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Remote Employees With 2 Jobs Pose New Risks To Cos.

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The COVID-19 pandemic has brought about many changes affecting our lives, including where, when and how we work.

While some businesses are beginning to require employees to return to the office, others have decided to permanently operate remotely or in a hybrid environment. Remote work can reduce operational overhead expenses and, in some instances, increase worker productivity and efficiency.

However, businesses should keep in mind some potential pitfalls when deciding whether to remain or go remote, not the least of which is the increased risk that a full-time remote employee might accept an additional full-time remote position with another company or, worse yet, a competitor.

Such conduct raises the obvious ethical and financial concerns that go along with time theft. More importantly, however, dual employment — also called double employment — in the remote work environment could lead to previously unseen legal liability for employers.

Dual Employment Likely to Rise as More Work Remotely

Dual employment isn't merely working a part-time job at night or driving for Uber on the weekends to make ends meet. It is the phenomenon of employees working ostensibly full-time for multiple employers.

Imagine a situation where Employer A invests resources to recruit, interview, hire and train an employee to work remotely full time. The employee appears to be adequately performing the functions of her position, but because she does not spend the majority of her workday at the office, she decides that her full-time position does not require full-time work.

Instead of speaking to her superiors at Employer A about taking on more responsibilities to fill her downtime, she applies for and accepts a second full-time remote position with Employer B and enjoys a compensation windfall as she continues to work for Employer A without revealing to either employer that she has another full-time job.

This scenario has already become a headache for some companies,[1] and the phenomenon is sure to repeat itself across the country as remote work becomes ever more prevalent across various industries.

Legal Woes for Employers

There are myriad legal risks for employees who are caught engaging in this surreptitious behavior, including discipline and termination, civil litigation, and perhaps even criminal charges for theft or fraud. But double employment also could result in a multitude of legal problems for employers, particularly if their policies are not clear on whether or to what

extent employees are permitted to take on other jobs.

For instance, trade secret law issues may arise if an employee has access to his employers' confidential information. For information to qualify for trade secret protection, a business generally must show that it took reasonable measures to keep the information confidential. What constitutes reasonable measures varies by jurisdiction and is usually decided on a case-by-case basis, but the new hybrid work environment has created new parameters.

If the remote employee sits at a kitchen table doing work with a partner or roommate, that third person may gain access to the employer's trade secret information. If the employee uses a personal device to work for both Employer A and Employer B, one employer's trade secret information could become intermingled with the other employer's information, even if the employee did not act intentionally.

On the flip side, a trade secret misappropriation claim could be asserted against an employer if an employee takes information from a different employer and shares or uses it in a manner that provides an unfair competitive advantage. Under most trade secret statutes, actual damages and varying levels of exemplary damages are available and the second employer could be held liable.

It is important that employers update their policies regarding handling trade secret and confidential information to address precautions employees must take in their remote work space.

We are also likely to see an uptick in claims between employers for tortious interference with contracts or business relations, which generally requires proof that a defendant knowingly interfered with a contractual relationship and caused harm.

Thus, in our hypothetical, Employer B could be liable for damages if it knew or should have known of the employee's relationship with Employer A. An employer also risks liability to a customer if its employee's dual employment harms the customer or breaches a term of the employer's agreement with its customer, particularly if the employer is handling customers' sensitive information.

Therefore, it is critical to recognize an employer's responsibility to minimize these risks by acting to prevent inappropriate double employment and properly reacting when double employment is suspected.

Government Contractors Face Unique Risks

Dual employment is perhaps most consequential for companies that do business with the government. They are often required to certify and represent to the government that, when they bill an agency for work performed by their employees, their employees are actually spending the stated amount of time or giving the stated effort working for that agency's project or program.

Mischarging time under a government contract may amount to more than merely a breach of contract; in some cases, it constitutes fraud and is actionable under the federal False Claims Act,[2] which imposes steep liability on contractors that submit false claims for payment to the government. Neither actual knowledge nor specific intent to defraud is necessary to prove an FCA violation.

Thus, if an employee who is secretly working two jobs improperly records his time and the

employer submits the inaccurate information to the government, it could result in an FCA enforcement action.

And FCA liability could even extend beyond the employee's immediate employer. For example, under certain circumstances in multitiered contracts, a prime contractor or first-tier subcontractor could be liable for a lower-tier subcontractor's false claim. FCA civil penalties range from $11,803 to $$23,607 per violation, plus up to three times the actual damages incurred by the government as a result of the false claim.

An employee working for two competing government contractors also raises very real concerns about unfair business advantages or access to sensitive information if the contractors are competing for a government procurement that must follow strict competitive bidding rules, which often require confidentiality regarding bidders' pricing and technical proposals. These issues could taint an entire procurement and give rise to costly protests.

In a worst-case scenario, suspension and permanent debarment could be on the table for government contractors that knowingly or unknowingly permit remote workers to maintain dual employment.

Prevention Is Key to Minimizing Legal Exposure

An employer has relatively limited options for avoiding the legal pitfalls of double employment once it has already commenced. Disciplinary action, including terminating the employee, is the most obvious, but that alone will not prevent an employer from facing legal liability.

Employers might be able to assert claims for breach of employment agreements or certain fiduciary duties, including the duties of loyalty and confidentiality, or even third-party cross-claims against employees whose misconduct results in the employer's liability, but collecting judgments against individuals is never guaranteed.

And discovering a current employee's dual employment opens an entirely separate can of worms for a government contractor.

For example, Federal Acquisition Regulation, Section 52.203-13[3] requires government contractors to timely disclose the discovery of credible evidence of criminal conduct, including FCA violations. After such a disclosure to the relevant government agency, its office of inspector general may launch a costly investigation, which could lead to the very same FCA claim the business was trying to avoid through disclosure.

Therefore, prevention is key. Employers should carefully and thoroughly vet remote work candidates before making a hiring decision. The employer and candidate should discuss potential issues related to other employment during the interview process, including any employer policies or restrictions.

Employers transitioning to remote work should strongly consider updating their handbooks, policies and employment agreements to clarify that remote employees are expected to dedicate full-time effort to a full-time position and, if necessary, to explicitly prohibit other outside employment unless a specific request is made and approved.

Noncompetition agreements should be reviewed or added to expressly contemplate the possibility of dual employment. It is especially critical that government contractors institute compliance and audit programs that closely monitor how remote employees spend and

record their time.

However, employers should be careful not to inadvertently violate laws protecting employees' rights, create ongoing investigatory obligations or simply scare away prospective or current talent by being too heavy-handed.

The broad expansion of remote work may be relatively new, but the wisdom of the old adage still applies: An ounce of prevention is worth a pound of cure.

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[1] https://www.wsj.com/articles/these-people-who-work-from-home-have-a-secret-they-have-two-jobs-11628866529.

[2] 31 U.S.C. § 3729 et seq.

[3] https://www.law.cornell.edu/cfr/text/48/52.203-13.