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Workplace law trends for today and beyond.
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Regulators Knocking on Your (Home) Door: Employment and HR Issues Raised by Remote Work



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Introduction – Remote Work



- **COVID-19 pandemic drastically expanded remote work (telecommuting)**
 - Technological advances allow more workers to work from anywhere
 - More employees are asking to work from more remote work locations
- **Legal and HR considerations, however, have not changed**
 - Payroll (including withholding and reporting)
 - State and local employment laws (including, unemployment insurance, workers compensation)
 - Benefit considerations
 - HR and employment considerations (including training, monitoring, mentoring, evaluating, providing equipment)



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Payroll State and Local Income Tax

- **States (and local jurisdictions) may tax employees based on:**
 - Residence
 - Services (days services performed in; office primary located in; etc.)
- **States have a variety of rules**
 - **Some states have exclusions**
 - Based on number of days worked in state
 - Based on amount earned while working in state
- **Employers concerns**
 - Does the employer need to report?
 - Does the employer need to withhold?
- **To address, employers need to know where employees are performing services and where they reside**

Payroll State and Local Income Tax

- **Employee doing remote work from state other than normal work location**
 - **Examples**
 - Remote work from Iowa
 - Employee subject to income tax; employer not considered to have business nexus (and not required to withhold) due to telecommuting during COVID pandemic
 - <https://tax.iowa.gov/COVID-19>
 - Remote work from North Dakota
 - Employee subject to income tax; employer not considered to have business nexus (and not required to withhold) due to telecommuting during COVID pandemic
 - <https://www.nd.gov/tax/faq/topics/28/>
 - Remote work from Wisconsin
 - Employee subject to income tax; employer not required to withhold if employer does not have sufficient business contacts with Wisconsin
 - <https://www.revenue.wi.gov/withholdingtaxupdate/20-1.pdf>

Payroll State and Local Income Tax

- **Employee who telecommutes from state other than normal work location**

- **Examples (continued)**

- **Remote work from Massachusetts**

- Employee subject to income tax; employer not required to withhold during pandemic
- <https://www.mass.gov/technical-information-release/tir-20-10-revised-guidance-on-the-massachusetts-tax-implications-of>

- **Remote work from New Jersey**

- Employee subject to income tax; employer not required to withhold during pandemic
- <https://www.state.nj.us/treasury/taxation/covid19-payroll.shtml>

Payroll State and Local Income Tax

- **Employee who telecommutes from state other than normal work location**

- **Examples (continued)**

- **Remote work from New York**

- Employee subject to income tax; employer not required to withhold during pandemic
- Different scenario – NY office and telecommuting from outside NY – “If you are a nonresident whose primary office is in New York State, your days telecommuting during the pandemic are considered days worked in the state unless your employer has established a bona fide employer office at your telecommuting location.”
- <https://www.tax.ny.gov/pit/file/nonresident-faqs.htm>

- **Note: New York is not alone in the rule that employee who works remotely for employer’s convenience rather than employer’s necessity remains sourced to state where employer is located**

- Other states that have this rule are Arkansas, Connecticut, Delaware, Nebraska, and Pennsylvania
- Illustrates some of complexity of state tax laws

Payroll State and Local Income Tax

- **Employee who telecommutes from state other than normal work location**
 - **Examples (continued)**
 - Remote work from California
 - Employee subject to income tax; employer not required to withhold due to telecommuting during COVID pandemic
 - <https://www.ftb.ca.gov/about-ftb/newsroom/covid-19/help-with-covid-19.html>
 - “The wages of employees who typically perform services in another state for an employer located outside of California will not be subject to Unemployment Insurance (UI) tax, Employment Training Tax (ETT), and Disability Insurance (DI) withholdings if those employees are temporarily performing services within California due to the COVID-19 pandemic. If a worker remains in California performing services after state or federal public health officials have ended stay-at-home orders and the worker could have resumed working at their normal work location outside California, the worker and the employer will be considered subject to California employment tax laws.”
 - https://www.edd.ca.gov/about_edd/coronavirus-2019/faqs/employer.htm#collapseTeleworking
- **Employers need to check with tax department, tax counsel, and payroll providers**

Payroll State Reporting – Health Coverage

- **Employer reporting of health coverage**
 - **Several states and D.C. require employers to report employer-provided health coverage**
 - California – Requires filing of Form 1095-C
 - <https://www.ftb.ca.gov/file/business/report-mec-info/index.asp>
 - D.C. – Requires filing of Form 1095-C
 - <https://otr.cfo.dc.gov/sites/default/files/dc/sites/otr/publication/attachments/FAQ%20reporting%20SRP%20%288.6.19%29.pdf>
 - Massachusetts – Requires filing of Form 1095-HC (Massachusetts form)
 - <https://www.mass.gov/files/documents/2016/08/st/attestation-let.pdf>
 - New Jersey – Requires filing of Form 1095-C
 - <https://nj.gov/treasury/njhealthinsurancemandate/employers.shtml>
 - Rhode Island – Requires filing of Form 1095-C
 - <http://www.tax.ri.gov/healthcoveragemandate/IndividualMandateReportingRequirementsFAQ.pdf>
 - **If employee is a resident of the state, then employer has a reporting obligation**

Payroll State Reimbursement Laws

- **Employee who telecommutes likely needs equipment to do their job**
 - **A number of states and D.C. require reimbursement, including:**
 - California, Illinois, Iowa, Massachusetts, Montana, Pennsylvania, New Hampshire, New York, North Dakota, Pennsylvania, and South Dakota
 - Example: California law provides, “An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer”
 - » California Labor Code, § 2802(a)
 - Example: Illinois law provides, “An employer shall reimburse an employee for all necessary expenditures or losses incurred by the employee within the employee’s scope of employment and directly related to services performed for the employer”
 - » 820 ILCS 115, § 9.5(a)
- **What is covered?**
 - **Internet connection? Computer equipment? Office equipment? Need to check state**



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Payroll Wages and Job Location

- **Minimum wage**
 - **At least 29 states have minimum wages higher than the federal wage:**
 - <https://www.dol.gov/agencies/whd/minimum-wage/state>
 - At least 45 localities have adopted ordinances with higher minimum wages
 - For example, St. Paul, Minnesota: \$11.50 – raised to \$12.50 as of 7/2021
 - **Department of Labor prevailing wage laws**
 - Davis Bacon Act: construction
 - Service Contract Act (McNamara-O’Hara Act): service and supply
- **Immigration issues**
 - **Employees working pursuant to H-1B must pay “prevailing wage” in the location of employment**
 - **Changes to location may require new LCA and amendment to current H-1B**



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Audience Poll Question 1 – Return Date

- If your company has some workers working from home, what date do you anticipate they will return to their work at your company's office?



Audience Poll Question 2 – Testing

- Will you require employees to test before being allowed to return to work?

State and Local Employment Laws

- **Onboarding issues such as background checks and drug testing**
 - State law applies where the employee is performing services
- **Pay history inquiries**
 - Example: California, Colorado, Massachusetts and Oregon prohibit employers from inquiring about salary history
- **Workers compensation and unemployment insurance**
 - Changes to working conditions and locations may affect workers compensation
 - As discussed earlier, payroll withholdings must include unemployment contributions for the state where the employee is working and resides
- **Non-compete issues**
 - Some states will not enforce restrictions: California and North Dakota

State and Local Laws COVID-19 Benefits (Paid Leave)

- **State and local COVID paid leave laws**
 - **Examples**
 - California – Supplemental Paid Sick Leave (SPSL)
 - In general, up to 80 hours of paid sick leave for FFCRA reasons
 - Employers need to post and provide notice to employees
 - » <https://www.dir.ca.gov/dlse/COVID19Resources/FAQ-for-SPSL-2021.html>
 - Colorado – Public Health Emergency Paid Sick Leave (PHEL)
 - In general, up to 80 hours of paid sick leave for FFCRA reasons
 - Employers need to post and provide notice to employees
 - » <https://cdle.colorado.gov/sites/cdle/files/INFO%20%236C%20%2812-23-20%29%2C%20How%20HFWA%20Differs%20by%20Year%20%26%20From%20Other%20Laws.pdf>
 - Local laws – several California cities have COVID paid leave requirements
- **Employers with remote workers in these locations need to comply**



Audience Poll Question 3 – Work from Home

- Will you allow employees who have been working from home to continue to do so?



Benefits Health Plan Considerations

- Remote work may mean more individuals are outside of network area
 - Depending on plan design, outside of network area could result in no coverage, or coverage with large cost sharing
 - Unexpected cost sharing for employees
 - But more telehealth options are now available
- Remote work may mean that individuals are in states that are unanticipated by the carrier, if you have an insured plan
- Remote work may trigger unanticipated health plan reporting requirements in states

Benefits Dependent Care Considerations

- **If an individual is working from home, are they still entitled to use dependent care flexible spending account?**
 - Typically yes, but what if they work flexible hours?
 - If non-working spouse is at home, then not entitled to use dependent care flexible spending account

HR and Employment Required Postings

- **Department of Labor and EEOC:**
 - Generally, “posters must be displayed or posted in conspicuous places where they are easily visible to all employees”
- **Field Assistance Bulletin No. 2020-7:**
 - **December 23, 2020**
 - https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_7.pdf
- **An electronic posting constitutes a sufficient substitute for a posting requirement only where:**
 - **ALL employees work exclusively from home;**
 - **ALL employees customarily receive information from the employer electronically; and**
 - **ALL employees have readily available access to the electronic posting at all times**

HR and Employment Performance Monitoring and Evaluation

- **Concerns to address in ongoing remote work environments:**
 - **Privacy (software tracking)**
 - States may have more protections for employees than federal law
 - **Examples:**
 - California Wiretap Statute, Cal Penal Code, § 631
 - Illinois Right to Privacy in the Workplace Act (IRPWA), 820 ILCS 55, § 10
 - **Performance monitoring**
 - **Mentorship**
 - **Team building and collaboration**
 - **Termination of employment**
 - Returning company property
 - See Dorsey's presentation on March 31, 2021, "Tips for Employment Separations in a Remote Work Environment"

Audience Poll Question 4 – Vaccination

- **Will you require employees to be vaccinated before being allowed to return to work?**



Audience Poll Question 5 – Vaccination Incentive

- Will you offer an incentive to your employees to get vaccinated?



Corporate Nexus Corporate Taxes

- **Employers need to consider whether allowing employees to perform remote work may trigger additional corporate taxes based on the location of the remote employee**
 - **States may tax revenue from services performed, typically using one of following:**
 - **Cost of performance** – all revenue from provision of services based on where services are performed (if multiple states, sourced to state with greatest proportion of activity)
 - **Modified cost of performance** – similar, except revenue is divided among the states based on percentage of total revenue for services performed in each respective state
 - **Market-based sourcing** – varies by state; generally means revenue from services is sourced to state where benefit of services is received
 - **Many states have issued guidance providing for temporary suspension of corporate income tax or sales and use tax thresholds where the pandemic based on employee remote work due to COVID-19 pandemic if employer otherwise has no nexus**
 - **Employer tax departments need to consider corporate nexus**

Looking Forward Practices – ADA Reasonable Accommodation

- **Working from home as reasonable accommodation**
 - Have duties been performed successfully from home in past?
 - Are others who perform the same duties working from home?
 - Do state COVID-19 orders require additional accommodation measures?
 - For example, Minnesota’s executive order provides that (as of yesterday), “employers are strongly encouraged to allow employees who can work from home to continue to work from home.”
 - This says nothing about “reasonable accommodations”
- **Policy considerations**
 - Do policies require specific performance level in order to allow work from home?

Looking Forward Practices – Short-Term & Long-Term Disability

- **How will the pandemic affect short-term and long-term disability?**
 - **Competing trends**
 - Remote work provides for greater flexibility
 - Long-term health impacts from COVID-19
 - Reports of extended effects of COVID-19 including fatigue, brain fog, and other health issues
 - **Short-term disability**
 - 2020, 2021, and maybe 2022 – Possibly more short-term disability claims
 - Fewer claims due to fewer accidents (less travel)
 - More claims related to COVID-19
 - **Long-term disability**
 - More long-term disability claims?

Looking Forward Policies – Where Employees Can Work

- **How will the pandemic affect where employees can work?**
 - **Will employers adopt policies on remote work?**
 - Will employers limit states from which employees may engage in remote work?
 - Will employers want to limit talent pool by limiting states?
 - Will employers face legal challenges if the limit states?

Looking Forward Policies – International Work

- **How will the pandemic affect where employees can work?**
 - **Will employers adopt policies on international work?**
 - **Take everything about working in multiple states and multiply the complexity**
 - Will employers limit international locations from which employees may engage in remote work?
 - Will employers want to limit talent pool by limiting locations?

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Thank you!

