Remote Work Is Still a Focus of Mediation and Arbitration Cases

By Gary Fowler, Esq.

Rising numbers of remote workers and changing state and federal employment laws bring challenges for employers in the new year. Gary Fowler, a JAMS arbitration and mediation neutral, analyzes the issues and steps employers can take to prepare.

Employers and alternative dispute resolution providers face new challenges in 2023 from the virtual working world. Remote workers, new statutory provisions, and a major overtime case before the US Supreme Court highlight the new year in employment law.

More Remote Work

Most mediators, and many employers, first encountered remote work when Covid-19 hit in March 2020. The **US Census Bureau** reported in September that the percentage of people primarily working from home tripled to 17.9% (27.6 million people) in 2021 from 5.7% (roughly 9 million people) in 2019. Employees report that they are more productive, have more working time without a commute, and are less distracted by co-workers.

There are upsides and downsides to this. One downside is the risk for more harassment cases. While one might think a remote workforce would have fewer harassment claims, three studies—from **Project Purple**, **Project Include**, and **Deloitte**—show an increase in sexual and other harassment reports, including for race and age discrimination.

Perhaps working remotely tends to make employees less inhibited in electronic communications, but as practitioners and mediators know, these electronic communications often become prime exhibits.

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Impact of State Laws

Which state law applies is another question regarding a remote workforce. When an employee alleged sexual harassment in 2019, that question was easy to answer—typically, the employee, employer, and supervisor were at the same location. With remote workers, each may be in a different state, with different laws, including those covering the burden of proof and recoverable damages.

Employers can take pre-dispute steps to reduce these risks. One is increased training and enforcement of anti-harassment policies. Employers should also confirm where their employees are working—even temporarily, like a summer vacation home.

Also, employers may wish to consider pre-dispute employee agreements on choice of law or dispute resolution, including arbitration. However, employers can no longer enforce pre-dispute arbitration agreements in certain instances, and choice of law provisions may not be honored by courts when another state's laws have a significant interest.

When litigation develops despite these pre-dispute steps, mediation can resolve disputes early with less cost. Parties should be mindful of unique issues for remote workers. In pre-session calls, mediators should confirm where the employee worked and focus parties' counsel on which state's law applies.

With remote employees, settlement amounts may be subject to different rates of taxation, depending on where the plaintiff-employee lived or worked. Also, state and local governments

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enact new laws each year, thus further complicating the resolution of cases involving remote workers—for example, New York City's recent ordinance aimed at eliminating at-will employment for fast-food workers.

Changing Federal Laws

In March 2022, President Joe Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which allows employees alleging sexual harassment or assault to elect not to arbitrate the case under a pre-dispute arbitration agreement. It provides that a court, not an arbitrator, shall determine whether the act applies to a dispute.

On Dec. 7, 2022, Biden signed the **Speak Out Act**, which is limited to non-disclosure and non-disparagement agreements that are "agreed to before the dispute arises." When such a dispute arises, though, may be subject to debate, so before entering into a confidentiality clause in a settlement, parties should consider the new law.

Supreme Court Cases

The Supreme Court's employment docket includes an important case under the **Fair Labor Standards Act**. In ***Helix Energy Solutions Group, Inc. v. Hewitt***, the Supreme Court heard arguments regarding whether a highly compensated employee/supervisor on a drilling vessel was entitled to overtime under the FLSA when he was paid on a "day rate" instead of a weekly salary.

In some industries, such as energy, employees work shifts on a day-rate basis, and overtime claims will increase if the Supreme Court agrees with the Fifth Circuit's decision that Hewitt was not exempt from the FLSA overtime requirements.

Two college admissions cases—***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*** and ***Students for Fair Admissions, Inc. v. University of North Carolina***—will address the use of race under **Title VI** of the Civil Rights Act and thus impact "reverse discrimination" cases alleging an employer race-based preference.

Finally, ***in re Grand Jury***[1] considers whether a communication involving both legal and nonlegal advice is protected by attorney-client privilege. The Ninth Circuit held that providing legal advice must be the primary purpose for a communication to be privileged, rather than one of several significant purposes. While the case pertains to communications regarding taxation, it has implications in employment cases when an attorney provides both legal and management advice.

The coming year will pose new challenges to employers, as well as to practitioners and mediators in aiding the resolution of workplace disputes.

Gary Fowler is a JAMS neutral based in the JAMS Dallas Resolution Center. He is an arbitrator and mediator, handling employment, insurance, business and commercial, civil rights, health care, training, and teaching, professional liability, and federal law disputes.

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1. After the publication of this article, in a *per curiam* decision dated Jan. 23, 2023, the Supreme Court dismissed its writ in *in re Grand Jury* as improvidently granted. (598 U.S. __) (2023).