimbursement for all remote, work-related expenses under California law, but hybrid-assigned employees will.

To protect against liability, California employers should explicitly define each employee's job duties and use these definitions to determine the reasonableness

of remote work costs. In addition, California employers should obtain written acknowledgments from employees who voluntarily work from home, to avoid any argument that they are entitled to reimbursement for all remote, work-related expenses. Further, employers should establish and make accessible expense reimbursement forms to streamline the process, and consider providing stipends to employees that cover any anticipated, WFH expenses.

Monitor Remote Work For Workplace Discrimination and Harassment

California's anti-discrimination and anti-harassment laws still apply to employees working remotely. The challenge for California employers is how to best monitor work activities to prevent unlawful conduct, while also complying with privacy requirements. With the increase in the use of instant messaging and video platforms, such as Teams, Zoom and Slack, claims of improper conduct are on the rise. In these informal settings, employees are less guarded with their interactions, and more apt to engage in potentially discriminatory or harassing conduct. These interactions can be recorded and/or saved through their respective platforms, providing employees with easily-obtainable evidence supporting claims of alleged unlawful conduct. This significantly disadvantages employers who cannot monitor all employee conduct at all times. There is a fine line between monitoring employees and infringing on their privacy rights, especially when the employee is WFH; yet employers are obligated to investigate any improper conduct of which they knew or should have known. This significantly expands the scope of workplace investigations and the onus on the employer in conducting them.

California employers should discourage the recording of team or employee meetings and have compliant, written anti-discrimination, harassment and retaliation policies that address virtual platforms and social media. Employers should also have a written workplace privacy policy that alerts employees to the potential review by the company of workplace conversations through messaging and video platforms.

Hybrid options at work can be very attractive to applicants and employees, but they can be equally attractive to potential employment law liability. Planning ahead and knowing the risks is the key to a healthy hybrid work environment.

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