

MANAGING A REMOTE WORKFORCE

Adam Hamel, Esq. and Peg O'Brien, Esq.

2024 Granite State Human Resource Conference

April 11, 2024

Presentation Overview

- **Introduction**
- **Which Laws Apply to Which Workers**
- **Leaves of Absence/Time Away from Work**
- **Wage and Hour**
- **Other Considerations**

Introduction

Why is the parking lot empty at our office building?

Where did all the employees go?

- During the pandemic – work from home was the rule
- Following the pandemic, employers discovered that employees had moved and did not want to return to the workplace
- Labor Shortages
- Increased hiring of fully remote workers; Permissive culture on hybrid work
- To attract and retain the best talent, need to be willing to recruit regardless of location
- Requires employers to be aware of and address local and state employment law requirements where they have employees
- Key Issue – which law applies; multiple wage and hour and leave of absence issues; custom handbook policies now required; UE, PFML and WC concerns; which “protected categories” apply for purposes of Discrimination/Harassment
- Many employees have adopted remote work and hybrid policies

Which Laws Apply

Can we make NH law apply to all employees regardless of where they work?

Choice of Law Provisions

If a contract contains a choice of law provision, New Hampshire applies the law of the state chosen by the parties if the contract bears a significant relationship to that jurisdiction, and the contract is not contrary to a fundamental public policy of New Hampshire.

New Hampshire courts have applied this rule in the context of employment contracts.

Choice of Law Provisions

In order to determine if a contract has a significant relationship to a particular state, New Hampshire courts will consider factors including:

- the place of contracting
- the place of negotiation of the contract
- the place of performance
- the location of the subject matter of the contract, and
- the domicile, residence, nationality, place of incorporation and place of business of the parties.

Which Leaves of Absence and Break Policies Apply?

Which leave laws apply?

ABC Company is headquartered in NH. It has employees who work at the company facilities in NH, and some who work from home in NH. The company also has one employee who works remotely from her home in Massachusetts – Martha.

Martha is about to take maternity leave. Which leave laws, if any, apply?

What if other employees work in CA, CO, NY and GA?

What if Martha lived in NH, and then moved to MA right after the baby was born?

Leaves of absence / Time Away from Work

- Thank goodness for federal laws – consistency in all 50 states;
- Identify in which states your employees are working and which state leave and break / rest periods apply to the particular employment relationship;
- Review your handbooks to ensure you have the right leave of absence and break policies included; add a state addendum for each applicable state;
- Confirm any employee poster/notice obligations regarding the particular leave;
- Register/contribute to the applicable agency (e.g., MA DFML).

Remote Work Policies

Policy Considerations:

- Which positions in the company are eligible to work remotely – some, all, none;
- When, where, and how often are employees allowed to work remotely;
- The factors considered by the employer in the approval process;
- The process by which employees request permission to work remotely;
- Where workers are expected to work when working remotely;
- Equipment, expenses and security measures;
- Timekeeping issues; and
- Communication expectations with managers.

Which Wage and Hour Laws Apply

Remote and Multi-State Concerns

Wage an Hour Concerns

The Basics –

- Understand that states' wage and hour laws can vary significantly;
- The law of the state with the “most significant relationship” to the employment will apply;
- Timekeeping and work schedules are critical for non-exempt remote employees.

Which wage laws apply?

XYZ Company is a Delaware corporation headquartered in Massachusetts. Craig lives in Virginia and was hired as a remote account executive servicing customers worldwide. Craig regularly interacts via Slack with company leaders and other colleagues based at the Massachusetts home office, and from time to time, Craig travels to Massachusetts to attend trainings and meetings. After Craig's employment ended, a dispute arose over his commission payments.

Does the Massachusetts Wage Act apply to him?

Which wage laws apply?

Massachusetts Wage Act can apply “extraterritorially” if Massachusetts has the “most significant relationship” to the employment.

Based on totality of circumstances. Factors include:

- Where is the employer’s headquartered?
- Where did the employee perform work?
- How frequent are interactions with the employer in Massachusetts?
- Does another state have a significant connection to the employment?
- Is there an employment agreement with a choice of law provision?

Which wage laws apply?

123 Company is a Texas corporation. Alan lives in Massachusetts and was hired as a fully-remote executive. Alan's employment agreement contains a general choice-of-law provision specifying Texas law. Due to financial problems, the company "deferred" half of Alan's compensation. Alan is unhappy and wants the pay that he's owed.

Can Alan sue under the Massachusetts Wage Act?

Which wage laws apply?

When it comes to choice-of-law provisions, “Wage Act claims are analyzed differently.” “When a contractual choice-of-law provision does not make clear reference to statutory causes of action, the provision is not dispositive where a plaintiff’s claims are based on the Wage Act.”

The court went on to do a “most significant relationship” analysis and determined that the Massachusetts Wage Act applies.

Wage and Hour Concerns – Nonexempt Remote Workers

- Time keeping
- NH Two Hour minimum Rule Applies to Remote Employees working in NH (NH RSA 275:43-a)

Other Issues to Consider

Checklist of Considerations

Other Considerations

- **Restrictive Covenant Agreements**
- **Discrimination, Harassment Claims**
- **Expense Reimbursement**
- **Salary Transparency Laws**
- **Unemployment**
- **Workers' Compensation**
- **Taxes**
- **Benefits**
- **Workplace training**

Thank you!

THIS PRESENTATION IS FOR INFORMATIONAL PURPOSES ONLY AND IS NOT LEGAL ADVICE

Adam Hamel, Esquire

ADAM.HAMEL@MCLANE.COM

781.904.2710

Please feel free to reach out and connect on LinkedIn

Margaret (“Peg”) O’Brien, Esquire

MARGARET.OBRIEN@MCLANE.COM

603.628.1490

Please feel free to reach out and connect on LinkedIn

Employment Law Practice Group | McLane Middleton Professional Association