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Remote Workers: Not as Simple as You Think

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REMOTE WORKERS: NOT AS SIMPLE AS IT SEEMS

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The COVID-19 pandemic had both short- and long-term implications for individuals, families, entities and economies. In the same vein as individuals identified as "long-haulers," who seemed to recover from the virus but are grappling with lingering symptoms, businesses should be aware of the pandemic's continuing after-effects on how they do business and manage their staffing needs.

In the earliest stages, as the virus spread and local governments responded with mask mandates and "stay at home" orders, some employees chose to shelter in place in locations other than their usual work community, such as in vacation homes or with distant friends or relatives. According to makemymove.com, 53 communities in 24 states and PR tried to lure new residents by offering cash, covering moving costs or offering other incentives.

Employers faced with employee requests and, in some cases, demands to work from an out-of-state location often acquiesced without considering the long-term effects. That indifference may have been due, in part, to the belief that COVID-19 was a brief storm that could be waited out, and things would soon return to normal as workers returned to their offices. Some of that indifference may have been due to the need to focus on other, more urgent concerns such as keeping the business running in the face of declining sales, rising costs, supply chain issues and more. Some of the indifference may be due to a lack of knowledge of what they were getting into, which this paper hopes to supply.

The effects of having a long-term remote worker are both legal and practical. On the legal side, this paper will identify a host of issues and provide short answers where possible and links to resources where the answers are more complex (e.g., tax). With the potential for dozens of employment laws in each of the 50 states plus myriad local enactments, this paper does not purport to identify and explain each of them. Instead, it identifies the mainstream enactments (and a few of the unique ones) and explains what they require. On the practical side, be aware of what is being referred to as "proximity bias" (aka "out of sight, out of mind"). With the surge in hybrid arrangements, combining days in and out of the office each week, and some entities going 100% remote, employers will need to rethink how they manage and motivate teleworkers. When reading about unfamiliar legal obligations, your immediate response may be to deny teleworking requests but that must be balanced against shifting norms and the war for talent.

LEGAL - TAX

A teleworker who is working from a state in which the employer previously had no connection may be the first domino in a chain reaction to an unsuspecting employer. That employee's presence and performance of duties in the new state may establish a nexus with the state which means there is sufficient contact with the state to trigger a tax filing obligation (as well as the other legal obligations itemized below). The most obvious tax filing obligation is state income tax on the teleworker, but the list may not end there. It's possible that sales tax, income tax, franchise tax, unemployment tax and gross receipt tax obligations will ensue in states like CA, ID, NJ and VA which find a nexus with the presence of a single employee. Depending on which states are involved in the analysis, there is potential for double taxation.

Prior to pandemic, some states had already considered and addressed the scenario of a person living in one state but commuting to and working in an adjoining state. For instance, NY has a "convenience of the employer" rule which requires non-residents to pay NY tax if their primary office is in NY and they work elsewhere (say, NJ or CT) for their own convenience. AR, CT, DE, NE and PA regularly apply the "convenience of the employer" rule and a handful of states and cities (e.g., St. Louis, MO) adopted the rule temporarily during the pandemic. Other states address this concern via their definition of a "resident" and often attach a minimum number of days the individual must be present in the state for taxation to apply. Per the AICPA white paper referenced below, sixteen states had reciprocal agreements in place which govern which jurisdiction could or must receive income tax on the teleworker.

During the pandemic, some state governments recognized the burden this would place on both teleworkers and their employers and responded by waiving individual state income tax on teleworkers in what was expected to be their temporary home, but most of those waivers have already expired or are expiring soon. Conversely, IL may have seen an opportunity to collect more revenue in the pandemic when it enacted a rule in 2020 which requires an employer to withhold IL tax for out-of-state employees who work in IL for more than 30 days. See IL Department of Revenue Bulletin FY 2020-29.

MA enacted a law stating that as of March 10, 2020 and until 90 days after the COVID-triggered state of emergency in MA is lifted, all pay received for services performed by a non-resident who, immediately prior to the COVID-19 state of emergency was an employee engaged in performing services in MA, and who began performing services from a location outside of MA due to pandemic-related circumstance, will continue to be treated as a MA source of income subject to personal tax under M.G.L. chapter 62 and personal income tax withholding. See 830 CMR 62.5A.3. NH promptly filed a lawsuit with SCOTUS complaining the law was unconstitutional, but SCOTUS declined to review the lawsuit, leaving unanswered the question of one state's ability to impose its personal income tax on a nonresident telecommuter. The MA state of emergency was lifted June 15, 2021 so the tax rule expired on September 13, 2021.

A tremendously comprehensive white paper by the American Institute of CPAs ("AICPA") on the issue of COVID impacts on taxation, during 2020 and 2021, can be found at https://us.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/coronavirus-state-filing-relief.pdf. It is 134 pages long and chock full of weblinks to connect you to additional resources on this very complex issue.

State-specific taxes which support the unemployment insurance system (FUTA) are determined using the U.S. Department of Labor's Localization of Work Provisions, a four-factor test to determine to which state wages should be reported and FUTA paid. For remote workers who perform all services in one state, the work is "localized" and the answer is decided by the first factor - - the state receiving the tax is the state where the work is performed. If the work is not localized in a single state, the employer goes to the ensuing factors to determine if the chosen state will be [1] the base of operations; [2] the state from which the service is directed and controlled; or [3] the state where the employee lives. See https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1565.

If you are using a reputable third party to handle your payroll, be sure to let them know when your employee's physical address changes so that they can respond with proper tax withholding. If you are handling your own payroll, you might check in with your CPA or similar professional to ensure you understand what tax obligations now apply so you can satisfy them. If your employee alerts you to a