

Having Employees Working Remotely May Become the New Norm - There May Be Tax and Other Traps Lurking Out There for Unwary Employers

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Today, as a result of the COVID-19 pandemic and resulting stay-at-home orders issued by the governors of most states, many employees are working remotely from home for their employers. In fact, for many employers and employees, the arrangement is working well enough that they will likely consider continuing the arrangement, on a full-time or part-time basis, when the stay-at-home orders are lifted. This type of arrangement raises all kinds of issues and concerns for employers, including compliance with applicable laws. Many of the issues are obvious, but some of them are more nuanced and may not be on the minds of employers.

Employees Working Remotely

The trap is set when an employer has an employee performing services outside of the state(s) where it operates. Historically, this scenario was likely rare. It probably only occurred when an employer was physically located near a state border and had an employee working from his or her home located in the neighboring state. Today, with the internet and sophisticated communication technologies, it is not limited to employees residing in neighboring states. Further, with the COVID-19 pandemic facing the world, more and more employees are working remotely. Assuming a remote work arrangement is acceptable to both an employer and an employee, I suspect it will continue to be a prevalent employment arrangement post-COVID-19. As a result, employers may find themselves with employees working in states, and possibly countries, different from where the employer has its business physically located. As discussed below, it is vital that employers know where their employees are performing services. The consequences of not knowing where your employees are working could be costly.

A multitude of issues for employers arise from employees working remotely, including:

Taxes

Having an employee working in another state typically creates physical nexus, subjecting the employer to the tax regimes of that jurisdiction. Those tax regimes could include (but are certainly not limited to) income taxes, gross receipts taxes, as well as sales and use taxes. The tax regimes could extend beyond the state level and could also be imposed at the city or county level. Being subject to state and local taxes generally requires both the preparation and filing of tax returns, and the payment of taxes.

Labor and Employment Laws

Generally, the labor and employment laws of the state where an employee is actually working will apply to the employment relationship. Consequently, employers need to know where their employees are working. Additionally, they need to understand the labor and employment laws that apply to the relationship. These laws may greatly differ, depending upon the jurisdiction. These laws may relate to many aspects of the employment relationship, including wage and hour rules, termination of employment, noncompetition, trade secrets, and sick and family leave rules.

Authority to Do Business

In most states, the mere presence of an employee working in the state, absent the presence being temporary or transitory as the employee is traveling to another state, triggers the requirement that the employer be registered to do business in the state. The consequences of doing business in a state without being registered vary, but it is not uncommon for the business to be subjected to monetary penalties and not be allowed to appear in the state courts until the registration is completed.

Presence for Disputes

The mere presence of an employee working in a state may be sufficient to subject the employer to the jurisdiction of the courts of that state for the commencement of legal disputes. So, an employer may find itself defending a claim in a court located in a state far and away from its state of operations.

Workers' Compensation Insurance

Having an employee working in another state generally requires that the employer register for and obtain workers' compensation insurance in the state where the employee is performing the services. Failure to do so may expose the employer to liability, including penalties for noncompliance with the state's workers' compensation laws.

Unemployment Insurance

Like worker's compensation insurance, most states have their own unemployment insurance programs. Having an employee working in another state generally requires that the employer register for and pay the

unemployment insurance premiums for the employee through the state unemployment insurance program where the employee is performing the services. Failure to do so may expose the employer to liability, including penalties for noncompliance with the state's unemployment insurance laws.

Conclusion

The workforce in the world today is more mobile than ever before. Employees can work remotely. If anything, the COVID-19 pandemic has proven that a remote workforce may be a viable option for businesses and their employees. For one, the cost of commercial real estate is expensive. A remote workforce may help reduce that operating expense. That said, employers need to keep track of where their employees are performing services. Too many traps exist for employers who fail to keep an eye on the issues that accompany a mobile workforce. Additionally, employers need to analyze the cost of compliance created by a mobile workforce. Lastly, employers need to be vigilant, keeping track of the workforce, at least geographically speaking. A remotely working employee could move to another state (or even a foreign country) without the employer ever knowing. Again, technology can make remote working fairly seamless. That move, however, could subject the employer to unwanted liability and/or compliance obligations. Now, more than ever, it is critical for employers to know the whereabouts of their workforce and to understand the potential legal issues at play in remote work arrangements.

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Authored by

[Larry J. Brant](#)

[Principal|Portland](#)

[503.553.3114](tel:503.553.3114) larry.brant@foster.com