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Collaborative Compliance: Tax and Employment – Old Issues, New Lens

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Remote Workers: Tax And Employment Landmines For Companies To Navigate

The pandemic is ending, or at least there is light at the end of the tunnel as vaccines are being administered and employees are coming back to the office. Or are they? The "workplace" landscape has permanently changed in that remote work, at least in some form, is here to stay. Both employees and employers see the advantages of remote work – reduced overhead, expanded hiring pool, flexibility, no commute, improved morale, etc. – and are figuring out the details of remote work going forward, whether employees will work fully remotely or on a hybrid schedule. While workers and management are excited, human resources and tax/accounting departments are left to navigate new legal landmines, often landmines they did not even know exist. Changes are coming fast and furious and it feels as if we've been drinking from a regulatory firehose for the last 18 months.

What do workers and taxes have in common? Both are among the largest expenses for many employers, and among the greatest sources of liability if not properly managed. By 'properly managed', we mean not only compliance with applicable laws, but also collaboration among accounting and human resources professionals where compliance issues intersect. From the moment a worker walks in the door (even the proverbial "door" at home in a remote work scenario), there are legal consequences under tax and employment laws. And the location of a remote employee's office door can play a major role in determining those legal consequences.

While employers are about to begin a new year of unprecedented challenges under a still new administration, this Alert highlights that the *issues* are not entirely new. What has changed is the lens through which employers must view them given the evolving workplace and way in which work now gets accomplished.

When an employee works from home, or from anywhere other than the employer's facility or dedicated office space, especially when the remote work takes place in a state that is different from where the employer's facility or office is located, a myriad of tax and employment issues arise:

- In what state (or even local jurisdiction) should income taxes be withheld and remitted?
- To what state should unemployment taxes be paid?
- Has the company created nexus, and thus potential new state tax return filing obligations, in a new jurisdiction?
- Does the company need to register to "do business" in the new state/locality?
- Does the new state have its own wage and hour law, and does it apply?
- Are different minimum wage or overtime requirements applicable? Are exempt employees still exempt under the new state's law?
- When is the employee's final paycheck due?
- Does the state or local government mandate paid sick, disability, family, or maternity leave and do those requirements apply?
- Do you have to consider the new state's laws regarding employment-related agreements, such as severance agreements and restrictive covenants?

Tax Withholdings – Generally employers withhold and remit at the direction of the employee based on the information the employee provides on the W-4 and state equivalent form. However, the determination by the employee will depend largely upon in which state the employee will predominantly work. Employers should request updated withholding information from employees, especially if those employees are starting or continuing to work remotely.

Unemployment Taxes – There are various "tests" the states use to determine the proper jurisdiction for where an employer should pay unemployment taxes. In general, the hierarchy of tests is (i) localization of service, (ii) base of operations, (iii) direction and control, and (iv) residence. Many employers mistakenly assume that unemployment should be paid to the state where the employee has income taxes withheld. This is sometimes the case, but unemployment taxes and income taxes have different rules to determine the proper jurisdiction to where they should be paid.

State Nexus and Business Registration – Business registration signals to a state that a company is "doing business" in the state and thus will need to follow certain requirements such as having a registered agent (to accept process of service if sued), to file income tax returns, etc. Merely having an employee in a state does not by default create nexus (or connection to) the state at a threshold requiring the company to register to do business. In the past, the pre-pandemic guidance from the various states generally focused on a multi-factor test including if:

sales/revenue is generated within the state;

company-owned personal property and equipment is located in the state (this may need to be analyzed further as to home office equipment); and

whether the employees are permanently located in the state.

This is a rapidly changing area of state law/regulation that should be monitored closely, especially as businesses grow and expand, and establish new remote work policies.

Coverage Conundrum – State employment laws are not uniform in their coverage provisions, if they expressly address coverage at all. By coverage, we mean the language or provision of a given law defining who is subject to its requirements or who receives its benefits. Some employment laws base coverage on whether an employer has a threshold number of employees (company-wide or in the state at issue). Some are less specific and use terms like "Louisiana employee," which begs the question of what this means when someone who lives in Louisiana works from home for a Texas company that has no facilities or other employees in Louisiana. You can see how tricky the coverage question can be, and it is one that must be assessed in the context of the specific statute, ordinance, or regulation at hand. The variation among state and local laws means that there may be a patchwork of policies and practices in place to comply with these laws depending upon the number of states at issue. Drafting a uniform policy may not be impossible, but it will require solid understanding of the various laws and a decision about whether to comply with the most stringent requirement across borders or to adopt a more state-specific approach.

Wage and Hour – When an exempt office-based employee begins working remotely, even if the work is performed in the same state, you should consider whether the duties or compensation structure of the position have changed in a way that would affect exempt status. For a non-exempt employee, the process for determining compensable work time in a full or partial remote setting also needs to be evaluated. In a recent [opinion letter](#), the U.S. Department of Labor addressed the question of compensability of commute time for a hybrid remote/office non-exempt employee. When an employee transitions to telework from a different state,

state wage and hour law may impose different rules for minimum wage, overtime, compensable time, and exemptions, which could require additional action on the part of the employer to comply with applicable law.

Paid Sick and Family Leave Laws – States and local governments have begun to enact their own laws and ordinances requiring paid leave for sick, disability, family, maternity, and other similar types of leave. For example, within Texas alone at least three localities passed such ordinances and legal challenges have followed. In addition to the coverage conundrum noted above, employers have the compliance conundrum of attempting to draft a uniform handbook or set of policies to cover varied employment law requirements.

Employment-Related Agreements – Some states require specific provisions to be included in certain types of employment agreements. For instance, California requires that separation or severance agreements contain a specific provision to be valid. Choice of law clauses, an agreement between the parties choosing the specific state law that will apply to their agreement, are not valid or enforceable in every state. Louisiana, for example, does not permit them to be enforced unless the employee agrees to or ratifies the choice of law provision after the dispute has arisen. Restrictive covenants are governed by state law principles, so it is important when drafting such agreements to contemplate on the front end what law will apply. If an employee who works at an employer's office in Mississippi signs a non-competition agreement containing a Mississippi choice of law clause and then begins working fully from home in Louisiana, will Mississippi or Louisiana law apply? If the non-competition agreement was drafted to meet the requirements of Mississippi law but Louisiana law has different requirements, will the agreement be enforceable?

What can you do now? Well, you can avoid many of the existential questions that will inevitably arise if you implement a remote work program without considering these legal issues by establishing formal communication between your accounting and human resources teams and meeting to review legal compliance issues related to your employees. Start by evaluating tax forms, understanding where everyone is working even when remote, and reviewing policies, processes, and forms that govern the work relationship, from cradle to grave. Consider whether they need to be updated given realities of where and how your people now work. Engage tax and employment counsel to assist with the more difficult legal questions such as coverage and compliance with conflicting or varied multi-state requirements. Understand that the situation is fluid and states (and even local jurisdictions) are constantly putting forth new legislation and guidance. The issues and relevant rules need to be reviewed on a regular basis to ensure company policies remain compliant in the rapidly changing environment.

At Baker Donelson, a legal team consisting of members from both the Tax and Employment practice areas meets regularly to share knowledge and strategies on these issues. If you have questions or need more information, contact Jennifer L. Anderson or any member of Baker Donelson's [Tax](#) or [Labor & Employment Teams](#).