5 Steps For Transitioning To A Permanent Remote Workforce

By **Narendra Acharya, Caroline Burnett and Susan Eandi** (July 20, 2020)

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Most U.S. employers have accepted that the COVID-19 pandemic has changed the future of work. This is particularly true on the fundamental level of where employees work. Aside from looking around our own virtual workspaces, how do we know this?

First, since the start of the pandemic, employees have worked from home in unprecedented numbers. Before the crisis, only 13% of workers in the U.S. were remote at firms run by the Fortune CEO community.[1] By June, that number stood at 73% of workers in the U.S., even though some states had eased their lockdowns allowing businesses to reopen.[2]

Further, for many companies, particularly in tech, the work-from-home experiment has been surprisingly successful. As the saying goes, necessity is the mother of invention, and when faced with no other option but to adapt, CEOs of the 2020 Fortune 500 list reported that one of the single most important things the crisis has taught them is working from home works.[3]

Finally, according to research from Gartner Inc.,[4] nearly three quarters, or 74%, of chief financial officers expect to transition a number of previously on-site employees to remote work setups permanently in the aftermath of COVID-19.

This data is not surprising when you consider the advantages of remote work — substantially lower real estate costs, increased flexibility for employees, access to a much wider and more diverse talent pool, and a positive impact on the environment due to reduced commuting. In addition, considering that spikes of the virus are likely to continue for some time, many employers appreciate the health and safety benefits most of all.

Of course, there are challenges too, for example, how to effectively onboard new hires, how to maintain a sense of company culture and deliver a top-notch employee experience without working together at a company office, as well as mitigating against unintended disparate treatment of employees, among others.

While there are certainly hurdles to navigate, risk profiles to consider and cost-benefit decisions to be made, there is nothing legally insurmountable about transitioning to a permanent remote work model. Each organization is different, and what works for one company many not work for another, but with careful planning, it can be done.

Recognizing that there are many integrated legal considerations and drivers, including employee compensation and benefits, data privacy and trade secrets, corporate law, and corporate tax, what follows is a basic five-step blueprint of the U.S. employment law considerations for building out your company's remote work plan.

1. Define remote.

First, companies must define what they mean by "remote." Most employers are familiar with the concept of telecommuting and have allowed certain employees privileges to work remotely from home on occasion.

What we are seeing now, however, is a different trend toward temporary remote work and permanent remote work.

Temporary remote work typically refers to employees who are either working from home now due to local shelter-in-place orders, or employees who are working from locations other than their primary residence — because they have been stranded at various borders, need to care for family members, etc. — but who do expect to eventually return to the office. Permanent remote work refers to employees who could work from home, or anywhere else, forever with no expectation of ever coming into an office.

There may be yet another group of employees who desire flexibility, and would like to come into an office a few days a week. How a company lands on one, or several, of these scenarios, contemplates embracing them or looks at limiting options depends on a number of factors, including the industry, business model, location of the offices/workforce, footprint and internal company technology and resources.

2. Set the guardrails by choosing locations and monitoring head count triggers.

While the simplest approach for determining locations for remote work is to limit employees to working from their primary residence only — i.e., working from home which is theoretically in the same location as their office — that is rarely the reality.

Even then, there will be various employment law issues to consider, including ensuring that telecommuting employees remain subject to company rules and expectations — such as policies regarding anti-discrimination and anti-harassment, information technology resources and communications systems, confidential and proprietary information, and workplace safety.

Among other action items, companies will also need to implement a compliant office expense reimbursement policy, and clearly define the workspace and work time to establish some reasonable limits on the employer's responsibilities for accidents and illnesses that may occur.

More often, however, the decision point is whether to allow employees to relocate to states (or countries) where the company does not yet have a legal presence. If employees will only be allowed to work remotely from locations where the company already has a corporate presence and ability to payroll, that raises issues more akin to scaling up activities.

Key employment considerations will be head count triggers, such as application of paid sick leave laws in certain U.S. states which have minimum head count requirements, changes in pay equity analysis due to impact of location change on cohort analysis, and change in EEO-1 reporting to the U.S. Equal Employment Opportunity Commission.

This issue is exacerbated as soon as employees are working in locations outside of the U.S., where obligations to set up collective representation, requirements for hiring employees in protected categories and termination protections apply when employee head count thresholds are met.

If employees will be allowed to work remotely from locations where the company has no corporate presence or ability to payroll, then all of the legal issues raised when expanding into a new location are triggered.

For example, employment considerations include application of local, state and, in some cases, municipal wage and hour, vacation, sick and other leave laws; registration as a local employer for payroll tax withholding; unemployment insurance contributions; and notification to workers' compensation and health and welfare insurance providers. Also consider that the mere presence of employees working from home in a particular state or jurisdiction may constitute a presence of the employing entity in that location for corporate tax purposes.

The additional flexibility in work location does raise significant compensation considerations, especially in connection with international relocations. Employee compensation often reflects a premium for higher-cost locations.

Consider what adjustments, if any, might and can be legally made to reflect an employee's relocation to a lower-cost location. In some cases, decreasing the future bonus opportunities and/or the dollar value of future equity compensation grants may be the most appropriate manner of adjustment.

3. Design an application process with established criteria.

As with any new program, setting out a clear policy on the application process and eligibility criteria, while reserving the right to terminate the remote work opportunity, is key for U.S. employers. Outside of the U.S., this becomes trickier given the absence of the concept of at-will employment.

A few key tips to mitigate legal risk and preserve flexibility are as follows:

- Develop template application requirements, such as minimum seniority, excluded positions, interviewing with management in the new location, and whether a justification is required.
- Determine which job positions can be performed productively in a remote setting.
- Define eligible locations and decide whether to implement headcount limits by qualifying location.
- Establish objective criteria for accepting and rejecting applications.
- Consider that once the remote work policy is implemented, it will be difficult for the company to reject remote work requests outside of the policy — e.g., as a reasonable disability accommodation on the basis of business hardship.

The communication related to this application process should make clear that the applicant is responsible for all changes in the individual's tax consequences as a result of relocations made in connection with the program.

4. Craft policies to support the remote model.

There is a laundry list of issues to address when implementing a remote work program, all of which can be rolled into a remote worker policy. For example, consider the following:

- What salary/cost of living adjustments may be appropriate depending on the transferring employee's new location;
- How the employer will provide remote workers with the equipment necessary to perform their jobs and whether the employer will cover certain costs of remote working;
- How the company will track hours/overtime for remote workers in accordance with applicable local law;
- How the company will provide mandatory rest breaks to remote workers in accordance with applicable local law;
- What business travel policy updates may be necessary; and
- How increased risks of misappropriation of confidential information and loss of trade secret status will be mitigated.

Employers may need to strengthen the payroll function so that the more complicated employer tax withholding requirements are appropriately satisfied. This is a common challenge for employers that have historically only needed to address U.S. state and local income withholding in a few jurisdictions, as the U.S. state withholding requirements are quite varied and the scenarios with multiple state requirements typically need some analysis prior to implementing the withholding.

Finally, when documenting the remote work opportunity, whether in written communications or policies, U.S. employers should carefully set expectations with employees that remote work is a privilege — not a right — to maintain flexibility to deny applications and/or recall employees back to the workplace if necessary.

5. Communicate expectations and compensation.

Given the importance of clearly communicating expectations of working remotely, as well as potential changes in compensation, best practice includes providing employees with an individualized remote work agreement. In addition to communicating the effective date of the arrangement, expected hours of work, home office inspection agreement, use of equipment, reimbursement/stipends and insurance requirements, oftentimes, companies will align compensation with the local market/workforce.

Likewise, it is essential to confirm the work location — to document the employee's representation of which state they are actually working, and paying taxes in — and remind employees that they continue to be responsible for the tax consequences.

Finally, as COVID-19 has demonstrated, we never know what tomorrow will bring. As such, it is wise to maintain flexibility and protect the company's discretion to change course. All remote work agreements should protect the company's right to recall employees to an on-site location, to the extent allowable under local law.

What's next?

It's likely that the concept of remote work — whether temporary, permanent or somewhere in between — will be the norm for the foreseeable future. Putting a basic blueprint in place for remote working now will not only position employers to adapt to the current environment quickly, but also attract and retain key talent as the markets change and fluctuate.

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[1] https://fortune.com/2020/06/17/fortune-survey-62-of-ceos-plan-policy-changes-in-response-to-current-calls-for-racial-justice/.

[2] Id.

[3] https://f.datasrvr.com/fr1/720/77406/Fortune_500_CEOs_Survey_results.pdf.

[4] https://www.gartner.com/en/newsroom/press-releases/2020-04-03-gartner-cfo-surey-reveals-74-percent-of-organizations-to-shift-some-employees-to-remote-work-permanently2.