THE LITTLER REPORT

MITIGATE OR LITIGATE: Flexible Working and Legal Exposure

by Littler Mendelson and FlexPaths

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This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

With over 800 attorneys and 50 offices, **Littler Mendelson** is the nation's largest law firm exclusively devoted to representing management in employment and labor law matters. **FlexPaths**, a certified women-owned business founded in 2005, is a leading provider of web-based and consultative flexible working solutions for corporations, governments and people seeking employment in organizations that have a flexible working culture. Littler presents this paper with FlexPaths discussing the growth of flexible work, the legal and policy implications of flexible work, and providing best practices recommendations for employers.

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MITIGATE OR LITIGATE: FLEXIBLE WORKING AND LEGAL EXPOSURE

I. INTRODUCTION—TRENDS IN FLEXIBLE WORK by Sandy Burud of FlexPaths

Flexible work is the future of work—a continual evolution that characterizes the "new normal" of a global working culture. The legal implications of this transformation in how, when, and where work is done are substantial. Its rapid growth makes it essential that employers understand and mitigate legal exposure associated with how flexible work is executed.

What is Flexible Work?

This paper will consider legal issues related to three basic types of flexible work: flexible work schedules and locations (*e.g.*, telework), less than full-time work, and flexible employment relationships.

Flexible work schedules and telework—the most familiar forms of flexible work—are possible at most companies today. According to the Society of Human Resource Management, 51% of companies have flexible work schedule options such as a change of start or stop times or compressed work weeks (four ten-hour days; "9-80s"—80 hours worked over nine days, etc.). Slightly more than half of companies with flexible schedules allow all employees to work on a flex schedule with certain core hours.[1]

Sixty percent of companies have telework/remote/virtual work options (work from home, a satellite office or other location) every day or a few days a week. Access to telework is typically restricted to specific jobs, but 16% of employers allow all employees to work remotely.[2]

In addition to flexing the "when" and "where" of work, employees can increasingly flex how much. They can work on a reduced schedule (temporarily or longer term), share a job, phase into retirement or back to work after a leave, or self-fund a sabbatical. Fifty-eight percent of companies have part-time or reduced work schedule options; 15% have phased retirement; 11% have job sharing. Thirty-six percent allow employees to reduce work hours during a transition period, e.g., after adoption of a child; 64% of these allow all employees to reduce work hours.[3] While many employers have had part-time jobs, what is new is the fact that less than full-time positions are now possible in salaried professional, advancement-track, managerial and executive positions.

A decade ago, flexible work options were limited to *formal* arrangements negotiated in advance with a manager and oftentimes HR. Today they include *informal* change in hours or place on the spur-of-the-moment—when a snow storm shuts down the mass transit system, people work from home.

More companies and employees are also flexing the employment relationship—combining or alternating contingent, contracted and freelance work with regular employment.

How is Flexible Work Changing?

The familiar forms of flexible working (flexible schedules, telework, reduced work schedules) are morphing into what is simply a more fluid approach to the time and place in which work is done. From Starbucks at midnight—it is becoming "anytime, anywhere" work—powered by technology and expected by the Facebook generation. Ubiquitous broadband, cloud computing, smart phones and laptops are creating a "virtualization" of the workplace. The workplace, in fact, isn't always a "place" anymore.

This change is a metamorphosis away from the traditional work schedules, central work locations, and linear careers that are artifacts of the Industrial Age when a machine-driven economy prospered with a homogeneous workforce working 9-to-5 at a common location full-time without interruption throughout a career. That Age was characterized by work done in the same place, at the same time, in the same way—centralized, synchronized, standardized.

But now, in this age of knowledge and technology, human ideas and attention, not machines, drive performance. Business success requires mobility, versatility, and innovation. Work environments must take on the organic nature of humans acting like humans, rather than like machines. People are more likely to generate new ideas and respond to the diversity of customers when their own work environment promotes their individuality and autonomy.[4]

Flexible working at its essence reflects this transformation from a mechanized, one-size-fits-all approach on which current business practice (and regulation) is based, to a customized way of working, unique to the individual and the business situation.

It is essential to a knowledge-based culture because it is a fundamental shift in the locus of control, suited to knowledge work. Until now *management* dictated when and where work was done; now *employees and teams* are more effective if they exercise more influence and choice. Knowledge workers know best how to get their jobs done. They should be accountable for results, not just activity and given more autonomy to work in the way they work best.

What is Driving the Growth of Flexible Work?

Business Imperatives

Initially employers "allowed" flexible work to accommodate employees' complex lives. Flexible work was a program, a perk, a benefit, a reward. Now, employers are actually *promoting* it, as a business-driven tool to support other business goals, which is why its growth is accelerating.

The business goals it supports are varied. As fewer jobs require a physical presence, businesses encourage (even require) employees to work remotely to save real estate costs and reduce their carbon footprint. In an increasing number of jobs, there is no "office" to go into. Companies are "home-shoring" customer service and other jobs instead of "off-shoring" them, eliminating facilities space and boosting productivity through increased employee engagement.

Disaster planning managers are insisting that teams be equipped and trained to work remotely so the business can sustain operations on short notice in an emergency. Business operations can be interrupted by something as minor as a power outage or as large as a major disaster. Disaster preparedness and business continuity have become a priority as one in five U.S. businesses will suffer a disaster that causes it to cease operations for a time.[5] Roughly two-thirds of the companies that go through a severe crisis fail within two years.[6] If the workforce is already equipped, trained and proficient at working from home or an alternate workplace, it can literally save the business. According to a 2008 survey of 450 private companies, when a company has telework, it is four times more likely that employees can continue working if offices are closed due to a disaster.[7]

Expanding flexible work also helps employers lower health care costs, by reducing employee stress, depression and burnout. Teleworkers and workers on compressed work weeks, for example, use the time they would otherwise spend commuting to exercise and sleep more[8] and follow better health practices in general. [9]

Businesses have avoided the disruption of wholesale layoffs by offering employees the opportunity to work on a reduced work schedule–for a short time or permanently. The business can reduce overhead, retain employees with institutional knowledge that would have been lost through downsizing, and restore operations more efficiently.

Finally, staggering employees work hours via flexible scheduling enables a business to serve customers over longer service hours and in more time zones. Forty-five percent of companies say the demand for 24/7 services prompted them to adopt flexible work options.[10]

External Catalysts

In addition to employers embracing flexible work for these business-driven reasons, external forces are also pushing it for the public benefits it yields.

Many states and municipalities, the Environmental Protection Agency (EPA), and policy makers are promoting flexible work for environmental reasons. Over 20 states have invested in establishing coordinating agencies to facilitate telework. Flexible schedules, compressed work weeks and telework all reduce the number of commutes and shift travel toward off-peak hours.

By one estimate, $1 trillion (7.2% of GDP) is wasted annually in time and vehicle expenses commuting.[11] Increasing the number of full-time equivalent teleworkers by 10% would reduce gasoline consumption by 4.4 billion gallons per year, as people commuting to work in personal vehicles consume 44 billion gallons per year. Commuters in private vehicles also release 424 million tons of carbon dioxide into the atmosphere a year,[12] 23 million tons of carbon monoxide, 1.8 million tons of volatile organic carbons and 1.5 million tons of oxides of nitrogen.[13] Plus, an estimated 3.5 billion square feet of saved commercial space would save 35 million metric tons of greenhouse gases; the avoided construction would save another 36.4 million metric tons of greenhouse pollution.[14]

Implications of the Transformation

In the next few years we will see organizations placing much greater attention on the operational and legal issues associated with shifting to this evolving new work paradigm. While many have had flexible work policies in place, their practices often began as individual "deals" between a few highly-valued employees and their manager, often behind closed doors. Far from transparent, the intent of managers was to not open the floodgates and to limit the number of such deals. These ad hoc arrangements were not only deliberately invisible but inconsistent and even discriminatory, often relying on a single manager's attitude, knowledge and comfort level and how the employee presented his or her "case." In many companies today, because of that legacy, flexible work is inconsistently offered, silo-ed in Human Resources as an employee "program", sometimes promoted only to certain demographic groups (to women, for example), and not integrated into business processes or culture. Employees can hesitate to take advantage of the opportunity, fearing a subtle or not-so-subtle penalty. Managers—the lynchpin—are often ambivalent, apprehensive, and ill-equipped to change how they have done things.

For many organizations the transitional stage is the most challenging—moving from discreet flexible work policies for what

are considered "non-traditional" employees, to a systemic and pervasive change in how work is done, performance measured, and teams communicate—affecting the majority. These are complex changes in organizational systems, attitudes, and behaviors and not accomplished overnight or without careful scrutiny and planning.

This change in how work is done and how people are managed calls for particular attention to the legal implications employers should be aware of in implementing flexible work practices, the most notable of which are highlighted in the following section.

II. LEGAL ISSUES RAISED BY FLEXIBLE WORK by Littler Mendelson Attorneys

This discussion is organized into three sections to cover the distinct legal issues related to: (1) telework, (2) flexible schedules and (3) flexible employment relationships. It provides a general discussion of the legal implications of flexible work based on the current state of the law and provides best practices recommendations for employers.

A. Telework—Legal Implications

For purposes of this section, *teleworking* is defined as a work relationship in which a worker spends a significant amount of the normal workday at home, using a computer, a modem, a facsimile and telephone, or other similar equipment, to conduct business for an employer. Allowing an employee to work at different locations requires special attention apart from the issues posed by employees who work flexible work hours.

1. Wage & Hour

If an employee regularly works at home, the employee may assert that the travel from home to the employer's offices is travel from one worksite to another "in the course of the day" and it is compensable work time. As a result, an employee who is hired to work at home, and who is then required to travel to the employer's premises, may also incur compensable travel time. Different courts have reached different results on this issue and further inquiry should be made before assuming that travel between home and an office or a customer site is not work time for employees who regularly perform work at home.

Similarly, an employee who is hired to work in a particular office may incur compensable work time if the employee is allowed to travel to more distant locations. For such an employee, travel "out of town" on a single day-trip generally requires payment for the travel that exceeds the commute to the regular, local office. The compensability of such time can vary with the expectations set as to where the employee will work—at the time of hire and if/when there are subsequent changes in employment. Employees who are advised in advance that they have multiple worksites are less likely to have compensable travel time when traveling to such sites.

Generally, there are relaxed rules for compensating the travel time of employees who travel on overnight trips. However, some states limit the use of the relaxed rules.

Some cost control can be attained with respect to employees who travel frequently by providing a lower rate of pay for the time spent traveling. Where a lower rate of pay is used, that lesser rate must apply to all travel whether occurring during or after the regular business day. An employer must determine whether state law will require overtime to be paid based on the wage rate in effect during the overtime hours of work or as an additional one half of the weighted average of the wages paid in that week for travel and regular work.

Points to Remember

- When applicable, employers should advise employees at the start of employment that they are expected to have more than one worksite because employees who are advised in advance that they will have multiple worksites are less likely to have compensable travel time.
- If employers provide a lower rate of pay for employees for travel time, that lesser rate must apply to *all travel*, regardless of when it has occurred. Consult your local state law to determine how to calculate overtime pay for travel time and regular work time.

2. Workplace Safety [OSHA]

There are several workplace safety-related issues an employer should be aware of when offering employees the option to telework from home.

After a congressional inquiry into the privacy and overbreadth concerns about the Occupational Safety and Health Administration (OSHA) enforcing safety and health requirements in home-based worksites, OSHA issued a compliance directive clarifying that:

- OSHA will not conduct inspections of employees' home offices.
- OSHA will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their employees.

If OSHA receives a complaint about a home office, the complainant will be advised of OSHA's policy. If an employee makes a specific request, OSHA may informally let employers know of

complaints about home office conditions, but will not follow-up with the employer or employee.[15]

Employers who are required, because of their size or industry classification, by the Occupational Safety and Health Act ("OSH Act") to keep records of work-related injuries and illnesses, continue to be responsible for keeping such records, regardless of whether the injuries occur in the factory, in a home office, or elsewhere, as long as they are work-related, and meet the recordability criteria of federal regulations.

Under prior guidance, OSHA had recommended that employers require employees working at home-based worksites to complete a safety checklist covering the following items:

1. Functioning smoke detectors
2. Multiple exits from the work area (*e.g.*, door and window)
3. Proper ergonomic set up of desk areas
4. Hall, aisles and passageways free of debris, cords and spills
5. Adequate illumination
6. Effective grounding and insulation of electric equipment

Even in the absence of federal regulation, employers are well advised to provide employees with a checklist of items to review and consider.

Employers in most states are covered by workers' compensation laws that require payment of compensation in case of personal injury arising out of and in the course of employment. There are very few reported cases involving workers' compensation claims of home-based workers, but the law does not distinguish between home-based and office-based worksites. Employers should ensure that workers' compensation coverage is provided for home-based worksites and that policies and procedures are in place for reporting any at home injuries.

3. Privacy and Data Protection

Every business possesses confidential and private information about its business operations, employees, customers, and third parties that it has a legal duty to protect. Such information includes a company's trade secrets, financial information concerning customers or partners, private information about employees' family situations, and personal health information of employees or third parties whose data the business uses or processes. Myriad legal issues relating to privacy and data protection apply regardless of whether a worker works on-site or off-site or works full-time or part-time.[16]

However, businesses that permit or require certain workers to work at home or off-site face additional challenges as to the protection and security of confidential information. Privacy and data security issues regarding those workers who work at home or in other remote locations fall into the following major categories:

Access to Confidential Information. A business should determine what confidential information it will give a remote worker access to and, conversely, to what information it will not give the worker access. It should also determine whether and how to track the information that is accessed.

Use of Equipment. A business should determine to what extent it will require a remote worker to use company-owned equipment or peripherals and to what extent it will allow that worker to use his or her own equipment and peripherals. A business should also decide what limitations to place on the use of all equipment in connection with the business of the company and establish protocols for the return of all company equipment and data upon termination of employment.

Ownership of Information. A company should ensure that equipment and confidential information it shares with those working at home or at a remote location will remain the property of the company.

Transmission and Transfer of Information. A person who works off-site and obtains access to confidential information often must transfer that information electronically or transfer it in hard-copy form to be able to use it remotely. The business should determine what methods and forms of data transfer will be acceptable for remote workers to use. In addition, although the law might allow the transmission of confidential information from one state or country, the corresponding law of the recipient state or country may not, underscoring the need to become familiar with applicable law.

Storage and Safeguarding of Information. A business should determine whether and how a worker will be required to store and safeguard confidential information and prevent access by others, such as household members and service providers who enter the worker's home.

Preservation of Information. Although workers at home or other remote locations may access or use confidential information transmitted or otherwise obtained from the company, they may modify that information, create new confidential information or obtain information from a third party that the company needs to protect. The business should determine what information the remote worker will have to preserve for the transmission or transfer back to the company.

Implementing Litigation Hold. Federal courts are becoming increasingly aggressive in imposing sanctions on litigants that do not properly preserve discoverable, electronic information.

An organization should consider how potentially discoverable information in the possession of remote workers will be preserved for litigation.

Destruction/Disposal of Information. The business should determine when, under what circumstances, by whom, and by what means electronic or hard copies of confidential information and storage media containing it will be destroyed.

Retrieval of Information. The company should also determine how and by what means to quickly retrieve information from a remote worker if there is an internal or external investigation, termination of the worker's employment or contract, or termination of the flexible work arrangement for some other reason.

Points to Remember

To address privacy and security issues that arise when businesses allow employees or contractors to work at home or remotely, employers should take the following steps:

Limit Eligibility for Working from Remote Locations. Consider which workers are appropriate candidates for working from home or remotely based on employee suitability and trustworthiness, job responsibilities and the needs of the business. Develop a process for careful selection of those who are eligible to work remotely. Conduct adequate background checks on those seeking to work remotely, including current employees who have not recently been subject to a background check. And retain discretion to modify or terminate those arrangements.

Evaluate Current Policies. Ensure that all policy handbooks and codes of conduct, particularly those addressing monitoring of employees' electronic communications, expressly cover all workers, employees and contractors, whether they work on or off the premises.

Establish Policies and IT Practices Specifically Applicable to Working from Remote Locations. These policies and IT practices should address the following aspects of protecting privacy and data security:

1. Access to the Employers' Computer System and Data
2. Use of Company Computer and Other Equipment
3. Ownership of Equipment & Confidential Information
4. Transfer or Transmission of Confidential Information
5. Storage and Safeguarding of Information
6. Preservation of Information
7. Implementing a Litigation Hold
8. Destruction of Confidential Information
9. Retrieval of Information from Remote Computer or Equipment

Train Workers and Managers About the Policies and Enforce Violations. Each person seeking to work at home or remotely, and those who manage their work, should be trained about the company's privacy and data protection policies, how to identify situations in which specific data security tools should be used, and how to use them to safeguard data. Training should also address how to identify a security incident and what to do when one occurs. Further, the company privacy and data protection policies will require the involvement of human resources, security and information technology personnel to apply and enforce them, so they should have input into and be carefully trained about the policies.

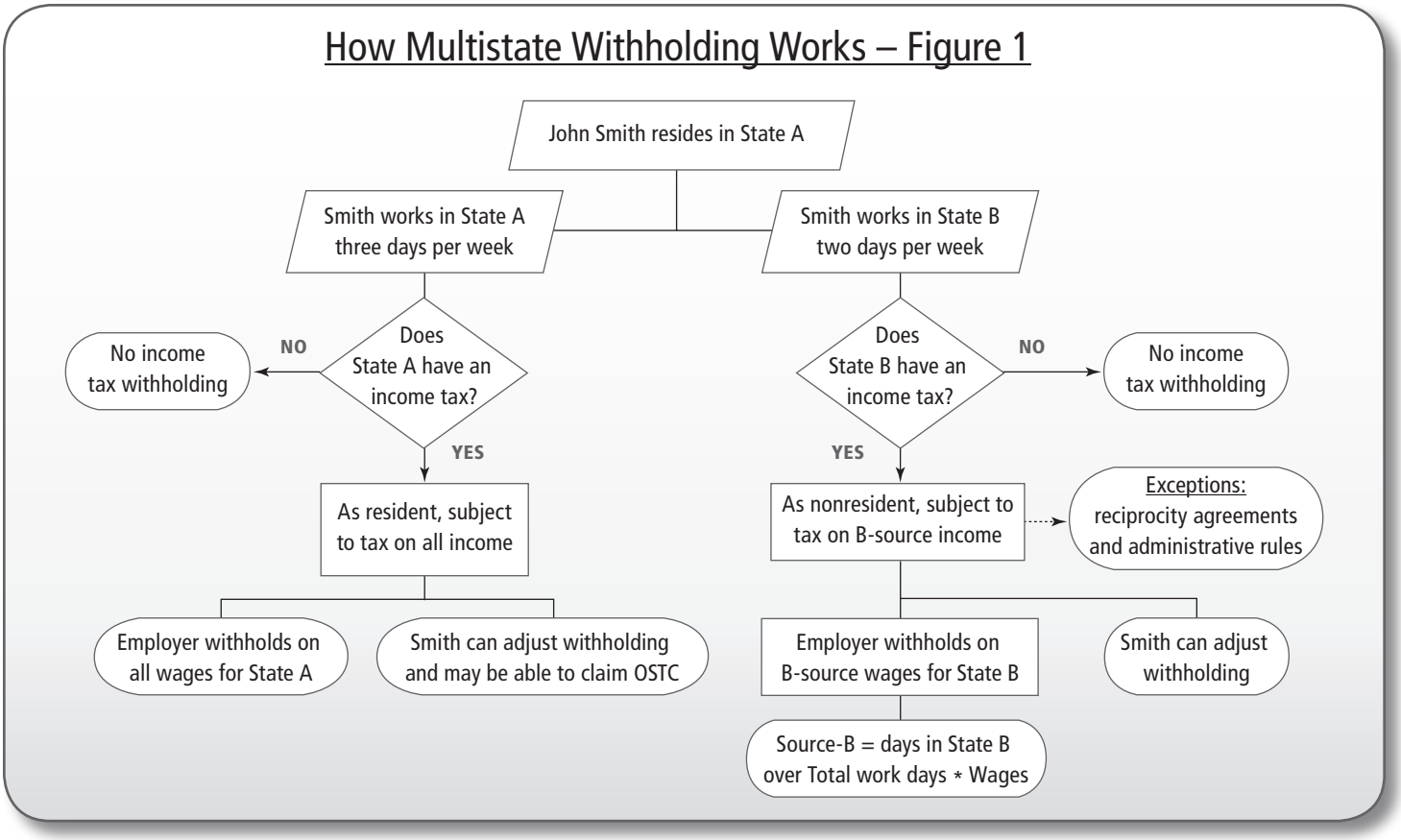
Require Each Worker Who Performs Duties from a Remote Location to Enter into a Telecommuting or Remote Worker Agreement. With respect to privacy issues, a telecommuting agreement, among other things, should: incorporate the company's privacy policies, including limitations on access; seek consent to company monitoring of and access to any computer or other electronic device (whether company-owned or personal); secure commitments to report immediately any unauthorized access or loss of company equipment or data; require participation in any internal or external investigation concerning the equipment or data stored on the equipment; and require the return of all company equipment and data upon termination of employment. In addition, remote workers should be required to execute non-disclosure covenants either as part of their telecommuting agreement or in a separate non-disclosure agreement.

4. Employment Taxes

Other than the status of the worker, the single biggest tax issue employers face when dealing with flexible workers occurs when a telecommuting worker lives in a different state from the one in which he or she is assigned or otherwise would perform his or her services. There are two specific considerations in such cases: (1) the proper state to report and pay unemployment insurance taxes; and (2) state income tax withholding.

State Unemployment Insurance Taxes

The first consideration is the state to which state unemployment insurance taxes must be paid. Regardless of how many states an employee works in, unemployment insurance taxes are only paid to a single state. All states use the same four-part test to determine the proper state to report and pay unemployment insurance taxes:



1. Localization
2. Base of operations
3. Place of direction and control
4. State of employee's residence

This test must be applied in hierarchical order; that is, it must first be determined if the work is localized to a particular state. An employee's services are "localized" in a particular state if all or most of the employee's services are performed in such state, with only incidental services performed elsewhere (for example, where the out-of-state service is temporary or transient in nature or consists of isolated transactions). Where the services performed outside of the state are either permanent, substantial, or unrelated, it cannot be treated as localized to a particular state.

If an employee's services are not localized to a particular state (because, for example, he or she spends 33 percent of his or her time in three separate states), then the next test to apply is the base of operations. Under this test, unemployment insurance taxes are paid to the state in which the employee has his or her only base of operations. A base of operations is generally considered to be a more or less permanent place from which the employee starts work and customarily returns to receive employer's instructions, to receive communications from customers or others, to replenish stocks or supplies, to repair equipment, or to perform other functions relating to the rendition of services. For example, if an employee telecommutes but is assigned to an office location, where he or she comes for meetings, obtains supplies, etc., such office location would be considered a base of operations.

If the employee's services are neither localized nor subject to a base of operations, the third test is the place of direction and control. Under that test, if an employee performs some services in a state and it is also the place from which employer exercises basic and general direction and control over all the employee's services, then unemployment insurance taxes are sourced to such state.

Finally, if none of the previous three tests apply, then unemployment insurance taxes are sourced to the employee's state of residence. For states that have other employment taxes (such as state disability insurance taxes (SDI) in California), they are sourced according to the same rules that apply to unemployment insurance taxes. Thus, for example, if an employee works both in California and Oregon, if it is determined that unemployment taxes should be sourced to California, then the employee must also pay California SDI taxes. However, if unemployment taxes must be sourced to Oregon, then the employee does not pay California SDI taxes.

Multistate Income Tax Withholding

Unlike unemployment insurance taxes that are paid to a single state, income taxes may be paid to several states. Thus, when an employee works in more than one state, an employer may be obligated to withhold and remit income taxes to more than one state. The states have very different rules about when income taxes may be withheld. For example, New York and Connecticut both have a 14-day rule that states if an employee is working in the state for 14 days or less, then there is no income tax withholding. Other states use a dollar threshold. In addition, some states have reciprocity agreements. For example, if an employee lives in New Jersey but works in Pennsylvania, the employer is not required to withhold Pennsylvania income taxes under an agreement between New Jersey and Pennsylvania.

In the context of flexible work, the issue often arises in the context of an employee who telecommutes from home either on a part-time or full-time basis. In such cases, employers will need to determine whether they are required to withhold and remit income taxes in both states. See Figures 1 and 2 for a decision tree that shows how to determine whether an employer must withhold income taxes.

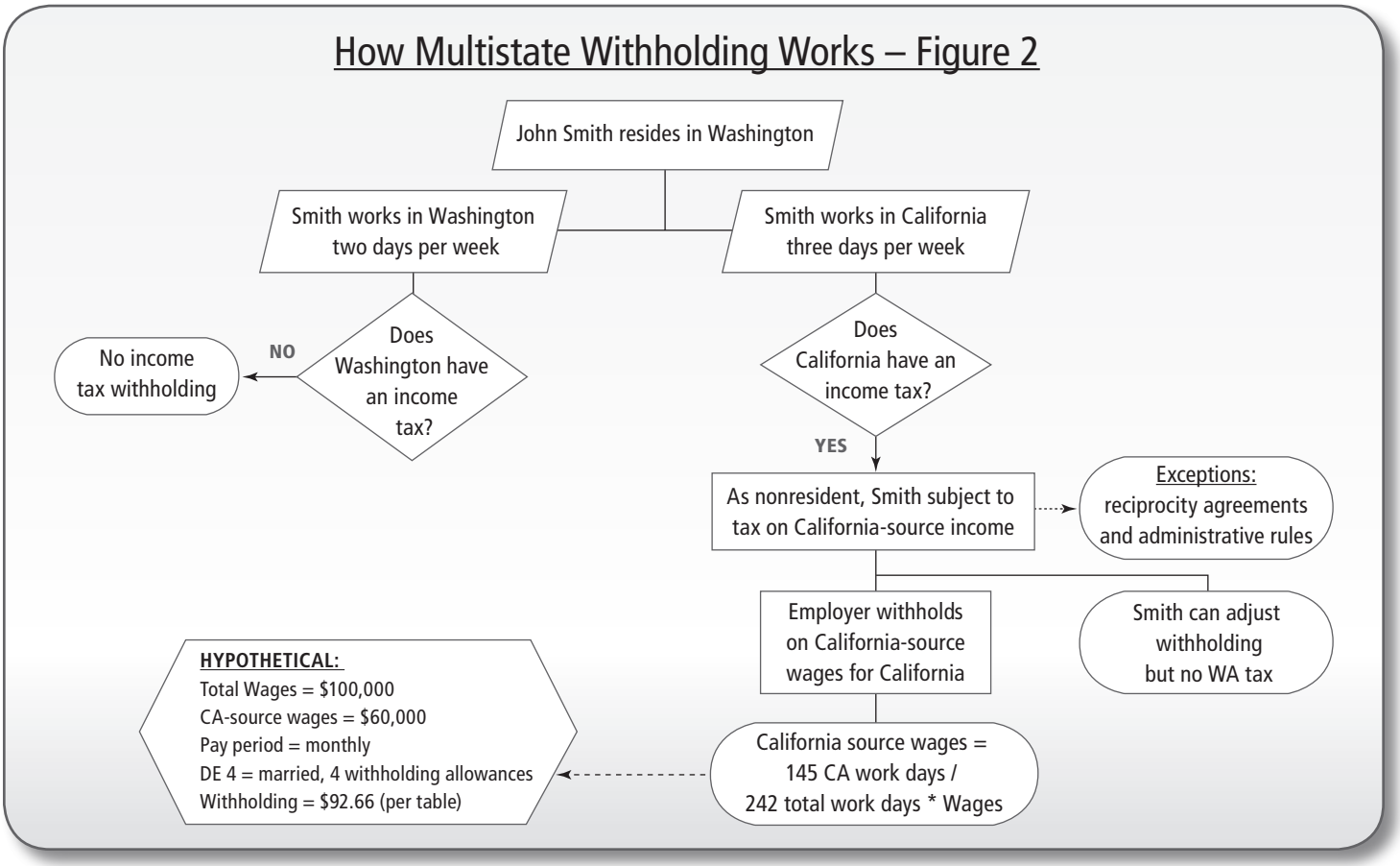
B. Flexible Work Schedules—Legal Implications

An employer in the private sector who is considering flexible work schedules or managing a flexible workforce should be mindful of the potential costs of employees working varying hours. Careful planning, however, can provide substantial flexibility at no increase in cost. Flexible work schedules are defined as a variation in start or stop times, a full-time work schedule compressed into fewer than five days a week, and other variations, such as annualized hours (looking at hours annually, even if not spread evenly throughout the year).

1. Wage & Hour

Part-Time Flexible Work Schedules

Allowing employees who are employed less than full time to work flexible hours presents a unique set of concerns. For example, in states where daily overtime is required (such as California or Alaska, and possibly, Nevada), an employee who works less than full-time may still be entitled to overtime pay if the employee works more than eight hours in a given day. An employee may be entitled to daily overtime premiums if the employee works more than 10 hours in a given day at a mill or factory in certain states (such as Oregon),



or works more than 12 hours in a day or more than 12 continuous hours in certain states (such as Colorado).

Exempt employees who work part-time schedules present other problems. The U.S. Department of Labor (DOL) has said that the salary of an overtime-exempt, part-time employee must be prorated based on the number of days that the employee regularly works. For example, an employee who regularly works four days in a week and misses one day of work in a week may be docked one quarter of the employee's salary for the absence if the absence is due to vacation or due to illness or injury before sick leave benefits accrue or after such benefits are exhausted. If a part-time, exempt employee works varying hours from day-to-day, docking the employee in uniform increments based upon the number of days of work missed in a workweek may not make economic sense to the employee or the employer. And, docking an exempt employee on an hour-for-hour basis for anything other than intermittent or reduced scheduled FMLA leave would compromise the exempt employee's exempt status. If the employee works such limited hours as to not qualify for sick leave benefits, the employee cannot be docked for full-day absences without compromising the employee's exempt status. While compromising the overtime-exempt status of an employee who regularly works less than 40 hours per week may not appear to be problematic, such employees may occasionally work more than 40 hours per week. Furthermore, any improper docking practice may expand to affect the salaries of exempt employees who regularly work more than 40 hours in a week.

Finally, California's Labor Commissioner has said that there cannot be part-time, overtime-exempt employees. In the states that require daily overtime, part-time exempt employment is of more significant concern.

Full-Time Flexible Work Schedules

Allowing hourly employees to choose their starting and ending times is appealing, but has to be reconciled with the major cost consideration of overtime. If employees are allowed to vary the total number of hours worked from one workweek to the next, then an employee may earn overtime in one week and then work less than a full-time schedule in the following week.

The challenges of flexible starting and ending times require close attention in states that require daily overtime. Those states include California and Alaska, which require overtime after eight hours of work in a day, and Nevada, which requires overtime after eight hours of work in a day for employees that are paid less than one and one-half times Nevada's minimum wage. Oregon requires daily overtime after 10 hours of work in a day for factory and mill workers. Colorado requires overtime after 12 hours of work in a day or after 12 continuous hours of work for employees who are covered by the state's wage orders. Other states require premium pay for work on a seventh day of work in a single workweek or, in some cases, on Sundays and holidays.

Where there is a daily overtime requirement, overtime costs can be avoided by requiring employees to work no more than the maximum number of straight-time hours each work day. This allows employees to vary when they start work each day. This may, depending on an employer's policy, allow employees to spread their hours of work across six days in a week so long as the daily and weekly overtime thresholds were not exceeded. Work could be spread over all seven days in the workweek without overtime as long as an employee did not work in a jurisdiction that required premiums for a seventh day of work in a workweek or other special premiums that are based on the day of the week worked.

Some states that require daily overtime provide an option to work more than eight hours per day without the payment of overtime premiums. This permits a "compressed work week," one form of a flexible schedule, where 40 hours are compressed into less than five days a week or 80 hours into ten days bi-weekly. Generally, a special procedure must be followed for such a schedule to be worked without the payment of overtime. In California, for example, the implementation of a straight-time schedule of four, ten-hour days of work per week requires a written disclosure to the employees about the effect of the schedule, duly noticed meetings during regular working hours to discuss the schedule, a secret ballot election in which two-thirds of the employees approve of the schedule, a waiting period of 30 days before employees are required to work the schedule, and notice to the State's Division of Labor Statistics and Research. In Alaska, a schedule of four, ten-hour days per week is generally permissible if the employee and the employer have signed a written agreement, the written agreement has been filed with the Labor Department, and the Labor Department has issued a certificate approving the plan. In Nevada, a schedule of four, ten-hour days per week with the mutual agreement of both parties will not require the payment of daily overtime premiums. In both cases, once such a schedule is adopted, it must be followed quite precisely or be re-implemented if a material change in the schedule is to occur. An employer wishing to use such schedules should carefully review the requirements before implementing such a schedule.

2. Employee Benefits

As a general rule, an employee's status as a flexible schedule worker should not impact such individual's eligibility for participation in an employer's employee benefit plans and

arrangements. One exception to this general rule, however, is with respect to part-time, seasonal and temporary workers.[17] As a result, an employer must decide whether it desires to provide certain employee benefits to its part-time workers. In reaching a decision, the employer should review general employment discrimination laws to ensure that any potential exclusion will not have the effect of excluding a protected class. For example, if an employer's part-time workers are predominantly women who choose to work part-time so that they are able to spend more time taking care of their families, the employer may face potential legal exposure for employment discrimination if it excludes such part-time workers from certain of its employee benefit plans. As a result, and in an effort to minimize this potential legal exposure, an employer may wish to provide proportional benefits to its part-time workers.

Based on an employer's decision to provide (or not provide) certain employee benefits to its part-time workers, the employer should carefully review and, to the extent necessary, revise each of its employee benefit plans to specifically include in or exclude from participation its part-time workers. In addition, with respect to health and welfare plans, the employer should review and, if necessary, seek to negotiate revisions to any underlying insurance contracts and agreements with applicable carriers to specifically include in or exclude from participation its part-time workers. In doing so, the employer should consult with employee benefits counsel to ensure that it is permissible under applicable law with respect to each plan to so include or exclude from participation its part-time workers.

Generally, with respect to inclusion in participation, as long as the plan language provides for participation and, with respect to any health or welfare benefits, the underlying insurance contracts and agreements with the applicable carriers provide for such participation, there will not be any issues under the Internal Revenue Code of 1986, as amended (the "Code") or the Employee Retirement Income Security Act of 1974, as amended (ERISA) with respect to including part-time workers in any employee benefit plan. However, to the extent the employer desires to exclude its part-time workers from participation in a specific plan, in addition to ensuring that the plan language excludes them from participation, the employer should consult with counsel to ensure that such exclusion is permissible under the Code and ERISA (particularly problematic with regard to retirement plans, as discussed below).

Qualified Retirement Plans and ERISA-governed 403(b) Plans ("Retirement Plans"). Retirement Plans must comply with the Code's and ERISA's minimum age and service rules, which set forth the minimum age and service requirements that a Retirement Plan can impose on employees with respect to plan participation. Section 410(a) of the Code and Section 202(a) of ERISA state generally that a plan cannot exclude an employee from participation on account of age or service if the employee has attained at least age 21 and completed at least one year of service (*i.e.*, a 12-month period in which the employee completes at least 1,000 hours of service). In interpreting Section 410(a) of the Code, the Internal Revenue Service (IRS) stated in an IRS Field Directive issued on November 22, 1994, that the exclusion of part-time employees as a class from plan participation imposes an indirect service-based requirement that results in a per se violation of Section 410(a) of the Code and Treasury regulations promulgated thereunder, which is a tax qualification error that could lead to the Retirement Plan losing its tax-qualified status under the Code.

DOL regulations promulgated under Section 202(a) of ERISA incorporate the requirements of Section 410 of the Code, stating:

> [A]n employee pension benefit plan [which includes an ERISA-governed 403(b) plan] may not require as a condition of participation in the plan, that an employee complete a period of service with the employer in excess of the limitations established by section 202 of [ERISA] and section 410 of the Code. [See DOL Regulation § 2530.202-1(a).]

As a result, and consistent with the IRS, the DOL takes the position that a plan provision that excludes a class of employees from plan participation on account of a service based requirement violates Section 202 of ERISA.

The importance of Section 410(a) of the Code and Section 202 of ERISA to part-time workers is that if an employer excludes from retirement plan participation part-time workers as a class, the IRS and DOL will conclude that such exclusion is a per se violation of the Code and ERISA. Additionally, if an employer excludes from retirement plan participation a class of employees that on its face appears to be a permissible exclusion, for example, the employer excludes all employees employed in Division A of the company, and if all such employees are either entirely or predominantly part-time employees, the IRS and DOL may take the position that the exclusion of the Division A employees from plan participation is a per se violation of the Code and ERISA. However, if the number of part-time employees compared to full-time employees in Division A is small (or if there is a reasonable mix of both and it is representative of the employer's workforce generally), the exclusion from participation of Division A employees (that includes a certain number of part-time employees) is more likely to survive IRS and ERISA scrutiny. Where an employer generally permits employees to start participating in a retirement plan without a one-year waiting

period, the employer could exclude employees who are classified as "part-time" or some similar category, provided that those employees are allowed to start participating after they have completed a "year of service" (referring to the 1,000 hours of service in a 12-month period) and avoid violating the service requirements of the Code and ERISA.

In addition to the Code's and ERISA's minimum age and service rules, the Code's minimum coverage rules under Section 410(b) of the Code require Retirement Plans to cover (*i.e.*, benefit) a non-discriminatory group of employees. A Retirement Plan is discriminatory as to plan coverage if it discriminates in favor of highly compensated employees (generally employees who are 5% owners or whose compensation exceeds a certain threshold—$110,000 for 2011, indexed annually for inflation). Depending on an employer's employee demographics, if the employer's part-time workers are either entirely or predominantly non-highly compensated employees, it may be necessary to permit such employees to participate in the Retirement Plan in order to pass the Code's minimum coverage test.

Health and Welfare Plans. Similar to the discussion above regarding inclusion in plan participation, with respect to exclusion from participation in a health and welfare plan, generally, as long as the plan language provides for such exclusion and the underlying insurance contracts and agreements with the applicable carriers provide for such exclusion, there generally will not be any issues under the Code or ERISA with respect to excluding part-time employees from participation in a health and welfare plan. However, there are several exceptions to this general rule.

The first exception relates to an employer's group health plan. Similar to the Code's minimum coverage test that applies to Retirement Plans, Section 105(h) of the Code contains non-discrimination rules with respect to self-insured group health plans. To the extent such a plan discriminates in favor of highly compensated individuals with respect to eligibility to participate or benefits provided under the plan, the highly compensated individuals will be taxed on benefits received under such plan. A *highly compensated individual* generally is either: (1) one of the five highest-paid officers; (2) a shareholder who owns more than 10 percent of the company; or (3) among the highest paid 25% of all employees.

In addition, though beyond the scope of this paper, it is to be noted that effective for plan years commencing on and after September 23, 2010, the recently enacted Health Care Reform legislation also requires non-grandfathered, fully-insured plans to satisfy the non-discrimination rules of Section 105(h) of the Code. If a fully-insured plan does not satisfy such rules, instead of subjecting benefits received by highly compensated individuals to taxation, it appears that the Health Care Reform legislation imposes an excise tax on the employer in an amount equal to $100 per day, per affected participant.[18]

Due to the above-mentioned requirements, and similar to the Retirement Plan discussion above, depending on an employer's employee demographics, if the employer's part-time workers are either entirely or predominantly non-highly compensated individuals, it may be necessary to permit such employees to participate in the employer's self-insured (or, if non-grandfathered, fully-insured) group health plan and receive the same benefits as highly compensated individuals in order to pass the non-discrimination rules under Section 105(h) of the Code.

Second, the Code also contains rules similar to the Section 105(h) rules discussed above with respect to participation in and benefits under a Section 125 (cafeteria) plan, a flexible spending account (both medical and dependent care assistance), a health reimbursement arrangement and an adoption assistance plan. As a result, depending on the employer's employee demographics, if the employer's part-time workers are either entirely or predominantly non-highly compensated individuals/non-key employees, it may be necessary to permit the part-time workers to participate in such plans in order to satisfy the applicable non-discrimination rules.

Finally, and, as previously stated, though beyond the scope of this paper, it is to be noted that effective beginning in 2014, the Health Care Reform legislation's "play or pay" rules relating to group health plan coverage provided to full-time employees (*i.e.,* average of 30 or more hours per week) may impact an employer's decision to exclude certain part-time workers from the employer's group health plan.

COBRA Continuation Coverage

One final area deserving of consideration is COBRA. To the extent a full-time employee's transition from regular employee status to part-time status results in a reduction in work hours such that the employee no longer qualifies for coverage under an employer's group health plan, the reduction resulting from the change in status would be a qualifying event under COBRA (permitting the employee to continue his or her group health coverage in effect prior to that change under applicable COBRA rules). The employer, as plan administrator, would have to provide the required COBRA notice to the employee and permit the employee to elect COBRA continuation coverage under the plan.

Points to Remember:

- As a general rule, an employee's status as a flexible schedule worker should not impact such individual's eligibility for

participation in an employer's employee benefit plans and arrangements.

- An exception to the general rule exists for part-time, seasonal and temporary workers. Nonetheless, depending on an employer's employee demographics, it may be necessary to include such employees in plan participation in order to satisfy the various compliance tests that apply to such plans under the Code and ERISA.

3. Employment Discrimination [ADA, ADEA, Title VII][19]

Employers need to ensure that they do not offer flexible work options, such as flexible work schedules or locations, in a discriminatory manner. Likewise, employers must ensure that the flexible work options they offer do not adversely impact a protected class of employees under federal equal employment opportunity laws, including Title VII of the Civil Rights Act (Title VII),[20] the Americans with Disabilities Act (ADA),[21] the Age Discrimination in Employment Act (ADEA),[22] the Equal Pay Act (EPA)[23] and the Civil Rights Acts of 1866 and 1871.[24] State and local laws impose further complications by creating additional protected classes. The central requirement under each of these statutes is relatively simple, however: employers must not exhibit a bias against any protected class in connection with flexible work.

Under the ADA, flexible work schedules and locations may constitute an appropriate accommodation for a disabled employee.[25] Similarly, flexible work may provide a convenient and accessible way for caregivers to continue to work and care for a child or disabled loved one. Further, the Equal Employment Opportunity Commission recently suggested in a "best practices" publication that offering flexible workplace policies that help employees to balance their work and family responsibilities may decrease complaints of discrimination.[26]

In many respects, therefore, flexible work can enhance efforts to create and maintain a diverse and inclusive workforce and eliminate discriminatory bias in the workplace. However, flexible work practices need to be carefully implemented and regularly monitored to ensure that they do not facilitate discriminatory practices and/or attitudes in the workplace.

Flexible Work and Accommodation

The ADA requires employers with 15 or more employees to provide reasonable accommodation for qualified applicants and employees with disabilities. Flexible work, including flexible work locations, may constitute an appropriate accommodation, but employers must take into account that not all persons with disabilities need, or want, to work from home. Further, if flexible work would impose an undue burden, or if the essential functions of the job cannot be performed remotely, flexible work is not mandatory under the ADA. For example, where face-to-face contact with coworkers, clients or customers is necessary, location-flexible work is not required. Nor must an employer offer a flexible work location where alternative accommodations are possible. An employer may select any effective accommodation, even if it is not the one preferred by the employee. However, if an employer offers flexible location generally, it must allow employees with disabilities an equal opportunity to participate in this choice.

Family Rights Discrimination Claim in *Velez v. Novartis Pharmaceuticals Corp.*, No. 04 Civ. 9194v(S.D.N.Y.)

On May 19, 2010, a federal jury in New York ordered Novartis Pharmaceutical Corp. to pay over $3 million in compensatory damages to twelve female plaintiffs, and $250 million in punitive damages to the class of 5600 current and former female Novartis employees represented by the plaintiffs.

The 2005 class action complaint in *Novartis* alleged gender discrimination, pregnancy discrimination, and Family Responsibilities Discrimination (FRD), as well as interference with FMLA rights. Plaintiffs claimed that they had been discriminated against on the basis of gender in promotions, pay, and treatment, and subjected to gender hostility and retaliation. In addition, the plaintiffs alleged discrimination based on pregnancy and motherhood, claiming that women were fired while on maternity leave and mocked by supervisors if they were visibly pregnant. The plaintiffs alleged liability under three discrimination theories: disparate treatment, pattern and practice, and disparate impact.

The *Novartis* jury found that Novartis' actual practices did not live up to their written policies. While the jury noted that Novartis had progressive written flex-time policies, those policies were not followed in practice, and those who used flex-time schedules suffered a "flexibility stigma" that resulted in lost promotions and terminations.

Assigning Flexible Work

Flexible work may not be assigned or denied on the basis of a worker's protected classification or family situation, but most typically problematic are race, gender, age, and disability, in association with disability or caregiver status. The assignment or denial of flexible work on the basis of any protected characteristics or caregiver status constitutes unlawful discrimination under federal law. Some of the prohibited conduct related to workers' election to participate in flexible-work programs include:

- Asking female applicants and employees, but not male applicants and employees, about their child care responsibilities.
- Treating men, younger employees, or workers without caregiving responsibilities more favorably than caregivers.
- Steering women, older employees, and employees with caregiving responsibilities to flexible work arrangements that are lower paid or provide less opportunity for promotion.
- Treating persons of color who have caregiving responsibilities differently than other workers with caregiving responsibilities due to gender, race, and/or national origin-based stereotypes.
- Treating male workers who participate in flexible work programs more, or less, favorably than female workers who participate in flexible work programs.
- Steering individuals with disabilities to work off-site, despite their ability to perform work on-site with a reasonable accommodation.
- Providing accommodations, including flexible work opportunities, for temporary medical conditions, but not for pregnancy.

Employers should thoroughly train their managers and human resource professionals to recognize and discourage the workplace stereotypes that result in discriminatory employment decisions in connection with flexible work. Some common stereotypes which may result in unlawful conduct include:

- Assuming female workers' caretaking responsibilities will interfere with their ability to succeed in a fast-paced environment.
- Assuming female workers, older workers, and caregivers who participate in flexible work are less committed to their jobs than other employees.
- Assuming older workers prefer, or should prefer, the reduced or flexible schedule of flexible work.
- Assuming male workers do not, or should not, prefer to spend time with their families rather than at work.
- Assuming female workers prefer, or should prefer, to spend time with their families rather than time at work.
- Assuming female workers and caregivers are less capable than other workers.
- Assuming individuals with disabilities prefer, or should prefer, reduced hours or a flexible schedule.

Finally, in many states, marital status is also a protected classification.[27] As a result, the above stereotypes and prohibited practices should be examined with respect to marital status in many jurisdictions.

Workplace Attitudes and Promotion

The attitudes of managers and other employees regarding employees who take advantage of flexible work opportunities can create as much exposure to liability as the policies under which flexible work is offered. For example, in a recent class action alleging gender discrimination, one class member quoted her supervisor as indicating he did not like to hire young women, and further explaining, "first comes love, then comes marriage, then comes flex time and a baby carriage."[28] Though the company maintained flexible work policies for the benefit of all of its employees, and offered them in an otherwise nondiscriminatory manner, the attitudes of its supervisors and non-flex-time employees toward employees who work flexibly were sufficiently discriminatory to result in a substantial judgment against the employer for gender bias. The proliferation of such perspectives could also result in a finding of unlawful hostile work environment harassment on the basis of gender or association with an individual with a disability.

Further, employees who work under a flexible work program may have a cause of action under a theory of disparate impact if they are not offered the same opportunities for pay increases and promotions as others who do not participate in flexible work. Because a disproportionate number of the employees who work flexibly are women and caregivers, the grant of disparate benefits or wages to such employees could result in a finding of gender or disability discrimination. As a result, compensation practices and performance appraisal systems should be carefully monitored to ensure the employees who work flexibly are not inadvertently undervalued simply because they put in less "face time" due to working remotely. Of course, a plaintiff alleging disparate impact must identify appropriate comparators for the purpose of establishing disparate impact, which may be difficult if he or she works fewer hours or

performs different duties than employees who do not participate in flexible work. However, to the extent overall hours worked or duties performed are similar or even identical, employers must make sure that their compensation and performance appraisal systems, as well as promotional and other employment opportunities, are neither designed, nor implemented in a manner that results in a disproportionate adverse effect upon flex-time workers.

Points to Remember

- Caregivers, disabled employees, and new mothers may appreciate having flexible work options that allow them to continue to participate in the work force despite competing demands on their time. However, flexible work arrangements should also be granted to new fathers and, in many states, non-caregivers to prevent the appearance or effect of reverse discrimination or discrimination in violation of state law.
- Participation in a flexible work program should be voluntary under all circumstances, and should not be vigorously "recommended" to one class of individual at a greater rate than another.
- Managers should be trained regarding the proper application of flexible work policies and should be on alert for hostile attitudes among employees and other managers toward employees who choose to participate in such programs.
- Managers and human resource professionals should also be thoroughly trained to respond to complaints of discrimination among flexible work employees or their coworkers, and to protect against retaliation.

C. Flexible Employment Relationships—Legal Implications

Employers face unique legal concerns when dealing with workers who are engaged in flexible employment relationships. There are many different types of workers who fall into the flexible employment relationship category, and some are employees while others are not. For example, *freelance workers* are workers who are self-employed and are typically hired on an as-needed basis. Similarly, *project-based workers* are hired to do specific projects or assignments, and may be employees or independent contractors. *Independent contractors* are workers who contract to do work according to their own processes and methods and they are not subject to another's control except for what is specified in an agreement for a specific job. As will be discussed in detail below, there is a stringent test for determining whether a worker is an independent contractor or an employee, and that determination has a number of implications as to how a worker is paid, the benefits that worker is entitled to, and the federal and state tax withholdings an employer is obligated to pay. Independent contractor misclassification is a hot-button issue, with many states recently enacting misclassification legislation and plaintiffs procuring large class action settlements pertaining to misclassification.

1. Wage & Hour

An individual who is truly an independent contractor, raises few wage-and-hour concerns. However, when assessing whether an independent contractor relationship qualifies as such, a business must be sensitive to the fact that contractors that are paid in an employee-like fashion (such as on a salaried basis, or by the hour) are less likely to be found to be independent contractors.

Freelance workers, being those who work intermittently on an as-needed basis, generally present few wage payment concerns if they are paid by the hour for all their hours of work and are paid overtime for all such hours.

As noted in section **II.B.1** above, it is difficult to reconcile the DOL's rule that salaries must be prorated in uniform daily increments when such employees may work widely varying hours from one day to the next. In addition, the general rule that a salary can be prorated for initial and final weeks of work may not apply to employees who work on intermittent basis.

The wage-and-hour concerns of project-based workers are relatively limited. If such employees are entitled to overtime and are paid for all their hours of work, then the fact that an employee is retained on a project basis is of limited concern. A project-based employee who is paid a salary as an overtime-exempt employee will present few concerns if the employee works essentially the same hours from day to day. As noted in section **II.B.1** above, it is difficult to reconcile the salary-pay requirement with the schedules of overtime-exempt employees who are allowed to work widely varying intermittent schedules.

Points to Remember

- Businesses should be careful not to inadvertently create an employment relationship with workers that they have classified as independent contractors. In particular, a company should be mindful of its payroll practices. In order to avoid creating employment relationships, a company should avoid practices such as identifying itself as "employer" on paychecks or using the same payroll practices for contractors that it uses for employees (*e.g.*, paying contractors by the hour or on a salaried basis).

2. Employment Taxes

Assuming that flexible workers are employees and not independent contractors, the same tax rules that apply to regular full-time employees also apply to workers that work flexible schedules; that is, all wages paid are subject to employment tax withholding and must be reported on IRS Form W-2. Again, this is true regardless of whether the employee only works for a single day, part-time or only a few hours per month. Employers that use independent contractors do not have to withhold and remit taxes on amounts paid, but must report such amounts if more than $600 on IRS Form 1099-MISC, box 7, nonemployee compensation.[29]

For federal tax purposes, employment taxes include:

1. Personal income taxes,[30] which fund general government services
2. Social Security taxes,[31] which fund retirement payments to individuals
3. Medicare taxes,[32] which fund medical coverage payments for individuals
4. Federal Unemployment Tax Act (FUTA) taxes,[33] which fund unemployment insurance benefits

For state tax purposes, all states have an unemployment insurance tax that complements FUTA. This tax is paid by employers and thus is not deducted from employees' wages. Most states also have a personal income tax. Some states also have other employment taxes. For example, California has a state disability insurance tax (SDI) that is paid by employees but deducted by the employer.

For a comprehensive discussion of how to properly determine whether a worker is an employee or an independent contractor for Internal Revenue Code and other purposes, see section II.C.3 below.

3. Contingent Workforce

There are several tests used to determine whether a worker is an employee or an independent contractor. The tests vary by the law in question, such as the Internal Revenue Code (that is, federal taxes), the Fair Labor Standards Act (FLSA), etc. They also vary among the states for different purposes. There are three major tests used to determine whether a worker is an employee or independent contractor: (1) the common law control test; (2) the economic reality test; and (3) the ABC test.

The Common Law Control Test

The most important test is the common law control test. This test is used for federal employment tax purposes as well as ERISA. It is also used by roughly half the states for state unemployment and income tax purposes. The U.S. Supreme Court has explained that absent specific statutory authorization applying a different standard, the common law control test applies.[34]

The common law control test, also called the "usual common law rules," states that if an employer has the right to control the means by which the worker performs his or her services as well as the ends, the worker is an employee.[35] The existence of the employer's right to control is critical; the exercise of that control is not. Thus, the Treasury Regulations state that "it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so."[36]

In contrast, "if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor."[37] Each case must be determined by its own facts and circumstances.

Independent Contractor Misclassification Claim in *Paula Labrie v. UPS Supply Chain Solutions Inc.* (No. 08-3182, N.D. Cal. Settlement Approved Mar. 17, 2010)

In their Fair Labor Standards Act (FLSA) class action filed on July 2, 2008, a class of over 200 delivery drivers for UPS Supply Chain Solutions Inc. alleged that the company misclassified them as independent contractors and, as a result, failed to pay them proper wages and benefits under federal and California law.

After engaging in 16 months of litigation with substantial discovery that included the production of thousands of documents and more than 35 depositions and a lengthy mediation process, the parties settled in late 2009. As part of the settlement, UPS Supply Chain Solutions Inc. agreed to pay $12.8 million to the class. After deductions for fees and expenses, the settlement was divided up with two-thirds of the funds going to class members with California law claims and the remaining third divided among those with FLSA claims. The settlement agreement further provided for up to $1.5 million in attorneys' fees to class counsel.

In 1987, the IRS issued Revenue Ruling 87-41 in which the IRS distilled years of case law into a 20-factor common law test. While the 20-factor test is commonly relied upon, it is not an exhaustive list and other factors may be relevant.[38] Further, some factors may be given more weight than others in a particular case. In 1996, the IRS reorganized the 20 factors into three broad categories in its training materials:

(1) **Behavioral Control:** The facts that illustrate whether there is a right to direct or control how the worker performs the specific task for which he or she is engaged (*e.g.*, instructions, training).

(2) **Financial Control:** The facts that illustrate whether there is a right to direct or control how the business aspects of the worker's activities are conducted (*e.g.*, significant investment, unreimbursed expenses, method of payment, opportunity for profit or loss).

(3) **Relationship of the Parties:** The facts that illustrate how the parties perceive their relationship (*e.g.*, intent of the parties/written contracts, employee benefits, discharge/termination, regular business activity).[39]

There are several statutory independent contractors. These include real estate agents, newspaper delivery personnel, direct sellers[40] and certain home care workers.[41] There are specific requirements for each of these statutory independent contractor classifications.

In addition, the Internal Revenue Code defines six kinds of persons as "employees" in addition to persons who are employees under the usual common law rules: (1) any officer of a corporation; (2) an agent-driver or commission-driver; (3) a full-time life insurance salesman; (4) a home worker performing work on materials or goods furnished to such worker; (5) a traveling or city salesman; and (6) certain state and local government employees covered by an "Section 218" agreement between the state and federal government.[42] There are specific rules regarding the tax implications of these classifications that should be reviewed.

Economic Reality Test

The most prominent laws that apply the economic reality test are the Fair Labor Standards Act (FLSA) and the Family Medical Leave Act (FMLA). The economic reality test is considered to be a broader test than the common law control test, and thus it is more likely that a worker will be found to be an employee under this test.

The starting point for the economic reality test is whether the engaging entity has the right to control how the work is to be performed by the worker; that is, the usual common law test. However, the economic reality test also requires an examination of the underlying "economic realities" of the work relationship.[43] For example, in *Rutherford Food Corp. v. McComb*, the Supreme Court ruled that slaughterhouse meat boners were employees, based upon the following facts:

- The job duties were interchangeable between workers.
- The company supplied the equipment and premises for the work.
- The company was the workers' single source of work.
- The company closely supervised the workers' performance.
- Although the workers did profit from their efficiency, they did not enjoy the type of profit generally associated with entrepreneurship.[44]

The Supreme Court reached this conclusion after evaluating the circumstances of the whole activity; no single factor was considered determinative.

The U.S. Department of Labor (DOL), the agency that enforces the FLSA, interprets the Supreme Court's economic reality test to mean that the primary consideration is whether the engaging entity controls or has the right to control the work to be done by the worker to the extent of prescribing how the work shall be performed. To determine whether the right to control exists, the DOL accords emphasis to the following factors: (1) the extent to which the services in question are an integral part of the employer's business; (2) the amount of the contractor's investment in facilities and equipment; (3) the contractor's opportunities for profit and loss; and (4) the amount of initiative, judgment, or foresight in open-market competition with others required for the success of the claimed independent enterprise.[45]

Additional factors considered by the DOL include whether:

- The contract gives any right to the engaging party to detail how the work is to be performed.
- The engaging party has control over the business of the contractor.
- The contract is for an indefinite or relatively long period.
- The engaging party may discharge the contractor's employees.
- The engaging party has the right to cancel the contract at will.
- The purported independent contractor is performing work that is the same or similar to that performed by the engaging party's employees.[46]

The DOL regards certain factors as immaterial to the determination of employee status, including: whether the worker has a license from a state or local government; the measurement, method, or designation of compensation; the fact that no compensation is paid and the worker must rely entirely on tips; the place where the work is performed; and the absence of a formal employment agreement.[47]

Thus, while somewhat similar, there are differences between the economic reality test and the common law control test. To illustrate, in *In re Miller*,[48] a case dealing with whether a worker was an employee or self-employed for federal employment tax purposes, the court observed that "a separate line of decisions has attempted to define the term 'employee' in the context of the Fair Labor Standards Act… that six-part test cannot be borrowed *in toto* for [federal employment tax] purposes. Congress and the courts have both recognized that, of all the acts of social legislation, the [FLSA] has the broadest definition of 'employee.'"[49]

In addition to being used for most federal employment-related laws, most states use the economic reality state for state employment law purposes as well as workers' compensation purposes.

ABC Test

The ABC test is used for state unemployment tax purposes by about half the states, or a variation of it (*e.g.*, A and B, or A and C). A few states, such as Wisconsin, have unique tests that are similar but not identical to the ABC test.

Under the "ABC" test a worker is an independent contractor if: (1) there is an *A*bsence of control; (2) the *B*usiness is unusual or away from offices; and (3) the work is *C*ustomarily done by independent contractors. While providing a fewer number of factors, this test is also far from straightforward, making it very difficult for employers to know whether they are following the law in classifying their workers.

Points to Remember

It is important to recognize that a worker may be an employee under one law but not under another, or in one jurisdiction and not another. For example, a worker may be deemed an independent contractor under the common law control test but not the ABC test. Thus, it is important to know the jurisdiction and laws that will be applied to the particular worker and analyze the status appropriately.

In addition, whether workers are employees or independent contractors is not really determined by where they work, whether they are full-time or part-time, temporary or permanent, or have flexible schedules. Thus, the tests for employees are not dictated by the various flexible work arrangements that employers might seek to implement for their employees. Rather, a person may be an employee even if he or she works from home, works for a single day, a season, or only 1 hour a day.

There is no prototypical independent contractor because the nature of an independent contractor's operations vary greatly depending upon a variety of factors, such as industry, skill sets, size of operations, specific licensing requirements, etc. However, there is some evidence to suggest that bona fide independent contractors are often highly educated and earn higher average incomes than employees earn.[50] They want to be their own bosses, controlling their own work schedules and making their own determinations on how to best accomplish certain tasks, without much, if any, oversight from their clients. True independent contractors consider themselves to be in business for themselves. Besides the personal freedom, there are financial incentives. For example, unlike employees, who can only deduct business expenses as itemized deductions, independent contractors can generally fully deduct their business-related expenses.

III. POLICY CONSIDERATIONS AND IMPLICATIONS by Sandy Burud of FlexPaths and Littler Mendelson Attorneys

The direction of proposed and newly enacted legislation can shed light on trends and on what may lie ahead. This section reviews some of the most noteworthy new legislation.

The transformation to the virtual, flexible workplace as both an economic reality and business necessity has brought the issue of flexible work to the attention of policymakers in Washington, D.C. and state capitals across the country.

The White House convened a Forum on Workplace Flexibility on March 31, 2010, during which President Obama stated:

> Workplace flexibility isn't just a women's issue. It's an issue that affects the well-being of our families and the success of our businesses. It affects the strength of our economy–whether we'll create the workplaces and jobs of the future that we need to compete in today's global economy.[51]

As evidenced by the President's remarks, flexible working has taken on even more importance in the eyes of many policymakers as businesses struggle to remain globally competitive. A report issued by the President's Council of Economic Advisors concluded that: "The best available evidence suggests that encouraging more firms to consider adopting flexible practices can potentially boost productivity, improve morale, and benefit the U.S. economy."[52]

The focus on flexible work as an economic issue suggests that federal and state efforts to promote such flexibility will intensify. However, impediments to doing so remain and approaches among policymakers differ.

Legislative efforts to promote flexible work range from imposing new federal paid leave mandates to removing existing legal impediments to flexible work and incentivizing adoption of such policies.

During the 111th Congress, numerous bills were introduced to expand federal family leave requirements. Among the proposals garnering the most attention is the Healthy Families Act. The bill, which was reintroduced in the Senate by the late Senator Ted Kennedy (D-MA) and in the House of Representatives by Representative Rosa DeLauro (D-CT), would require employers with more than 15 employees to adopt paid sick leave policies. Specifically, the Healthy Families Act would require employers to provide up to seven days of paid leave to care for themselves or sick family members as well as for needs stemming from domestic violence. The Healthy Families Act and other mandated leave legislation failed to advance in Congress given concerns about the increased cost and regulatory burden of a federal mandate, particularly in the current economic climate. Concerns were also raised that federal mandates such as those imposed by the Healthy Families Act would inhibit rather than promote flexible work policies by limiting flexible work options. These concerns with federal paid leave mandates are unlikely to diminish during the next Congress, indicating that other approaches to promoting flexible work will be considered.

During the 111th Congress, numerous bills were also introduced that directly or indirectly would support the expansion of flexible work. The American Recovery and Reinvestment Act of 2009 (ARRA), which became law, creates among other things a Broadband Technology Opportunities program to expand access to broadband service, expand public awareness and educate potential users of broadband. This program provides funding streams and lays the infrastructure for the expansion of a telework nationwide.

The Clean, Low-Emission, Affordable, New Transportation Efficiency Act (S. 575, H.R. 1329) was proposed, which would require states and metropolitan planning organizations to develop "Transportation Greenhouse Gas Reduction Plans" to reduce greenhouse gas emissions for the transportation sector by investing in "travel or demand management programs," which include "promoting telecommuting, flexible work schedules, or satellite work centers."

Several bills introduced in the 111th Congress would facilitate flexible retirement, by which employees can reduce their work hours to less than full time prior to retirement. The Older Worker Opportunity Act of 2009 (S. 502) includes tax credits for businesses with employees over the age of 62 who participate in a "flexible work program" of part-time and flexible-work schedule with full pension and health care benefits.[53] Other bills (S. 469, H.R. 1198, H.R. 1804) would reduce the financial disincentives (the impact on pension, etc.) for phasing into retirement among civil service employees.[54]

Other bills concern the federal government acting as a catalyst to promote flexible work. One such example is the federal government acting in its role as a contracting entity to influence the proliferation of flexible work. H.R. 1007 was proposed, which would clarify that federal contractors are allowed to have employees telecommute.[55] Others concern the federal government as an employer. These would supplement existing policies that endorse flexible work and telework for federal employees, considered to assist continuity of business operations, for example, allowing federal employees to continue working in the event of a pandemic. Already adopted is the Federal Employees Flexible and Compressed Work Schedules Act, which permits (but does not require) agencies to establish "flexible work schedule" programs and/or "compressed work schedule" programs for their employees.[56] Federal legislators are making efforts to expand the use of telework arrangements in the federal government. The Senate passed an amended version of H.R. 1722, the Telework Enhancement Act of 2010, on September 29, 2010. It was passed by the House on November 18, 2010 and signed by President Obama on December 9, 2010. The measure makes federal employees presumptively eligible for telework, requires agencies to designate a telework officer and to ensure that telework is part of planning for continuity of business operations.

Although this measure does not apply to private employers, it reflects an endorsement of the benefits of telework and illustrates its appeal. As more employees require flexible work options and the economic and environmental benefits of workplace flexibility become even more apparent, federal and state proposals to encourage telework and other flexible work arrangements are likely to gain momentum.

State proposals to promote flexible work arrangements range from promoting flexible work options for state employees to telecommuting tax credits. For example, a bill, H.B. 1144, was introduced in the Virginia legislature to direct state agencies to develop a telecommuting alternative work policy. The Telecommuting and Alternative Work Schedule Act, another bill introduced in the Virginia legislature would provide a tax credit to employers for expenses incurred in allowing employees to telework pursuant to a signed agreement. Connecticut, Florida, Mississippi

and New Jersey are among the other states that have considered or passed legislation to promote telecommuting and other flexible work arrangements for state employees.

Legal issues impacting flexible work must be carefully considered if efforts to encourage these practices are to be widespread and successful. The Fair Labor Standards Act (FLSA) has failed to keep pace with technological advancements that have transformed the 21st century workplace. This gap has, in some cases, inhibited the workplace flexibility that technology now enables. Some policymakers are attempting to remove impediments in current wage and hour law in order to advance work flexibility. The Family-Friendly Workplace Act seeks to extend "comp time" arrangements to the private sector. The legislation, which was introduced by Representative Cathy McMorris Rodgers (R-WA) on February 10, 2009, would amend the FLSA to allow private sector employees to opt for paid time off, at the same time-and-a-half rate, for overtime hours. At the close of the 111th Congress, this legislation remained stalled.

Looking ahead to the 112th Congress, technological advances and the realities of the modern workforce and workplace will drive employers, employees and policymakers to reexamine the impact of wage and hour and other laws on work flexibility. The call for promoting workplace flexibility amidst an ever more competitive global economy is expected to grow louder. The prospects for legislation advancing this practice improves as trends toward flexible work environments are increasingly seen as both an employee-friendly practice and a business necessity.

The exact shape such legislation will take is expected to differ from what has been proposed in the past, but it is increasingly likely that policies promoting flexible work will advance. Flexible work legislation will undoubtedly continue to be seen as supporting individuals' work-life balance, which was its genesis. Previously proposed bills such as the Working Families Flexibility Act (S. 3840), which would protect employees "right-to-request" flexibility and protect employees from being penalized for working flexibly, are likely to be replaced with legislation that promotes flexible work but is less prescriptive. (It is worth noting that even absent this legislation, which specifies request process timetables, employers are still well-advised to have a clearly communicated request process whereby employees' and managers' communications are transparent and consistent, to guard against the potential for discriminatory practices.)

Recommendations issued by Workplace Flexibility 2010 may inform the direction future legislation will take. The consensus from this five-year, cross-constituency policy analysis is that the goal is to integrate flexible work practices into the workplace as standard operating procedure for doing business. Therefore, recommended policies would at a minimum support innovation by funding projects to test new models and measure results; facilitate model practices by the federal government; establish minimum labor standards to ensure that flexible work arrangements are available; provide technical assistance and training for employers; create public education campaigns; and develop an infrastructure of federal, state and community players to execute the policies. In short, policies would involve incentives, supports and models to stimulate the growth of flexible work, as it is in the best interest of businesses and individuals alike and a critical component of any new economic thinking.[57]

IV. MOVING FORWARD by Sandy Burud of FlexPaths and Littler Mendelson Attorneys

While it may seem daunting for employers to consider their legal implications, flexible work *is* the work of the future and employers can avoid future missteps—including potential litigation—by setting up legally compliant, flexible work practices early on and ensuring that they remain compliant. Employers should apply the same care and attentiveness to developing their flexible work policies and practices that they apply to their other human resources and personnel policies and practices. Both employers who are considering implementing flexible work practices and those who have already done so should consult knowledgeable partners regarding legal and policy issues pertaining to flexible work.

Recommendations

To ensure that the day-to-day behaviors practiced by employees, managers and leaders are aligned with what is legally required, the following are recommended:

- The organization's legal counsel and HR department should work closely together so that after legally compliant policies and protocols are established, they are communicated, understood and followed consistently across the enterprise. Payroll and accounts payable departments should also be informed so that workers are properly compensated in accordance with the correct legal status.
- The working relationship between the legal and HR departments should be oriented toward facilitating, rather than restricting, flexible work in a legally compliant manner.
- Managers, employees, leaders and work teams should be trained as new policies and protocols are rolled out and they should have ongoing guidance—through live or online training, internal resource personnel, or other means.

- Policies, procedures and guidance about how to use and manage flexible work options should be available broadly to all employees and managers, for example, through an intranet or extranet. Such a system can help promote transparency, consistency of practice and accountability.
- Consideration should be given for how to hold managers and employees accountable for following the recommended policies and protocols, (*e.g.*, in performance reviews) 360-evaluations and annual reviews of flexible work agreements between managers and employees.
- Methods and mechanisms should be established for accurately and efficiently tracking access to and use of flexible work options among employee subgroups and work units, for identifying discriminatory issues and areas that need improvement, and for measuring success.
- Regular legal audits can be helpful in determining whether further modifications in policy or practice are needed as changes take place in the company or in the legal environment.

With the ongoing participation of legal partners and flexible work specialists, employers will be equipped to take advantage of the strategic and practical value that this new, agile way of managing can bring to the 21st century workplace.

V. ENDNOTES

1 *Workplace Flexibility in the 21st Century*, Society for Human Resource Management, 2009.

2 *Id*.

3 *Id*.

4 S. Burud and M. Tumolo, *Leveraging the New Human Capital* (Davies-Black Publishing 2004).

5 AT&T and Partnership for Public Warning, 2004 (cited in *Exploring Telework as a Business Continuity Strategy*, ITAC, at 3).

6 Cerullo and Cerullo, 2004 (cited in *Exploring Telework as a Business Continuity Strategy*, ITAC, at 3).

7 CDW-G, Telework Report, 2008.

8 P. Moen & E. L. Kelly, *Flexible Work and Well-Being Study,* 2007.

9 J.G. Grzywacza, D.S. Carlson & S. Shulkin, *Schedule Flexibility And Stress: Linking Formal Flexible Arrangements And Perceived Flexibility To Employee Health*. Community, Work & Family, Vol. 11, No. 2, May 2008, 199-214.

10 *Workplace Flexibility in the 21st Century*, Society for Human Resource Management, 2009.

11 Fuhr and Pociask, *Broadband Services: Economic and Environmental Benefits*, 2007, at 23.

12 Environmental Protection Agency, cited in Fuhr & Pociask, at 24.

13 Retrieved from *http://www.telcoa.org/id134.htm*, cited in Fuhr & Pociask, at 24.

14 Fuhr and Pociask, *Broadband Services: Economic and Environmental Benefits*, 2007, at 20, citing Joseph Romm, "The Internet and the New Energy Economy," *Center for Energy and Climate Solutions, Global Environment and Technology Foundation*, 2002, at 35.

15 U.S. Dep't of Labor, Occupational Safety and Health Administration, Directive No. CPL 2-0.125, *Home Based Worksites* (effective Feb. 25, 2000), *available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=directives&p_id=2254*.

16 Apart from these examples, such privacy issues include surveillance; use and monitoring of electronic equipment and devices; drug testing; and searches and seizures. The full scope of those issues, as well as practical steps employers can take to manage risks associated with them, are discussed in more detail in Chapter 19 , "Employee Privacy Rights" in Littler Mendelson's The National Employer (2011-12 ed.).

17 For ease of discussion, the remainder of this section II.B.2 will refer to this group of part-time, seasonal and temporary workers as "part-time workers" or "part-time employees."

18 This provision of the Health Care Reform law is subject to a temporary moratorium on enforcement, so it will not be applicable until plan years starting after further guidance on this topic is issued.

19 Section II.B.3 discussing Employment Discrimination applies to both Telework and Flexible Work Schedules.

20 42 U.S.C. § 2000e *et seq.* (2010).

21 42 U.S.C. § 1201 *et seq.* (2010).

22 29 U.S.C. § 621 *et seq.* (2010).

23 29 U.S.C. § 206(d) (2010).

24 42 U.S.C. §§ 1981, 1983 (2010).

25 EEOC, *Work At Home/Telework as a Reasonable Accommodation* (2005), *available at http://www.eeoc.gov/facts/telework.html*.

26 EEOC, *Employer Best Practices for Workers with Caregiving Responsibilities* (2009), *available at http://www.eeoc.gov/policy/docs/caregiver-best-practices.html*.

27 *See, e.g.*, Alaska Stat. § 18.80.220; Cal. Gov't Code § 12926; Colo. Rev. Stat. Ann. § 24-34-402; Conn. Gen. Stat. Ann. § 46a-60; Del. Code Ann. tit. 19 § 711; D.C. Code Ann. § 2-1401.02; Fla. Stat. Ann. § 760.10; Haw. Rev. Stat. Ann. § 378-2; 775 Ill. Comp. Stat. Ann. 5/1-1-3; Md. Ann. Code art. 49B, § 15; Mich. Comp. Laws § 37.2202; Minn. Stat. Ann. § 363A.08; Mont. Code Ann. § 49-2-303; Neb. Rev. Stat. § 48-1115; N.H. Rev. Stat. § 354-A:7; N.J. Stat. §§ 10:5-5, 10:5-12; N.Y. Consol. Laws, Exec. § 296; N.D. Cent. Code § 14-02.4-02; Or. Rev. Stat. § 659A.030; Va. Code Ann. § 2.2-3901; Rev. Code Wash. § 49.60.180; Wis. Stat. § 111.321.

28 *Velez v. Novartis Pharm. Corp.*, Case No. 04 CIV. 9194 (S.D.N.Y. 2007).

29 IRC § 6041.

30 IRC §§ 3401-3402.

31 IRC §§ 3101(a); 3111(a).

32 IRC §§ 3101(b); 3111(b). The Federal Insurance Contributions Act (FICA) includes both Social Security taxes and Medicare taxes, and those taxes, while technically four separate taxes (two each on the employee and employer respectively), are often referred to simply as "FICA taxes."

33 IRC §§ 3301 through 3311, inclusive.

34 *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (rejecting economic reality test and applying common law test for worker status for ERISA purposes); *cf. Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-740 (1989) (unless Congress has specifically defined the term "employee" in the statute at issue the term means an employee under the usual common law rules).

35 Treas. Reg. § 31.3121(d)-(1)(c).

36 Treas. Reg. § 31.3121(d)-(1)(c)(2).

37 *Id*.

38 The factors provide that workers are generally employees if they: (1) must comply with employer's instructions about the work; (2) receive training from or at the direction of the employer; (3) provide services that are integrated into the business; (4) provide services that must be rendered personally; (5) hire, supervise, and pay assistants for the employer; (6) have a continuing working relationship with the employer; (7) must follow set hours of work; (8) work full-time for an employer; (9) do their work on the employer's premises; (10) must do their work in a sequence set by the employer; (11) must submit regular reports to the employer; (12) receive payments of regular amounts at set intervals; (13) receive payments for business and/or traveling expenses; (14) rely on the employer to furnish tools and materials; (15) lack a major investment in facilities used to perform the service; (16) cannot make a profit or suffer a loss from their services; (17) work for one employer at a time; (18) do not offer their services to the general public; (19) can be fired at any time by the employer; and (20) may quit work at any time without incurring liability. The Internal Revenue Service Manual, *4600 Employment Tax Procedures*, Exhibit 46401.

39 *See* IRS, *Independent Contractor or Employer? Training Materials*, Training 3320-102 (Oct. 30, 1996).

40 IRC § 3508.

41 IRC § 3506.

42 IRC § 3121(d).

43 *Rutherford Food Corp.*, 331 U.S. at 727. This test is important because "the fact that the parties… may have entered into a relationship which appeared on paper to be that between a business and an independent contractor is not dispositive of the issue of whether [the] plaintiff was, in reality, an employee as opposed to an independent contractor for FLSA purposes." *Padjuran v. Aventura*, 500 F. Supp. 2d 1359, 1362 (D. Fla. 2007). *See also Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1, 10 (2007) (observing that "the parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship") (settled in December 2008 for approximately $27 million).

44 *Rutherford Food Corp.*, 331 U.S. at 730.

45 *See, e.g.*, U.S. Dep't of Labor, Field Operations Handbook (hereinafter "FOH") ch. 10, § 10b05-10b09 (1993), *available at http://www.dol.gov/esa/whd/FOH/index.htm.*

46 FOH § 10b06; *see also Henderson v. Inter-Chem Coal Co., Inc.*, 41 F.3d 567 (10th Cir. 1994) (reversing summary judgment for the employer because genuine issue of material fact existed as to whether mechanic was an employee or independent contractor); *Baker v. Barnard Const. Co.*, 860 F. Supp. 766 (D.N.M. 1994) (rig welders were granted overtime compensation because they were found to be employees under the FLSA); *Carrell v. Sunland Const., Inc.*, 998 F.2d 330, 334 (5th Cir. 1993) (welders were independent contractors and not employees); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293-96 (3d Cir. 1991) (commissioned service station operators were employees); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988) (nurses dispatched by home health care service were employees); *Secretary of Labor, U.S. Dep't*

of Labor v. Lauritzen, 835 F.2d 1529, 1534-35 (7th Cir. 1987) (migrant farm workers economically dependent on the farms where they worked were employees); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985) (home researchers of telephone marketing firm were employees, but distributors who recruited and picked up and delivered researchers' work product were independent contractors); *Donovan v. Brandel*, 736 F.2d 1114, 1117-20 (6th Cir. 1984), *reh'g denied*, 760 F.2d 126 (6th Cir. 1985) (migrant farm workers with special harvesting skills were independent contractors and not employees); *Doty v. Elias*, 733 F.2d 720, 723 (10th Cir. 1984) (waiters and waitresses were employees); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (strawberry growers may be employees); *Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1311-15 (5th Cir. 1976), *cert. denied*, 429 U.S. 826 (1976) (laundry workers were employees); *Martin v. Albrecht*, 802 F. Supp. 1311, 1313-14 (seamstresses who worked at home were employees).

47 FOH § 10b07(c). Some of these considerations are contrary to how tax agencies approach the determination of a worker's status. For example, tax agencies routinely rely upon whether the worker has a license, such as a city business license, in determining worker status. Further, the location where services are performed is often a critical element under the ABC test used for state unemployment tax purposes.

48 *In re Miller*, 86 B.R. 817 (Bankr. E.D. Pa. 1988).

49 *Id.* at 820 n.1 (italics in the original) (internal quotations and citations omitted).

50 For example, a March 2001 study by Marisa DiNatale, "Characteristics of and Preference for Alternative Work Arrangements, 1999," published in the *Monthly Labor Review*, found that in February 1999, independent contractors' average earnings were $33,280, while employees earned only $28,080 on average. More recent evidence also supports that independent contractors earn higher wages. For example, the U.S. Department of Labor Bureau of Labor Statistics "Occupational Outlook Handbook, 2010-11" notes that, for example, medical transcriptionists that work as independent contractors "earn more than do transcriptionists who work for others…"

51 President and First Lady Host White House Forum on Workplace Flexibility, White House Press Release, Mar. 31, 2010, *available at*, *http://www.whitehouse.gov/the-press-office/president-and-first-lady-host-white-house-forum-workplace-flexibility*.

52 *Work-Life Balance and the Economics of Workplace Flexibility*, Executive Office of the President Council of Economic Advisors, Mar. 2010, at 25.

53 *http://workplaceflexibility2010.org*

54 *Id.*

55 *Id.*

56 *Id.*

57 Public Policy Platform on Flexible Work Arrangements, Workplace Flexibility 2010, Georgetown Law, at 12.

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