National Association of College and University Attorneys
Presents:

# Practical and Legal Considerations for Managing a Multi-State Workforce

## Webinar

## May 5, 2022

12:00 PM – 2:00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

Presenters:

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**Neil Goldsmith**
University of Minnesota

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## Practical and Legal Considerations for Managing a Multi-State Workforce

**Laurie R. Bishop** is Partner at Hirsch Roberts Weinstein LLP. Laurie's practice includes advising colleges, universities, and nonprofit organizations on their policies and procedures, and aiding them in various risk-management decisions. Working with a diverse body of clients, including in her role as the General Counsel at Berklee College of Music, Laurie has experience in a wide array of issues unique to higher education, including the areas of complex contracts, institutional policies and handbooks, campus safety and security, reputational risk management, faculty misconduct, student affairs and various state, federal, and international compliance issues, such as Title IX, the Clery Act, data privacy and security, Massachusetts regulations concerning summer camps and minors on campus, Massachusetts' criminal background check regulations, the Family Educational Rights and Privacy Act (FERPA), and state and federal employment laws.

**Neil Goldsmith** is Senior Associate General Counsel at the University of Minnesota. In his role, Neil is responsible for providing employment and HR advice to academic departments and administrative units with roughly 15,000 employees. Neil is also the University's primary labor attorney, advising University leaders on labor relations with several unions on campus. Neil also represents the University in litigation and labor arbitrations when they arise. Prior to joining the University of Minnesota, Neil was a Partner in the Minneapolis office of Lathrop GPM LLP, where he represented higher education institutions in union organizing campaigns, labor arbitrations, Title IX litigation, and student and faculty discrimination litigation before administrative agencies and courts nationwide.

# Practical and Legal Considerations for Managing a Multi-State Workforce

May 5, 2022

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May 5, 2022

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# THE REMOTE WORK TRANSFORMATION: EMBRACING OPPORTUNITIES AND MANAGING CHALLENGES

June 21-25, 2021

**Panelists:**

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## I. Introduction

In addition to the challenges the pandemic brought, it also brought opportunity in the form of learnings about remote work. Some of us may have already been piloting remote work programs prior to the pandemic. For others, it wasn't even on the radar. Regardless, for many of us, our leaders and employees now understand how such a model can be successful, and desire to make that part of the "new normal" post-pandemic.

The goal of this article is to highlight some key areas where state laws differ, as well as offer practical tips on different approaches one can consider as they start to tackle the legal and compliance challenges posed by supporting a multi-state, remote workforce. Not all state laws are covered in this article, and the laws in this area tend to change frequently. However, we hope this will, at least, be a helpful resource for high-level issue spotting as you plan, and perhaps assist in your conversations with business colleagues who may not yet be familiar with the many and varied implications (both legal and operational) of multi-state, remote work.

## II. Framing the Challenge of Fifty-State Compliance

The first rule of thumb for compliance with respect to remote worker relocation (wandering workers) is "location, location, location." The law that applies to a person's work

will most likely be the law of the jurisdiction where that person is working – even if the employer is located elsewhere. With limited exceptions of states whose courts have found "extraterritorial application" of their employment laws, most state legislatures and courts recognize that their power to regulate the work is limited by the state's border. What does that mean for you? It means, if your employees are working in a different jurisdiction, you need to assess and determine what compliance obligations you have in that jurisdiction – ideally, *before* the employee starts working there!

Employment laws, both at the federal and state level, are nuanced, complex and constantly changing. There are conflicts between state and federal laws, and also conflicts among the laws of the various states. To add to the complexity, the rules that apply to a particular employer or employee, can vary depending on any number of factors, e.g. is the employer private or public, for-profit or not-for-profit, a small employer or large employer (or something in between), or is the employee salaried or hourly, full-time or part-time, or in a protected class, as well as how *many* employees are located in the jurisdiction, and how long the employee has been in the jurisdiction. Where a state and federal law conflict, it is often, but not always, the law that offers the greatest benefit to the employee that must be followed by the employer. Litigation and audits in this area focus on institutional policies and practices, as well as decisions made or actions taken at the individual worker level. The following list highlights some of the more relevant areas to remote work in the state employment law context. In addition to the below, there are many state laws that pertain more to physical office locations, and, as such, were not included.

### A. *Employee Classification Laws*

Like the federal Fair Labor Standards Act (*29 U.S.C. § 201, et seq*), many state laws establish different "tests" relating to salary standards and job duties that employers need to apply in determining whether a certain employee can be classified as exempt from overtime entitlement, and paid a set salary, or must be non-exempt and paid based on actual hours worked and overtime wages. Several states either impose higher salary standards than the federal law, and/or establish their own job duties tests, both of which must be met in order to classify an employee as exempt. Other states adopt only portions of the FLSA's exemptions, leaving implication in the law that the remainder is rejected – without any state statute to indicate as much. Even for states that adopt the FLSA's exemptions, there are some that do not adopt particular exceptions to those exemptions.

For example, although Illinois law adopts the FLSA's interpretation of the professional exemption for certain "IT professionals," the federal salary requirement that the Illinois statute adopts does *not* include the hourly pay provisions for IT professionals, which are found in a different subsection. *See* 820 Ill. Comp. Stat. § 105/4a (referencing 29 C.F.R. § 541.600(a)-(b), but not subsection (d)). The result is there is no hourly-pay exception for exempt IT professionals in Illinois.

These differences in state law can be particularly impactful for institutions of higher education that are currently relying on FLSA tests for teachers or administrators in educational

establishments. California also has a unique law relating to classification of adjunct professors. *See* Cal. Lab. Code § 515.7.

Note, too, that while some federal FLSA exemptions apply to both minimum wage and overtime requirements, there are several states that apply different exemptions to only overtime requirements, and do not permit exemptions from minimum wage where the federal law does. And don't forget about independent contractor classifications either—some states have their own tests for this as well. *See, e.g.*, N.H. Rev. Stat. Ann. § 281-A:2 VI (b).

**B.** ***Minimum Wage/Overtime and "Hours Worked"***

i. Minimum Wage - As of the publication of this article, roughly half of all U.S. states have a minimum wage that exceeds the federal minimum wage, and in many of those states, current rates are scheduled for progressive, statutory increases over the next few years. Applicable minimum wage rates can vary based on the size of the employer (*see, e.g.*, Seattle, Wash. Mun. Code §14.19.020, as amended by Seattle, Wash. Ord. 124960 § 48)*;* the type of job or industry (*see, e.g.*, New York Hospitality Industry Wage Order, 12 N.Y. Comp. Codes. R. & Reg., § 146-1.1-146-3.13) or the location of the worker *(see, e.g.*, Oregon Minimum Wage Law, Or. Rev. St. § 653.025).

ii. Overtime - With respect to overtime, as is true under federal law, the state's definition of wages will need to be factored in when determining compliant overtime rates. There are some states that also require payment of overtime wages based on hours worked in a day, rather than hours worked in a week. *See, e.g.*, Colorado Overtime and Minimum Pay Standards Order #37, 7 Col. Code Regs §1103-1. Premium wage rates also apply to "split shifts," holiday and Sunday work in some jurisdictions.

iii. "Hours Worked" – In this category fall the multitude of meal and rest break laws, day of rest laws, travel time pay, predictive scheduling requirements, reporting time pay, and other types of laws relating to scheduling of workers. Be wary of states that recognize policy statements as "contracts" that may turn what is an option under state law to provide certain breaks into a requirement. Unknowing violations of these laws can lead to wage and hour claims, as well as fines and penalties as a result of regulatory audits. Incorporating regular training to raise awareness for managers on these requirements is a critical risk mitigation strategy.

**C.** ***Expense Reimbursement Laws***

Employers should consider the patchwork of various state laws affecting expense reimbursement, particularly in instances involving mandatory or permanent remote work, as

opposed to occasional remote work voluntarily requested by the employee. Ascertaining expense reimbursement obligations is one of the most challenging aspects of implementing a compliant remote work program. In some states, expense reimbursement obligations are evolving by judicial decision. In states where the expense reimbursement obligation is addressed by statute, there may still be a lack of guidance as to how to apply the statute to specific circumstances.

There are currently fifteen states that have express laws relating to reimbursement of business expenses, several of which require an employer to "indemnify" employees for what is often referred to as "reasonable" or "necessary" costs incurred in performance of their job duties. The states with statutes requiring reimbursement of expenses beyond tools are: **California, Illinois, Montana, North and South Dakota, New Hampshire**, and **Iowa.** Localities may also impose such obligations, such as **Seattle**'s municipal code.

In determining whether expense reimbursement is required under state law, and how that payment should be treated, it is also important to review the state's definition of "wages." California's statute is the most restrictive and has served as a model for others. It requires employers to reimburse "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of duties or obedience to the employer's directions." Although the law is not entirely settled, only California courts have held that an employer should reimburse a reasonable percent of the expense for things used to perform the work, even if the employee would have incurred the same expense without having used the item for business (*i.e.*, no incremental cost to employee such as existing home internet or use of personal cell phone that is on an unlimited plan). *See Cochran v. Schwan's Home Service, Inc.*, 228 Cal. App. 4th 1137 (Cal. App. 2d Dist. 2014); *see also Fox v. Eclear Int'l Co.*, 2018 U.S. Dist. LEXIS 226213 (C.D. Cal. 2018). The applicable statutes in Montana, South Dakota, North Dakota, Illinois, and localities like Seattle are sufficiently similar that there is a possibility of courts in those jurisdictions reaching a similar conclusion.

In thinking about this issue, it is also important to remember that how an expense reimbursement program is structured can have implications from a tax liability perspective. More information about state expense reimbursement laws can be found in the Littler survey - *Business Expenses: Uniforms, Tools & Equipment, and Miscellaneous Expenses Incurred During Employment* (*Dec. 2020*) included with the program materials.

### D. *Disability, Sick, Family/Medical and other Leave Laws*

Mandatory paid sick leave and "kin" care laws have existed for several years in multiple jurisdictions. Paid Family/Medical Leave (PFML) laws also have been emerging in recent years. More information about current state PFML laws can be found in the Littler survey *Leave of Absence: Family and Medical (April 2021)* included with the program materials. Paid sick leave laws have specific accrual and recordkeeping requirements, and typically do not discriminate between part-time, full-time or even temporary workers. PFML laws typically require employers to set up payroll deductions for workers, and/or require employer contributions to fund state programs and qualifying reasons for leave are often broader in scope than under the federal Family Medical Leave Act.

Other common types of leave laws found at the state level that tend to confer greater benefits for employees than under federal law include:

- Adoptive Parents Leave
- School Activities Leave
- Blood, Organ, or Bone Marrow Donation Leave
- Voting Time
- Leave to Participate in Political Activities
- Leave to Participate in Judicial Proceedings
- Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime
- Military-Related Leave

Many of these leave laws also impose specific requirements related to content for handbooks policies, or notices that must be provided to employees.

Keep in mind, too, that rules regarding disability accommodations, maintaining safe workspaces, and liability for workers compensation claims still apply even for employees working from home. And importantly, many workers' compensation policies are not transferable from state to state, and several states do not permit employers to use private workers' compensation coverage.

### E. *Right to Work Laws and other Union Related Considerations*

For higher-education institutions, unions also present unique challenges. Right to work laws, off-duty conduct laws and legislated benefits vary from state to state. In some cases, negotiated terms in a collective bargaining agreement (CBA) will trump, or provide a safe harbor, for employers under state laws; in other cases that is not so. Understanding the intersection of these laws with existing CBAs is critical. Also, depending on how bargaining units are defined, employers should consider the possibility that new geographic presence could result in new bargaining units. For those bargaining units that are not geographically limited in scope, so as long as employees continue to do the same work under the same supervision, an employee moving to a new location will have no impact on their membership. In other words, an employer cannot "transfer" employees out of the unit based on their moving to a new location.

### F. *Payroll and Tax Laws*

In addition to federal and state income tax withholdings, many states also impose income tax at the county or municipal level. The American Payroll Association website (https://www.americanpayroll.org/news-resources/resource-library) contains many useful resources for researching when a state has local taxing jurisdictions. For remote workers, it is also important to consider state reciprocity rules, to avoid double taxation, as well as minimum thresholds for income tax reporting, particularly if workers will be allowed to travel, and perform

work, in multiple states. The taxable wage base for determining unemployment insurance contributions (and in a handful of states disability insurance contributions) also varies at the state level.

### G. *All the other stuff…*

While the above are some of the more high-risk/high-impact areas to consider in planning for a multi-state remote workforce, there are many other areas of law that differ among states and should not be overlooked, including, but not limited to:

- Variations in scope and administrative requirements under state EEO, harassment and discrimination laws
- Mini-COBRA laws
- Wage theft laws
- Mini-WARN laws
- Ban-the-Box and other requirements relating to background and credit checks
- Reporting and notice requirements for new hires
- Rules relating to salary history inquiries and pay equity
- Requirements relating to release to employees of personnel files and payroll records
- Timing for remittance of pay upon separation
- Enforceability of restrictive covenants and other employment agreements
- Enforceability of separation agreements (e.g., confidentiality clauses, general releases, and agreements not to re-hire)

The *Littler Wandering Worker Remote Relocation Checklist* is also included with the program materials.

## III. Approaches to Consider: Who, What, When, Where, Why, and How?

With the above background on the legal and compliance challenges in mind, it's now time to start planning. For any remote work program, having well-defined policies is key, but to draft effective, and relevant policies, you must ask: Who, What, When, Where, Why and How?

What, specifically, you need to ask, and the order in which you do so, likely will depend on your current role and tenure within the organization, including how familiar you are with current institutional operations, particularly within Human Resources. While the "where" and the "how" questions tie most directly to the legal and compliance requirements, asking "who", "what," "when," and "why" before you start, may help you to gain a clearer understanding of the business goals, and ultimately save you time and effort as you navigate decisions about what areas of the law are relevant, what the material risks are to your organization, and who needs to be involved in turning this theoretical concept into a practical, implementable and compliant program.

### A. Why?

Question number one: Why is the institution offering remote work? Is it meant to be a new benefit for employees, e.g. to support employee engagement, flexibility and work-life balance? Is there an operational need that is driving the decision, e.g. to meet a physical presence requirement for a certain academic program, or recruit new employees? Or is it cost savings, e.g. a desire to downsize office space? The goal of the program can influence outcomes. Take, for example, differences in state laws regarding jury duty. Maybe the state you are presently in doesn't require paid leave for jury duty, but several of the states you want to be in do – if your goal is employee engagement, in considering your policy on this issue, perhaps it's worth considering whether the administrative benefit of managing just one program outweighs the potential costs of offering the greater benefit to all employees?

### B. Who?

Question number two: Who gets to work remotely? For whom is remote work a viable option? For whom does the institution want it to be an option? Consider asking managers to review job descriptions and consider whether tasks can be performed on-site or not. Think about whether the rules would be the same for all employees or whether restricting remote work to only some types of employees (full-time, part-time, faculty, staff, exempt or non-exempt) is more realistic, or enough to achieve the employee's goals. Focusing on the job duties or "roles" at the institution, and their related business requirements, can also help with defining eligibility parameters that are non-discriminatory and defendable, and it can establish parameters for the following questions – for example, if only exempt employees are permitted to work remotely, the institution need not make adjustments for timekeeping systems to work in the remote workspace.

### C. What?

Question number three: What does remote work look like? Will workers have the option to work fully-remote? Is there an expectation or need for employees to be on-site for meetings or events? If so, is a hybrid remote arrangement required? What the institution is willing, or wants, to offer, might just dictate what states end up on your "approved" list – it's really hard to attend weekly in-person team meetings in Albuquerque if you're living in Tampa! And if the institution does want to allow that, make sure everyone knows they might need to budget a little more for airfare and hotels; the scope of reimbursement and compensable time obligations will turn in part on the voluntary nature, and permanence and frequency of the remote work.

### D. When?

Question number four: When does this need to happen? For many institutions, the answer to this question may be, "yesterday"... but, seriously, if time is tight, focus on the most material risks first. Categorically, those tend to be the situations where employees are already not where they should be; assess what liability or compliance challenges the institution has with respect to those individuals first. If folks have been allowed to move freely during the pandemic

(or weren't allowed to but did it anyway), consider whether to survey your managers or workforce to get a sense of where they are, when they are returning and if you need to make any payroll adjustments or corrections.

**E. How?**

Question number five: How is the institution currently operationalizing its employment policies and programs, and how will that need to change in the future? When it comes to 50-state employment compliance, how things must be done is often dictated by the law – the devil is in the details! "How" is both a question for now and a question for later - you need to understand what is happening now to identify the gaps you will need to fill later.

a. *Remote Work Policy and Agreements* – Establish your internal process for evaluating and approving remote work, including obtaining and retaining agreements documenting the arrangement for each remote working employee. Included in the policy and agreement can be parameters for location and requesting and evaluating relocation.

**b.** *Payroll* – Have we mentioned that payroll compliance is one of the critical areas to get right? Many states define wages differently, and require specific information be included on wage statements. As noted above, permitted and mandated deductions may vary depending on state run insurance programs, among other reasons. Recordkeeping and reporting requirements also may differ from state to state.

**c.** *Recruiting and Hiring* - Be on the lookout for required language or notices for job advertisements, offer letters, specific requirements for background checks, wage theft and other new hire notices.

**d.** *Employee communications* – In addition to workplace posters (and the challenge those bring in a remote environment), state laws often require additional written policies be included in handbooks and/or written notices be provided to employees about leave rights (both at time of hire and upon notice to the employer of eligibility), whistleblower protections, and wage and hour laws.

e. *Training* – In addition to required trainings, the content and duration of which can sometimes be set by state law, think also about best practice trainings for staff at the institution who may not have operated in a multi-state environment before and whose day-to-day work may be impacted (e.g. human resources business partners and employee relations managers, leave administrators, accounting staff that are processing expense and travel reimbursements).

**F. Where?**

Question number six: Where do your employees get to work? The answer to the "where" question for a remote work program is perhaps, more than any other answer, driven by legal and compliance considerations. As noted above, when you really look at, "how" things are currently being done, where employers want to be, and where it is realistic for them to be do not always align. If you are lucky enough that the "where" in your equation is still somewhat of an open issue, this can be a great opportunity to be strategic and show some value.

*Step 1*: Research and understand the differences in the laws of your target states to identify key risks. For those with access to technology tools, a good place to start is to look at 50-state compliance resources to identify variables and get a high-level understanding of potential gaps between state, federal and institutional standards. Refer above, and to the attached Littler checklist, for some of the key risk areas to consider.

*Step 2*: Consider categorizing states by relative risk based on identified gaps. Doing this will help to think through some of the implementation and operational considerations as well (discussed above in the "How" section).

Depending on the outcome of your review, and the amount of work that will be needed to address gaps (e.g., policies, notices, updates to payroll practices), possibly consider a phased approach. Some options for phasing into remote work include:

- One state at a time
- One employee type at a time
- Some combination in a phased approach

*Step 3*: Once you have your plan, strategize compliance solutions with an eye toward:

- Addressing gaps
- Supporting your "why" (risk-aware, but also business-focused)

## IV. Other Considerations and Tips for Success

- Don't go it alone… partner, partner, partner! Partnering with the right teams will be critical to your success. Internally, engage with other compliance and operations teams like Human Resources, Payroll, Finance, Facilities and IT to help think through what is feasible from an operational perspective. Externally, consider partnering with law firms and outside consultants to help ease burden, provide practical advice, and assist with provision of form policies, notices, etc. that will be needed to operationalize the program. Littler offers invaluable resources like Littler Edge™ and the Littler Remote Work Toolkit. Particularly for those that are considering a foray into multiple new states on a short-timeline, having an external consultant will be invaluable.

- Take every opportunity you can to educate your colleagues. Particularly for those institutions that have historically operated in only one state, the challenges of 50-state compliance will not be top of mind for our business colleagues. Make it a point to get involved in business discussions early. Consider targeted communications/reminders to employees, managers and union reps about why where they work matters to the institution.

- For those institutions outsourcing payroll, or using electronic payroll software or HRIS systems, much of the technical compliance functionality may be built into that solution, but regular auditing may still need to be set up at the institutional level. Some things to consider:

    - Organizations new to local tax withholding should conduct an audit after a period of time to validate proper tax withholdings
    - Validation of W-2 data on a quarterly basis can help reduce the need for amendments and possibly W-2c's. When doing this be sure to understand what you are validating.
    - Depending on the number of employees on an organizations' payroll and what states the employer is located in it may be extremely helpful to audit (1) New Hire Addresses & (2) Address Changes on a particular frequency (Daily / Weekly). Auditing employee home and work states to ensure they are the same, or when different they make sense, can help to avoid errors in reporting and withholding… unfortunately, remote employees don't always think to tell you when they move. Also to consider the frequency to which tax forms should be implemented (likely the same frequency of monitoring the addresses).
    - When in doubt call the jurisdiction. It's always better to validate to ensure compliance for proper withholding.

- Be sure to predetermine your Workers Comp Classification Codes and ensure they are set up on each employee for easy of preparing for your Workers' Comp Audit.

- 501(c)(3) non-profits may have the option to opt out of state unemployment tax and instead operate as a reimbursable employer. Posting of a bond is required in some states.

- Don't forget about business registrations and build in time to get those in place if needed.

## REMOTE RELOCATION CHECKLIST

*The Checklist provides an outline of the myriad employment law considerations when evaluating the compliance obligations associated with a remote worker relocation (a "wandering worker"). Consult Littler counsel to assess particular requirements and evaluate risk and priorities.*

### PURPOSE AND DURATION OF RELOCATION

1. Has a U.S.-based employee (remote or onsite) requested to work remotely from a new U.S. location different than their current location?
   **Yes**: Go to question # 2.
   **No**: This is the wrong decision tree for your situation.
   - If "*no, because the employee is requesting to work remotely oversees*": Consult international counsel.

2. Does the employee have any known family care or medical conditions that, the employee might legitimately argue, elevate the request to work remotely to an FMLA request or a request for ADA (disability) reasonable accommodation?
   **Yes**: Consider referring the employee to the Organization's third-party leave administrator so that FMLA / Short Term Disability may be initiated. If the employee is not eligible for FMLA, please undertake the ADA's interactive process in addressing the response. Then, go to question # 3.
   **No**: Go to question # 3.

3. Ask the employee how long the employee will work remotely in the new location.
   - This will be important information for tax withholding purposes, and for the Legal team's risk assessment.

4. As to the employee's planned duration for working remotely in the new location:
   - If the period exceeds an established internal threshold duration or is ***permanent***: Review the following checklist with the indicated stakeholders.

### ORGANIZATION CONSIDERATIONS

Evaluate with Accounting/Corporate Tax advisors:

1. Is the Organization registered to do business in the requested state? If not, will that be necessary?
2. Does the Organization pay corporate taxes in the requested state? If not, will that be necessary?
3. Does the Organization have any facilities in the requested state?

### THRESHOLD COVERAGE CONSIDERATIONS

Evaluate with Human Resources:

4. Does the Organization have existing employees working in the requested state, such that this employee could be added to an existing compliance program?
5. Is a change in tax withholdings necessary?

6. Is a change in insurance coverage payments necessary (unemployment, workers' compensation, sick leave bank)?

Evaluate with Human Resources and Legal:

7. Is this worker and independent contractor?
    - State law applies different tests for independent contractor status; review whether applicable test will be met in the new state.
8. If there are existing the Organization employees in the new state, will this employee's presence in the state trigger new coverage for the Organization under any sick leave or family medical leave entitlement (hypothetical example: law applies to all employees in the state if employer has 12 or more full time employees in the state; this employee will be #12).

Evaluate with Legal:

9. Is the employee a party to any agreements with the Organization (i.e. confidentiality, non-competition, trade secrets protection agreements, executive employment agreements)?
    - Review for enforceability in the new location.
    - Choice of law provision enforceable?

**NEW HIRE REQUIREMENTS**

10. If this employee is a new hire in a new state, review with Human Resources:

- Employment Eligibility & Verification Requirements: Is the Organization required or prohibited from using an electronic employment verification system?
- Are there restrictions/prohibitions on considering criminal history in employment decisions?
- Are there restrictions/prohibitions on requesting information about arrest history?
- Does the state have a mini-Fair Credit Reporting Act law?
- Does the state law restrict an employer's access to an applicant's or employee's social media accounts?
- State restrictions on job Application fees, deductions, or other charges required?
- Are fingerprints & Photographs prohibited?
- Are pre-employment medical & psychological examinations prohibited?
- Are salary history inquiries prohibited?
- Review all documentation required at time of hire.

**DURING EMPLOYMENT**

11. If the employee is an existing employee, and for any new hire, review with Human Resources what changes will be needed to Organization policy/procedure:

- What posters are required, and have they been provided to the employee remotely?
- What recordkeeping is required for personnel files and other employee information?
- Is background screening of current employees prohibited?

12. Drug Use

- Does the state permit recreational marijuana use?
- Is the Organization's drug use policy consistent with the state/city law?

**MINIMUM WAGE & OVERTIME**

13. With Legal, determine whether the employee's current pay rate and classification is consistent with the law in the new location:

- Is the employee paid over the applicable minimum wage?
- Is the employee exempt from minimum wage and overtime requirements under the new state law?
    - Does the employee's compensation meet the salary basis test in the state?
    - If the Organization has relied on the highly-compensated exemption for the employee in the old location, can that exemption apply in the new location?
- If the employee is currently salaried, non-exempt, can that pay scheme be maintained in the new location?
- If the employee is hourly, exempt, can that pay scheme be maintained in the new location?
- Is the employee entitled to any of the following in the new location, requiring any adjustment to timekeeping, scheduling, and/or payroll?
    - Daily overtime
    - Double time pay
    - Split-shift premiums
    - Meal breaks at specific intervals
    - Rest breaks at specific intervals
    - Travel time for any business-related travel regardless of time of day
    - Reporting time (i.e. "show up" time)
    - Predictive scheduling (i.e. advanced notice of any change to work schedule)
    - On-call time
    - Paid vacation time
    - Preliminary and postliminary activities outside the scope of "compensable activities" under federal law (i.e. if the state does not follow the Portal-to-Portal Act, explore further)
    - Reimbursement for necessary business expenses, including expenses of maintaining a home office

**UNIQUE COMPENSATION CONSIDERATIONS**

14. With Legal, determine whether the employee's current compensation plan is consistent with the law in the new location:

- If the employee is paid in tips, is the tip policy (credits, pooling) consistent with the law?
- If the employee is paid commissions, are changes needed to the commission plan?
- If the employee is non-exempt and receives bonus compensation, is the regular rate calculation accurate in the new state?

**WAGE PAYMENT CONSIDERATIONS**

15. With Legal and Payroll, determine whether adjustments are needed to comply with applicable law in the new location regarding:

- Pay frequency: How often must wages be paid?
- Final wage payment: When must the employee receive their final paycheck?
- Wage Theft Notices: Does the state/city law require employers to provide employees a written notice, in the language the employer normally uses to communicate employment-

related information to employees, containing specific information about rates of pay, payday, sick leave entitlement, and other information?

- Wage Statement Requirements: Does the current wage statement (i.e. paystub) comply with the requirements in the new location?
- Changing Regular Paydays or Pay Rate: What notice is required if there is a change to pay?
- Deductions: Are signed authorizations needed for existing or planned deductions from wages?

**TIME OFF FROM WORK**

16. With Legal and Human Resources, evaluate whether the employee's existing vacation and sick leave entitlements are compliant with the law in the new location:

- Does the law require a particular day of rest?
- Does the law permit "use it or lose it" or forfeiture of vacation, if such a policy applies?
- Does the law require pay-out of vacation at termination, if such a policy is not currently in practice?
- Does a state or city family medical leave entitlement apply, and is it different than the current entitlements?
- Does a paid sick leave entitlement apply in the state/city? Is the employee accruing sick leave at a rate consistent with the requirement?
- Must the Organization pay into a state-operated insurance program for the sick leave bank?
- Is there a particular requirement for pregnancy accommodation?
- Consider other protected leave:
  - Adoptive Parents Leave
  - School Activities Leave
  - Blood, Organ, or Bone Marrow Donation Leave
  - Voting Time
  - Leave to Participate in Political Activities
  - Leave to Participate in Judicial Proceedings
  - Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime
  - Military-Related Leave

**DISCRIMINATION, RETALIATION & HARASSMENT**

17. Evaluate with Legal:

- Does the Organization's policy adequately prohibit discrimination and harassment of categories protected under the state/city law?
- Pay Equity: Will this employee's relocation create the appearance of any disparate impact/pay inequity?
- Harassment Prevention Training & Education Requirements: What training is required in the new location?

**END OF EMPLOYMENT**

18. Evaluate with Legal:

- Does the new state have a mini-WARN act?
- Will this employee's relocation affect the location where they are "counted" for purpose of the WARN act and/or a state mini-WARN act?

# I AM NOT A CAT: ETHICAL CONSIDERATIONS FOR THE REMOTE PRACTICE OF LAW AND REMOTE EMPLOYMENT

**March 29 - 31, 2022**

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## I. Introduction[1]

In March 2020, the COVID-19 pandemic required campus legal counsel to provide legal services almost exclusively on-line. While many of us had used Zoom or Microsoft Teams in the past – from time to time – none of us had spent full days in back to back on-line meetings, trying to learn new technology while grappling with challenging and novel legal issues presented by the pandemic. The meetings, particularly at the beginning of the pandemic, were all urgent – we were all dealing (and continue to deal) with time sensitive legal matters that were critical to maintaining the safety and stability of our employee populations, among others. And while we dealt with these matters, we juggled: learning new technology and new laws; our families; our pets; personal and work responsibilities which collided daily, and we tried to provide the best support to our clients who were also trying to ensure campus employees were safe, well, engaged, supported and *stayed employed.*

Now, over two years since the start of the pandemic, we have become masters at on-line hearings, mediations, trials, collective bargaining, meetings (and sometimes even multi-state and multi-national ones!), and more! But this mastery has not come without a steep learning curve, ongoing challenges and the consistent consideration of our professional responsibilities, and legal ethics in the pandemic era. This paper provides a glimpse into three topics that continue to raise ethical and professional responsibility concerns for campus counsel across the country: (1) preserving the attorney-client privilege and managing the privilege in cyberspace; (2) being mindful of the rules around practicing law over zoom within and outside your jurisdiction; and (3) the importance of wellbeing on the ability to comply with our ethical and professional responsibilities. In describing these topics, we rely on selected Model Rules of Professional

[1] The authors would like to thank Christa Evans, University of Mississippi School of Law, Class of 2022, for her contributions to this presentation.

Responsibility referenced throughout the paper and included in full in the appendix, and recommend that you also review your relevant state rules.

## II. Preserving the Privilege in Cyberspace

### *A. Working in the Cloud*

Many attorneys are using email and cloud services more frequently than they did prior to March 2020. Model Rule 1.1, and specifically Comment 8, require that attorneys have some knowledge and understanding of technology, including the risks and benefits of cloud storage and transmission of data.

> To maintain the requisite knowledge and skill, *a lawyer should keep abreast of* changes in the law and its practice, including *the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[2]

During the pandemic, some attorneys switched to fully remote work for the first time in their careers. However, cloud storage has been available for years, and attorneys' obligations to ensure client confidentiality haven't changed.[3] What may have changed is whether you and your provider are keeping up with best practices in cybersecurity. For instance, do your contracts with such providers include terms that require confidentiality of information that passes through or resides in the provider's system? What protections should be in place to maintain the privilege?

Attorneys must pay attention to both transmission and storage of information. In assessing the risk presented by email, for example, attorneys should consider the level of confidentiality required and the controls on both ends. If a university's email system is secure, one must still consider the security of the recipient's email system, as well as the means used to transmit the email. Gmail or a like service may have terms and conditions of use which permit third party access and undermine a claim of privilege.

Services like Box or DropBox may be used to avoid sending sensitive information via email. In using such services, attorneys should use any available security features, such as requiring passwords for links to confidential files. In *Harleysville Ins. Co. v. Holding Funeral Home, Inc.*[4], the court considered the facts surrounding an inadvertent disclosure of privileged documents.

An insurance company investigator shared a video of a fire with the National Insurance Crime Bureau, a "non-profit organization that partners with insurance companies and law enforcement agencies to fight insurance fraud and insurance crime."[5] The investigator emailed a link to NICB, and the email stated that it was "privileged and confidential."[6] Months later, the same investigator was asked to supply a copy of the claims file and investigation file with Harleysville's counsel. He did so, using the same link provided to NICB (effectively giving

[2] ABA Model Rules of Professional Conduct ("MRPC") 1.1, Comment 8 (emphasis added).
[3] MRCP 1.6.
[4] Case No. 1:15dv00057 (W.D.Va. Oct. 2, 2017).
[5] *Id.* at 3, n.1.
[6] *Id.*

NICB access to those documents, too). Opposing counsel issued a subpoena to NICB, requesting all information that Harleysville had provided to NICB. NICB turned over its files, including the link to Harleysville's privileged documents. Opposing counsel looked at the files, and concluded that Harleysville had waived the privilege by producing the privileged documents to NICB.

Four months after reviewing the privileged documents, counsel for Holding produced the documents on a thumb drive, in a file labeled "NICB video," to counsel for Harleysville. Counsel for Harleysville requested that opposing counsel destroy the documents; opposing counsel refused. The District Court judge, overruling the Magistrate judge, found that the documents disclosed were "the epitome of privilege", and that the disclosure to opposing counsel was inadvertent. While the file was not password-protected, the judge found:

> Although any person who knew the URL could access the Box Folder without a password, as a practical matter, the URL itself functions as a password. The URL contains a string of 32 characters, where each character can be one of 36 letters or numbers, These parameters mean that there are 6.3340287 x 1049 (63,340,287,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000) possible "sharing" links. The security of the Box Folder, then, is inherent in the nature of the URL. In this context, the magistrate judge's analogy of Harleysville leaving the Claims File in a briefcase on a public park bench and telling its counsel where it could be found, is inapposite. Practically speaking, it would be impossible for anyone, let alone a particular person connected with the case, to accidentally stumble across the Box Folder. As far as real-world equivalents go, it is ore appropriate to characterize the briefcase as having been buried somewhere in a large park, technically publicly-accessible, but for all practical purposes. secured.[7]

Ultimately, opposing counsel was prohibited from using any of the privileged contents of the Box file in the litigation. While this looks like a win for Harleysville, it took just over a year for the court to resolve the issue.

In addition to taking precautions like password protection when sharing information via the cloud, attorneys should ensure that appropriate contractual provisions are in place to protect and to preserve data in the cloud and bolster a claim of privilege. The New York Bar issued a useful opinion outlining the issues to be considered in engaging a cloud service.

> A lawyer must … take reasonable care to affirmatively protect a client's confidential information.
>
> "Reasonable care" to protect a client's confidential information against unauthorized disclosure may include consideration of the following steps:
>
> (1) Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;

[7] *Id.* at 18.

(2) Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;

(3) Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and/or

(4) Investigating the storage provider's ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.[8]

### *B. Who's Zooming Whom*

The considerations outlined in NY Ethics Opinion 842 are also useful in evaluating the security of virtual meetings. Zoom and similar platforms require vigilance. What are the terms of your (or your institution's) contract with the provider? Will the provider record your meeting, and if so, retain a copy of that recording? Who has access to those recordings? How does the provider ensure that only authorized attendees may participate? Who will be able to listen to your meeting while it's in progress?

As with many cybersecurity issues, technical safeguards are not enough. The most stringent security measures are of little benefit if the end-user does not know how to implement them. Furthermore, the usual means of protecting attorney-client privileged communications still apply. "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."[9] In conducting privileged conversations via a third-party platform, it is not enough for an attorney to ensure that he or she is in a private space. Is the client in an office with the door closed? At the dog park? In a coffee shop? Attorneys must ensure that each party is in a private space or, failing that, that participants use headphones or take other steps to ensure that they are not overheard.

### *C. Ways to Mitigate the Risk and Maintain Privilege*

1. Use passwords or lobbies for virtual meetings.
2. Use strong passwords for mobile devices.
3. Be wary of the "reply-all" and auto-complete functions
4. Read the terms and conditions of your products to know who can access your data, who can see your data, and what will happen if there is a security breach.
5. Know your storage options for records, including email, and choose wisely. You may have to defend your choices.
6. Close the door!
7. Use headphones, rather than speakers, if other people are in your vicinity. Make sure that your client does the same.

[8] New York State Bar Ass'n., Ethics Op. 842 (Sept. 10, 2010).
[9] MRPC 1.6, comment 18.

8. Lock your computer if you step away from it and limit access to the room your computer is in. You may trust your spouse and children, but their presence and access may damage any claim of privilege.
9. Remind clients of the need for confidentiality. An infant in your virtual meeting is one thing; a teenager wandering through is another.
10. Use a VPN.
11. Use a password for Box and similar cloud files.
12. Consider setting links to expire.
13. Consider encryption to protect your information at rest and during transmission.

## III. Who, What, Where, and When: Authorized Practice of Law. Does the pivot to a virtual workplace change these obligations when state lines are crossed?

### *A. Jurisdictional Considerations*

After addressing the privacy and security associated with virtual practice, lawyers should consider their authority to practice law remotely in the world of on-line hearings, mediations, trials, collective bargaining, and meetings. Absent a specific rule or court decision in your particular jurisdiction that states a contrary position,[10] lawyers who are physically located in one jurisdiction do not violate MRPC Rule 5.5 – engaging in the unauthorized practice of law – when they provide advice in the jurisdiction where they are admitted, but obligations regarding communication with clients, maintaining expertise and practice with competence as required by other rules remain.

1. Who? Licensed/admitted attorneys are authorized to practice law in the jurisdiction in which they are admitted: "A lawyer who is not admitted to practice in this jurisdiction ***shall not*** … establish an office or other systematic and continuous presence in [another] jurisdiction for the practice of law; or hold out to the public or otherwise represent that the lawyer is admitted to practice law in [another] jurisdiction."[11]
2. What? Protection of the public by ensuring competence, and qualifications, to represent clients in a particular jurisdiction. Competency and expertise are required – whether through your own training and experience or with the advice and support of local counsel. Members in good standing of the legal profession in another jurisdiction, those subject to regulation and discipline by a "duly constituted professional body" or by a court in a foreign jurisdiction "may provide legal services through an office or other systematic and continuous presence in" foreign jurisdictions as long as (a) those services are being provided to an employer or organization, (b) pro hac vice admission is not required, and (c) where advice on matters of law specific to the foreign jurisdiction is required, the advice is based upon a federal rule or is "based upon the advice of a lawyer who

[10] The Ohio Supreme Court was concerned about this issue pre-pandemic. *See* Richard J. Rosenweig, "Unauthorized Practice of Law: Rule 5.5 in the Age of COVID-19 and Beyond" (ABA March 12, 2020).

[11] MRPC 5.5.

is duly licensed and authorized by the jurisdiction to provide such advice". [12] Ethically, lawyers may need to advise the client that the lawyer is not licensed to practice in the particular jurisdiction.[13]

That the intent of MRPC 5.5 is to reduce the risk to clients and the public of unauthorized practice can be seen in the application of MRPC 5.5 to in-house counsel. As clarified in the Comment, these legal services are provided directly to their employer, to serve its interest, and the employer can assess the lawyer's qualifications and quality of work.[14]

3. Where? Lawyers who are authorized to practice law can do so in either a temporary or permanent location consistent with the rules. Lawyers who are not admitted to practice in a particular jurisdiction cannot "establish an office or other systematic and continuous presence" in a "foreign" jurisdiction in order to practice law. Nor can they represent to the general public that they can practice law where they are not admitted. Even prior to the pandemic, however, the rules allow for the "temporary" provision of legal services in another jurisdiction. Lawyers must, however, take steps to assure competence in a particular jurisdiction by, for instance, associating with another actively participating lawyer, who is authorized to practice within that jurisdiction, or providing a service "reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding" when "the services arise out of or are reasonably related to the lawyer's practice" in an authorized jurisdiction and the local rules do not require admission.[15] Depending on the jurisdiction, in house counsel may also have an office or systemic presence where they are not licensed – but may also need to comply with registration requirements for such practice, including CLEs and assessments for the protection of client funds[16] and the disciplinary authority of the local jurisdiction consistent with MRPC 8.5.

   With the advent of the pandemic, the ABA issued two opinions that attempted to clarify these rules and apply them to COVID-19 realities.[17] Acknowledging that technology has made it possible for lawyers to practice virtually in a jurisdiction where they are licensed, even if they are *physically* located elsewhere, lawyers can ethically engage in the practice of law while being physically present in a

[12] MRPC 5.5 (d)(1).

[13] MRPC 5.5, Comment 20.

[14] MRPC 5.5, Comment 16.

[15] MRPC 5.5 (c).

[16] MRPC 5.5, Comment 17.

[17] ABA Comm. on Ethics & Prof'l Responsibility, "Lawyers Working Remotely", Formal Op. 495 (2020). *See also* "Unauthorized Practice of Law: Rule 5.5 in the Age of COVID-19 and Beyond" (August 12, 2020); Laurie Webb Daniel and Phillip George, "Twin ABA Ethics Opinions Cover What You Need to Know About Remotely Practicing Law" (ABA May 15, 2021); and Suzanne Lever, "Home is Where the Heart Is" (North Carolina State Bar) (last accessed Mar. 18, 2022).

jurisdiction where they are not admitted if they[18] assess whether the jurisdiction in which they are physically present has a rule that "working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law" [19] because "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so".[20] If the jurisdiction where the lawyer is physically present has rendered such a rule, then practicing remotely violates MRPC 5.5(a).

"Absent such a determination," the physical location is not an operative decision point. Analyzing the language of the rule itself, the opinion considers what it means to establish an office or systematic and continued presence and determines that:

> [a] local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence

noting that the physical presence in the jurisdiction is "incidental" and "not for the practice of law".[21]

4. When? Temporary is not defined and "may include services that are provided on a recurring basis or for an extended period of time." [22] In fact, a temporary period "could vary significantly based on the need to address the pandemic".[23]

Services may be provided on a "temporary basis … under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts."[24] While not explicitly contemplating remote work, the Comment notes that temporary services could be provided "on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation." [25] The MPRC acknowledges that legal services in a foreign jurisdiction may "arise out of or be reasonably related to" practice where one is admitted – if the client is resident in or has substantial contacts with the jurisdiction where the lawyer is admitted or has previously been represented by the lawyer.[26] Finally, the MRPC is cognizant that, at

[18] ABA Comm. on Ethics & Prof'l Responsibility, "Lawyers Working Remotely", Formal Op. 495 (Dec. 16, 2020), at 1.

[19] *Id.* at 2.

[20] *Id.* at 1.

[21] *Id.* at 2, applying R. 5.5(b)(1).

[22] *Id.* at 3.

[23] *Id.*

[24] MRPC 5.5, Comment 5.

[25] MRPC 5.5, Comment 6.

[26] MRPC 5.5, Comment 14.

times, clients' activities may involve multiple jurisdictions, thus permitting advice to be contextualized without rising to the level of unauthorized practice of law.[27]

Generally speaking and absent a state rule that would otherwise prohibit it, practicing law over zoom around and outside your jurisdiction is permissible, provided that lawyers do not hold themselves out as authorized by the local rules to do so, or as able to do so on a permanent basis. Compliance with MRPC 5.5 is best addressed while meeting the ethical obligations of competence, diligence, and communication.

### *B. To Mitigate Risk of Violating Rule 5.5*

1. Check the local rules to confirm:
    a. you are not engaged in the unauthorized practice of law.
    b. requirements related to such practice, including CLEs and assessments for the protection of client funds imposed by that jurisdiction.
    c. differences in disciplinary action as it is likely defined by where you are **practicing if it is different from where you are admitted.**[28]
2. Ensure you do not hold yourself out as "establishing" a permanent practice in a jurisdiction with only virtual presence: **Make sure your business cards, email signature, and stationery all indicate where you are practicing**.
3. Communicate, communicate, communicate. Advise your clients early on that contacts in far flung jurisdictions may require advice and counsel from local counsel - employees who live and reside remotely could trigger tax and employment law consequences about which neither you nor your institution are aware. Competent counsel in such jurisdiction may be required to provide advice or appear there jurisdiction.

## IV. Attorney Wellness and Professional Responsibility in the Time of COVID

Almost 5 years ago, the American Bar Association (ABA)'s National Task Force on Lawyer Well-Being issued its ground-breaking report: *Creating a Movement to Improve Wellbeing in the Legal Profession.*[29] Completed well before the start of the pandemic, the ABA Report contemplated the importance of attorney well-being in maintaining attorney ethical and professional responsibilities. Two years into the pandemic, which has left many of us managing: unanticipated loss; dependent care (and its instability); physical, mental and emotional challenges, and resource constraints created by tightening budgets and the great resignation, among other challenges, the ABA Report's findings and recommendations have renewed relevance. All lawyers today can benefit from a review of how their wellness or that of their legal teams impact their ability to comply with their ethical and professional responsibilities. The following section will outline a number of professional responsibility rules to consider in the context of lawyer wellness followed by some resources and suggestions for all of us as we continue to navigate the enduring pandemic and its effects.

### A. The Model Rules of Professional Responsibility through a Wellness Lens

[27] *Id.*

[28] *See* MRPC 8.5.

[29] *See* American Bar Ass'n., Report from the National Task Force on Lawyer Well-Being (Nov. 9, 2018).

### *1. Rule 1.1 - Competence*

In its Report, the ABA Report recommended a modification to the rules of professional conduct to acknowledge the important role of attorney wellness to a lawyer's foundational duty of competence. Although few states have made this recommended change, there is no question that if legal counsel is not well, ethical and professional obligations may be at risk. Virginia's State Rules of Professional Responsibility comments on "Maintaining Competence" describes this reality perfectly:

> A lawyer's mental, emotional and physical wellbeing impacts the lawyers ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional and physical ability necessary for the representation of a client is an important aspect of maintaining the competence to practice law.

Virginia State Bar Professional Guidelines, Rule 1.1.[30]

Rule 1.1. requires the competent representation of a client through diligent work - to effectuate this representation, a competent lawyer reads, analyzes and adequately prepares to address the legal issues presented by a client. Rule 1.1 expects that a lawyer only tread into areas in which they are knowledgeable through appropriate experience and/or preparation. It also requires that the lawyer become competent in and stay abreast of technology and other aspects of the profession that evolve over time. These days, attorney wellness - like the wellness of many across the country, is challenged. Attorneys who may be struggling with mental or emotional health challenges, substance abuse or other circumstances that could infringe on their ability to read, analyze or otherwise prepare for the competent representation of a client may run the risk of violating Rule 1.1.

### *2. Rule 1. 3 - Diligence*

Rule 1.3 requires lawyers to engage with reasonable diligence and promptness in their attention to their client matters. The model rules address the need to avoid procrastination and other behaviors which can seriously compromise the client. For instance, missing statute of limitations or filing deadlines can be catastrophic for a client (and their lawyer!). The model rule also discusses the importance of managing workload, by seeking reasonable extensions when necessary in lieu of delays. Although not explicitly mentioned in the rule, many legal offices use teams to cover work in order to ensure that the diligence of any one lawyer is supported by the ability of other lawyers to cover the matter if it is required for *any* reason.

### *3. Rule 1.4 – Communication*

Communication between a lawyer and their client is critical. But it is not just the act of communication that is addressed in Rule 1.4 but also the importance of prompt communication, complete communication and also refraining from communication in the rare instances when doing so would be in the client's interest. While communication seems like an easily met expectation, the reality is that in small legal offices or where there may only be one lawyer, communication can become not only daunting but almost impossible. Layering on lawyer

[30] *See* Virginia State Bar Ass'n., Professional Guidelines, Rule 1.1.

wellness concerns that may impact a lawyer's ability to organize and prioritize tasks, or to manage competing demands will make communication an easily breached rule of professional responsibility and could lead to misconduct. *See* Office of Disciplinary Counsel v. Dixon, Philadelphia, March 4, 2022 (lawyer who alleged misconduct due to depression suspended for missing an appeal deadline and failing to communicate timely and truthfully with client).[31]

#### *4. Rule 2.1 – Lawyer as Advisor*

Rule 2.1 states:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Although an unwell lawyer may not be able to properly advise their client, this rule also raies an important and related wellness concern– the wellness of the client and/or those involved in the legal matter. Often times it is incumbent upon the lawyer to notice that a *client* is not well enough to participate in an aspect of a legal matter (e.g., not fit for deposition or trial) or to take a bird's eye view of a matter and note not just the legal issues but moral and social challenges posed, for instance, by the impact of litigation or other legal process on individuals involved in a matter (e.g., requiring a student in distress to participate in a disciplinary hearing, or terminating an employee who has been marked absent because of a health related reason). Wellness can be a guiding perspective for lawyers – both for the lawyers involved in the matter, but also for those they serve.

#### *5. Rule 5.1 – Responsibilities as a Supervisor*

Lawyers that supervise other lawyers are reminded that they have responsibility for the compliance with the rules of professional conduct of those they supervise. In this regard, rule 5.1 contemplates that legal supervisors establish internal policies and procedures designed to ensure that the lawyers they supervise are in compliance with the rules of professional conduct. Internal policies are also expected to prevent lawyer misconduct prohibited under rule 8.4. While rule 5.1 suggests policies and procedures to detect and address conflicts of interest; address matters related to deadlines; and manage inexperienced lawyers, prioritizing and supporting lawyer wellness - which can have such a dramatic impact on client matters if not attended to - must also be on the list!

### B. Prioritizing Wellness Prioritizes Ethics and Professionalism

As we enter the spring of 2022, more and more lawyers are returning in person to campus to resume in person full time duties or in some cases, a hybrid schedule. Some offices, however, may remain fully remote. As with any change, these transitions can be stressful for some. For those who are remaining remote, issues with isolation and "FOMO", the real fear and concern with missing out on daily interactions and activities, can exacerbate these stresses. Furthermore, while the pandemic continues to evolve, resource constraints remain present for many offices

[31] *See* *Office of Disciplinary Counsel v. Daniel Michael Dixon*, No. 2844 Disciplinary Docket No. 3 (Pa. Dec. 8, 2021).

and the workloads remain significant – regardless of the location of the workplace. Lawyers who prioritize their own wellness and that of their teams will be better able to manage the transitions, stresses and challenges that will continue to create pressures in the legal offices across the country.

### *1. Wellness for Lawyers in a Remote Environment*

During the NACUA General Counsel Institute this year, NACUA colleagues Kristen Bowes, Rebecca Gose and Sharmaine LaMar were joined by Stacey Dougan of Dougan Consulting and Counseling, LLC in a tremendous program that identified a number of easy ways to prioritize wellness in our legal offices - for ourselves, our teams and our clients. The materials for this program are available on the NACUA website and include a list of ideas for lawyers looking for ideas to address wellness helpful for lawyers working in remote environments and beyond. Some of the most relevant tips applicable to the remote environment included: setting boundaries between work and home,[32] making time for exercise, and making time for family, friends, and colleagues. Also, Patty Beck, formerly of the Minnesota Lawyers Mutual Insurance Company which provides professional liability insurance to lawyers and now working in the field of lawyer wellness, has written a number of articles that identify other ideas including: (1) writing down what you need to maintain and improve your mental health - then doing those things!; (2) additional tips for setting boundaries between work and home - tip: keep your cell phone out of most of your rooms - force yourself to check work e-mail by opening and loading your computer (guess what, you may not do it that often!) and (3) starting a mindfulness practice to help prepare for and conclude your days, and to refresh throughout the day when needed. [33]

For those working remotely, making time to connect co-workers about work but also in casual and fun ways that would have otherwise been available in person are key. Setting up regular "yappy hours" or letting folks know when you will have your personal Zoom open for drop ins could provide for opportunities to connect in brief, impromptu ways just like it might have happened in person. In addition, being in a remote environment still provides opportunities that may exist on campus such as opportunities for exercise and breaks, and mindfulness breaks. Being able to notice and name when you feel lonely, isolated or excluded and being able to share this with a colleague or a supervisor will also be important to communicate. Finally, it is important to remember that remote workers still need and benefit from vacation!

### *2. Wellness for the Lawyer Manager*

Modeling wellness and self care is an act of leadership. As a manager of lawyers, modeling boundaries between your work and personal time (including taking and protecting vacation time), your ability to bring colleagues together and saying out loud when that connection is needed or helpful, and consistently checking in with yourself will be noticed by your team – even when you are working remotely. Checking in with your team to ensure they are doing well, that you can see them either in person or on zoom on a regular basis will be key to supporting attorney wellness. Managers may be in the best position, as well, to ensure lawyers on their team

[32] *See id.* and ABA Journal article attached to this manuscript.

[33] Thanks to Patty Beck for her generosity in sharing wellness tips and experiences in support of this presentation. A collection of Patty's articles can be accessed for free, here: https://www.pldf.org/page/AttorneyWellness and her website, here: https://abalancedpracticellc.com/.

are aware of opportunities available for education and/or activities supportive of lawyer wellness either offered in the workplace or through the local bar association. Most bar associations also partner with "LCL" Lawyers Concerned for Lawyers programs which have really ramped up services during the pandemic, offering sessions relating to time management, nutrition and meal planning, care for lawyers with specific concerns like depression, anxiety and/or attention deficit disorder, and also offer free yoga, mindfulness and/or mediation sessions on-line.

## V. Conclusion

If the pandemic has taught us anything, it has taught us to be flexible and to always remember to prioritize the things that matter. For lawyers, revisiting the rules of ethical and professional conduct during this time is key; no matter all of the change we have experienced over the past two years, the ethical and professional responsibilities of lawyers remain critical to the ability to provide quality legal services to the institutions of higher education that we support.

## V. Appendix -- Related Model Rules

A. Client-Lawyer Relationship *Rule 1.1: Competence*. [34] A lawyer shall provide competent representation to a client. Competent representation requires the legal

[34] *Comment:* **Legal Knowledge and Skill** [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

**Thoroughness and Preparation** [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

**Retaining or Contracting With Other Lawyers** [6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4

knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

1. *Rule 1.3: Diligence.* [35] A lawyer shall act with reasonable diligence and promptness in representing a client.

(communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

**Maintaining Competence** [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject

[35] *Comment:* [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and

## 2. *Rule 1.4: Communications.* [36]

take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

[36] *Comment:* [1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

**Communicating with Client** [2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

**Explaining Matters** [5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

**Withholding Information** [7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

B. Counselor

1. *Rule 2.1: Advisor.* [37] In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer

interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders

[37] *Comment:* **Scope of Advice** [1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

**Offering Advice** [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course

may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

C. Law Firms and Associations

1. *Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer*[38]

of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[38] *Comment*: [1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

2. *Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law*[39]

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

[39] *Comment*:

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically

present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rule 7.1.

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also *Model Rule on Temporary Practice by Foreign Lawyers*. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See *Model Rule for Registration of In-House Counsel*.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., *Model Rule on Practice Pending Admission*.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the

when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.3

advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

D. Maintaining The Integrity of The Profession

1. *Rule 8.4 – Misconduct* [40] It is professional misconduct for a lawyer to:

[40] *Comment:* [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

# IN A STATE OF FLUX – THE FUTURE OF EMPLOYMENT COMPLIANCE AMIDST THE PANDEMIC'S EFFECTS

November 10 – 12, 2021

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*Excerpt from pps. 12-18 of the original manuscript.*

III. Remote Work as a Reasonable Accommodation – Employers must offer qualified individuals with disabilities reasonable accommodations in order to ensure that applicants and employees have equal access to employment opportunities and benefits. *See* 42 U.S.C. §§ 12101-12117; 29 U.S.C. §§ 793(d), 794(d) (for convenience, this outline will refer to both the Americans with Disabilities Act and the Rehabilitation Act, inclusive of amendments, as the "ADA"). Accommodations that impose an "undue hardship" on the employer need not be offered under the ADA. *See* 29 CFR § 1630.9(a).

a. Guidance from the Equal Opportunity Employment Commission (EEOC) has long maintained that employers are not obligated to create or maintain "telework" programs under the ADA. *See* EEOC Enforcement Guidance on Home/Telework as a Reasonable Accommodation, 2003 (available at https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation). This guidance does recognize that telework may be a reasonable accommodation in some circumstances when the disabled employee can still perform their "essential job functions" while working remotely. *Id*. at 4; *see* 29 C.F.R. § 1630.2(n). Ultimately, the reasonableness of telework, as with any accommodation, should be determined through an interactive process. *See* 29 C.F.R. § 1330.2(o)(3).

Factors to evaluate during this process include:

1. The employer's ability to adequately supervise the employee;

2. The necessity and availability of equipment and tools;

3. The need for face-to-face interaction with customers, coworkers, or associates; and

4. Access to documents or information located in the workplace. *See* EEOC Enforcement Guidance on Home/Telework as a Reasonable Accommodation, 2003, *supra*.

This final consideration likely carries less weight in the era of cloud computing than it did in 2003, but analogous information security concerns may be more relevant now than ever.

b. More recent EEOC guidance has reiterated this framework for evaluating telework requests. *See* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, 2021 at D.15 (available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws). Perhaps most importantly, EEOC has opined that allowing telework during the pandemic does not bind an employer to that arrangement. *See* id. Rather, essential job functions that were excused can be reintroduced and the feasibility of telework can be reexamined in order to assess whether it still allows for the completion of essential functions or imposes an undue hardship on the employer. *See* id.

    i. In the context of higher education, faculty whose courses were taught online or in hybrid format during the height of the pandemic may have felt the effects of transitioning from remote to in-person most acutely (or at least challenged the changes most vigorously). Many of these faculty, disabled or not, would prefer to continue to teach online and argue that their ability to do so effectively proves the reasonableness of their request. An interactive process can rightfully consider the reasonableness of such requests in light of current circumstances. In the context of teaching faculty, such considerations may include the effects that online learning has on educational outcomes, enrollment, retention, and even the mission and character of the college or university experience itself. *See generally* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws at D.15, *supra*; *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565, 573 (7th Cir. 2019), as amended (Aug. 9, 2019)

(confirming that the changing needs of an employer can affect and alter essential functions of an employee's position).

ii. However, in its first lawsuit connected to a request for an ADA accommodation related to COVID-19, the EEOC recently filed suit against an employer for denying and a partial remote work accommodation, and ultimately terminating, an employee who claimed she needed the accommodation based on increased risk from COVID-19. *EEOC v. ISS Facility Servs., Inc.*, No. 1:21-CV-3708-SCJ-RDC (N.D. Ga. 2021). The employee had been teleworking since the beginning of the pandemic and the accommodation request was prompted her employer's return to in-person work. This action suggests that the EEOC may consider the changing nature of workplaces during—and after—the pandemic when considering what accommodations are reasonable as opposed to an undue burden. Furthermore, the EEOC has suggested that pandemic-related telework "could serve as a trial period that" may show whether or not an "employee with a disability could satisfactorily perform all essential functions while working remotely." *See* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws at D.16, *supra.*

IV. Reasonable Accommodations for Remote Workers – Determining that an employee may telework may not be sufficient. Many employees will need assistance and accommodations in order to do their work from a remote location. Moreover, when employers institute large-scale teleworking arrangements—as was done during the early stages of the COVID-19 pandemic—some employees will require aides and accommodative measures in order to effectively perform their essential functions from a remote location.

a. Ensuring Digital Accessibility – While many web-based and software programs may advertise accessibility features and even come with reassuring Voluntary Product Accessibility Templates (VPATs), there are two ways to confirm that software and platforms are truly accessible: testing and talking.

i. Testing the Accessibility of Technology – Ideally, thorough testing should occur during the procurement stage. If your campus does not have a digital accessibility officer or other expert capable of performing such testing, there are services that will perform it. There are also industry groups working on large scale testing of widely-used platforms. The important thing is to ensure that broad accessibility is treated as an essential element of any large-scale information technology asset procurement.

ii. Asking Employees – It is important to keep an open line of communication with employees when teleworking arraignments are made or there are changes to the programs and platforms that your campus uses. This should be done proactively in order to head off problems and ensure an effective transition. For instance, deaf or hard of hearing employees should be consulted regarding the effectiveness of the captioning within a new or updated remote meeting platform.

b. Some titles and sections of the ADA explicitly make effective communication a touchstone of ADA compliance. *See* 28 CFR Part 35, subpart E. Whether these sections—specifically Title II—apply to employment has produced a circuit split. *Compare Bledsoe v. Palm Beach County Soil and Water Conservation District*, 133 F.3d 816 (11th Cir. 1998) *with Brumfield v. City of Chicago*, 735 F.3d 619 (7th Cir. 2013). However, there is no question that ensuring that employees can effectively communicate with colleagues, students, and administrators must be a first order compliance concern. When teleworking, some of the informal accommodation/coping measures that disabled employees may use—e.g., visiting colleagues or offices in person, lip reading, converting documents into readable format—may be unavailable. Therefore, it is essential that all phone systems, meeting platforms, messaging services, and even online forms, are accessible to all employees regardless of disability.

V. Other Remote Working Considerations

a. Time Tracking – Under the Fair Labor Standards Act (FLSA), employers must pay wages and overtime to (non-exempt)[1] employees for all hours that an employee is suffered or permitted to work. 29 U.S.C.A. § 203(g); *see* 29 CFR § 785.11.

i. It is incumbent on an employer to track its employees' work. *See Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 388 (6th Cir. 2016).

ii. The FLSA makes no distinction between hours worked remotely as opposed to hours worked on site. *See* 29 C.F.R. §§ 785.12.

[1] Though beyond the scope of this presentation, information on classifying employees for wages and overtime purposes under the FLSA can be found here: U.S. Department of Labor, Wage and Hour Division, Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act [September 2019], available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17a_overview.pdf.

iii. Employers must compensate employees even for unscheduled time worked and even when the employer has a policy against such work. *See* 29 CFR § 785.13.

iv. Employers must exercise "reasonable diligence" in tracking teleworking employees' work hours. *See* U.S. Dep't of Labor, Wage and Hour Division, Field Assistance Bulletin No. 2020-5 (August 2020), available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf. In practice, this means that college and university employers must have a procedure in place to track nonexempt employee work, especially when such work is performed remotely.

b. Workers Compensation – Employers are generally responsible for providing workers with a safe environment in which to perform their duties and in most states employers must maintain workers compensation insurance to protect both workers and employers from the financial impact of on-the-job injury and illness. When an employee suffers an injury or illness while performing job-related duties, workers' compensation coverage will usually apply regardless of the location where the work was being performed. *See* Alex C. Dell and Edward Obertubbesing, *Workers' Comp and Working at Home*, N.Y. BAR JOURNAL (July 20200); *Fine v. S.M.C. Microsystems Corp.*, 75 N.Y.2d 912, 914 (1990).

i. While the burden is typically on the employee to prove that an injury or illness is attributable to a work-related activity, this is generally a low bar, especially when teleworking is routine. *See generally Matter of Hille v Gerald Records*, 23 NY2d 135, 139 (1968); *Bobinis v. State Ins. Fund*, 235 A.D.2d 955, 956 (1997) (noting that an employee's home can achieve "the status as a place of employment where the record showed that he regularly took work home, had work equipment at his house and it was necessary and beneficial to his employer for him to perform duties at home").

ii. Many types of cumulative injuries may be more likely to occur when an employee is spending significant time at an impromptu at-home workstation that lacks ergonomic features that are common in a modern workplace. For this reason, it may be advisable to offer "home office set up" training for employees and provide some support for things like chairs, desks, and keyboards. *See* Appendix A SUNY Workplace Flexibility – Telecommuting (allowing for transfer of work-assigned equipment to a remote worksite).

iii. Since state rules can vary widely and coverage can depend on policy language, college and university employers should consult with local

experts and coordinate with their policy providers in order to ensure appropriate coverage. *See generally* Allen Smith, *Manage Workers' Compensation Claims from Telecommuters*, SHRM (2020) available at https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/telecommuters-workers-compensation-claims.aspx.

c. Multi-jurisdictional Workforce – In many situations, it is the jurisdiction that the work is performed in that will regulate the employment relationship. Therefore, employers that allow telework must be aware of the location where employees are performing the work.

    i. Employment of workers through telework agreements in other states can expose an employer to multiple and sometimes overlapping employment regulation. Employers that allow workers to reside in other states should be prepared to comply with that state's labor/employment regime, including:

        1. Workers' Compensation
        2. Tax/withholding;
        3. Wage and hour regulation;
        4. Anti-discrimination laws;
        5. Paid time off; and
        6. Right to work.

    ii. When an employer chooses to allow employees to work from a foreign jurisdiction, that employer is likely subjecting itself to the labor and employment laws of the country where the employee is located. Aspects that need to be considered include:

        1. Wage requirements;
        2. Health benefits;
        3. Pension / retirement;
        4. Privacy laws (e.g., GDPR);
        5. Vacation and leave;
        6. Taxes; and

7. Establishment and registration requirements.

iii. If a college or university employer is not prepared to become versed and comply with another state or foreign country's legal requirements (usually through retention of local counsel), long-term remote work from outside of the institution's home state should be prohibited.

1. The cost and complication of foreign labor/employment compliance can often be mitigated by utilizing a foreign partner or professional employer organization to serve as the employer of record.

2. Do not assume that another country will respect the "independent contractor" label that is widely used in U.S. jurisdictions. In many foreign jurisdictions, pay-for-work will be presumed to create an employment relationship.

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Webinar

# Practical and Legal Considerations for Managing a Multi-State Workforce

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## Agenda

- Framing and Context
- How Do We Start?
- Principals for Assessing Risk
- Practical Considerations
- Insurance Considerations
- Privacy/Cybersecurity
- Union Issues
- Personal Jurisdiction and Conflict of Laws
- Practical Takeaways

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# How Did We Get Here?

## How Do We Start?

- Prospective Requests
- Retroactive Requests

## General Principles for Assessing Risk

Employment laws vary from state to state

Courts/agencies typically apply the law where employee is located

A physical campus presence is not required

## General Principles for Assessing Risk

- What laws should we be concerned about?
  - Business registration
  - Required notices/postings/policies
  - Background checks
  - Wage and hour
  - Benefits
  - Taxes
  - Workers' compensation
  - Leaves
  - Discrimination
  - Whistleblower
  - Required trainings
  - Expense reimbursements
  - Severance agreements

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# General Principles for Assessing Risk

Blue states = more regulated

Red states = less regulated

Remedies and SOLs vary

First Steps

Which states/cities are your employees in and how many?

What compliance issues do you struggle with already?

Constitutional issues for public institutions

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# Practical Considerations

- Time zones
- Workday flow
- In-person requirements
- Equipment/supplies

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# The Hundred Thousand Dollar Question

"We would like to allow remote employment in State X. What do we need to know about key differences in employment laws of State X vs. our own state?"

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## State Specific Considerations

- Business Registration
- Notices
- Required Policies
- Background Checks/Ban the Box Laws
- Drug Testing
- Wage and Hour Laws
- Taxes

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# State-Specific Laws

| Leaves | Workers' Compensation/OSHA |
| --- | --- |
| • Paid leave laws<br>• Mini-FMLA laws<br>• State disability funds<br>• Obscure protected leaves | • Carrier Issues<br>• Home workspaces |

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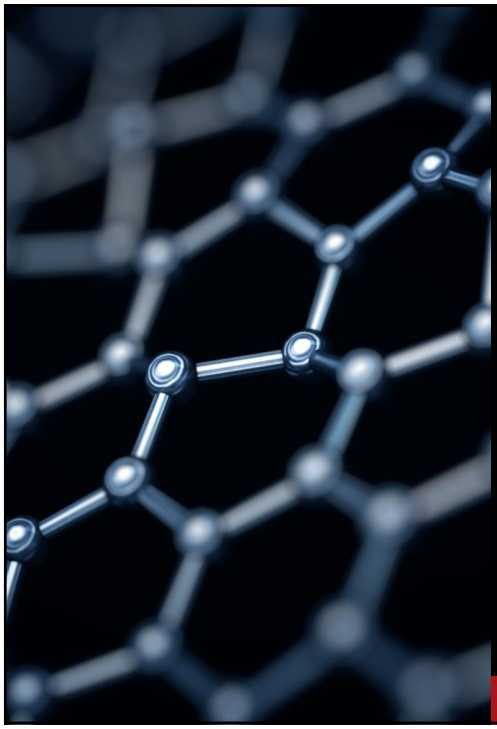

# State-Specific Laws

**Discrimination/Harassment**

- Protected classes
- Remedies for violations
- Administrative exhaustion

**Whistleblower**

- Protected activity
- Covered entities

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# State-Specific Laws

- Required harassment training
- Expense reimbursement
- Severance agreements
- Other

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# State-Specific Laws

- Independent Contractors
  - Common law vs. statute
  - Different agencies = different tests
  - New laws (CA, MA)

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Insurance Coverage Considerations


Privacy/
Cybersecurity
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# Labor Issues

- Does your contract allow remote work?
- Unit scope issues
- Subcontracting
- Direct dealing

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## Labor Issues

- Non-Union Environments
  - Right-to-work states
  - Protected, concerted activity
  - Organizing in an unfamiliar jurisdiction
  - Dispersed workforce

# Litigation Issues

**Personal Jurisdiction**

- Where can you be sued?
- Can you sue an employee in your home state?

**Venue**

- Litigating in an unfamiliar jurisdiction
- Choice of counsel

**Conflicts of Laws**

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# Practical Takeaways

- Know where your employees are located
- Develop an approval process
- Understand compliance requirements
- Monitor for new developments in key states
- Gather resources

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