



A Robinson+Cole Legal Update

Coronavirus (COVID-19)

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Work from Anywhere? Telecommuting and Tax Obligations for Employers: Practical Considerations and Tips for Human Resources and Management

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As a result of the COVID-19 pandemic, there has been a sudden, widespread shift towards remote work arrangements. This shift has provided many benefits, including an increase in the employee talent pool and the ability to recruit without borders, cost savings, and a more flexible employee workday. In response, a number of employees have moved away, or plan to move away, from city centers or to a different state to find a better location in terms of cost of living and personal preference. However, this shift creates concerns for employers regarding labor and employment law compliance, tax compliance, and other business considerations when employees choose to permanently work remotely in a new location. Employers may not be aware of these considerations or even the fact that the employee has moved. It is important to understand these concerns and how they may affect the “workplace” as more businesses prepare for long-term policies on working remotely.

Labor & Employment Considerations

Wage and Hour Laws. Different jurisdictions impose different wage and hour requirements, such as minimum wage, paid sick leave, overtime, exemptions, pay frequency, and pay statements. Multi-jurisdictional employers must understand these variations to make sure that they are complying with the various wage and hour laws in the states and localities where employees are working. For example, non-exempt employees working from home are still required to be paid based on actual hours worked, and are entitled to overtime. If an employer employs an employee who moves to a state where overtime must be paid for any work over eight hours per day instead of being paid for all hours worked over 40 in a work week, the employer would need to update its payroll system to ensure compliance.

Tracking Hours Worked. With remote work, employees’ actual hours worked can be difficult to track because of variable schedules necessitated by the competing demands of working from home. On August 24, 2020, the U.S. Department of Labor’s Wage and Hour Division (WHD) recognized this issue and published a [field assistance bulletin](#) that reminds employers of their obligation to track all hours worked by employees who are working remotely, including addressing authorized versus non-authorized hours of work, hours that the employer knows are being worked, and reminds employers that their processes and policies cannot prevent or discourage the reporting of hours worked.

Workers' Compensation Insurance. Most employers are generally required to obtain workers' compensation insurance in the states in which they employ workers. An injury that arises out of or in the course of employment will generally be covered by workers' compensation insurance. This includes injuries that occur suddenly or over time as well as injuries that may occur when working remotely. For example, due to the COVID-19 pandemic, many employees are conducting business from home-office setups where they may sustain various injuries. Depending on the applicable state law, this may be deemed a work-related injury eligible for coverage under workers' compensation insurance. An employer that does not abide by a state's laws requiring workers' compensation insurance may be liable for noncompliance, resulting in potential fines and penalties.

Unemployment Insurance. Similarly, employers are generally required to pay premiums for state unemployment insurance when at least one of their employees conducts business in the state. Employers must generally register for an account with the state unemployment agency within the states in which they have employees working. A failure to pay these premiums may create liability for the employer, including penalties for noncompliance.

Discrimination Laws. As a general tenet, the federal and state employment discrimination laws in a particular state apply to employees working in that state and they apply to "workplace," which includes remote work arrangement, online forums, etc. Employers must be prepared to comply with various local and state employment laws, keeping in mind that localities and states might include different protected characteristics in their laws. Employers also will need to be in compliance with state and federal disability discrimination laws, as employees are entitled to reasonable accommodations even when working remotely. Employers may wish to review and, if appropriate, update employee handbooks to ensure that their procedures for internal reporting are accessible and are reasonable as they relate to remote employees.

Posting Requirements. Employers may be required to display in the workplace posters that discuss employees' employment rights, such as those granted under the federal Occupational Safety and Health Act (OSHA) or the federal Family and Medical Leave Act (FMLA), as well as under other local, state, and federal laws. If employees are working remotely, employers may be required to send out the postings by mail or email or display the postings on an employee information website, depending on the applicable law. Employers may want to consider providing a manner for employees to acknowledge receipt of the posted information to ensure they are fulfilling their obligations.

State Tax & Registration Implications

The unplanned and exponential increase in the number of remote workers due to the COVID-19 pandemic has raised state tax and registration questions for employers with employees now working in one or more states separate from the states(s) in which the employer normally conducts business. Generally speaking, the presence of an employee in a state may trigger a requirement that the employer register as an entity transacting business, establish nexus for income/franchise taxes and sales and use taxes, and require registration as an employer for purposes of state and local income tax withholding.

This analysis is further complicated by the lack of uniformity in guidance issued by state authorities. A number of state tax authorities have been noticeably silent, suggesting that pre-pandemic rules continue to apply to out-of-state employers. Even with regard to the states that have issued COVID-19 related guidance, that guidance varies, as some states provide relief (generally temporarily waiving registration and reporting issues relating to remote workers created as a result of the pandemic) while others have simply confirmed that their laws are not impacted by the pandemic. The state guidance may also draw a distinction between previously assigned remote workers and those forced to work from home due to the pandemic.

Business Registration. Employers may wish to consider whether the presence of these new remote workers creates a duty to obtain a certificate of authority in order to transact business in states in which employers previously did not have any employees or operations. Failure to comply with these rules can result in significant penalties.

Business Taxes. If an employee performs services in his/her state of residency, this may create substantial nexus between the employer and this state. As a result, employers may be obligated to pay state and local franchise, income, or other applicable business tax in such states solely as a result of their remote workers. For retailers, it would trigger a duty to collect, remit, and report state and local sales and use taxes.

Income Tax Withholding. In the majority of jurisdictions, employers attribute an employee's wages for income tax withholding purposes to the state in which the employee performs services. These rules would require employers to register with state and local tax agencies and withhold the income taxes according to the laws of those jurisdictions. With regard to other states that utilize a "convenience of the employer" sourcing rule, employers are faced with unique and complex challenges in the current pandemic environment. Generally, in such states, wages are considered earned by a nonresident employee and are allocated to the office location the employee is assigned to, unless the employee performs work that, out of necessity and not convenience, requires the employee to perform work from another location other than their assigned office. Historically, what is considered to be at the "convenience of the employer" has been defined broadly with narrow exceptions, and it remains unclear whether alternative remote working arrangements due to the pandemic would constitute work conducted offsite for the "convenience of the employer." This situation is further complicated by additional states (most notably Massachusetts) temporarily adopting "convenience of the employer" rules under the guise of limiting disruption to employers.

In many cases, employers are left without clear direction and have no choice other than to review state specific guidance as it applies to their remote workers, including those who may have relocated temporarily or have relocated without any advance notice to their employer. While enforcement activity may be limited at the current time, employers should consider whether states will look to enforcement of these tax rules against nonresident employers in order to balance state budgets deeply impacted by the pandemic.

Localized Compensation

Many employees who plan to work remotely on a permanent basis are moving to more affordable cities to reduce costs or for other personal reasons. Some employers have responded by adjusting pay for employees based on localized factors, including income tax rates and the cost of labor in the employee's new location. Some of these employers have made pay adjustments based on a case-by-case basis, while others have implemented a set pay cut when an employee moves away from large city centers, such as New York or San Francisco. While companies have pointed out that it is standard practice for an employee's location to be a factor considered in determining pay, there has been some push back by remote workers related to this decision.

Conclusion

Due to the legal risks associated with employees relocating while working remotely, employers may wish to consult with legal counsel for guidance on navigating applicable law.

Read more legal updates, blog posts, and speaking engagements related to this area on [Robinson+Cole's Coronavirus Response Team](#) page and feel free to contact any member of our team with questions.

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