

# Remote Working Across State Borders: Issues Lurk Within the United States

## Overview

The COVID-19 pandemic prompted an unprecedented experiment in large-scale remote working arrangements. Almost overnight, many employers in the United States saw a large proportion of their corporate workforces begin to work predominately, or even exclusively, from remote locations. That sudden shift, however, built on a long-term trend toward more work remote arrangements as some employers have sought to cut overhead by moving away from expensive real estate in city centers and reducing their fixed costs. Now that employers are looking beyond the pandemic, they must evaluate whether to continue the remote work policies that they put in place out of necessity.

In addition to the potential for reducing overhead, remote work policies may be seen by some employers as providing other benefits. For example, as many workers moved further into suburban and exurban areas in search of public schools, lawns, and green space, daily commutes have grown longer. Remote work policies may hold environmental appeal as a way to reduce greenhouse gas emissions through reduced commuting. Employees may relish having the time spent on the road back for family and personal activities, and surveys have indicated that many view the opportunity to work remotely—at least part-time—as a significant benefit.

While remote work policies may provide many benefits, they may also present new difficulties for employers depending upon how the policies are designed and implemented. Our companion client alerts look at global tax, benefit, and employment issues that are raised by remote working arrangements when employers permit their employees to work in foreign jurisdictions. This alert examines similar concerns, including tax, employee benefits, and employment law issues, that U.S. employers need to address before rolling out long-term remote work arrangements within the United States.

## Key Legal Issues With Remote Working Within the United States

Below, we outline three key legal considerations when exploring a remote working program.

1. [Tax Issues](#)
2. [Employee Benefits Issues](#)
3. [Employment Law Issues](#)

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## 1. Tax Issues

Permitting employees to work remotely—whether from their home near the employer’s office or from anywhere—can present a number of issues for employers. The one most likely to come to mind when human resources is crafting a remote work policy is employment taxes, but other taxes, such as corporate income and franchise taxes and sales tax can also be impacted by a company’s remote work policy. These issues are more acute for employers with a more limited geographic footprint, but even employers with employees in every state need to be mindful of where their employees are working. Thus, it is important for corporate tax departments to be involved in the development of any remote work policy.



### *Employment Taxes*



Like the federal government, most states collect the majority of their tax revenue through the employment tax system. Employers are generally obligated to withhold state income taxes from the wages they pay to their employees based on the location where the employee performs the work. Allowing employees to work remotely will potentially increase the number of jurisdictions in which an employer is obligated to withhold state income tax from employee wages. For example, if an employee moves into a state where the employer does not have other employees, the presence of the single employee working remotely is, in most cases, sufficient to require the employer to register with the state tax authority, withhold tax from the employee’s wages, and deposit those taxes with the state. In some states, such as Pennsylvania and Ohio, it may also subject the employer to tax withholding requirements for cities, counties, and/or school districts. Employers who already have a nationwide employee footprint, and the infrastructure to support it, can still be impacted by these issues as employees become more mobile. For example, some employees have sold their homes, purchased a recreational vehicle (RV), and taken to the road, performing work from wherever the employee is on a given day. This requires significant administration on the part of the employer to track the employee’s work location and update the appropriate withholding jurisdiction. For linear payroll systems that do not track historical work locations, this may require system updates as the appropriate work location may vary from payroll-to-payroll or even within a payroll.

State unemployment taxes are also complicated by a remote workforce. In general, employers pay state unemployment insurance taxes to only one state determined by applying a series of four sequential tests: localization, base of operations, direction and control, and residence. However, with a mobile remote workforce, applying the tests will likely become significantly more challenging.

In addition to income tax withholding and unemployment taxes, remote workers can create other potential employment tax issues for their employers. For example, California (among other states)

requires employers to withhold disability insurance taxes from employees' wages. Although a remote worker who works in California on a transient basis may not be subject to the disability insurance tax (or eligible for benefits), an employee who relocates to California to work remotely is. Other jurisdictions, like Washington, DC, and New York City have payroll taxes that are levied on the employer to fund various government programs. For example, Washington, DC, has a tax on employer payroll's paid by employers to fund its paid leave program. New York imposes the Metropolitan Commuter Transportation Mobility Tax on the payroll of employers engaged in business in the New York City area. Several other states have different state or local-level employment taxes of which employers need to be aware.

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### **Corporate Income and Franchise Taxes**

In addition to employment tax issues, remote workforces can complicate corporate income and franchise taxes. More than a decade ago, the Tax Court of New Jersey ruled that an out-of-state company that employed a single telecommuter who lived and worked in New Jersey was subject to the New Jersey Corporation Business Tax Act. Other states take a similar position. Accordingly, employers who are not already subject to corporate income and franchise taxes in every state will need to closely monitor the presence of remote employees in every state to determine if they are subject to state corporate income or franchise tax requirements. Although many states waived these requirements due to telecommuting workers during the COVID-19 pandemic, that relief has already begun to expire in many states. Accordingly, employers must carefully consider whether they have established nexus with additional states based on the current work locations of their employees.



Even for employers who already had nexus with all (or most) states due to the nature of their business, it may be necessary for employers to consider whether their apportionment calculations need to be revised. Although a number of states use a single sales factor to apportion business income, a significant number use three-factor apportionment, including payroll expense. Accordingly, it is important for human resources to monitor the location of employees and share that information with the tax department to ensure that income is apportioned properly.

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## **Sales Tax**

As with corporate income and franchise taxes, a single telecommuter working in a state may be sufficient to trigger sales and use tax obligations for the employee's employer. This is true even if the employer has no other physical presence in the state and does not have sufficient sales in the state to satisfy the dollar or volume thresholds necessary to trigger sales tax obligations for remote sellers post-Wayfair. Some states provided temporary relief from sales tax nexus during the COVID-19 pandemic, but as states begin to wind down their states of emergency, that relief has begun to expire. Given the strict liability that applies to sales tax collection failures, employers of telecommuting workers should consider whether they must begin to collect sales tax for additional states. Communication between human resources and tax regarding employees' work locations will be necessary to avoid ongoing compliance issues.



## **2. Employee Benefits Issues**

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### **Health and Welfare Plans**

Most employee benefit plans and programs benefit from the uniform national legal framework provided by ERISA. However, there are still employee benefits issues to be considered as employees become more mobile. For example, most U.S. employers contract with insurance carriers to provide medical insurance coverage and/or access to provider networks. Some of these networks are national, but others are not, which could leave mobile employees with significantly higher out-of-pocket and out-of-network costs than they would have if they were living and working in the employer's home territory. In addition, insurance contracts are generally subject to state insurance laws, which can differ widely depending on the state in which the contract is written. Whether differences in state insurance laws and contractual agreements could create material concerns depends greatly on the facts of a given situation; however, employers should be aware that these issues could arise. Other state laws (e.g., health information disclosures, post-termination continuation coverage) can also come into play as employees cross state lines.



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## **Retirement Plans**



Similar to health and welfare plans, U.S. employer-sponsored retirement plans are generally subject to ERISA, and are not typically subject to material operational differences based on the state where the employee works. However, some states, like California (CalSavers) and Illinois (Illinois Secure Choice), have created payroll-based IRA programs that require certain employers to automatically enroll employees in state-sponsored IRAs funded by payroll deductions. Companies that sponsor their own qualified retirement programs are typically exempt from participation in these state-sponsored programs; however, companies should be mindful of these requirements, as these states may require employers to certify their exemption from the program.

## **Tax Home and Travel Expenses**

Unlike an employee's personal commuting expenses, employers can reimburse travel expenses when an employee is "away from home" for business. For this purpose, the IRS has long held (and courts have largely agreed) that "home" is where the employee's principal place of business is located. Under the test laid out by the IRS, an employee's tax home is the employee's regular place of business or post of duty regardless of where the employee lives. If the employee has more than one regular place of business, the employee's tax home is the employee's "main place of business" based on the time ordinarily spent in each place of work, the level of business activity at each place of work, and whether the income from each place is significant or insignificant. If the employee does not have a "main place of business," the employee's tax home may be where the employee regularly lives. Finally, if the employee has no place where the employee regularly lives (such as in the case of a circus performer), the employee is an itinerant and the employee is never away from home.



These rules can be difficult to apply in the case of a permanent telecommuter. In a World War II-era Supreme Court case, *Commissioner v. Flowers*, the Court ruled that an employee who lived and worked in one city more than half the time with the permission of his employer was not away from home when he travelled to a distant city in which his employer was headquartered and where he had an office. The court determined that because business did not require him to live and work in the city distant from the headquarters, his travel costs to the headquarters city was personal in nature. Under that analysis, an employer who permits an employee to telecommute from some distance from the employer's office on a regular basis may not be able to reimburse the employee's travel expenses (flights, hotels, meals, etc.) tax-free when the employee must travel to the employer's office on an occasional basis. Depending upon the frequency with which a remote teleworker must travel to the office, there may be strategies to avoid income imputation. Alternatively, in the case of our RV worker described above, the employee could be an itinerant for whom travel expenses are never reimbursable on a tax-free basis.

## Commuting and Parking Costs



For teleworkers who work remotely from near the office, rules regarding daily transportation expenses may also come into play in determining what the employer can pay on a tax-free basis. In general, IRS Revenue Ruling 99-7 permits employers to reimburse employees tax-free for travel from the employee's residence to temporary work locations even if they are within the same metropolitan area as their regular work location. However, if the employee does not have a regular work location, such a trip is reimbursable tax-free only if the employee's residence is the taxpayer's principal place

of business within the meaning of Section 280A(c)(1)(A) of the Internal Revenue Code. For most employees, this test will not be satisfied either because the employee does not have a space used exclusively for business or because it is not exclusively used for the convenience of the employer.

## 3. Employment Law Issues

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### *Expense Reimbursement*

A number of states have laws that require employers to reimburse employee expenses. If an employer chooses to allow employees to telework from a jurisdiction with such a law, it may be subject to it even though it does not have an office location there. Although many employers reimburse employee business expenses as a matter of course, some states, including California, have read their statutes requiring expense reimbursement more broadly than employers unfamiliar with the requirements might expect. For example, a California court has required an employer to reimburse a portion of an employee's cell phone expenses when the employee used a personal cell phone for business calls. The reimbursement was required to avoid the employer experiencing a "windfall" even though the employee bore no extra costs as a result of having used the personal phone. A similar analysis could theoretically require an employer to reimburse a portion of the teleworking employee's home internet service and utility bills. Although the California case is perhaps the most well-known, a number of other states and localities (such as, Illinois, Massachusetts, Montana, North Dakota, South Dakota, Seattle, and Washington, DC) have similar requirements. Employers should keep these reimbursement requirements in mind when considering whether to permit employees to telework from varying locations.



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## **Leave Entitlement**



Within the United States, there are significant variations in the laws governing paid time off. Permitting employees to telework from the location of their choosing may subject employers to the paid leave laws of the states from which the employees work. Some states, like California, Colorado, Connecticut, and Maryland, may require employers to provide paid sick leave to employees (even those who work relatively few hours). Even within states that don't have a state-wide requirement, local jurisdictions, such as Chicago, Minneapolis, and Pittsburgh may impose paid sick leave obligations on employers. Even states not known for employee entitlements, such as Texas, have seen jurisdictions adopt paid sick leave mandates (although laws enacted in Austin, Dallas, and San Antonio, have been blocked by court orders).

Similarly, some states, including California, may require an employer to pay out accrued leave upon an employee's termination. In other states, an employer may be required to pay out accrued leave unless the employer's policy explicitly states otherwise. Accordingly, employers moving to a "work from anywhere" model should carefully consider their existing leave policies to determine whether changes are necessary based on the states from which employees are teleworking.

A number of states have also adopted state-level family and medical leave laws that may require employers not subject to the Family and Medical Leave Act to provide unpaid leave to employees. Similarly, a number of states may require that employers provide more unpaid leave than they are required to provide under federal law. Employers will need to monitor their teleworking employees' work locations to determine the applicability of and ensure compliance with these state laws.

## **Non-compete and non-solicitation agreements**

The enforceability of non-compete and non-solicitation agreements varies greatly from state-to-state. Employers should carefully consider whether employees subject to these types of agreements should execute new agreements in consideration for being allowed to work remotely in a different jurisdiction if the existing agreement may not be enforceable based on the law in the employee's new work location.



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### ***State and Local Minimum Wage and Overtime Requirements***



Although most employees for whom a full-time telework arrangement is viable are not likely to have significant minimum wage concerns, employers should be mindful of state and local minimum wage requirements that may far exceed the federal minimum wage. In addition, state and local law may apply minimum wage to classes of workers exempt under the Fair Labor Standards Act. Similar consideration should be given with respect to any state-specific overtime requirements.

### ***Other Employment Laws***

Employers may also be subject to other employment laws based on the location of their employees—or potential employees. For example, Colorado recently adopted a law requiring that employers disclose a target pay range in their job postings. Thus, employers who have adopted a “work from anywhere” model may be subject to this law even if the employer does not have any employees in Colorado, provided the job is available to Colorado residents.



Other laws also affect the hiring process. For example, approximately 20 states and 20 local jurisdictions have prohibited employers from collecting or restricted employers from using salary histories in making hiring decisions. Similarly, a number of states and jurisdictions have prohibited employers from requesting information about an applicant’s criminal records. Employers who open positions to nationwide hires may unwittingly subject themselves to these laws.

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When designing remote work policies, employers have a number of issues to consider, even if they are only permitting employees to telecommute from locations within the United States. There are significant differences among the laws of the various states and employers with a limited geographic footprint should consider reviewing their policies for compliance with state laws in varying jurisdictions given the ability of employees to pick the jurisdiction from which they are working. In designing remote work policies and on an ongoing basis, human resources should work closely with tax to ensure that the company remains compliant with state tax laws as its employees move in and out of different jurisdictions.



## Contact Us to Learn More

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The areas highlighted above are the most critical for organizations considering remote working, but they are not exclusive. Even within each area, many issues will arise depending on the program design the organization wishes to pursue. If your organization is considering a remote working program or other reorganization in the U.S. or internationally, we encourage you to contact anyone in our [Global Workforce Solutions](#) practice.



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