

Remote, Out-of-State Work Requires Tax, Corporate and Employment Law Compliance

COVID-19 has made remote work more prevalent. Employers considering making these work-from-home arrangements permanent need to be prepared for the compliance issues that arise when the remote work crosses state lines. PS&H attorneys Russell Stein and Alicia Samolis were recently interviewed by *Providence Business News* to discuss some of these concerns.

As Russell and Alicia explain, when an employee works from home in a state where the employer does not have an office, allowing the work might result in income taxes being owed to another state, subject the employer to withholding tax and sales tax collection requirements in the other state, require the Company to register to do business in the state and subject the employer to out-of-state local employment laws.

In the tax context, whether an employer has to pay income taxes, collect sales taxes, or withhold employment taxes in a state depends, in part, on the nexus of where the work is performed. During COVID, some of the states suspended some of these nexus rules. In Massachusetts, employees temporarily working remotely in Massachusetts due to COVID-19 will not, by itself under certain circumstances, cause the non-Massachusetts company to become subject to Massachusetts income, sales and use, or employment tax withholding regulations [XYZ] (See 830 CMR 62.5A.3 and TIR 20-15, <https://www.mass.gov/technical-information-release/tir-20-15-revised-guidance-on-the-massachusetts-tax-implications-of>). However, Massachusetts required employees who previously worked in Massachusetts prior to COVID-19 and started working remotely outside Massachusetts due to COVID-19 to continue to be treated as receiving Massachusetts source income and be subject to Massachusetts withholding taxes. In Rhode Island, the Division of Taxation passed similar [regulations](#) which essentially allowed employers with employees working in Rhode Island only due to the COVID-19 crisis to avoid Rhode Island income taxation while making clear that Rhode Island still expected taxes to be paid to Rhode Island on employees who traditionally worked in Rhode Island but now were based from their homes out of state. The Rhode Island special COVID tax rules are currently set to expire on September 15, 2021 and the Massachusetts rules are set to expire on September 13, 2021. Alicia and Russell cautioned employers not to “count on states extending or making permanent their pandemic tax policies. If anything, the increasing number of out-of-state remote workers will make states step up their enforcement of tax nexus policies.”

Employers who grant permanent work from home also need to be aware that depending on specific state rules regarding registering to do business, they might also need to register to do business with the state where the remote employee works, pay income taxes because of the at-home work creating nexus in the state, and possibly collect and pay over sales tax to the state.

Finally – and not insignificantly – it is almost guaranteed that the local employment laws will apply to employees who regularly work from home in a different state, such as sick time, overtime, medical laws, leave laws requiring notices to employees and laws that require participation in state funded disability programs. Like tax law, this is not necessarily a choice of law question; employees who work partially in one state from home and partially in one state in the Company's office will be protected by both state's laws in many contexts. Additionally, the out-of-state work must be accounted for when considering restrictive covenant enforceability and policy drafting. While this is not a new issue due to COVID, it is a more prevalent issue and Alicia anticipates state agencies and plaintiff's attorneys will focus more on out-of-state companies who are ignoring these laws simply because the employer does not have an office in the state. There is already a trend for many new employment laws to hinge applicability to the number of employees overall, rather than the number of employees in the state.

According to Alicia and Russell, the first step in handling this issue is to make sure your Company knows where

your remote employees are working. As Alicia commented, “a lot of companies might be surprised to learn that they have employees working elsewhere. You need that information so you can make the decision: Is it worth the cost to comply, or can you find someone else locally?”

Given the tight labor pool, employers are increasingly saying “yes” to remote work. Some employees do not want to work yet due to the enhanced unemployment benefit and free COBRA laws, as well as lingering COVID concerns. To compound the problem, older employees may be more prone to retire, caregivers may be more likely to step back to spend more time with their families and to deal with continued childcare problems and other employees are leaving jobs to pursue different career paths. In summary, many employers cannot afford to lose workers right now and thus are granting more employee requests. As Russell succinctly noted “[e]mployees have a lot of bargaining power right now.”

Thus, unlike pre-COVID times, the compliance complexity and expense of having remote workers across state lines is less likely to result in a “no” or “your fired”. Instead, employers in all industries are working with their employment, corporate and tax counsel to assess what compliance would entail and, in many cases, taking the necessary compliance steps to make the remote arrangements work.

The full article as published in *Providence Business News*, can be [viewed here](#). (Subscription required)

Date Created

July 15, 2021