
Navigating the Ever-Changing Legal Landscape of the Workplace for Multi-State Employers

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New Jersey seems firmly entrenched in the top tier of the fierce competition to be the most employee-friendly state this side of California. With the Earned Sick Leave Act, NJ Mini-WARN's mandatory severance requirements, required Labor Peace Agreements for cannabis businesses, and more, employers in New Jersey face an increasing, and often unique, set of statutory and regulatory requirements. These requirements often set minimum standards that well exceed the benefits required under federal law and by other (often neighboring) states. For businesses with employees in multiple states, the heavy regulatory burdens of operating in New Jersey present a challenge to developing consistent policies across the organization. Reconciling how to integrate these policies with the associated costs is a challenge many businesses face when they expand from New Jersey into other states or expand from other states into New Jersey.

Although this challenge once primarily fell on mid-size and larger businesses that were more likely to have multi-state operations, the expansion of remote work, especially since 2020, resulted in smaller businesses also facing this burden. Indeed, recent surveys suggest upwards of 20% of employees work remotely. This has allowed employers of all sizes to leverage employees outside of their immediate commuting range and fill their ranks with talent from near and far. It also means considering which states' laws apply and integrating them across an organization.

One of the most confounding threshold factors employers face in deciding how to approach compliance and policy-making across states is determining which state's laws apply to remote workers and workers whose work spans multiple states. In many instances, as is the case with on-site employment, the laws of the state in which the employee works or reports will govern, as opposed to the laws of the state where the employee lives. However, that is not necessarily true for all laws. For instance, California's recently enacted SB 699 extends the reach of California's restriction on non-competes to out-of-state contracts and, for the most part, will bar restrictive covenants for remote workers who live in California even if they are working for a New Jersey company and their work is in New Jersey. This legal landscape can be even more uncertain for an employee who covers many states, does not reside in the state where they work, and reports to an overseas headquarters.

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There are many approaches to multi-state employment. Some employers adopt differing policies that comply with each state's law, while others create a baseline that complies with the most generous policies, so as not to run afoul of the state with the strictest law on the subject. Alternatively, some employers adopt a hybrid; using the most employee-friendly policies as a baseline for benefits, but differentiating employees based on location for issues having direct and far-reaching impact to the bottom-line. For instance, employers often are willing to adopt a company-wide paid time off policy (whether sick, vacation, or both) that meets or exceeds the most stringent state minimum across multiple states, but differentiate when it comes to restrictive covenants. This approach is sensible when there is no reason to abandon requiring restrictive covenants that are enforceable in New Jersey just because they are barred in California.

Employers often face challenges when differentiating employees by state even when it is the only practical option. For example, employees in New Jersey can receive state benefits for childbirth via state short-term disability and the New Jersey Family Leave Insurance program. These benefits are funded, in whole or in part, through employee taxes and are not directly paid by employers. Yet, employees in neighboring Pennsylvania do not have these benefits provided through the Commonwealth. If an employer voluntarily elects to provide these to its Pennsylvania employees to equalize benefits, it is effectively increasing the per employee cost. This raises critical questions, such as: Does the employer then offer less generous compensation to Pennsylvania employees to account for these added costs? On the one hand, it seems fair to adjust compensation downward for employees who receive a benefit with direct costs to an employer considering that the New Jersey employees fund these benefits with an increased tax burden, and they are not an expense borne by the employer. On the other hand, many other factors, such as the local real estate market, may have an even greater impact on employee costs and those costs are not necessarily considered in adjusting compensation (e.g., paying an employee in an exurb office less for the same work than an employee in a more expensive urban office).

Reconciling these approaches requires an employer to account for the intended and unintended consequences, and to make decisions that align with priorities. For example, if maintaining harmonious corporate culture is a priority, it often makes sense to standardize policies across an organization using the most generous applicable state law as a minimum. Likewise, if the goal is incentivizing employees to take on roles that require relocation, it may be sensible to adopt policies that mitigate any negative effects, such as offering relocation benefits and/or adjusting for overseas taxes. On the other hand, if cost control is a more important priority, the opposite approach may be a better fit. Employers should also take into account the operational costs of maintaining and managing disparate policies and the risks associated with inadvertently applying a non-compliant policy.

Accordingly, employers must look beyond the policy that is most favorable to their immediate bottom-line and, instead, adopt an approach supporting the organization's long-term goals. A chosen approach can shape the organization's hiring and operating decisions. Businesses also must consider the potential company-wide impact of operating in certain employee-friendly areas and determine if the potential costs justify the expected benefits. Although this conflict regularly arises for multi-national employers, employees more often are willing to accept disparate treatment when it comes to overseas colleagues—especially when foreign holiday schedules and currencies make it more challenging to compare.

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Although, employers have a range of options for implementing policies that meet or exceed varying required minimums, successful organizations lead with an approach that aligns with their values and organizational priorities and concentrate on messaging supporting their approach. Messaging, whether egalitarian (e.g., “we value everyone’s contributions equally”) or brutally honest (e.g., “we take into account that some employees operate in higher cost markets”), will succeed only if it is consistent with the organization’s overall culture.

Ultimately, there is no “one size fits all” approach to multi-state employment policymaking. Businesses are served best when their employment lawyers understand the compliance landscape across the organization’s geography and offer advice factoring in the organization’s values as well as its regulatory burdens.

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