

The Performance Review Podcast
Greenberg Traurig, LLP
Episode 27

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Philip Person: Welcome back to The Performance Review. Today we're going to be covering issues relating to remote work. Our last few episodes, I know you all [00:00:30] were bored, it was just me and Ryan, but luckily we have a guest today. Our guest is Brian Kelly, the brilliant Brian Kelly, I should say, who was begging us to be on video, but I told him, unfortunately we can't show his face because it's just an audio format. But he is the global head of employment law at WeWork. So Brian, welcome. Tell us about yourself and happy to have you here.

Brian Kelly: What a podcast to make my podcast debut on. I think this is the start of a beautiful broadcasting career and [00:01:00] I hope everyone rates this episode five stars in the app store. As Philip mentioned, I'm currently the global head of employment law at WeWork. I've been there coming up on five years this month. And for anyone who's followed the news, it's been an exciting five years at WeWork. We have an incredible team there, a resilient team that has been happy to help shepherd the company through a difficult macro environment in commercial real estate.

Prior to being at WeWork, I was a big law attorney. I was at Goodwin Procter for almost six years, which was [00:01:30] a very lovely, happy time to start my career and great people there. I was curious about in-house life and it's been a great jump over to this side of the fence.

And then in terms of work, I currently do all three buckets of employment law from obviously counseling my business stakeholders, litigation, although we love to avoid, minimize litigation generally, and then to the extent we have M&A activity, of course advising on that stuff.

Ryan Bykerk: You end up wearing quite a few hats.

Brian Kelly: Being [00:02:00] in house, it's interesting because you always are trying to be conscious of staying in your lane, but you often get asked to share your thoughts on a business perspective, which is gratifying.

Ryan Bykerk: No, that's the one. And good that you describe your time in big law the way you do in such glowing terms, not everyone does. It's certainly been our experience I think, speaking for Philip and myself. So good stuff, and like Philip said, good to have you here. So thank you.

We're going to be talking a little bit today about [00:02:30] remote work and there's just a lot of things that go into that. Employers are generally familiar with remote work. It's been a part of American life, it's been a part of global life since 2020, but there's still issues developing in this space. If you haven't thought about it at all up to this point, well, congratulations I suppose, but if you have, I think it's still good to have a little bit of a refresher.

And so that's what we're going to do today, discuss just some of the legal issues that employers face when working with employees in a remote work environment, and just practical consideration. Just of to start, Brian, can [00:03:00] you tell us a little bit about maybe just some statistical trends that you've seen when it comes to remote work lately?

Brian Kelly: Breaking news, remote work is up, guys.

Ryan Bykerk: What?

Philip Person: Interesting.

Brian Kelly: Yeah, I know, I know. Fully remote work at the farthest end of the spectrum, that alone has I think tripled from pre-pandemic levels based on recent studies I've seen, and the average US employee's working almost six days remotely per month. As a result, I think somewhere around 15 to 20% of US companies [00:03:30] have moved to a fully remote workforce and there's definitely been a shift in attitudes that mirrors that change. I think two thirds of US workers today have expressed a preference to be remote, whether fully or otherwise.

Ryan Bykerk: We've certainly seen that and just in counseling our clients as well. So given that we've seen this increase in remote work, as global head of employment law at WeWork, certainly you've noticed I'm sure some downstream legal implications about that shift. Can you tell us a little bit more about that?

Brian Kelly: [00:04:00] As companies are providing more flexibility to their employees regarding where they work, they of course also have new legal and practical issues to consider when employees are not in the office.

I think we're going to touch on a few topics today and I'll put them into different buckets, but the first, wage and hour. The second would be coverage of applicable leave laws and other major employment statutes. Third would be what jurisdiction even governs the remote worker in question. [00:04:30] And then finally, we can touch on accommodations, harassment and discrimination in the context of remote work.

Philip Person: Brian, because I follow instructions and you said wage and hour first, I'm going to start there. Let's talk about that.

Brian Kelly: Speaking of.

Philip Person: There's specific issues related to hybrid and remote work arrangements. What should employers be thinking about? What should they consider when they're implementing this?

Brian Kelly: First, to the extent that you're an employer who isn't fully remote and you're trying to discern what is the optimal [00:05:00] balance or division of remote work and in-person work, I think the first consideration is whether you can limit remote work to only overtime-exempt employees. And depending on the nature of your workforce, this might naturally align with certain roles and responsibilities in your employee population.

So for instance, at WeWork, the bulk of our non-exempt population is our front of house hospitality staff, our community team. If we permitted them to work remotely, [00:05:30] we wouldn't be providing much of a service to our members in our locations, right? If you are able to restrict remote work to exempt employees, I think that eliminates a lot of the wage and hour considerations that I'm about to go over.

To the extent you cannot do that and you have some non-exempt employees working from home, then you of course have to make sure that your timekeeping and meal and rest break policies and procedures are adaptable and ready to go for the at-home setting.

By its very [00:06:00] nature, when employees are at home, it's harder for an employer to know exactly what they're up to. And not like every employer has infinity resources to always put every employee under the microscope regardless of whether they're in the office or outside of the office, but when an employee is at home, the wage and hour requirements still apply just the same as if they were in the office under the labor code.

So you're still required to track non-exempt employees' time worked with precision. Don't be rounding to your nearest half hour or [00:06:30] hour. And similarly, you need to still permit employees to take their meal and rest breaks under state law. And in California, there are many meal and rest break rules that vary based on the length of time someone works in a given day.

You definitely want to take a look at your policies because even policies that aren't well-drafted on their face can cause potential liability for California employers regardless of how people are actually acting with respect to their breaks [00:07:00] and time tracking. So start with your policies and then make sure you actually implement those approaches consistently for your remote workers who are non-exempt at home.

And then separate from time tracking, we of course have the Pandora's box of remote work expenses to consider. Now, California employers are familiar with the requirement that direct and necessary business expenses must be reimbursed when incurred by the employees, but it doesn't necessarily mean

that the employer's determination turns on whether it's [00:07:30] a but-for test.

There was a recent decision at the court of appeals level that said that when addressing remote work, by allowing employees to work from home, employers derived some benefit when they allowed and expected employees to continue working from their homes. So the permission that employers gave to their employees to work from home set up the potential for reimbursable business expenses.

That particular case, of course, came out [00:08:00] in recent years when there was a mandate in certain jurisdictions that employees must work from home if they were non-essential workers. And the court said that the mere fact that the state stay-at-home order ultimately causes employees to transition to remote work was of no significance. It was only significant that they were in fact permitted to work from home.

And putting that another way, guys, the court was careful to explain that the obligation doesn't turn on whether the employer's [00:08:30] order was the approximate cause of the expenses. It turns on whether the expenses were actually due to the performance of the employee's duties. Forget whether the remote work is the cause of a stay-at-home order or an employer policy. You got to be looking at the direct and necessary basis for the expense based on the employee's work.

That case interestingly didn't go the full mile and address what is considered a reasonable [00:09:00] business expense, which is the outer limits of what employers have to reimburse, and it didn't get into which particular expenses were incurred for work and personal reasons. So probably more to come. There's always more to come in California employment litigation, and it'll be interesting to see how that shakes out.

Ryan Bykerk: Oh, for sure there's more to come. I think we're going to see cases in the coming years. They're going to really round that out because it's been an issue I know we've seen wrestled with at the trial court level and it's starting to trickle up to the court of appeal level. So [00:09:30] I'm sure there is more to come on that.

I'm going to try to follow Philip's example and continue going in order here. I think the second thing you mentioned was how do we deal with counting our remote employees for purposes of coverage for WARN or for FMLA or CFRA coverage? So for leave laws and for mass layoff rules.

Brian Kelly: All right, everyone, you have your calculators out, right? You're ready to start counting?

Philip Person: We're ready. We're ready.

Brian Kelly:

Sometimes these laws feel like that, but no, we're going to talk at a higher [00:10:00] level. So brief preview, just because a worker's remote doesn't mean that they're excluded from eligibility under these laws or counting under these laws, okay? So let's dive in a little more detail.

With respect to WARN, WARN in its regulations do not explicitly address remote employees, but there is some regulations that talk about workers who are out-stationed. Unsurprisingly, there was a recent decision that said that out-station employees undoubtedly [00:10:30] covers remote employees. Adapting an old law to new times, there we go. Remote means out-stationed or out-stationed means remote, interchangeable concepts there for WARN.

You should be looking at what work site does the remote employee, where are they reporting to and where is their work assigned from or where do they occasionally go into when they're not working from home?

FMLA and CFRA, let's start with the FMLA. Remote employees, again, can still be eligible under the law and should be [00:11:00] counted for coverage purposes. This issue was such a hot topic that the DOL actually issued some guidance on tele-work and how it is handled under the FMLA. The DOL concluded in that guidance that remote employees should be counted based on the office or workplace to which they report, or if none, where their work assignments are generated. So very similar concepts to what we just talked about with WARN.

If a remote employee does not physically report to a work site, [00:11:30] they are deemed a part of the work site where the assignments originate. You might have to look at the org chart for a particular employee in question. Who on their team is in charge of making certain employment decisions or workload decisions for them and treat them accordingly?

The CFRA similarly got some direct attention from the state, just like the FMLA drew the attention of the DOL. So in September 2020, Governor Newsom signed SB 1383 [00:12:00] into law and the impact of this expansion of the CFRA was to cover small employers with five plus employees and remove the requirement that employees all be employed within a 75-mile radius.

I think California perhaps more so than any other state has seen its huge share of remote work. So it was not surprising that the Governor Newsom wanted to ensure the protection of California's key leave law to employees in remote work settings. Of [00:12:30] course, the CFRA still had other eligibility requirements like working for the employer for 12 months and working more than 1,250 hours in a 12-month prior to leave. But the mile restriction was gone, which is a major change.

Philip Person:

I had my calculator out and I think I was able to follow. I think I could do this on the back of a napkin. It's not that difficult. But let's shift gears from talking about lovely wage and hour laws, leave laws, WARN requirements. We pride

[00:13:00] ourselves of living in California and dealing with all these crazy California laws, but let's talk about a different scenario where a California employee starts working remotely out of state. How do we determine what law applies?

Brian Kelly:

For the most part, it's straightforward common sense. The laws of the state where the employee is actually working is going to govern. So let's say you're a California-based company or your entire employee population is based in California, but during the pandemic you had someone who really loves [00:13:30] fly fishing and moved to Wyoming or wherever people fly fish, is permanently based in Wyoming now working from home. That fly fisher is governed by the laws of Wyoming going forward, not California.

Now, employers should of course assume that California law applies when employees work in California. If there's some split in time between multiple states, you want to look at where's the majority of work performed. If the majority of work is performed in California, then you should definitely continue to treat that person as if California [00:14:00] law applies to their entire employment, not only to be legally safe, but if you're complying with California-based laws, you're probably complying with most other state laws. That's not a 100% true statement, but most of the time it is.

California law might also apply to someone who's not really based in any one particular state for a majority of their time, but in your HRIS systems or where they were hired, they are tagged or were tagged to California as their home base location. [00:14:30] For traveling salesmen, potentially also flight attendants, California law could still apply there.

And then, guys, separate from the concern of what states' laws apply to a worker, California has some additional interesting governing law questions that employers should be aware of. So California Labor Code Section 925 is a law that prohibits employers from requiring employees who [00:15:00] work in California to, as a condition of their employment, sign any agreement with a provision that would require them to litigate outside of California or have the laws of another state govern their employment.

If an employer does try and sneak one of these prohibited provisions in, like for instance, I'm employed in California and if WeWork said, "Brian, your employment's going to be governed by New York law," that's no good. By the way, WeWork doesn't do that because we follow the law, but-

Philip Person:

[00:15:30] Of course.

Ryan Bykerk:

Of course.

Brian Kelly:

Yes, of course, of course. If I was asked to sign such provision it would be void. There is an exception under Section 925. It doesn't apply to an agreement with

an employee who is in fact individually represented by their lawyer who is negotiating the terms of those provisions.

You can imagine that's a pretty narrow exception. I'm sure the majority of your clients' workforces aren't represented by attorneys when they're signing their offer [00:16:00] letters or NDAs or other agreements upon hire, but of course might apply in unique executive settings or perhaps nuanced agreements upon employees exiting a company.

Section 925, one other exception, it also does not apply to a voluntary agreement that is not a condition of employment. So piggybacking on what I was just saying about unique exit situations. If there's a voluntary severance type agreement when someone's leaving, that again is not a condition on continued [00:16:30] employment because there is no more continued employment. Perhaps you can agree to a Colorado governing law or forum selection clause and have that be enforceable.

Let's go back to, I didn't want to forget about this, my fly fisherman example. You have that happy camper in Wyoming now, you might need to consider whether you have to register to do business in Wyoming by virtue of just having one employee there. I know that sounds a little crazy, but that could also be a somewhat helpful tool [00:17:00] to employers to tell employees who are making requests to go move to some state where they've never considered operating that, sorry, we are just not set up to do that. We're not registered to do business there and we're not willing to incur the costs that are associated with registering to do business there.

Ryan Bykerk: Really good point. I hadn't even hadn't thought about that, but that makes a lot of sense and certainly it impacts what you're going to be able to allow your fly fishermen or other hobbyists to do. So good point.

Philip Person: That's a fairly reasonable fly fisherman, right? If he's able to understand [00:17:30] that and agree with you like, "I don't want to put you in that bind so I can go fly fishing."

Brian Kelly: That's right. You don't want to crush his dream unnecessarily.

Ryan Bykerk: Right, no. Well, let's talk about any sort of obligations employers have to support remote work, and by that I mean as this is becoming the norm, we've talked about the stats, we've talked about how this really is, in fact for years now, it's becoming embedded as the norm. Are employers required to allow remote work as an accommodation, for example?

Brian Kelly: [00:18:00] Answer may be yes, and there are two potential sources for that maybe yes. Let's start with the local San Francisco law and then we'll zoom out to of course, state and federal. So under San Francisco City law, there's a recently enacted family-friendly workplace ordinance and it provides eligible

employees who have worked for the employer for a minimum number of hours and period of time, the right to request flexible work arrangements, which of course might include remote work, in addition, changes in hours for reasons that are not related to their own disability.

[00:18:30] So usually when we're talking about accommodations, everyone always thinks for disability purposes, the employee's own medical condition. This is for additional reasons like family caregiving for a child or for an elderly person over the age of 65. So you definitely want to look at that law and that law has a slightly slimmed down interactive process from the ADA, but there's good guidance actually on the San Francisco OLSE website that employers can easily reference.

Putting that [00:19:00] local law aside, who knows? Maybe we'll see more cities adopt something like that in the future, but San Francisco unsurprisingly out ahead of the rest. At the federal and state levels, you of course have disability accommodation laws and remote work may be deemed a reasonable accommodation if working in person in the office is not an essential function of their job.

So that's really the key threshold consideration, guys, is look at the particular duties of this person's job, forget whether it's historically [00:19:30] been performed in the office, like almost every single job under the sun was pre-pandemic and say, "Are there things inherent about what they're doing that require them to be in person?" If they have customer interactions as the primary task of their job, then of course, yes, they have to be in person for those in-person customers.

You can get more philosophical too about this question and based on how consistently you apply this in your workforce, you could say that having [00:20:00] significant managerial duties actually makes working in person an essential function of the job, and that would really be rooted in a company's consistent philosophy that training can only occur or best occurs in person. And for certain senior leaders, having them anchor the offices is a very important and essential function, and therefore perhaps remote work either completely or partially is not a reasonable accommodation for disability purposes.

Ryan Bykerk:

What about employees who, [00:20:30] if they were in the office, might need a particular accommodation? Would an employer need to provide that type of accommodation in the employee's house? So for example, because that question is really hard to hold onto without some facts. If for example this person was in the office and needed a specialized chair as an accommodation for their disability, what obligations if any does an employer have to make sure to provide that specialized kind of chair if the employee is working from home?

Brian Kelly:

If the employee is working from home [00:21:00] purely voluntarily and they haven't been given an accommodation to work remotely on the basis of their job and they're just electing to work from home, then I think an employer most

of the time is going to be pretty safe not to have to purchase that home office equipment.

But if on the other end of the spectrum, you're an employer and you have an entirely remote workforce and there's no option for any employee, disabled or otherwise, to come into the office, then you very well could have to provide [00:21:30] a reasonable accommodation of home equipment office for someone.

Philip Person: Since we're on this topic, let's talk about discrimination and harassment issues. Working remotely, you would think that it's changed, maybe it doesn't occur as much. Is it different in a work setting, the discrimination and harassment issues?

Brian Kelly: Forums and mediums in which employees interact are always changing and new compared to where we were 5, 10 years ago, but at the end of the day, guys, it's still the same [00:22:00] old story. Employee interactions are employee interactions and employer's obligations to make sure that no unlawful discrimination, harassment, retaliation take place are just the same on video conferencing as they are in the office.

It's a little harder to monitor, right? You might not be picking up on it as quickly or as fully, but it doesn't change the obligation to the second you get a complaint about, let's say harassment that takes place over a work video call, to fully investigate, promptly take action.

[00:22:30] I think the other thing that is exacerbated by remote work is the casualness of employee interactions that can sometimes take place on new technologies that employees otherwise wouldn't engage in in person, whether that's shorthand abbreviations or memes. These are things that 10 years ago, it was hard to imagine would be as central to a harassment or discrimination type claim. But you very much have to be [00:23:00] monitoring or if not actively monitoring, then reacting to troubling conduct that occurs on Slack, whatever other platform you guys might use in your workforce for communication purposes.

Some rules of the road that might help proactively deter or mitigate some of those troubling behavior. First, in your annual harassment trainings, maybe consider using not super outdated examples from the 1970s of harassment that everyone [00:23:30] will probably laugh at when they're taking the course, and try and incorporate some more modern examples where the conduct in question is taking place virtually.

You might instruct employees to be mindful of their video conference backgrounds when they're working from home. Even totally innocuous things can be perceived as triggering by others. Most video conferencing software these days has pre-populated backgrounds that employees can use to avoid that.

You should always, regardless of remote work, I think encourage employees and even require them [00:24:00] to only use approved methods of communications for work purposes rather than private texts. Look, we're realistic. People are going to talk however they choose to talk in today's world. Setting a standard at your company for saying if you're talking for work purposes, it has to be on company email, company Slack, whatever the other platform you use, and not to incentivize employees to be texting each other on the side.

Ryan Bykerk:

Your outside counsel would like you to not text. Thank you. We've covered a bunch of the legal [00:24:30] issues and I know there's no real divide between legal and practical, but let's maybe talk about some of those more practical aspects of the impacts of remote work. Are there other things that employers could be doing just proactively that might not be necessarily legally required? Other considerations that again aren't primarily legal but certainly impact human resources decisions, management decisions, all of that?

Brian Kelly:

Despite all the challenges that are posed by remote work, remote work is such an interesting philosophical question [00:25:00] for the power structure in any given employment relationship and how it can either accentuate or not an employer's business goals. You really need to take an honest look at where you are as a company when you're assessing what policy should I adopt with respect to remote work.

Should I go fully remote? Should I go three and two? Should I insist on five days in the office? Things you might want to ask yourself are in what environment are we competing for talent? What are our peer companies doing? Are we better served by falling in line [00:25:30] with our closest competitors or should we try and be on one end of the spectrum or the other and differentiate ourselves?

Where are we at in our life cycle as a company? Are we brand new and in the early years we can be a little more flexible? Or have we been around for a long time and things have grown a little stale and we really want to shake things up and give new life to our employees by making a change with respect to remote work?

Of course company culture is very central to making any policy decision. [00:26:00] Ask yourself what are you giving up if anything, by offering more flexibility? Are you giving up comradery in the office, productivity, corporate knowledge, other soft skills? Training might be chief among them.

I know that a lot of employers in good faith think that training is more difficult virtually than if it's in person. And I think we've all had moments in our career, guys, where training is not like a hey, we're going to have a formal one-hour training session, but it's those little connective moments [00:26:30] during the day where you just wrapped up a meeting and you're walking back to your desk and your boss or some other key stakeholder gives you a nugget of wisdom that

you're probably not going to get if you were just hitting the end call button on a Zoom. Something to think about.

To the extent you do open up employees' opportunity to work remotely, I think it's absolutely critical that you have a centralized consistent review process to determine whether [00:27:00] and when remote work requests are approved. And ideally, it would be a multi-stakeholder diverse center of excellence that's reviewing each request consistently. And so you're removing any individual bias that various managers might have around your organization and you're producing disciplined, consistent outcomes based on all the facts and circumstances.

Just to go through a hypothetical, would you feel confident that a 45-year-old employee without kids and has always [00:27:30] worked in person for their entire career, would they approve or reject the same remote work requests as a new parent who has previously worked remotely? Probably not. If you're willing to acknowledge that individual people will arrive at different conclusions, then I think that really underscores the need for that centralized center of excellence review committee for these requests.

The ultimate question is, what is the right policy? And I don't have the answer on that. I think you've seen some of the world's [00:28:00] biggest employers change their approach multiple times over the last few years as they are trying to calibrate for what's best.

Anecdotally, it seems like three days in the office or two days in the office per week is pretty standard, especially in California right now. And regardless of where you land, if you have any in-person requirements, what consequences will there be for failing to comply with the policy? If we don't consistently enforce, then good luck when [00:28:30] you look to enforce against someone who's in a protected class. You're going to have a problem on your hands and perhaps justifiably so, right?

Maybe it's not so much the stick approach to get people to comply, but it's incentivizing people, the carrot. Providing in-person lunch vouchers or something like that when people are in the office or otherwise providing meals. Maybe it's commuting benefits, anything creative here. There's been no shortage of creative solutions out there from employers to date.

Philip Person:

Ryan, thank you. That was very, very, very insightful, [00:29:00] very helpful to our listeners. In fact, you mentioned it's like being in the hallway, getting a little nugget of wisdom. I'm sure that's how our listeners feel today. But I know you said this is your debut, but it's not our first time. Every time we have a guest on here, we have to have some sort of interesting, wild, fun employment story. Do you have one to share?

Brian Kelly: Yeah, I have an easy one because I feel fairly convinced I'm never going to see something funnier, crazier in my career, and I'm only 10 years [00:29:30] into it. I've told this story before to my family and friends.

But when I was at my law firm prior to WeWork, I did pro bono work and one of my pro bono clients included a historical recreation museum that was both indoor and outdoor. And among the things that the historical museum did was they had people play various roles that you would observe as a patron or guest of the museum. They'd do anything from cook meals that honored the period [00:30:00] that they were covering to building small huts and other buildings that were appropriate for that time.

Among the groups of role players were carpenters and blacksmiths. And my client, the historical museum, called me up one day and said, "Brian, we got a huge problem on our hands. The blacksmiths and the carpenters are feuding. They are intentionally botching each other's projects. The carpenters can't make their buildings because the blacksmiths are only producing crooked nails [00:30:30] for them. We don't know what to do. Can you please come in and try and mediate and get working conditions back on a good footing for us?"

You can imagine that I was not qualified to do that. I don't know anything about being a carpenter or blacksmith, but I try my best to make peace.

Philip Person: Be a mediator anyway.

Ryan Bykerk: Yeah, exactly. Mediate between these role playing groups of people. That's fantastic. Well, Brian, I'm sure you put them on the straight and narrow and resolved all of their long-lasting [00:31:00] feuds and disputes. They're different guilds. I don't know. That's fantastic.

Brian Kelly: I would've liked to see a multi-generational feud develop. Who's going to win the war ultimately, blacksmiths or the carpenters? You don't know.

Ryan Bykerk: Right, exactly. That's fantastic. So thank you so much Brian for that story, for all these insights, for being on the podcast today. We really appreciate your time, so thank you. Thank you to all our listeners for tuning in here.

Just a reminder, we like to give you the little ... We're lawyers, we got to give you the little fine print at the end [00:31:30] here that like all of our podcasts, this is for informational purposes. And if you need legal guidance on any of the issues that we talked about today or any other issues, you should make sure to seek legal counsel.

If you have opinions on whether the carpenters or the blacksmiths should have won in this dispute, be sure to email us at theperformancereview@gtlaw.com. We'd be very happy to field any questions you might have in that regard. Until then, we will catch you on the next one. Thanks so much.