



**NHRMA 24**

86TH ANNUAL CONFERENCE + TRADESHOW

**CS43**

# **Telework and the Law: Navigating the Post-Pandemic Landscape**

# TELEWORK AND THE LAW: NAVIGATING THE POST-PANDEMIC LANDSCAPE

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10:30 a.m.-11:45 a.m.

Presented by  
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# WELCOME!



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# The Future Workplace Is Here

# MODELS OF REMOTE WORKING



Onsite Employees



Remote Employees



Telecommuters / Hybrid Employees

# CONSIDERATIONS?

- Employee preferences and talent retention
- Employee skill sets and job duties
- Manager skill sets
- Impact on innovation, performance, employee engagement, and culture
- Operational impacts
  - Protection of confidential data and documents
  - Remote workstations/technology and facility space
  - Other business costs
- Public optics
- **Legal considerations**



**POLL:**

**WHAT DOES YOUR CURRENT  
WORKPLACE LOOK LIKE?**

- A. Onsite only
- B. Almost everyone onsite
- C. Almost everyone remote
- D. Onsite or telecommuting only



**POLL:**

**WHAT DO YOU WANT YOUR  
FUTURE WORKPLACE LOOK  
LIKE?**

- A. Onsite only
- B. Almost everyone onsite
- C. Almost everyone remote
- D. Onsite or telecommuting only
- E. All three options
- F. I have no idea

## Where we are headed today...

1. General considerations
2. Policies preventing inconsistent treatment
3. Wage/hour risks
4. Worker's compensation
5. Workplace safety & security
6. Supplies, resources, and reimbursements, oh my!
7. Nod to taxes & benefits

# ROADMAP



# Mitigating Legal Risk

...always a delicate balance

# Good Leadership for Remote Workers

- Be intentional about involving remote workers
- Set and communicate expectations
- Focus on outcomes rather than activities and desk time
- Trust in your employees and give them room to get the job done
- Promote wellness and balance

# Protecting Against Inconsistent Treatment

- Train employers to remember remote workers
- Always consider how remote workers will be integrated into activities and opportunities for growth
- Ensure access to equivalent resources and supports
- Do ***not*** alter performance standards

# CRITICAL POLICIES TO ADD, REVISE, OR ENHANCE

- State a commitment to compliance with applicable state and local laws
- Consider application of each policy on remote workers
- Data security and confidentiality policies
- Wage and hour policies
- State or city specific policies or addendums
- Remote work, telecommuting, and offsite work policies
- Duty to bargain?



# KEY INGREDIENTS OF TELECOMMUTER/REMOTE WORKER AGREEMENTS

- Retain at-will employment/right to revoke arrangement
- Work schedule/availability
- Communication expectations
- Travel expectations
- Responsibility for work-related expenses
- Applicability of timekeeping, attendance, and break policies
- Data security and confidentiality expectations
- Workspace standards and safety obligations

# Other Related Considerations



Disability accommodation and availability of remote work depending on essential functions of positions



Who is allowed vs. who isn't? Discriminatory?



Establishing a past practice?

# WAGE AND HOUR RISKS

- Ensure all compensable time is recorded for non-exempt employees
- Travel time for non-exempt employees
- Meal and rest breaks for non-exempt employees
- Meeting state-specific exempt employee criteria

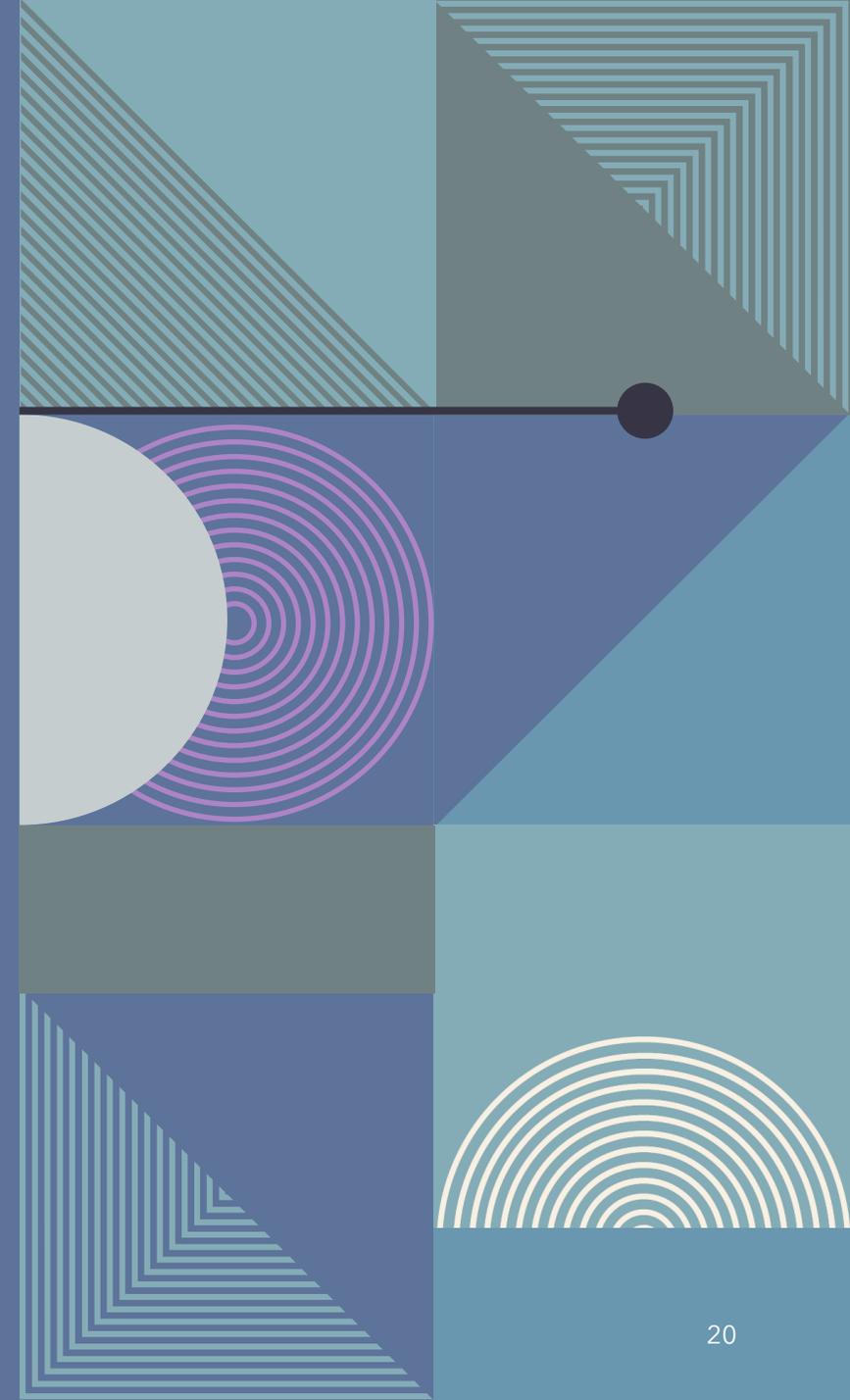
# Hours Worked While Teleworking

## DOL Field Assistance Bulletin - Key Reminders

- Short rest breaks are **compensable**
  - E.g., go to the bathroom, get a cup of coffee, stretch their legs, and other similar activities
- **Pay attention** to remote workers' working time
- **Exercise reasonable diligence** to confirm all unscheduled work hours are captured
- **PUMP Act and WA Healthy Starts Act** applies to remote and offsite employees

# TIPS FOR MITIGATING WAGE AND HOUR RISKS

- ✓ Set clear expectations regarding work schedules and overtime
- ✓ Set clear communication expectations
- ✓ Maximize tools in timekeeping systems
- ✓ Require use of company technology for all work and use monitoring technology



# Wage and Hour Take-Aways



**Have strong and clear policies**



**Train employees on expectations**



**Train managers on enforcement of policies**

# WORKER'S COMPENSATION

- **On-the-job injuries** that occur remotely will likely constitute workplace injuries covered by worker's comp.
- **Which law applies** if worker is out of state?
  - ✓ Depends on the definition of a "worker" under individual state laws
  - ✓ A Washington "worker" may file a claim in Washington and in the state in which they are injured (if injured outside of Washington)
- If an employee is working outside of Washington, you will have to ensure **compliance with that state's worker's compensation laws**
  - ✓ State-administered "monopolistic program" like Washington?
  - ✓ Private insurance requirement?

# Tips for Mitigating Worker Safety Risks



No remote work for hazardous activities



Define the remote work location and workspace



Set workspace standards and educate employees on safety



Require employees to report injuries; investigate and report those that are work-related



Have clear work hours and job duties



Make work from home voluntary, rather than a requirement of employment

# CYBER SECURITY CONCERNS

## Risk factors in remote work environments



# Resources for Remote Workers

- Reimbursements
- Stipends
- Per Diems

# MULTI-STATE CONSIDERATIONS

Before adding employees in a new state, consider:

- Suitability for remote work
- Relevant wage and hour laws, and their impact
- Impact on compensation structure
- Foreign Business Registration Requirements
- Administrative impact and costs related to human resources and payroll
- Ability to extend employee benefits



# Multi-Jurisdictional Tax Considerations

# BACKGROUND FOR PAYROLL TAXES



- “Payroll taxes” generally refer to:
  - Federal income tax withholding
  - FICA taxes – employer and employee portion
  - Unemployment insurance taxes
  - State and local income tax withholding
  - State and local taxes on wages
- Employers must withhold and pay state and local income taxes based on wages paid to employees



# FACT PATTERN: NEW LOCATION

- Emily is an employee of a Washington-based company
- Emily lives in Bellevue and has been working from her home
- Emily is moving to Portland
- Emily asks her employer if she can work remotely from Portland



# POLL QUESTION

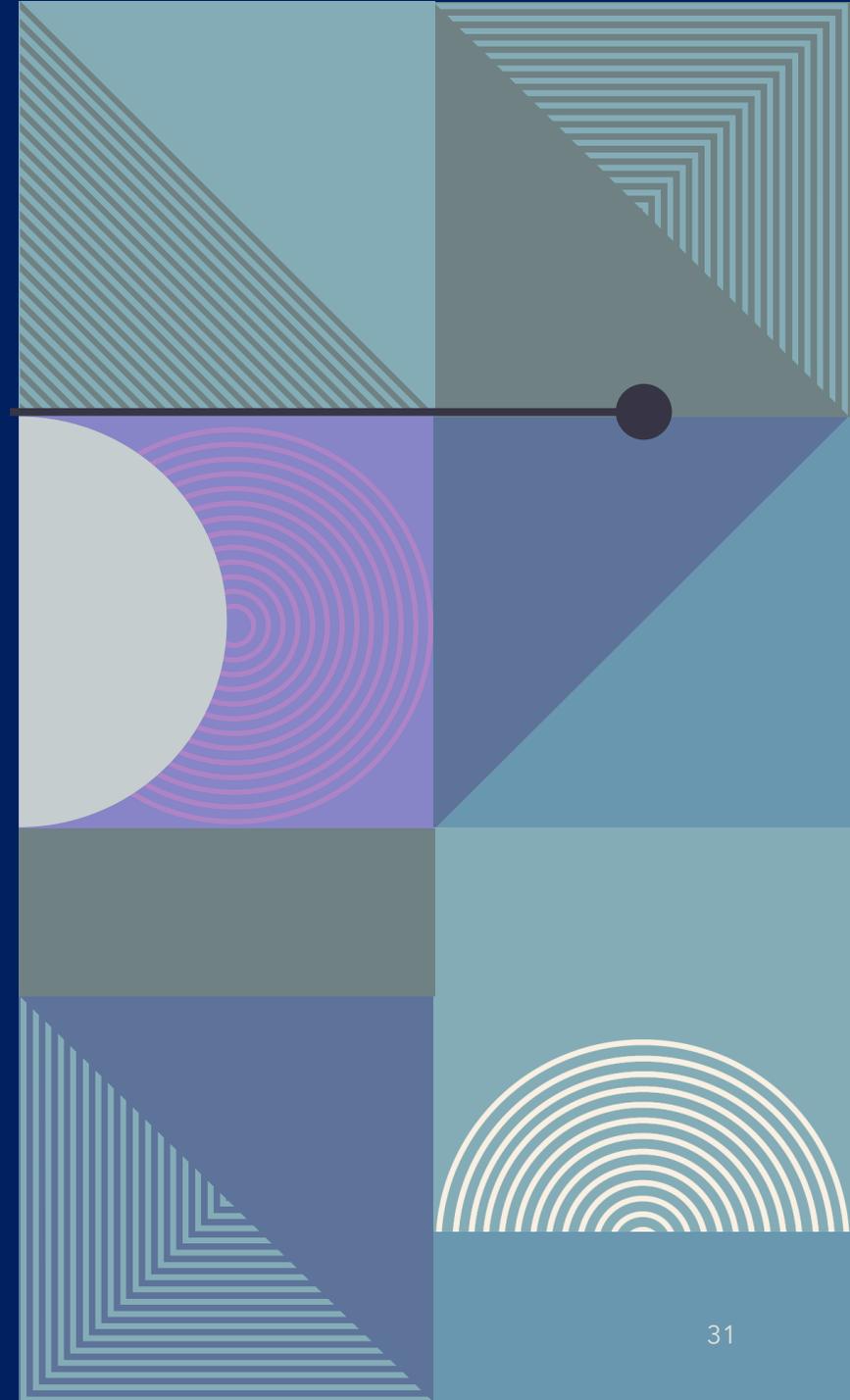
- **Will the employer have a withholding obligation for Oregon, Metro, and Multnomah County income taxes imposed on Emily?**

**A. Yes**

**B. No**

# FACT PATTERN: TEMPORARY LOCATION

- Emily also has a vacation home in Palm Desert, CA
- Emily plans to go to Palm Desert for one month or two months each year
- Emily will take two weeks of PTO during her time in the desert
- Emily asks her employer if she can work remotely from Palm Desert for the remainder of the time she's there



# POLL QUESTION

- **Does the number of days the employee works in the new location impact the state and local payroll taxes?**
  - A. Yes, there is a 30-day safe harbor/cliff for the imposition of new state and local payroll taxes**
  - B. No, California and other state and local governments can impose payroll obligations even for 1 day of work**

# ACTION ITEMS FOR TAX ISSUES FROM REMOTE WORK

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Separately analyze each request

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Determine what steps will need to be taken to set the employer up to employ remote workers in the applicable location

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Make sure your payroll provider can handle the state and local payroll taxes for the new location

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Decide whether you will use your own 30-day or other minimum presence threshold

# FOR THE REAL HARD ONES...



The screenshot shows the Lane Powell website. At the top, there is a navigation bar with the Lane Powell logo and links for "OUR PEOPLE", "STORY", "INSIGHTS", and "PRACTICES & INDUSTRIES". A search icon is on the right. Below the navigation bar is a red sidebar with icons for a menu, email, a car, and a person. The main content area is titled "Tax" and includes a paragraph: "Our Tax Team provides clients and their advisors with strategic tax advice with the goal of reducing taxes associated with business activities and significant transactions. We advise clients on taxation issues at the federal, state, and local levels, and are recognized as leaders for our advice related to tax review, compliance, reporting, and controversy. [More >](#)".

Below the text is a "Get to Know Us" section featuring a grid of eight team members' portraits. To the left of this grid is a red box with the text: "U.S. NEWS — BEST LAWYERS® 'BEST LAW FIRMS' 2023". Below this box is contact information for Lewis M. Horowitz: "Contact Lewis M. Horowitz D.206.223.7401 horowitzl@lanepowell.com". At the bottom of the grid, there is a "Related Practices & Industries" section.

Get to Know Us			
Lewis M. Horowitz	Jeremy Babener	Kara Backus	Callie A. Castillo
Paige L. Davis	Brett Durbin	Scott M. Edwards	Angela R. Foster

...Lane Powell PC's Tax Team to the rescue!!!



# Employee Benefits Considerations

# DO I NEED TO WORRY ABOUT REMOTE WORKERS COVERED BY AN ERISA PLAN?

- ERISA preempts most state laws that “relate to” an ERISA plan
- Significantly, state insurance laws are not preempted
  - This means insured ERISA group health plans and disability policies are subject to state-specific insurance laws

# GROUP HEALTH PLAN COVERAGE FOR REMOTE WORKERS

- Group health plan coverage will usually rely on a network to determine coverage
  - In-network/out-of-network
  - Preferred/non-preferred providers
- Plan will usually cover emergencies that occur out-of-network
- Non-emergency services incurred out of state or out-of-network will not be covered to the same extent, or may not be covered at all

# NON-ERISA PLANS

- State laws will generally apply to non-ERISA plans, so be aware of requirements that could apply to remote workers
- Common non-ERISA plans
  - Plans sponsored by governmental entities
  - State law unemployment, workers' compensation, or disability
  - Non-ERISA "payroll practices"
    - Unfunded sick pay/income replacement plans, vacation/holiday/jury duty pay plans



# CHECK COVERAGE REQUIREMENTS FOR REMOTE WORKERS

- Other Common Coverage Issues for Remote Workers
  - Unemployment Insurance
    - Tax varies in frequency and amount from state to state
    - Employers often are required to set up account with the state of the employee's residency to report and pay the tax
  - Workers' Compensation
    - Check state requirements and reciprocity rules
    - Private insurance vs. state-funded programs

# CHECK COVERAGE REQUIREMENTS FOR REMOTE WORKERS

## Other Common Coverage Issues for Remote Workers, Cont'd

- Insured STD or LTD
  - Review policy carefully for restrictions on coverage for employees living out of state
  - Inform carrier of any out-of-state employees covered
- State Paid Leave Laws
  - Many states have enacted paid leave programs that require withholding/payment into state fund or other coverage requirements
  - Be prepared for employees in remote locations to ask for benefits available under state law

# LANE POWELL PC'S ERISA & EMPLOYMENT BENEFITS TEAM

The screenshot shows the website's navigation bar with 'LANE POWELL' and links for 'OUR PEOPLE', 'STORY', 'INSIGHTS', and 'PRACTICES & INDUSTRIES'. The main heading is 'ERISA, Life, Health & Disability'. Below it, a paragraph states: 'There are many nuances to ERISA laws and regulations, and life, health and disability employee benefits. Lane Powell has you covered. Whether you need to develop an ERISA plan, amend an existing one, or if you face litigation involving plan terms, decisions or benefits, our breadth of experience, collaborative approach and extensive resources enables us to do so consistently, efficiently and effectively. [More >](#)'

The 'Get to Know Us' section features a grid of eight team member portraits with their names: D. Michael Reilly, Stephania Camp Denton, Kara Backus, Michael B. Baylous, Diane L. Cushing, Barbara J. Duffy, Charles C. Huber, and Allison J. Jacobsen.

On the left side of the screenshot, there is a 'BOOM!' badge for 'The ERISA Law Blog' with a 'READ MORE' link, and a 'Contacts' section listing D. Michael Reilly with phone number 206.223.7051 and email reillym@lanepowell.com, and Stephania Camp Denton.

# THANK YOU

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