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Rebecca Torrey represents companies in litigation in federal and state courts nationwide. She is an across-the-board employment lawyer with significant trial experience representing management in bet-the-company cases involving wage and hour and fair credit class actions, trade secret, wrongful termination, discrimination and fair pay claims. Rebecca is committed to developing a client's understanding of the law to improve human resources practices and guide business forward. Rebecca has been ranked by ChambersUSA multiple times and is honoured by her peers as one of the Best Lawyers in America, recognised for her trial successes as a Fellow of the Litigation Counsel in America.

The Torrey Firm represent employers in litigation and advise management on a broad range of employment matters. From creating effective personnel practices to defending employers at trial, we have the experience and judgement to help manage the maze of regulation and the risk of litigation that comes with it. As workplaces reflect societal developments, changes in personnel practices will occur. We assist businesses in looking ahead to improve human resource practices and reduce unnecessary risk.

QUESTION ONE

Are you seeing a shift in employee/workforce expectations in your jurisdiction, when it comes to flexibility, length of contract, remote working, hours of work, etc? How can clients both reflect this and protect their business interests in employment contracts?

In the US, and in California in particular, there has been a remarkable shift in employee expectations over the past few years among white-collar employees who we would have previously described as "office workers". This shift does not necessarily apply to employees working in other sectors, including retail sales, hospitality, construction, transportation, manufacturing, and domestic workers, as their jobs have not significantly changed with respect to remote work.

Many office jobs in California metro areas have become either hybrid or entirely remote. This is due to employees' insistence that they are able to work remotely and flexibly at least part of the time, along with employer adjustments to pandemic conditions. The expectation of at least some remote work is driven by the younger segment of the workforce, a group critically important to employers during talent shortages for the survival of the business. In our experience, most white-collar employees have a preference for the comfort and convenience of working from home, as well as the opportunity to reduce the amount of time they spend commuting. It is not uncommon for urban workers to commute to work a minimum of 30 to 60 minutes each way, with remote work offering extra hours of free time that would have been spent going back and forth to work.

Apart from fully remote work, the most common hybrid work schedule used currently is two or three days in the office with the rest of the week flexible. This schedule often demands less total office space, and there is a trend towards office hoteling where employees share desk space with others coming in on alternative dates. A growing number of employers are providing the flexibility of up to several months remote work from other states or countries, an option particularly attractive to younger workers. In most cases, it is a perk not an entitlement and

can present some complications for employers in terms of supervision, coordinating work schedules between time zones and various regulatory matters.

Most US based employees are at-will employees, a practice that has not changed with remote, hybrid or flexible work schedules. For that reason, relatively few employees in the US have contracts for any specified term of employment. While certain employers are willing to flex hours to accommodate part time work that provides employees with flexibility to do other work, pursue travel or other hobbies, be with family or whatever they choose, that practice has not been adopted across the board by most employers. Labour shortages have required employers in some instances to accept part time schedules in order to hire and retain qualified employees on the terms they are willing to work.

As the movement towards a transient workforce has grown, the law regarding contractor status has tightened in California. With few exceptions, most workers in California are presumed by law to be employees regardless whether they are classified as such by the entity for which they perform services. This removes as a viable option the inclination to classify workers as contractors to simplify compliance.

QUESTION TWO

What is the biggest benefit, and the biggest risk, to businesses facilitating a more transient workforce?

The biggest benefit to businesses in facilitating a more transient workforce is being able to meet labour needs by offering more flexible terms than the competition. Many younger white-collar workers will not even consider a job in a traditional office setting without hybrid and/or remote work options. Satisfying this desire for more flexible conditions of employment has left employers scrambling to develop options and market themselves as an attractive place to work.

In addition to flexible schedules and remote or hybrid work, many employees request to work where they chose, including in other locales, states, and countries where employers don't have a presence or an office. Managing these expectations and offering workable options that facilitate employee preferences, satisfy regulatory requirements and garner productive results are serious challenges to employers that have not previously considered a dispersed workforce and its impact on company culture. The compliance requirements and associated risks can be very significant and require some planning and compromises.

QUESTION THREE

How are you helping your clients to manage legislative and taxation issues around their transient workforce? For example, are there bi-lateral agreements with other jurisdictions or tax provisions to be aware of?

With respect to tax compliance, clients should use a payroll service or software that accommodates workers in all the US states and provides a fully compliant process for the payment and withholding of taxes for both employer and employee. Often this requires business registration in other states and

TOP TIPS

Preserving company culture and retaining staff in flexible working arrangements

Preserving workplace culture requires careful thought about a company's values and how to cultivate and encourage employees to embrace them. Employers need to develop new and interesting ways for employees to communicate with each other and get to know co-workers not in a centralised location. This may involve virtual coffee breaks, participatory activities, new ways to air concerns, as well as informal discussion and mentoring. Digital connections don't in-and-of-themselves bind people together like personal working relationships ideally can do.

The most common complaints I hear from departing employees include the lack of training, inadequate supervision and the absence of enough person-to-person contact, including no real relationship with one's supervisor. Not all employees work well remotely, and many supervisors are ineffective with employees who they don't personally interact with on a regular basis.

Management training is more critical with the transition towards a transient workforce. Employers must reconsider how to incentivise and assess performance and how to communicate both strengths and shortcomings in a way that supports individual development. The shift towards a transient workforce is a major societal change requiring new thinking about optimal ways that people may work together while working apart.

cities, a new employer tax identification number and the filing of corporate tax returns and payment of taxes on revenue earned where employees are located. In order to avoid costly legal and financial surprises, it is critical that businesses carefully consider these issues with an accountant and/or tax attorney in connection with each jurisdiction where they permit employees to work.

Employers should regularly review their personnel policies and practices and raise the level of internal sophistication in terms of human resources and personnel management. Companies are expected to comply with the laws applicable to the location where employees actually provide services even if the business does not have a physical presence or office location there. For a remote workforce within US borders, that would include compliance with federal and state laws and regulations, as well as local ordinances. Employment laws vary significantly across the states with the most common differences found in minimum wage requirements, the method and timing of payment of compensation, leaves of absence, paid sick time benefits, harassment and discrimination protections and employer recordkeeping requirements.

For US employees working outside the country, it is critical that employers get local legal and accounting assistance or risk being out of compliance in very significant ways.