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# Creative Approaches to the Nationwide Labor Shortage Dilemma

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## PART I
## STRATEGIES FOR ATTRACTING AND RETAINING TALENT IN A SELLER'S MARKET

With a record labor shortage challenging all employers, the franchise model is particularly vulnerable. Franchisors and franchisees seeking to attract and retain talent in the environment may wish to consider some of the strategies below.

*Compensation*

- Increasing starting pay
- Offering sign-on bonuses
- Designing a formal program of scheduled (virtually guaranteed) wage increases in small incremental steps
- Creating new incentive pay opportunities
- Conversely, shifting some current incentive pay to guaranteed base pay to provide employees assurance they can meet their fixed monthly needs

*Benefits*

- Extending traditional health insurance to employees who hadn't formerly been eligible for it
- Reducing the monthly premiums employees must pay, by accepting a higher share of the total cost
- Trading down to less expensive health insurance plans, which can be provided to a wider set of employees at an affordable cost to the employer
- Adding creative new alternative health insurance options, like telemedicine-only plans
- EAP/chaplain availability

*Lifestyle accommodations*

- Allowing flexible hours and/or Work From Home
- Contributing to the cost of childcare or providing onsite childcare

- Providing educational cost reimbursement programs for people pursuing a career path

- Structuring and communicating clear career paths / promotional opportunities for those interested in growth with the company

*Enhancing the work environment*

- Adding fun factors into the work environment: onsite gaming/entertainment, catered food, nicer office space, events, etc.

- Actually listening to employee input about job satisfaction and addressing dissatisfiers (still a rare approach, but not unheard of)

*Focus on Retention*

- Monthly raffles of gift cards or TVs and the like for employees who work a certain number of hours/shifts in the month (gas cards especially welcome these days!)

- Appreciation awards (money/gifts) for jobs well done

- Bulletin boards/other signage recognizing employees who are praised by customers

- Monthly focus groups/roundtables for employees to talk to management

- Retention bonuses paid over time

- Mentoring/buddy programs for new employees

*Different hiring methods and targets*

- Making greater use of part-time employees (or, less commonly, replacing part-timers with full time employees, who are thought to be more stable)

- Apprenticeship/internship programs and true job training programs

- Eliminating or de-emphasizing disqualifiers (e.g., dropping drug test requirements, lowering educational/skill standards)

- Recruiting non-traditional candidates (e.g., retirees, recent prison parolees)

## PART II
## MASSACHUSETTS HIGH COURT INTERPRETS THE ABC TEST FOR FRANCHISING

On March 24, 2022, the Massachusetts Supreme Judicial Court (SJC) handed down a key ruling that could have a significant impact on franchising across the state. In *Patel v. 7-Eleven, Inc.*, the SJC was asked whether the three-prong test for independent contractor status set forth in Massachusetts' state-law independent contractor statute applies to the relationship between a franchisor and its franchisee, where the franchisor must also comply with the Federal Trade Commission's (FTC) Franchise Rule. The SJC held that the independent contractor statue applies to the franchisor-franchisee relationship and is not in conflict with the franchisor's disclosure obligations set forth in the FTC Franchise Rule. Therefore, the SCJ determined, a franchisee providing services to a franchisor under the terms of a franchise agreement may, in fact, be classified as an "employee" of the franchisor under state wage-and-hour law.

**Massachusetts and FTC Rules**

The court's reference to the "independent contractor statute" refers to Massachusetts G. L. c. 149, § 148B. Under this law, "an individual performing any service" for a putative employer "shall be" considered an "employee" for purposes of the wage statutes. An employer may rebut the presumption by satisfying all elements of the well-known "ABC test." That is, an employer, by a preponderance of the evidence, must demonstrate: [A] the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and [B] the service is performed outside the usual course of the business of the employer; and [C] the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.[1]

The FTC Franchise Rule refers to 16 C.F.R. § 436.1, *et seq.* Of importance, this rule *does not* involve employee misclassification. Instead, "it was adopted in the late 1970s in response to widespread deception in the sale of franchises, including misrepresentations related to the costs to purchase a franchise and the terms and conditions under which a franchise would operate." The FTC Franchise Rule "considers a franchisor's failure to provide presale disclosures specified in the rule to a prospective franchisee to be an unfair or deceptive act or practice in violation of section 5 of the Federal Trade Commission Act." The FTC Franchise Rule "also prohibits a franchisor from making unilateral, material alterations to the terms and conditions of the franchise agreement without providing timely notice to the franchisee."

The disclosure requirements under the FTC Franchise Rule apply to, among others, "franchisors," which, under federal regulations, is defined as "any person who grants a franchise and participates in the franchise relationship." Additionally, a "franchise," in turn, is defined as a continuing commercial relationship where, among other things, the franchisor "will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's

method of operation." Therefore, as the Massachusetts high court stated, "under the FTC Franchise Rule, the required disclosures are triggered when a prospective franchisor makes one of two elections—either to exert a significant degree of control over the franchisee's method of operation or to provide significant assistance in the franchisee's method of operation."

**History of Lawsuit**

In this case, the U.S. District Court for the District of Massachusetts first held in September 2020 that owner/operators of 7-11 franchises were *not* employees of the national franchisor under state wage-and-hour law.[2] As the court observed in its decision, "It cannot be the case, as plaintiffs suggest, that, in qualifying as a franchisee pursuant to the FTC's definition, an individual necessarily becomes an employee. In effect, such a ruling by this Court would eviscerate the franchise business model, rendering those who are regulated by the FTC Franchise Rule criminally liable for failing to classify their franchisees as employees."

On an appeal brought by the plaintiffs, the U.S. Court of Appeals for the First Circuit last year asked the Massachusetts SJC to decide whether the Commonwealth's independent contractor law applied to franchising. In reaching its decision, the SJC first evaluated the purported conflict between the ABC test and the FTC Franchise Rule. Specifically, the court evaluated whether there was a conflict between the FTC Franchise Rule and the first prong of the ABC test, which is primarily centered on the level of control one exercises over its workers. According to 7-Eleven, "classifying franchisees as employees under the statute places the entire market for franchise relationships in the Commonwealth at risk." However, the SJC determined that no conflict exists between the statute and the regulation.

As the court stated, "[t]he FTC Franchise Rule 'is a pre-sale disclosure rule[,]'" and "[c]ompliance with these disclosure requirements does not mandate that a franchisor exercise any particular degree of control over a franchisee." Ultimately,
[a] franchisor can comply with the FTC Franchise Rule to make the prescribed disclosures, and in situations where a franchisee is deemed an employee under the independent contractor statute, the franchisor can comply with its obligations under the wage statutes. Compliance with these latter obligations does not render it impossible for a franchisor to comply with the FTC Franchise Rule.

In that light, it bears noting that the SJC's decision largely adopts the position that the FTC itself put forward in an amicus brief filed with the court: specifically, that compliance with the FTC's disclosure rules does not conflict with classification of individuals as employees or independent contractors under state wage-and-hour laws. Rather (and not surprisingly, given the current administration's focus on employee misclassification), the FTC's position is that franchisees may be employees of their franchisor, the FTC's Franchise Rule notwithstanding.

**Implications**

This decision could have a significant impact on businesses across Massachusetts, not only in the franchise context, but beyond the franchise-franchisor relationship. Specifically, the SJC's decision illustrates the lack of certainty surrounding the application of the independent contractor law, and for businesses that primarily rely upon independent contractor workforce models. However, it also remains to be seen what will happen as this case now heads *back* to the First Circuit with an answer to the certified question. In holding that the mere fact that a franchisee operates under a franchise agreement does not render the independent contractor statute inapplicable, the SJC went on at some length to note that this does not "render every franchisee an employee" under state law, citing numerous examples where even under the first "control" prong of the ABC test, franchisees were found to *not* be employees of the franchisor. Finally, insofar as it turns on a state court's interpretation of state wage-and-hour law, it is not entirely clear how other federal circuits will consider this case if similar issues arise under other comparable state laws.

**Changes to Independent Contractor Status in Massachusetts and Beyond**

The decision by the Massachusetts SJC is only one of many items impacting independent contractor status in Massachusetts and across the country. Here is an overview of other key changes and developments:

- **Pending Lawsuit.** In July 2020, Massachusetts Attorney General Maura Healy filed a complaint for declaratory judgment with the Suffolk County Superior Court alleging that rideshare companies have misclassified workers as independent contractors on their platforms. The complaint seeks declaratory relief that the employees are entitled to protections under Massachusetts' wage-and-hour laws. The lawsuit is currently pending.

- **Massachusetts Ballot Initiative.** In August 2021, the Massachusetts Coalition for Independent Work filed two versions of a ballot initiative (Petitions) designed to give Massachusetts voters the option of defining the relationship for Massachusetts app-based drivers for Delivery Network Companies (DNC) and Transportation Network Companies (TNC) as one of independent contractors, so long as certain conditions are met. Both Petitions would provide app-based drivers—as independent contractors—with a variety of guaranteed benefits and compensation. The initiative still needs to get more signatures to be able to appear on the Massachusetts ballot in November 2022, but the campaign has months to get those signatures. The SJC is also considering legal challenges to the two Petitions.

- **Trump-era Independent Contractor Rule.** On March 14, 2022, the U.S. District Court for the Eastern District of Texas held, in a case filed by Littler on behalf of several trade associations, that the Department of Labor's 2021 delay and ultimate withdrawal of regulations governing independent contractor status under the Fair Labor Standards Act (FLSA) violated the Administrative Procedure Act (APA). As a result, the former administration's independent contractor rule is now

in effect. On March 30, 2022, the U.S. Senate failed to confirm Dr. David Weil as administrator of the Department's Wage and Hour Division (WHD). In the absence of Senate-confirmed leadership, it is unclear whether and how quickly WHD may move to adopt a new and more limited contractor status standard by way of regulation, Administrator's Interpretation, or otherwise.

- **PRO Act.** Despite being stalled in the U.S. Senate, the Protecting the Right to Organize (PRO) Act remains a potential legislative threat to employers across the country. As previously reported, the PRO Act seeks to revise the National Labor Relations Act to incorporate the ABC test and reclassify millions of traditional independent contractors as "employees" subject to union representation.

- **NLRB & *The Atlanta Opera, Inc.*** Most recently, in *The Atlanta Opera Inc.*, 371 NLRB No. 45 (2021), the Board invited interested parties to file briefs addressing whether it should overturn its decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) and reconsider its standard for determining the independent contractor status of workers. Littler filed an amicus on behalf of a number of trade associations urging the Board to maintain the *SuperShuttle* standard.

In short, so-called "employee misclassification" and independent contractor status is likely to continue to be of great concern to employers at both the federal and state levels.

## PART III
## FEDERAL COURT DECISION PROTECTS INDEPENDENT CONTRACTOR STATUS

On March 14, 2022, the U.S. District Court for the Eastern District of Texas delivered a victory for businesses that utilize independent contractors, and for independent contractors themselves, when it held that the Department of Labor's 2021 delay and ultimate withdrawal of regulations governing independent contractor status under the Fair Labor Standards Act (FLSA) (the "IC Rule") was unlawful.[1]

In a 41-page opinion, the court found that the DOL violated the Administrative Procedure Act (APA) twice: first, in February 2021, when it delayed the effective date of the IC Rule, and later, in May 2021, when it withdrew the IC Rule in its entirety.

Promulgated in January 2021, the IC Rule clarified the relevant factors that the DOL would use to determine whether workers are in business for themselves and are independent contractors, or are economically dependent on a putative employer for work and thus employees under the FLSA. The IC Rule emphasized that the proper analysis is whether a worker is dependent on a purported employer for work as opposed to whether a worker is dependent on the income received.

Prior to adopting the IC Rule, the DOL and most courts considered seven economic reality factors when analyzing a work relationship using the economic reality test. The IC Rule clarified these seven factors by identifying two core factors based on an exhaustive analysis of decades of cases dealing with the test: (1) the nature and degree of control over the work; and (2) the worker's opportunity for profit or loss. It additionally set forth three additional non-exhaustive guidepost factors to be considered if the core factors are not determinative or point in different directions:

- The amount of specialized training or skill required for the work that the potential employer does not provide;
- The degree of permanence of the working relationship, focusing on the continuity and duration of the relationship and weighing toward independent contractor status if the relationship is definite in duration or sporadic; and
- Whether the work performed is "part of an integrated unit of production."

Shortly after the 2021 Inauguration, the Department proposed a rule purporting to delay the effective date of the IC Rule, which was originally scheduled to go into effect on March 8, 2021, to May 7, 2021. On May 6, 2021—the day before its delayed effective date—the Department issued a final rule withdrawing the IC Rule in its entirety, leaving businesses and stakeholders with little clarity as to how they might lawfully engage workers and other businesses as independent contractors.

The court's decision found that both of these actions were unlawful and violated the APA. Accordingly, the court vacated the delay and withdrawal of the IC Rule, and specifically held that the IC Rule became effective on March 8, 2021, and remains in effect today.

The decision brings welcome clarity to businesses and others seeking guidance and transparency as to how the DOL would analyze the question of whether a given worker was an independent contractor or an “employee” under the FLSA (thus entitled to, among other things, minimum wage and overtime).

It is unclear whether the Department will appeal this decision, as well as whether it will engage in new rulemaking to propose a new independent contractor standard.

## PART IV
## FRANCHISING IN THE CROSSHAIRS:
## AVOIDING "MISCLASSIFICATION" LIABILITY

Increasingly, we see an effort in the states to adopt wage and hour laws that are intended to or have the result of making it more difficult for businesses to use independent contractors. Often garbed in the language of "wage theft" and "worker misclassification," these laws apply stringent tests that result in many *bona fide* independent contractors being "reclassified" as W-2 employees (and thus entitled to, among other things, minimum wage, overtime, and, often, state-law requirements such as meal and rest breaks). To ensure workers are classified correctly, there are a number of practical steps you may wish to consider with respect to your business operations to minimize potential exposure under these laws.

*Legal Compliance: Get Your House in Order.* We recognize that many wage and hour laws are byzantine, and at times it appears impossible to be in full compliance. But there is truth in the old saying that "the best offense is a good defense." Franchises should do an in-depth examination of their practices to ensure they are complying with state wage and hour laws, ranging from scheduling, to rest and break periods, pay check data, to employee expense reimbursement, and beyond. For their part, franchisors may want to consider providing guidance to their franchisees with respect to state wage-and-hour compliance, and consider "spot checks" or audits to ensure franchises understand their numerous obligations under these laws. To the extent possible, these activities should be done in consultation with counsel, both to ensure legal compliance, as well as to ensure these analyses enjoy attorney-client privilege where possible. Counsel can also assist franchisors in providing guidance to franchises, or conducting field audits, while minimizing the risk that such activities will be used as evidence of a joint-employment relationship down the road. No one wants to be on the receiving end of a lawsuit—but if you find yourself in that position, steps taken to reduce damages and exposure to liability will prove to be valuable investments.

*Review Your Agreements.* If your franchise agreement does not already include a provision requiring both parties to the contract to comply with all federal and state laws, you may wish to consider adding such a proviso to current agreements where possible, and certainly to future agreements. Where a business model permits, a franchise agreement might want to include a requirement that all franchise workers will be classified as W-2 employees (rather than independent contractors).

*Review Marketing Materials and Consider How You Characterize Your Business.* In the wake of the *Dynamex* case in the California Supreme Court, at least one franchisor has avoided liability under *Dynamex* by persuading a court that its franchises were operating "outside the normal course" of the franchisor's business (an element necessary to satisfying the ABC test). In a recent case, a court found that a multinational oil and gas refiner was not in the same line of business as its branded retail franchises. Rather, the court found that the refiner was in the business of owning real estate and fuel, while its franchises were in the business of operating gas stations, thus satisfying the B prong of

the ABC test. While this approach was been viewed skeptically by some courts, it does offer a potential strategy for franchisors. Multi-unit franchisors in particular may want to scrub their marketing materials and websites to characterize themselves as being in the business of franchising various companies rather than in a single line of business.

There may be efforts franchisors can take to support an argument that their franchises are "outside the normal course" of its business. For example, brands may wish to consider eliminating or reducing the number of company-owned franchises. Similarly, both franchisors and franchisees may wish to review their websites and marketing material, to attempt to differentiate the business of the franchisor from that of the franchise. In one case, the court relied on representations that the franchisor was in the national business of janitorial services, rather than franchising opportunities to run cleaning businesses, to conclude that the franchises who performed these cleaning services operated within the same business as the franchisor. A review of material may minimize that risk.

In short, the legal landscape and the intersection of franchising, misclassification, joint employment, A.B. 5, and courts' application of *Dynamex* and its progeny continues to raise more questions than it answers, with numerous "moving parts"

**Take-Away**

If you do find yourself in the cross-hairs of a potential lawsuit, seek out qualified counsel immediately. Particularly where a new law is being tested, early decisions may have dramatic down-the-road consequences. IFA members in this position are well-advised to speak to counsel early and often.

## PART V
## THE FUTURE OF NON-COMPETE AGREEMENTS

On July 9, 2021, President Biden issued his Executive Order on Promoting Competition in the American Economy. Earlier in the day, the White House issued a press release announcing that the anticipated order would, "[m]ake it easier to change jobs and help raise wages by banning or limiting non-compete agreements and unnecessary, cumbersome occupational licensing requirements that impede economic mobility." Now that the executive order has been issued, employers are wondering: *are noncompete agreements with employees now illegal as a result of President Biden's order?* Short answer – *No* – but employers should be on alert.

More aspirational in nature, President Biden's order creates a new White House Competition Council and directs federal regulators to address a long list of different competition-related concerns – only one of which is noncompete agreements. In essence, President Biden's executive order directs the Federal Trade Commission (FTC) to pursue a rulemaking process that would ban or limit the use of noncompete agreements as a matter of federal law. At this time, it is unclear whether the FTC will propose very broad limitations that could potentially ban all employee noncompete agreements, or whether the agency will take a more targeted approach, limiting regulation to restrict the use of noncompetes with lower-income employees (as several states have done), or certain employment sectors.

This is not the first time the FTC has been asked to examine possible regulations regarding the use of noncompete agreements with employees. Back in January 2020, triggered in part by a Petition for Rulemaking by a group of academics, labor, and public interest organizations, the FTC held public workshops regarding the use of noncompete agreements. More than one meeting was held and a wide variety of different proposals were discussed at that time, but no action was taken to enact a specific rule or rulemaking process.

What may be different this time around is that the Biden administration has been more directly critical of noncompete agreements and has taken the position (at least at the outset) that noncompetes should be banned or at least heavily restricted. For example, President Biden's campaign website declared, "As president, Biden will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements."

Until actual proposed rules are presented, there is no way to know if the push to limit the use of noncompete agreements will go as far as the campaign rhetoric would indicate.

What the order does do is establish a White House Competition Council within the Executive Office of the President to coordinate, promote and advance a whole series of different initiatives. The chair of the FTC will be part of the Council and is specifically "encouraged to consider work with the rest of the Commission to exercise the FTC's

statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

There are many miles to go yet, and many bridges to cross before we know whether the law surrounding noncompete agreements will be changed dramatically. First, there are very significant open issues concerning whether or not the authority granted to the FTC under Section 5 of the Federal Trade Commission Act is so expansive that it would allow for the FTC to essentially establish a new set of legal criteria for what is a permissible contractual restraint on an employee despite the fact that there are existing laws such as the Sherman Antitrust Act, which already govern competition and have been interpreted to allow for noncompete agreements.

Second, there is also a significant constitutional issue to be addressed under the non-delegation doctrine as to whether this exercise of executive authority constitutes executive over-reach and invades the provenance of the legislature. The previously cited press releases President Biden made during his campaign said he would "work with Congress …" on these issues, not that he would pursue them as executive action. Legislative proposals have been made to address noncompete agreements and that is the body that many believe is best to debate the complex issues raised by a proposed regulation of such agreements.[1] When the FTC previously looked at regulating employment noncompete agreements, both of these significant legal hurdles were raised by Commissioner Noah Joshua Phillips and others as a major concern.

Finally, there is a significant issue of federalism and states' rights that will have to be addressed. Across the United States there are individual state legislatures developing and implementing state law limitations on the use of noncompete agreements with employees that address the most compelling concerns – like use of noncompete agreements with low-wage workers. Under circumstances where many of the concerns raised regarding noncompete agreements are already being addressed by the new wave of state laws sweeping the nation, the argument for aggressive use of federal power to override the hard work and balancing of interests the states have already put into their evaluations of this issue could trigger some stiff opposition from those who advocate for states' rights.

# PART VI
# "DEAR ATT'Y" – WANDERING WORKERS AND TAX, WAGE AND HOUR, AND BENEFITS CONSIDERATIONS FOR REMOTE AND RELOCATED WORKERS

***Dear Att'y:*** We're a small company based in Austin, Texas – but we're growing. We made it through the pandemic, and we're all looking forward to getting back to work. We recently announced that employees can return to the Austin office voluntarily, starting in August. When HR sent around the email, we heard from dozens of our employees letting us know they didn't plan to come back; they want to continue working remotely. We anticipated this, and we're working with them to navigate their individual situations. But one thing we did not anticipate: some of them don't want to come back because they've moved!

Fortunately, most of them are still in Texas – and we've made it work. But one employee, Wanda Wanderer, moved to Bismarck, North Dakota in April last year – without telling us! Wanda is a Junior Analyst in our Accounting department. She's a delight to have around the office but to be honest, she's been quite productive working remotely during the pandemic – she worked overtime nearly every week during our financial challenges in spring 2020. We don't want to lose her.

We see this as an opportunity; maybe allowing more remote work and flexibility will open the door to better recruiting for our growing teams. But before we cross that bridge, is it a problem that we've been paying Wanda as a Texas employee?

We're only worried about our wage and hour issues for now. Our pay practices are nothing out of the ordinary for Texas; everyone is full-time, we follow the FLSA, we pay semi-monthly, we provide two weeks of paid time off for all employees to use for whatever purpose they want each year and they can carry it over year after year. That should be fine… right? It's not as though she moved to *California* after all!

***—Worried & Wondering About Wanda Wanderer***

***Dear Worried & Wondering,***

The first rule of thumb for remote worker relocation (wandering workers) is "location, location, location." The law that applies to a person's work will most likely be the law of the jurisdiction where that person is working – even if the employer is located elsewhere. With limited exceptions of states whose courts have found "extraterritorial application" of their laws, most state legislatures and courts recognize that their power to regulate the work is limited by the state's border. What does that mean for you? It means, if your employees are working in a different jurisdiction, you need to assess and determine what compliance obligations you have in that jurisdiction, *from the beginning.*

Now, that didn't happen here. But let's start with the good news: North Dakota does not have daily overtime or double time pay requirements or mandatory split-shift premiums. And, both Texas and North Dakota follow the federal minimum wage rate. And other good news: Texas and North Dakota both allow semi-monthly pay – not all states do! So, your current pay practices are likely compliant in North Dakota. As long as Wanda has accurately recorded her time, and she's been paid for hours over 40 at 1.5 times her regular rate, you likely don't need to worry about minimum wage, overtime, or late wages.

Which may lead you to ask, what other wage/hour problems are there to worry about? Well, *Worried & Wondering*, quite a lot, even in a Midwest flyover state! We see three wage/hour challenges here:

- Unlike Texas, North Dakota law includes a general indemnification provision for "expenses or losses incurred as a direct consequence of discharge of duties." N.D. Cent. Code. 34-02-01.
- Unlike Texas, North Dakota law has a provision regarding mandatory off-duty meal periods for non-exempt employees. N.D. Admin. Code. 46-02-07-02.
- Unlike Texas, North Dakota has a quite particular law describing the limited conditions in which earned, unused vacation time can be forfeited at an employee's termination. Generally, in North Dakota, once paid time off is awarded, it is considered wages due at separation. *See* N.D. Admin. Code 46-02-07-02.

We'll also note, North Dakota is a "Captive Program" state for workers' compensation insurance coverage. This means that workers' compensation insurance cannot be obtained through private insurance or self-insurance. In general, workers' compensation laws are employee-friendly and typically allow the employee their choice of where to file a claim for injury incurred during the course and scope of employment in any state where the employee works. Besides filing in their work state, an employee can also file a workers' compensation claim in the state where the work injury occurred, even if that state is not a place where the employee typically works. For this reason, employers should consider having insurance coverage that applies wherever the employee works, and many employers already have nationwide coverage. To determine if you have a coverage problem for Wanda's prior work in North Dakota, and coverage for the future, consult your insurance broker and look into the state program.

What does this mean for Wanda Wanderer? She might be entitled to payments that you have not provided (business expenses) and she might have claims that she could raise with the state's department of labor (missed meal periods). If Wanda has an injury on the job while working remotely, and files a claim in North Dakota, both the state and Wanda will be surprised to learn that the company has not paid into the mandatory program. And, if at some point you decide to require her return or part ways with Wanda, she may be entitled to all her accrued paid time off if she doesn't come back.

Of course, each of these topics requires an individual assessment of the law, and potential risks; we're here for you! Remember the second Wandering Worker rule of thumb: "ignorance is no excuse." The fact that Wanda did not tell you she moved might help with some arguments about good faith and lack of willfulness (always good things to have in wage/hour world) but there is no exception that allows employers to violate laws they do not know about. As G.I. Joe used to say: *Now you know, and knowing is half the battle!*

There are a few more items to think about: other areas to review and consider when evaluating a remote worker relocation, or considering allowing remote work in a new jurisdiction:

- state and local taxation, including "nexus" coverage;
- registration to do business in new jurisdictions;
- additional or new paid sick leave obligations;
- counting issues under the Family and Medical Leave Act and similar state laws;
- payment of a different minimum wage or salary to be exempt from overtime;
- different meal and rest break compliance;
- additional wage and hour obligations, including a change in available exemptions under a different state law;
- job posters, pay data reporting, and hiring notifications;
- wage-theft notice requirements where none previously existed;
- unemployment insurance payment obligations; and
- conflicting laws, including extraterritorial application of a variety of state laws.

One final tip: Tackle this head on, before Wanda Wanderer wanders again! Remember to get a remote work agreement in place, recognizing only one approved remote work location, and establish a policy that remote workers need permission to change remote locations.[1]

I suspect if you do not tell Wanda to stay put until you're up to speed on compliance obligations nationwide, we may hear about Wanda Wanderer again… did I mention North Dakota has an emergency paid sick leave requirement?

***Dear Att'y:*** Thank you for answering our question last month about what wage and hour issues we needed to consider for our "wandering worker" who moved to North Dakota and wants to continue remote work. Of course, now that that issue is resolved, we have another question for you.

Our small, Texas-based company has now grown to 62 employees and we're still growing! We hired Terry Traveler about nine months ago and he has been an amazing employee with a skill set and work ethic we just can't do without. Unfortunately, Terry is not well – he was just diagnosed with a medical condition. This diagnosis and the pandemic, as well as Terry's recent viewing of the movie *Nomadland* have made him realize life is short and that he wants to travel the United States in his RV. He plans to spend the summer of 2021 in sunny Florida, the fall in lovely Massachusetts to watch the leaves turn, and then the winter with his extended family in New Jersey, starting right after Thanksgiving. Terry plans to continue to work full time from his RV while living in and visiting all these locales.

We have the wage and hour issues covered after reading your response to our last question (Terry would be considered a *bona fide* exempt employee in all three states). And we know there are tax issues we'll ask more about in a separate question. What we're worried about is Terry's benefits – we want to make sure he gets all the benefits to which he is entitled, but what we don't know is the following:

- Would Terry be able to use our Texas-based health insurance if he needs to see a physician while living and working in another state?
- What if he gets injured while driving his RV? Would that be considered a workplace injury covered by workers' compensation insurance since it's also where he works?
- What about FMLA? Would he be covered if he's working more than 75 miles from our home office in Texas and needs time off?
- What about any state leave laws – would they apply?
- Can we continue applying our normal Texas-based sick-leave policy of three days per year when he's not working in Texas?

We've never had an employee want to move around so much, and while Terry's job can be completed remotely, it's making us nervous. What can we do to protect Terry as well as ourselves?

***— Worried & Wondering About Terry Traveler***

***Dear Worried & Wondering,***

We completely understand your trepidation and hope to give you some guideposts to help Terry on his journey. Terry is moving around **a lot** and, as we said in part 1 of this series, the first rule of thumb for legal compliance with employees working at remote worksites (*i.e.*, wandering workers) is "location, location, location." The law that applies to a person's work will most likely be the law of the jurisdiction where that person is

working – even if the employer is located elsewhere. That said, the issues surrounding Terry's travels are not insurmountable, but may require a little more time and expense to ensure compliance.

We should start with the health insurance question. Health insurance coverage is typically limited to the plan's network of "preferred" or "in-network" providers. Otherwise, an employee will pay the provider's full rate or an out-of-network rate (if there is any out-of-network coverage at all in the plan) if they see a provider who is not considered "in network." Most health insurance plans only have "preferred" or "in-network" providers located in the state in which the plan was purchased or originated. The good news: all health insurance plans cover emergency services at any hospital in the United States, so if Terry has an emergency, he should be covered. The bad news is that if Terry's health condition requires regular medical care or he suffers a "non-emergency," he may not be fully covered. One option is to call your broker and see if you can find a multi-state plan (or MSP) that will cover Terry in the states he plans to visit.

Workers' compensation insurance typically will apply in states where the employer is physically located. When a worker travels to another state, the worker falls under the jurisdiction of a different, yet fundamentally similar, workers' compensation system. Many states, including Texas, have reciprocal agreements with other states allowing workers to be covered under their home state's workers' compensation law if they are injured in another state so this shouldn't be an issue, but we recommend you consult with your insurance broker and review the state programs to make sure.

In general, an employee's injury or illness is compensable under workers' compensation only if it "arises out of and in the course of employment," regardless of where the injury occurs. Hence, even though Terry's RV is his remote work location, if Terry gets into a car accident while driving his RV, it likely won't be a covered compensable injury because driving is not part of Terry's job duties and he would not be traveling at the behest of the employer. On the other hand, if Terry slips and falls in his RV on the way to the bathroom during his working hours, that slight deviation may be considered "in the course of" his employment and present a covered claim.

If Terry is seriously injured or requires time off from work for his own serious health condition, he would likely be covered by the Family and Medical Leave Act (FMLA). An employee who works remotely (75 miles or more from the employer's office) is covered under the FMLA if the office to which the employee reports and from which assignments are made has 50 or more employees working within 75 miles of its location. Your Texas office would qualify, to the extent Terry still reports there and receives his work from there. The applicable regulation says: "An employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made." Hence, the location of Terry's RV at the time he may need FMLA leave is not

his work location for purposes of the FMLA, and Terry would likely be eligible for FMLA leave if he meets all the other FMLA requirements.

Terry also may be covered by state leave laws, should a covered event occur. For example, Massachusetts has a Paid Family Medical Leave Act (PFML). Unlike FMLA, to be eligible to receive paid leave under PFML, a worker only must have earned at least $5,400 in the previous 12 months. PFML eligibility is not dependent on how long an individual has worked for a current employer – it applies to all W-2 employees working in Massachusetts (which Terry may be for the part of the year that he is working in Massachusetts). If Terry falls ill after earning more than $5,400 as a Massachusetts employee, he may be covered, and you may be required to withhold pay from his paycheck to fund this benefit. Similarly, New Jersey's Family Leave Act (NJFLA) applies to employers of 30 or more employees anywhere in the world and employees working in New Jersey who have been employed by the employer for at least one year and have worked at least 1,000 hours in the past 12 months. NJFLA allows up to 12 weeks off for an employee to, among other things, bond with a new child or care for a covered family member, *but* does not apply to one's own disability or injury. Therefore, if Terry falls ill while in Massachusetts and uses his 12 weeks of FMLA leave and Massachusetts PFML for his own illness, when he arrives in New Jersey in November, he may have up to 12 weeks of time off still available to him under the NJFLA if his mother falls ill and he needs to care for her. He also may be eligible for New Jersey Family Leave insurance benefits through the state, and you may need to fund such benefits as well. Payroll should be able to make these adjustments to his locations as Terry changes places.

Finally, with three days of paid sick time per year, you may not be offering Terry enough paid sick time to comply with Massachusetts or New Jersey state law. Massachusetts and New Jersey each requires paid sick time to be provided at a rate of one hour of paid sick time for every 30 hours worked, up to 40 hours each year. Terry's accrual of three days per year would not be sufficient to meet the requirements of the law, if he worked full time.

The most important thing is to make sure Terry keeps you informed every time he starts working in another state. With a little pre-planning and a few key policies and procedures in place, Terry can be on his way in no time![1]

***Dear Att'y****:* You alerted us to some wage & hour and leaves & benefits issues stemming from our "wandering workers" who have scattered across the country during the pandemic, yet continue to work for our Texas-based company. We have some new questions for you. We received calls this week from two very upset employees. One has been caring for his parents off and on in Duluth since April 2020. He has continued to work for us when he's in Minnesota, but still has a home here in Texas where he checks in periodically. He is surprised we have been withholding Minnesota income taxes, as he never paid such taxes in Texas. Who is in the right here? Our other employee, who was pregnant and concerned about the low COVID-19 vaccination rate in Texas, temporarily relocated to her sister's home in New Jersey during the last few months of her pregnancy, all the while continuing to work for our company. She recently gave birth and applied for NJ Paid Family Leave benefits, but was denied. She's claiming that we should have made New Jersey family leave insurance withholdings. Is she correct? Finally, both employees are asking us to cover their internet service. Would these payments be considered taxable expenses?

***—Worried & Wondering about Taxing our Travelers***

***Dear Worried & Wondering,***

These issues are, indeed, *taxing*. And complicated. There is a lot to unpack, so let's start with your employee who has been working in Minnesota. Texas, as you know, does not have an income tax. But employers must withhold and remit income taxes to each state where required, and the states have very different rules about when such taxes must be withheld. For example, New York has a 14-day rule that provides that if an employee is working in the state for 14 days or less per year, then there is no income tax withholding. New Jersey and Mississippi use dollar thresholds. In addition, some states have reciprocity agreements that eliminate income tax withholding. 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 your situation, under Minnesota law, if an employer is required to withhold federal income tax, then it also has an obligation to withhold Minnesota income tax. So as long as the employee earned anything while working in Minnesota and had federal income tax withheld, you are correct for withholding state income tax as well.

In addition, Minnesota, like most states, also says if you are living in the state for more than 183 days (roughly half the year), then you're a resident subject to income tax. You noted the employee has been traveling back and forth from Texas during that time, so we are not sure how long he has been in Minnesota versus Texas, but it is possible that he is subject to income tax withholding as a Minnesota resident even though he kept his house in Texas and travels back. It is also possible that the Minnesota income tax withholding was too much because he was not a resident and still in Texas a substantial amount of time, but that's a separate issue he'll need to take up with the state of Minnesota by filing a nonresident tax return and claiming a refund. What we do know is

if you hadn't withheld any income tax, you could have subjected the company to potential penalties for under withholding. It bears noting that most states have tax withholding forms and employment insurance benefits notices that should be given to employees when they move to a new state.

That brings us to your second employee who is working from New Jersey. Unlike income taxes, which can be withheld in multiple states, employment or payroll taxes are paid to only one state. How do you determine which state? All states use the same the same four-part test, which considers: (1) localization of services; (2) base of operations; (3) place of direction and control; and (4) state of employee's residence.

This test must be applied in hierarchical order; that is, an employer must first determine if the work is localized to a particular state before the next step is considered. An employee's services are "localized" in a particular state if all or most of the employee's services are performed in that 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.

In many cases, it is clear that services are localized in a particular state. If so, that is the end of the analysis. It is unclear from the facts you provided, however, whether Texas or New Jersey is the appropriate state. What work does she perform? How long has the employee been in New Jersey? Does she intend to stay there for an appreciable amount of time, or is she headed back to Texas?

If the employee's services are not localized to a particular state, then the next step is the base of operations analysis, which focuses on the place the employee customarily returns to receive instructions or supplies, to repair equipment, or to perform other functions relating to the provision of services. In your case, it appears as if the base of operations is indeed Texas, but we would need more facts from you to be certain.

If the employee's services are neither localized, nor subject to a base of operations, the third consideration is the place of direction and control, which is often a corporate or regional headquarters where the employee gets instructions. As noted in part two of this test, it seems fair to assume, given the information you provided, that Texas is where the employee is receiving her instructions.

If, however, none of the previous factors provides a clear answer, then payroll taxes are due to the employee's state of residence. Because it sounds like New Jersey is a temporary location, it seems reasonable for you to continue reporting your employee to Texas for payroll tax purposes. This means you are likely *not* on the hook for the family leave insurance payments that are part of a New Jersey-based employee's payroll taxes. If the employee continues to work out of New Jersey, however, you may need to revisit the issue.

Turning to your business expense question, some states require employers to reimburse their employees for business expenses—but most do not, including the states at issue here. If a business chooses to reimburse workers for business expenses, it can do so on a nontaxable basis if the employee substantiates the business purpose and nature of the expense, usually by way of an expense report with receipts that is submitted within a reasonable period of time, and is reimbursed only the exact amount claimed. Alternatively, an employer can reimburse employees a flat amount without regard to actual expenses. In such cases, the expense reimbursement is taxed as a wage for federal and state tax purposes.

IRS guidance has clarified that employers can reimburse employees for the reasonable expense of using their personal cell phones on a non-taxable basis. This principle should hold true for internet service, although it is important to recognize that not all use of home internet is a business expense. As a result, some allocation of a reasonable amount to reimburse for the business use must be made, as opposed to just paying employees' internet bills. This assessment typically requires employers to make reasonable inquiries regarding costs and business usage.

In sum, *Worried & Wondering*, there are different ways to reimburse employees for their internet expenses related to work, but you'll need to decide whether you want to provide them a flat amount per week or month to cover expenses while they work remotely and not worry about receipts, or if you want to make the payments nontaxable and collect the necessary information and documentation to ensure payment of no more than covers the business expenses.

As you can see, the tax implications of wandering workers can be thorny and are highly dependent on location. It is therefore key that you keep tabs on where your employees are performing their job tasks and for how long.

## PART VII:
## DUELING FEDERAL LEGISLATIVE PROPOSALS FOR INDEPENDENT CONTRACTORS AND FRANCHISE MODELS

Senator Tim Scott (R-SC) with several co-sponsors has introduced a pro-employee and pro-franchise owner alternative to the PRO Act. Another set of bipartisan legislators have introduced a bill that would address portable benefits for independent contractors.

### The Employee Rights Act of 2022

The Employee Rights Act (ERA) of 2022 – modeled heavily on Senator Orrin Hatch's legislation first introduced in 2011, the ERA addresses:

- **Secret Ballot Elections.** The ERA will ensure that any vote to organize a workplace or hold a strike is done via private ballot. Today, unions can bypass private votes in favor of a public "card check" election – a means by which unions organize by collecting signatures or "cards." Without a private ballot, workers can be subject to harassment or intimidation to sign a card authorizing the union to represent them. The PRO Act would essentially eliminate the secret ballot vote and replace it with a card check system.

- **Criminalized Union Threats.** The ERA has provisions to federally prohibit and criminalize coercion or threats by union officials while establishing privacy protections for employees to limit calls and other election activities outside the workplace.

- **Political Protection.** The ERA would require workers to consent to their union dues being used for anything other than collective bargaining efforts (i.e. for supporting political candidates and causes).

- **Union Decertification.** This section would codify the *Johnson Controls* 2019 NLRB ruling. Under this ERA provision, evidence of a union's actual loss of majority support within a bargaining unit, if received by an employer within 90 days prior to contract expiration, conclusively rebuts a union's presumptive continuing majority status when the contract expires, thus allowing the employer to withdraw recognition of the union when the contract expires.

- **Gig Worker Benefits.** The ERA allows employers to extend benefits to independent contractors without the workers having to abandon their status as independent contractors. The ERA also includes the Modern Worker Empowerment Act, a subsection that updates the law to keep the definition of an "employee" in line with the common-law definition used by numerous state statutes and in recent Supreme Court rulings.

- **Protection for Local Businesses.** The ERA includes the Save Local Business Act, which clarifies the joint employer standard, allowing more franchisees to own their own businesses.

### The Portable Benefits for Independent Workers Pilot Program Act

On February 17, 2021, Senator Mark R. Warner (D-VA), Senator Todd Young (R-IN) and Rep. Suzan DelBane (D-WA) introduced legislation to test portable benefit designs for the independent workforce. The *Portable Benefits for Independent Workers Pilot Program Act* would provide social insurance protections typically provided through traditional full-time employment. This legislation would establish a $20 million grant fund within the Department of Labor to incentivize states, localities and nonprofit organizations to experiment with either by evaluating new portable benefit models or improving existing portable benefit models for independent contractors temporary workers and self-employed workers.

The models receiving grants under this Act must consider multiple types of benefits such as paid leave, workers' compensation, skills training, unemployment insurance, tax withholding and tax-advantaged retirement savings. The grants will be prioritized for those models that can be replicated on a large or national scale. This legislation is co-sponsored by Senators Angus King (I-ME), Ben Sasse (R-NE), Michael Bennet (D-CO) and John Hoeven (R-ND).