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Worldview

Employment

GROWTH IN TELECOMMUTING RAISES LEGAL ISSUES FOR US EMPLOYERS

With as many as 30 million Americans working from home at least one day per week, "telecommuting" is a growing trend among US employers. Any employer considering introducing such a policy should, however, ensure it understands the potential legal ramifications for its business before doing so.

Fuel prices and severe weather are the most often cited reasons for permitting telecommuting in the US. However, employers also view it increasingly as a way to save time and money and to improve the morale of their workforce. Employers who permit telecommuting report less sickness and other personal leave taken by their employees, lower turnover (which saves hiring and recruiting costs), reduced office and parking space needs and increased productivity.

Telecommuting can, however, also raise a number of legal questions in relation to the Americans with Disabilities Act ("ADA"), workers' compensation programs and workplace safety, among others.

Under the ADA, employers must offer reasonable accommodations or adjustments for employees with qualifying disabilities. By implementing a telecommuting policy, an employer could be opening the door for a court to find that the practice is a reasonable accommodation for employees under the ADA. If an employee argues that telecommuting is a reasonable accommodation, the employer would have to either permit the employee to work from home or prove that his physical presence at the work site is an essential component of his job. The latter may be more difficult to show if other similar employees have been permitted to work from home.

Telecommuting also creates concerns for employers regarding workers' compensation coverage. Generally, workers' compensation covers injuries arising out of the employment. Although this standard is not always easy to define, the lines can become even more blurred for the telecommuter, as workers' compensation law does not typically distinguish between on-site and off-site employees. As telecommuters may not have standard working hours the question of whether an injury at home is covered can be a tricky one. An injury incurred while stepping out of the shower, or going up and down the stairs may well be deemed to have arisen out of the employment, depending on the circumstances. In one US State it was held that a telecommuter who injured himself while salting his driveway against the snow was entitled to compensation.

What about accidents that occur while a telecommuter is travelling between his home and the employer's place of business? Typically, an employee is not covered for an injury that occurs during a commute to or from work. However, accidents that occur after an employee's work day has begun are often compensable under workers' compensation law. Generally, this includes travel between work sites so telecommuters who are injured travelling to their employer's office may well be entitled to compensation.

Yet another issue for employers of telecommuters to consider is the Occupational Safety and Health Act 1970. This Act generally requires US employers to provide a workplace free from hazards that are likely to cause serious injuries or harm. The Occupational Safety and Health Administration ("OSHA"), the body responsible for enforcing the Act, considers that the Act covers home-based employees as well as other off-site employees. OSHA has indicated that it will not conduct routine investigations of home-based work sites, but it will respond to complaints and will fine employers that maintain unsafe home-based work sites. For example, if a home office is maintained in a basement and the stairway leading to the basement is unsafe, OSHA has indicated that this would constitute a potential breach of the Act.

These concerns are certainly not exhaustive, but they do highlight the need for employers to have a well thought out and detailed telecommunications policy in place before implementing a telecommuting scheme, thus ensuring the benefits of telecommuting outweigh the risks.

Kevin Hess, Associate, Columbus, Ohio

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GERMANY EASES RESTRICTIONS ON FIXED-TERM WORKING

The German Federal Labor Court recently made it significantly easier for employers to enter into fixed-term employment contracts.

Under the German Part-time and Fixed-term Employment Act employers can only enter into fixed-term contracts if there are "substantive" grounds for doing so, for example if they need someone to work on a particular project or to cover a maternity leave or, if no such grounds exist, provided the contract is for no longer than 2 years. According to the Act, an employer cannot enter into the second type of contract if it has had a previous employment relationship with the employee. If an employer enters into a fixed-term contract and it subsequently transpires that the employee has worked for it before, however briefly and however long ago, the fixed-term contract is converted into a permanent contract of employment.

These requirements have created all sorts of problems for German employers. Before entering into a fixed-term contract they have been forced to make enquiries to see if they have previously employed the individual, even if it was only for a short period of time. If unable to satisfy themselves that no previous employment relationship had existed, they generally would not agree to enter into a fixed-term contract – something that was not in the interests of either employers who do not then get the person they want or would-be employees who do not then get the work.

On 8 April 2011 the Federal Labor Court eased these restrictions on entering into fixed-term contracts to some extent. The case in question involved a teacher who had been employed from 1 August 2006 to 31 July 2008 on a fixed-term contact. She claimed that the contract should be considered as permanent because she had also worked a total of 50 hours as a student for the employer between November 1999 and January 2000. Based on previous case law she would have been entitled to be treated as a permanent employee because of her previous employment relationship. The Federal Court, however, held that the fixed-term contract was valid. It said that despite the express wording of the Act it is possible to enter into a binding fixed-term contract provided that the employee has not worked for the employer for at least 3 years before entering into the fixed-term contract.

This decision should give employers greater flexibility to hire employees on a fixed-term basis and reduce (though not remove altogether) their need to look backwards at past hires.

Martin Falke, Partner, Berlin

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SPANISH COURT DEFINES LENGTH OF SERVICE FOR COMPENSATION PURPOSES

The Superior Court of Justice of Madrid recently ruled that when an employer is calculating an employee's length of service for the purposes of making a compensation payment to him it should take into account his entire service with various group companies, not just his service with the last group employer.

In Spain a dismissal will only be fair if it is for one of the prescribed reasons set out in the Workers' Charter, for example misconduct, capability, etc. If a dismissal is found to be unfair, a Labor Court can order the employer to re-instate an employee or alternatively to pay him a compensation payment based on his length of service with the employer, up to a maximum of 42 months' salary.

In practice, rather than arguing about whether they have a potentially fair reason for it, many Spanish employers simply dismiss an employee, acknowledge it is unfair and then pay compensation. From a legal perspective this approach does not imply any kind of wrongdoing on the part of the employer. It is simply seen as a straightforward and quick way of effecting a dismissal. Any payment can be made tax-free, up to the maximum 42 months' salary.

In light of the Superior Court's recent decision, however, any employers considering adopting this approach should ensure that if an employee has worked continuously for a number of group companies they calculate any compensation payment for dismissal based on his first date of service with the group. A lack of due diligence here could mean that any compensation payment is higher than first anticipated.

Antonio Elcarte, Associate, Madrid

FRENCH EMPLOYER LIABLE FOR THIRD PARTY HARASSMENT

Earlier this year the French Supreme Court held for the first time that employers may be liable for acts of moral harassment (effectively bullying) carried out by a third party.

The Court ruled that an employer was responsible for acts of bullying and harassment of its employees carried out by an external service provider engaged by the employer to train its staff. It said that although the employer was not at fault it could not escape responsibility for the acts of a third party who had authority over its employees.

This ruling is in line with other Supreme Court decisions which have held that employers will be liable for moral harassment if they have done nothing to stop it taking place in the workplace. It serves to reinforce the importance of employers taking active steps to prevent acts of harassment taking place both between staff and by third parties.

Jean-Marc Sainsard, Partner, Paris

CHANGES TO POLISH LAWS GOVERNING WORK CERTIFICATES

Polish employers must provide employees with what is known as a "work certificate" on termination of their employment. This is a document which sets out the parties to the employment contract, its duration, the type of work carried out, the positions held by the employee and the method of termination, as well as various other information necessary to determine the employee's rights under the Social Security system on the loss of his job. On request an employer must also provide details of the employee's salary and qualifications.

Work certificates must be issued "immediately" on termination of employment, i.e. on the actual date the employment contract is terminated or expires. As a general rule this means handing a copy of the certificate to the employee on his last day of employment. If this is not practicable, the employer must send the certificate to the employee within 7 days.

This requirement obviously placed a considerable administrative strain on employers with large numbers of employees engaged on successive fixed-term contracts, especially at a time when the Polish Government was encouraging employers to enter into such contracts to help the employment figures. It meant that employers had to issue a work certificate every time a contract expired, even if the employee was subsequently re-engaged on the same terms on another contract.

In response to concerns raised by employers, starting from 21 March 2011, new legislation has come into force. Employers are now allowed to issue one certificate covering a 24-month period, irrespective of the number of fixed-term contracts that have expired during this time. It is crucial to remember, however, that employees can still ask for a work certificate on termination of each fixed-term contract if they wish. Employers must respond to such requests within the normal 7-day timescale. Employees also have the right to ask for changes to be made to any work certificate if they consider it to be inaccurate in any aspect.

Employers should take their obligations to issue work certificates seriously. A failure to issue a timely or proper certificate can give rise to a claim for compensation of up to 6 weeks' pay. The State Labor Inspector also has the ability to impose fines for non-compliance.

Malgorzata Grzelak, Partner, Warsaw

FURTHER INFOMATION

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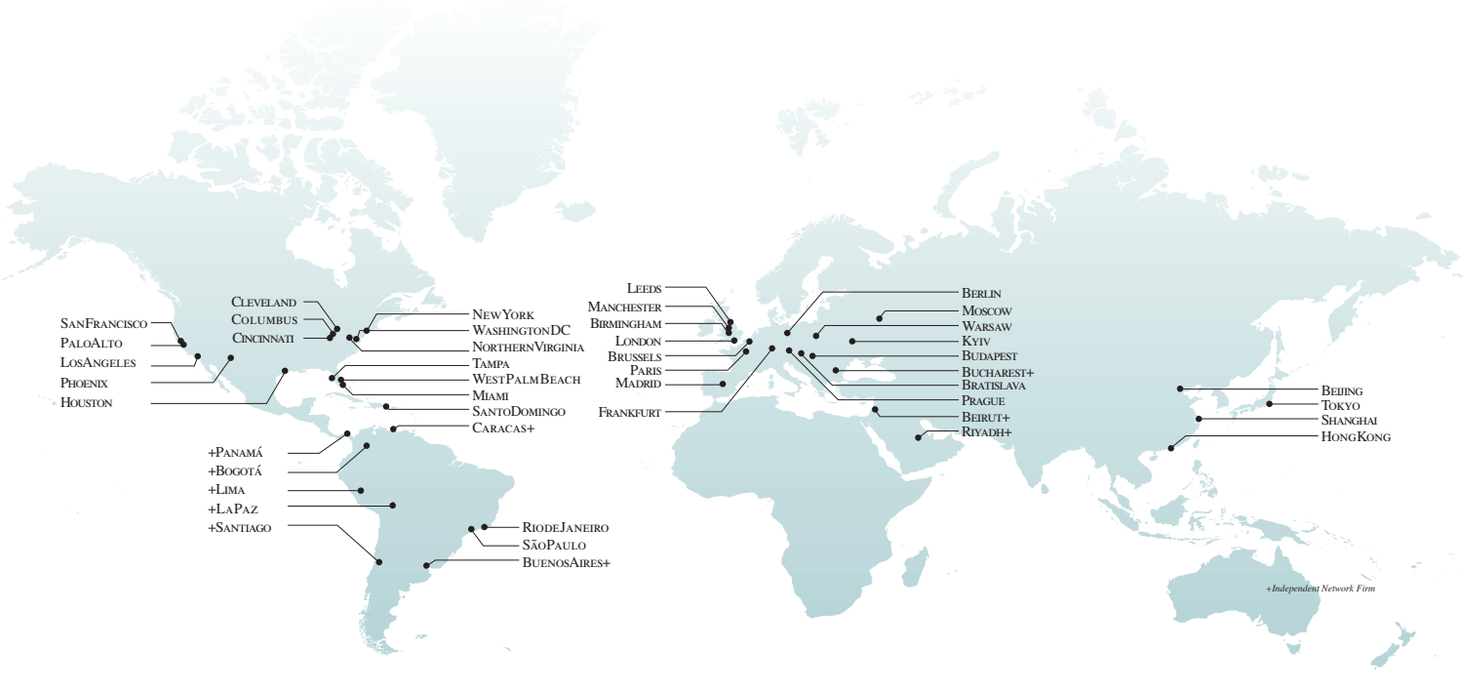

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