



EMPLOYEES TELEWORKING AND THE IMPACT ON EMPLOYMENT AND TAX POLICIES

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In March 2020, the COVID-19 pandemic spurred many employers to make temporary arrangements for their employees to telework. Now a year later, these arrangements have, in many cases, turned permanent. With the ability to work remotely, employees are not only teleworking but are also moving to states beyond corporate headquarters. While many employees and employers are celebrating the flexibility and benefits that teleworking brings, when an employee moves to a new state, it creates HR and tax compliance issues. This article provides a checklist to employers and their employment and tax counsel to consider when employees move out of state.

LEAVE LAWS

Family Medical Leave Act (FMLA)

Many employers forget that under the FMLA, an employee's personal residence is not a worksite for telecommuting employees.¹ Rather, the worksite of telecommuting employees will continue to be the site where the employee reports and from which assignments are made. Employees who would qualify for FMLA, if working at a traditional worksite, will continue to qualify for FMLA while telecommuting from their residence.

State, County and Municipality Leave Requirements

Employers should also review whether the state, county and municipality that the employee is working in require leave.

LOCAL FMLA AND PAID SICK LEAVE

Employees may be entitled to leave under state FMLA laws, even if the em-

ployee has only worked inside the state for a few months, and in some states, leave is required to be paid if the employee meets eligibility requirements. Currently, if eligibility requirements are met, California, Massachusetts, New Jersey, New York, Rhode Island, Washington, and the District of Columbia require paid family leave. Colorado, Connecticut, and Oregon have enacted paid family leave requirements, but as of the submission date of this article, the law had not gone into effect.

Certain states, counties and municipalities require employers to offer paid sick leave. Under many of these requirements, an employee who is based in location A and works from location B may be covered by the sick leave policies in both locations! It is extremely critical for employers to know where their employees are working and assess the leave laws for those locations, and be careful to not just examine state law, but also look to county and city codes as well. Many large counties (e.g., Cook County, Illinois) and cities (e.g., San Francisco, California) have their own specific paid sick leave requirements.

Often employers can use existing paid time off policies to satisfy these obligations. However, employers and their counsel should carefully and closely examine the company's existing policy and determine whether all eligible employees under the specific leave entitlements are covered by the company's existing policies as paid sick leave requirements are often tied to hours worked and capture employees who are often not benefit-eligible (e.g., part-time employees).

SCHOOL LEAVE

The location of employees may require employers to provide school-related leave. Employees in 10 states, and the District of Columbia, may be entitled to school-related parental leave. These policies give parents and legal guardians time off to participate in children's educational activities and attend school conferences. As of January 2021, California, D.C., Colorado, Illinois, Louisiana, Massachusetts, Minnesota, Nevada, North Carolina, Rhode Island, and Vermont all require eligible employees to receive unpaid school-related leave. Again, check local. County and city codes address school leave as well.

WAGE PAYMENT LAWS

Fair Labor Standards Act (FLSA) / Minimum Wage and Overtime

A non-exempt workforce telecommuting can raise questions on compensable time, overtime, and minimum wage compliance. When is a non-exempt employee working and when are they not?

On December 31, 2020, the Department of Labor (DOL) considered whether travel between a remote employee's home office and a company's worksites is compensable time. The DOL's opinion letter explores several scenarios where an employee starts work at one location, travels to another work location, with differing personal errands interspersed. Ultimately, the DOL determined that travel from a home office to a worksite is normal commuting time and as such is not compensable, even if the employee performs work before and after the commute.²

Employers are required to exercise reasonable diligence in tracking employee's compensable time, which can be challenging for a remote workforce. Employers must pay employees for all work performed, even if the employer did not request the work be completed, and even if they have a rule against doing the work. If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked.³ Employers should take care to consider how their employees are tracking time and create a procedure so that employees can report unscheduled hours.

Employers and their counsel should strongly consider creating telecommuting agreements that specifically address an employee's responsibility in tracking time and how an employee can report unscheduled hours.

Unused, Accrued Paid Time Off as Wages

Some states consider accrued vacation and paid time off as a wage and others do not. Many states require employers to follow their written policies, however, other states ignore an employer's written policy and mandate payment of unused, accrued paid time off at the end of employment. It is critical that employers and their counsel review state laws in which the company's employees are working and determine whether employees are entitled to payment of unused, accrued paid time off at the end of employment.

REVIEWING EMPLOYMENT POLICIES FOR COMPLIANCE

After determining where employees are working from, and what laws (city, county and state) apply, employers and their counsel are left to determine how to implement any necessary changes. Generally, there are two approaches. An employer can raise compliance standards for the entire company, meaning, the company provides the greatest amount of benefits provided to all employees. So, for example, an Iowa company may have a small number of employees who work and qualify for Colorado's paid sick leave requirements, but the Iowa company decides to comply with Colorado's paid sick leave requirements and provide those entitlements to all its employees, including those not working in Colorado. This might be achieved by the company following its al-

ready established policies (if those policies are in compliance) or by providing additional benefits. Alternatively, the employer may choose to issue stand-alone policies directly only to the impacted employees. In this example, only the Colorado-based employees would receive the Colorado sick leave policy and the Iowa employees would not.

STATE INCOME TAX

Employers with employees who work remotely will need to report income earned to the state where the employee performed the work, even if the employee is not a resident of the state where the work was performed. California requires income tax withholding for employees who are residents, whose base of operation is inside the state, or where the employee performs work inside the state. If the employee is working remotely temporarily due to Covid-19, Massachusetts and New Jersey will not require withholding by employers. Conversely, states such as Iowa have specifically required withholding by employers with telecommuters located in the state. New York issued guidance that requires withholding for employees whose non-pandemic worksites are within the state, regardless of the employees telecommuting location. These competing income withholding requirements highlight the need for employers to track the hours and location of remote workers.

STATE TAX OBLIGATIONS FOR EMPLOYERS

Most states require employers to pay state unemployment tax for employees working inside the state. Some locations require employers to withhold additional taxes from employees (such as Alaska, New Jersey, and Pennsylvania). Employers with a remote workforce will need to determine where the work is localized, with localization priority given to the state in which the service or work performance is located, and may need to comply with multiple state laws where employees reside, have worksites, or work remotely from more than one state.

Telecommuting employees may give rise to tax filing obligations for their employers. Employers may be burdened with franchise, income, or other business tax due to the "nexus" created by employees working remotely. Massachusetts, Rhode

Island, South Carolina, and New Jersey responded to COVID-19 remote workforce by excluding pandemic-related remote employees from their corporate income and franchise tax "nexus". These exclusions are unlikely to extend through the 2021 tax year. Similarly, state sales tax laws may require retail employers to withhold sales tax due to the presence of a telecommuting employee inside the state.

WHAT TO DO WITH YOUR REMOTE WORKFORCE:

- Implement Telecommuting Agreements that:
 - Require employees to record and report the city and state from where they telecommute.
 - Address how employees will record time and report unscheduled time.
- Review city, county and state laws in the locations in which employees work to determine compliance with employment laws.
- Review current policies and procedures for compliance.
- Determine whether overall changes are necessary or stand-alone changes should be implemented for the employees in highly regulated states.



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¹ 29 CFR § 825.111(a)(2)

² DOL Opinion Letter (Dec. 31, 2020) FLSA 2020-19 https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_12_31_19_FLSA.pdf.

³ DOL Field Assistance Bulletin (Aug. 24, 2020) No. 2020-5 <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-5>