

State and Local Income Tax and Employment Law Implications for Remote Workers During COVID-19

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COVID-19 has drastically changed how and where employees work, with many now working from their homes or other remote locations. These temporary (and sometimes longer-term) teleworking arrangements raise questions about how state and local income tax and employment laws should apply to employees who live and work in different jurisdictions.

For example, think of many large metropolitan areas — Washington, D.C.-based employers may have employees residing in Maryland or Virgin-

ia, and New York City-based employers may have employees residing in New Jersey, Connecticut or Pennsylvania. It also may be that although one state may be the situs for the employer's operations and the employee's residence, they may be in different local jurisdictions — e.g., employers with operations in Los Angeles may have employees resident in California but outside the city or county limits. And an employer faces similar issues if an employee has temporarily relocated to another state that is neither the state in which the employer's operations are located nor the employee's resident state (for instance, to shelter with family).

State and local governments have



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responded with guidance addressing the effect of temporary teleworking situations on state and local taxes and employment laws. In addition to analyzing these temporary teleworking rules, employers need to consider the ramifications if teleworking becomes part of employees' longer-term work conditions.

STATE INCOME TAX WITHHOLDING

Many state income tax wage withholding rules depend on whether an employee lives in the same state in which he or she works. Local tax jurisdictions often apply similar rules, but for brevity, we refer solely to state tax laws.

Withholding by the Employee's Home State. The general rule is that if an employer's business operations and an employee's principal residence are in the same state, state income tax withholding is required on all wages earned by the employee within and outside of the employee's home state. Many states also take the position that when work is primarily performed from an employee's home, the employee's home is a regular place of business. State resident income tax withholding therefore applies in the employee's home state in such instances.

Withholding by the Employee's Work State. The general rule is that if an employer does not have business

operations in the employee's home state, state income tax withholding is required only on wages earned by the employee in the employee's work state. Some states (e.g., Connecticut, Delaware, Nebraska, New York, Pennsylvania) have a "convenience of the employer" rule that affects state income tax withholding depending on whether the employee is working in a state other than the employee's work state for the employee's own convenience or out of necessity to carry out employer-assigned job duties.

But what is a state's position with respect to an employee who is temporarily working from home (or elsewhere) due to the COVID-19 national emergency? Many states and local tax jurisdictions have issued special guidance addressing how state tax withholding rules apply when an employee is temporarily teleworking due to the COVID-19 emergency. The guidance varies widely, and some states have yet to issue guidance, leaving employers in a quandary. Employers must examine the rules of each employee's home state and work state to determine if it is properly withholding and reporting income taxes; failure to do so could result in monetary penalties.

OTHER TAXES

Similar conundrums exist with re-

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ATTEMPTED MURDER

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the onus of showing why the potential harm to them by going forward outweighs the potential harm to the victim by delaying the case.

He said while Bannan's argument about his rights against self-incrimination in the motion to stay is grounded in sound law, delaying the civil case against Bannan is unfair because Marie has significant medical costs associated with her injuries and has also suffered economic damages by not having the same ability to work as she did

before the shooting. Harden added the plaintiff's side has the right to investigate and gather evidence from Black Lab Sports as a separate defendant.

"In this case, the problem is Mr. Bannan's charges have been out there for a very, very long time and he still hasn't even done the most basic thing, which is enter a plea in the case. And he's at the same time asking my client, who's really suffering, to perpetuate waiting for the conclusion of this very serious criminal case," Harden said. He added the criminal case could take years to conclude, and the civil case's proceedings could stretch on for years

after that.

Harden said he expects a ruling on the motion to stay sometime in September.

The two sides may have already anticipated each other's arguments, but they both believe the court should weigh their clients' interests heavier. The motion to stay characterizes the effect on Marie of delaying the civil case much differently than Harden's view, calling concerns about a delay in the civil case "modest." The motion adds that staying the case likely wouldn't change much about the timing of resolving it, given that

the COVID-19 pandemic has already caused continuances of civil cases months into the future.

"Defendant Bannan anticipates that Plaintiff will argue a stay pending the outcome of the criminal case will cause delay in the conclusion of this civil action," states the motion. "However, any modest concern about inconvenience or delay in the civil matter is clearly overshadowed by Defendant Bannan's interest in 'avoiding the quandary of choosing between waiving [his] Fifth Amendment rights or effectively forfeiting the civil case.'" •

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UNEMPLOYMENT

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Colaizzi said protection from liability would be the most significant aspect of the next stimulus package

for employers and would go a long way toward "calming their nerves" about trying to figure out how to balance employee safety with continuing operations.

"One side of the argument is going

to be that [it's] giving employers an incentive to cut corners because it's going to be tougher for an employee to prove liability.

"The flip side of it is, though, we're all learning how to do this for the first

time and we're making it up as we go along. And employers are having to implement procedures and standards that we're learning from scratch in a lot of ways." •

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EQUAL PAY FOR EQUAL WORK

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lawsuits is that workers try to compare themselves to people who are performing different jobs with a different set of responsibilities," she said.

"And while titles may share common elements... the actual responsibilities they may be performing may be different. So having an accurate job description can be helpful in distinguishing in an objective way."

The law prohibits employers from asking job applicants about pay history or relying on a prospective hire's pay history to determine wages in the new position, so job listings and

applications should be free of any requests to send salary history.

Employers will be required to let all current employees know of promotion opportunities on the same day. The information about promotion opportunities must be posted or announced before a hiring decision is made and must disclose the compensation or pay range for the position. "Although a lot of states are enacting pay equity laws," Wylie said, "that internal posting requirement is what's unique to the Colorado law."

External job postings must also disclose the hourly pay or salary range for open positions as well as a description of other benefits.

According to the law, employ-

ers should keep records of job descriptions and pay history for each employee for the duration of employment plus the law's statute of limitations of two years after the employee has left the organization.

The law does allow employers to justify pay differences if the entire difference is based on the following factors: a seniority system; a merit system; a system that measures earnings by quantity or quality of production; geographic location; relevant education, training or experience; and required travel.

Quantifying and documenting these "bona fide factors" will be key to defending any pay differentials. "Numbers tell the story. They are

best to tell the story when it comes to trying to comply," Loughner said. "So any time there's a system or measurements or metrics, those should be documented, and then they should be monitored and managed."

As for whether Colorado's EPE-WA will help fix the gender pay gap, Wylie, who has led salary negotiation workshops for professional women, said she thinks the added transparency about what colleagues are making could help women strike a better deal with their bosses.

"This isn't going to solve pay inequities overnight," she said. "But it does give employees some good tools in terms of negotiation leverage." •

—Jessica Folker, JFolker@circuitmedia.com

INCOME TAX

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spect to employment taxes. And employers need to think about whether the employee's home state will assert nexus for other business taxes (e.g., sales and use tax, corporate income tax). Also of concern is whether the employer must comply with the workers' compensation requirements of the employee's home state.

REPORTING OF WAGES FOR UNEMPLOYMENT INSURANCE

Fortunately, for purposes of wage reporting for state unemployment insurance purposes, a uniform standard applies with the result that, for most employees temporarily working from home in connection with COVID-19, employers continue to pay unemployment insurance to the state where the employee normally works rather than to the employee's home state. (See Attachment 1 to the "Localization of Work Provisions - Principles for Determining Where Wages Should Be Reported When Work is Performed Entirely in One State or in a Number of Different States," Unemployment Insurance Program Letter No. 20-04 (May

10, 2004).) This outcome would change if the telework arrangement lasts for an extended period or is made permanent.

EMPLOYMENT ISSUES

From an employment standpoint, allowing employees to telework for an extended period of time is essentially akin to opening a satellite location in the jurisdiction in which the employee resides, raising a host of additional employment considerations, most of which will be governed by applicable state law. Among them, there may be requirements to register to do business in the state from which the employee is teleworking, as well as workers' compensation and liability insurance coverage issues. Employers need to consider compliance with local ordinances, public health orders and executive orders regarding coronavirus health and safety, workplace protections, etc., job protections such as reinstatement rights and lawful off-duty conduct statutes, state and local benefits issues (such as the San Francisco Health Care Security Ordinance and state and local paid sick leave and other leave laws. Wage-and-hour laws may vary with respect to such things as minimum wage, daily overtime and meal and rest periods, and employee exemption standards

can vary from state to state (e.g., California applies a "quantitative" test, whereby employees must perform exempt work for more than 50% of their working time, versus many other jurisdictions' "qualitative" test). Notices to employees and required postings, contents of pay stubs, timing of compensation payments during and upon termination of employment and what must be paid out upon termination vary from state to state, as do expense reimbursement requirements, which may include home office expenses such as phone and internet service, equipment, supplies like ink and paper, and expenses incurred in traveling to the employer's facilities if and when required. Employers also should consider enforceability of restrictive covenants, such as noncompetes, requirements and restrictions with respect to various employment policies, and the contents of separation and release agreements. In addition, local WARN Act requirements and federal WARN Act considerations (e.g., where the employee is "counted" for WARN Act trigger purposes) can be implicated, along with a myriad of other issues.

The bottom line is that employers must look to state, county and city requirements to determine what laws apply to employees residing in—and

working remotely from—other jurisdictions. This is a new frontier, and we expect states and localities to address these issues going forward; right now, though, the situation is murky. What employers can expect is that, at some point, "temporary" remote work necessitated by the crisis will no longer be deemed "temporary," and compliance with local laws will be required.

What can employers do now? First and foremost, ensure that employees are providing timely information about where they are residing while teleworking. Employers then can make a determination—taking into account the factors outlined above, among others—as to whether employees will be permitted to continue teleworking. Employers also can consider whether compensation will remain at the same rate (e.g., employees who normally work in New York City who relocate to an area with a lower cost of living) and whether the same benefits need to be provided (such as commuting allowances). And, of course, if the arrangement is planned to be temporary, that should be made clear to employees up front. As always, employers must keep abreast of new developments; this is a rapidly changing area of law. •

—Nancy Strelau and Christine Samsel are shareholders at Brownstein Hyatt Farber Schreck