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THURSDAY THROWBACK AND FUTURE FORECAST

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Remote Work

In response to COVID-19, many companies shifted employees to remote work on a temporary basis. Various state and local laws across the country further required remote work for many companies – and still do. Now, however, many companies are considering or already are implementing a transition to permanent or partial remote work for most or all of their employees. These changes impact a number of areas for companies to consider:

1. Insurance. Any company considering permitting or requiring its employees to work remotely as a long-term strategy should have its insurance policies reviewed carefully by experienced coverage counsel to identify potential gaps or coverage issues and recommend changes in policy terms to align the company's coverage with the different risks of remote operations. To date, commercial policies generally have been written based on the premise that the policyholder's employees mostly work in company offices; in a remote workforce world, many policy terms will no longer match that risk profile. While companies' insurance policies and risks differ, there are some common issues that may arise under several types of commercial insurance policies in connection with a remote workforce.

    a. While cyber insurance is increasingly widespread, there are still companies that do not purchase dedicated cyber insurance, instead relying on limited cyber coverage in more traditional business policies or concluding that their cyber risk does not need to be covered. However, cyber insurance is a must-have for any company shifting to a permanent remote workforce, as that change will make the company more vulnerable to hacks, social engineering schemes, and data privacy incidents. Even if the company already has dedicated cyber insurance, the policy should be reviewed to ensure the terms match the actual risk exposure of the company's remote operations.

    b. When remote work is instituted on a permanent basis, logic would suggest that the location of the employee does not matter. But insurance policies typically provide coverage for loss or injury within a "coverage territory," and in employers' liability policies that territory is often limited. Companies should therefore make sure that their policies' coverage territory includes everywhere their workers may be located. Also, less control over activities of remote workers can also blur the line of what is a covered injury and what is not. For example, a court found that a claimant's injury "resulted from a risk of her work environment" and, thus, "arose out of" her

employment where the claimant, at home but during work hours, tripped over her dog while going to her garage to retrieve fabric samples for work. Other courts have routinely held that an employee who sustains an injury during minor deviations from work activities, such as going to the bathroom or getting lunch, may be considered to have sustained an injury in furtherance of the employer's business. This is particularly true for injuries that occur in remote work locations approved by the employer, such as an employee's home.

c. Property insurance typically covers commercial locations that a company rents or owns and property within those locations. However, it may exclude or significantly limit coverage for property located outside of specified covered locations, even if the company owns that property. Most commonly in remote work situations, such property consists of equipment like computers and related devices. Companies transitioning to permanent remote work should evaluate whether their property policy terms cover such equipment and the potentially even more valuable data in it.

2. Restrictive Covenants. With remote working, an individual can be physically located within a geographic area but direct their work to a location outside of that area. Some may argue that the legitimate business interest being protected is not really the physical location of the individual, but rather, the work they are performing. But of course, an employer that is concerned about a former employee working for a competitor will not take solace in that explanation. The former employer will argue that the legitimate interest is the employee's knowledge of the business, including its confidential and proprietary business information, and therefore, the location of the employee is what matters. Moreover, state laws are changing and what worked in 2018 may not work in 2021. Before the pandemic, at least one court held that telecommuting to a location outside of a non-compete's geographic restriction is not a violation because it is no different than physically commuting outside of the restricted area. Like most non-competes, the agreement in that case did not specifically address the issue of telecommuting.

3. Expense Reimbursement. California, along with other states, have specific laws that requires employers to reimburse employees for necessary business expenses that they incur. Thus, it is important to not only know where your employees are working remotely, but also whether or not you have to reimburse them for work from home expenses.

4. Compensable Travel Time. In a recently issued Opinion Letter, the Department of Labor ("DOL") addressed two examples of situations employers may face regarding their remote workforce and whether certain travel time is compensable under the federal Fair Labor Standards Act ("FLSA"). According to the DOL, the employer need not pay for the employee's travel time "[w]hen an employee arranges for her workday to be divided into a block worked at home and a block worked at the office, separated by a block reserved for the employee to use on her own, the reserved time is not compensable, even if the employee uses some of that time to travel between home and the office." Be sure to consider the FLSA when managing your remote workforce.

Handbook Revisions

Over the last month, a few state supreme court decisions have necessitated the revisiting of certain employee handbook policies.

1. Minnesota Invalidates General Disclaimer in Handbook. The Minnesota Supreme Court issued *Hall v. City of Plainview*, which dealt with handbook disclaimers and PTO policies. Prior to this decision, Minnesota employers with PTO/vacation policies were able to disclaim the creation of contractual obligations regarding payment of PTO at termination by including a general statement that the handbook (or any of its policies) did not create a contract. However, the *Hall* decision has disrupted this common practice. Despite the handbook at issue here containing two separate general disclaimers, the Minnesota Supreme Court held that "blanket disclaimers" created a conflict with the more detailed instructions for payout of PTO found in the City of Plainview's PTO policy.

2. California Strikes Down Meal Break Rounding. At the end of February, California's Supreme Court answered long-awaited questions of whether California employers can round meal breaks and whether records showing potential noncompliance with meal period requirements create a presumption of noncompliance. The answer is essentially – yes. In *Donohue v. AMN Services, LLC*, the employer at-issue had a practice of round meal period punches to the nearest 10-minute increment. As a result, meal periods as short as 21 minutes and as long as 39 minutes would be rounded to 30 minutes. According to the court, even if the rounding policy *benefited employees* overall, such that employees were either properly compensated or overcompensated by the rounding, meal periods premiums must be paid for the workdays when an employee is not provided the required off-duty meal break (unless there is a valid mutual waiver). California employers, specifically, must ensure that they prohibit the practice of rounding break periods or eliminate any such current practice – and ensure their handbook is in compliance.

3. Remote Work and Safe Harbor Policies. This is the time to ensure that you have some sort of remote work policy and a safe harbor statement regarding pay practices, particularly for non-exempt employees.

New CDC Guidance

In the wake of an increasing percentage of the population being vaccinated against COVID-19, the CDC recently issued guidance clarifying what changes and what doesn't change once a person has been fully vaccinated.

The CDC considers someone "fully vaccinated" two weeks after their second dose in a two-dose vaccination series or two weeks after a single-dose vaccine. If it has been less than two weeks, or if a person still needs to get their second dose, the CDC advises that the individual continue taking all preventions steps until they are fully vaccinated.

If you have been fully vaccinated, the CDC states that you:

- Can gather indoors with other fully vaccinated individuals without wearing a mask;
- Can gather indoors with unvaccinated people from one other household without wearing a mask (unless any of those people or anyone they live with has an increased risk for severe illness from COVID-19); and
- Need not quarantine from others or get tested for COVID-19 if you are around someone who has COVID-19 (unless you experience symptoms of COVID-19).

The CDC still advises, however, that if a person lives in a group setting and is around someone who has COVID-19, that they should still stay away from others for fourteen days and get tested, even if they don't have symptoms.

The CDC's guidance also includes a list of what does not change for people who have been fully vaccinated:

- You should still take steps to protect yourself and others in many situations, like wearing a mask, staying at least 6 feet apart from others, and avoiding crowds and poorly ventilated spaces. Take these precautions whenever you are:
    - In public;
    - Gathering with unvaccinated people from more than one other household; or
    - Visiting with an unvaccinated person who is at increased risk of severe illness or death from COVID-19 or who lives with a person at increased risk.
- You should still avoid medium or large-sized gatherings.
- You should still delay domestic and international travel. If you do travel, you'll still need to follow CDC requirements and recommendations.
- You should still watch out for symptoms of COVID-19, especially if you've been around someone who is sick. If you have symptoms of COVID-19, you should get tested and stay home and away from others.
- You will still need to follow guidance at your workplace.

Employers should continue to abide by state and local requirements regarding COVID-19 protocols, including social distancing and mask wearing. Where also permitted by state and local law, some employers may be able to allow small groups of fully vaccinated employees to gather indoors without wearing a mask. As more of the population gets vaccinated, we anticipate a further relaxing of COVID-19 rules regarding mask wearing and social distancing for those who have been fully vaccinated.

American Rescue Plan Act of 2021

We anticipate this bill will be signed tomorrow and many provisions will be implemented immediately. Some provisions of the relief bill affecting employers include:

1. Tax Credit. The provisions of the Families First Coronavirus Response Act ("FFCRA") requiring certain employers to provide federal paid sick leave and family leave expired on December 31, 2020. The Act does not reinstate the requirement to provide paid FFCRA

sick leave. However, it does temporarily extend a tax credit to employers who voluntarily choose to provide eligible employees with Emergency Paid Sick Leave or Emergency Family Medical Leave through September 30, 2021. These are fully refundable credits against payroll taxes.

a. Non-Discrimination Provision. Adds non-discrimination rules to provide that no tax credit is available if the employer, in determining availability of the paid leave, discriminates against highly compensated employees, full-time employees, or employees on the basis of tenure with the employer. This provision appears to be designed to compel employers who make the decision to voluntarily provide leave do so in a uniform manner, without discriminating against certain categories of workers.

b. Ten Day Limit. Resets the 10-day limit for the tax credit for paid sick leave under the FFCRA beginning April 1, 2021. Thus, an employer could voluntarily provide an additional 10 days of FFCRA paid sick leave beginning April 1, 2021 and would be eligible for a tax credit for doing so, but employers are not required to do so.

2. COBRA Premium Subsidy. The federal government will pay 100 percent of COBRA insurance premiums for employees who lost their jobs because of the pandemic, and for their covered relatives, through September, allowing them to stay on their company-sponsored health plan, under the American Rescue Plan Act ("ARPA") stimulus bill through Sept. 30, 2021. Employers will obtain the subsidy, to be passed along to COBRA enrollees, through a payroll tax credit against employers' quarterly taxes. If the credit exceeds the amount of payroll taxes due, the credit would be refundable when employers submit Form 941, their quarterly tax return. The credit could also be advanced under rules that will be set by the Treasury Department.

3. Special Election Period. The Act also creates a special election period for any individual who did not elect federal COBRA continuation coverage but who otherwise would have been eligible for the COBRA subsidy and for any individual who elected federal COBRA continuation coverage and discontinued such coverage before April 1, 2021. These individuals are allowed an opportunity to elect COBRA coverage within 60 days of receiving the required employer notice. The resulting COBRA continuation coverage begins with the first period of COBRA continuation coverage beginning on or after April 1, 2021.

4. Notices. The Act tasks the DOL and the Internal Revenue Service with issuing regulations and guidance regarding the application and administration of the COBRA subsidy provisions of the Act. In addition, the Act requires the DOL to produce model COBRA election notices within 30 days of the ARPA's enactment and a model COBRA premium subsidy expiration notice within 45 days of enactment.

5. Funding for COVID-19-Related Worker Protection Activities. The Act appropriates $150 million to various DOL agencies, including the Wage & Hour Division and OSHA, to "carry out COVID-19-related worker protection activities" through September 2023. At

least $75 million of this appropriation is specifically allocated to OSHA. We can expect an increased number of audits and inspections moving forward.

6. Extension of Federal Unemployment Supplements. The Act also extends federal supplemental unemployment benefits for those who have lost their jobs as a result of the COVID-19 pandemic that were initially made available through the FFCRA and the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). These supplements, which were slated to expire March 14, 2021, have been extended through September 6, 2021. Similar to the CARES Act, the ARPA supplement provides $300 in weekly unemployment compensation in addition to the amount provided under state law.

7. Extension of Employee Retention Credit. The Act encourages businesses to retain their employees despite the challenges posed by COVID-19 by extending the Employee Retention Tax Credit, until December 31, 2021. Eligible employers who experience a full or partial shutdown due to COVID-19 or a qualifying decline in their receipts in 2021 may qualify for the Employee Retention Tax Credit.