REMOTE WORKERS: NOT AS SIMPLE AS YOU THINK

By Audrey E. Mross, Partner at Munck Wilson Mandala LLP
amross@munckwilson.com

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This paper was presented at last year's conference as a tool to identify state and local legal obligations employers inadvertently stumbled into when they were forced (or allowed) their employees to work remotely during the COVID-19 pandemic. With an end to the national emergency officially declared on April 10, 2023, COVID-19 can no longer be blamed (or applauded) for the shift to both remote and hybrid work models. Employers continue to entertain job applicant and current employee requests and demands for the freedom to untether from the traditional workplace.

The effects of having a remote worker are both legal and practical. On the legal side, this paper will identify a host of issues and provide short answers where possible and links to resources where the answers are more complex (e.g., tax). With the potential for dozens of employment laws in each of the 50 states plus myriad local enactments, this paper does not purport to identify and explain each of them. Instead, it identifies the mainstream enactments (and a few unique ones) and explains what they require.

On the practical side, employers should be aware of what is being referred to as "proximity bias" (aka "out of sight, out of mind"). With the surge in hybrid arrangements, combining days in and out of the office each week, and some entities going 100% remote, employers will need to rethink how they manage and motivate teleworkers. Employees working from a new location must also consider what lies ahead, such as losing access to known medical providers and perhaps finding themselves in an area with no "in-network" providers under their employer's group health plan. Also consider that moving to the middle of MT for the quiet and stars above may mean a loss of IT connectivity and support critical to working remotely. It should come as no surprise the top locations for hiring remote workers, per Globalization Partners, are cities.

Employers are responsible for knowing where their employees are and observing all laws which may apply. Make it your policy and communicate the requirement that employees notify you before they set up shop in a new location. Before you approve having an employee in a new jurisdiction, use this paper and similar resources to understand the legal obligations. While weighing the pros and cons of the hire or transfer, your immediate response may be to deny teleworking requests but that must be balanced against shifting norms and the war for talent. Here is what you need to know, to help you decide.

LEGAL - TAX

A teleworker working from a state in which the employer had no prior connection may be the first domino in a painful chain reaction for an unsuspecting employer. That employee's presence and performance of duties in the new state may establish a nexus which means there is sufficient contact with the state to trigger a tax filing obligation (as well as the other legal obligations itemized below). The most obvious tax filing obligation is state income tax on the teleworker, but the list may not end there. It's possible that sales tax, income tax, franchise tax, unemployment tax and gross receipt tax obligations will ensue in states like CA, ID, NJ and VA which find a nexus with the presence of a single employee. The employer may need to register with the secretary of the state and relevant tax authorities and provide a registered agent address in addition to paying the aforementioned taxes. There may be transportation taxes withheld from wages and different tax treatment of employee

benefits. Depending on which states the remote worker and the employer are in, there is potential for double taxation.

Prior to the pandemic, some states had already considered and addressed the scenario of a person living in one state but commuting to and working in an adjoining state. For instance, NY (and DE, NE and PA) has a "convenience of the employer" rule which requires non-residents to pay NY tax if their primary office is in NY and they work elsewhere (say, NJ or CT) for their own convenience. The NY tax is not applicable if the home office is a "bona fide employer office" but litigation continues over that definition. CT has a partial "convenience of the employer" rule, applying the rule only against residents of states with a convenience rule, and a handful of states and cities (e.g., St. Louis, MO) adopted the rule temporarily during the pandemic. AR reversed its "convenience of the employer" rule in 2021. Other states address this concern via their definition of a "resident" and often attach a minimum number of days the individual must be present in the state for taxation to apply. Per the AICPA white paper referenced below, sixteen states had reciprocal agreements in place which govern which jurisdiction could or must receive income tax on the teleworker.

During the pandemic, some state governments recognized the burden this would place on both teleworkers and their employers and responded by waiving individual state income tax on teleworkers in what was expected to be their temporary home, but most of those waivers have already expired. Conversely, IL may have seen an opportunity to collect more revenue in the pandemic when it enacted a rule in 2020 which requires an employer to withhold IL tax for out-of-state employees who work in IL for more than 30 days. See IL Department of Revenue Bulletin FY 2020-29 at https://tax.illinois.gov/content/dam/soi/en/web/tax/research/publications/bulletins/documents/2020/fy2020-29.pdf.

MA enacted a law stating that as of March 10, 2020 and until 90 days after the COVID-triggered state of emergency in MA is lifted, all pay received for services performed by a non-resident who, immediately prior to the COVID-19 state of emergency was an employee engaged in performing services in MA, and who began performing services from a location outside of MA due to pandemic-related circumstance, will continue to be treated as a MA source of income subject to personal tax under M.G.L. chapter 62 and personal income tax withholding. See 830 CMR 62.5A.3. NH promptly filed a lawsuit with SCOTUS complaining the law was unconstitutional, but SCOTUS declined to review the lawsuit, leaving unanswered the question of one state's ability to impose its personal income tax on a nonresident telecommuter. The MA state of emergency lifted on June 15, 2021 so the MA tax rule expired on September 13, 2021.

A comprehensive white paper by the American Institute of CPAs ("AICPA") on the issue of COVID impacts on taxation, during 2020 and 2021, can be found at https://us.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/coronavirus-state-filing-relief.pdf. It is 134 pages long and chock full of weblinks to connect you to additional resources on this very complex issue.

State-specific taxes which support the unemployment insurance system (FUTA) are determined using the U.S. Department of Labor's Localization of Work Provisions, a four-factor test to determine to which state wages should be reported and FUTA paid. For remote workers who perform all services in one state, the work is "localized" and the answer is decided by the first factor - - the state receiving the tax is the state where the work is performed. If the work is not localized in a single state, the employer goes to the ensuing factors to determine if the chosen state will be [1] the base of operations; [2] the state

from which the service is directed and controlled; or [3] the state where the employee lives. See https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1565.

If you are using a reputable third party to handle your payroll, be sure to let them know when your employee's physical address changes so that they can respond with proper tax withholding. If you are handling your own payroll, you might check in with your CPA or similar professional to ensure you understand what tax obligations now apply so you can satisfy them. If your employee alerts you to a potential move by asking if he or she can continue to work from a new location, you may want to check with your payroll provider and/or CPA to ascertain the related costs before granting that request.

LEGAL – GENERAL APPLICATION OF STATE AND LOCAL EMPLOYMENT LAW TO TELEWORKERS

- Employers will need to check each potentially applicable law in the jurisdiction where the teleworker now resides for its definition of an "employer." That definition is often based on the number of employees. Some statutes and ordinances expressly state that the headcount to be used in this analysis includes only employees in that jurisdiction, but many are silent on that question. A few state statutes expressly say that employer status is determined by the number of employees anywhere in the U.S., such as the harassment training mandate in CA. A relatively new ordinance in Seattle WA is triggered by a global headcount.

- The "me too" movement spawned a broad but quiet trend in lowering the number of employees needed for certain state laws to apply so even if you know the "old rules" they may no longer apply. As an example, Texas had always been in synch with Title VII of the Civil Rights Act of 1964 in banning sex discrimination, harassment and retaliation. The federal law and Texas set the definition of an "employer" at 15 employees for at least 20 calendar weeks in either the current or prior calendar years. Effective September 1, 2021, the Texas law was amended to apply to employers of one or more employees. Additional changes include [1] increase in the limitations period for filing a claim from 180 to 300 days; [2] expansion of the definition the definition of an employer to include "a person who acts directly in the interests of the employer in relation to an employee"; and [3] making it a violation of the law if the entity or person either knew or should've known sexual harassment was occurring and failed to take immediate and appropriate action. Sexual harassment can and does take place virtually, so be aware of the protective laws in the jurisdiction where your teleworker resides.

- The bottom line here is that employers should not assume that state law does not apply when it has just one or a small number of teleworkers in a different state. The definition of who is a covered employer varies widely and laws are regularly being amended in response to current events. The trend has been to fill the gap and apply the protective laws to previously excluded smaller employers, providing broader coverage for employees. There is no trend of amending these laws to make them apply to fewer employers.

LEGAL – WAGE & HOUR

- **State law variations in exemptions' duties tests and/or minimum salary** – Most employers are well-versed in the federal Fair Labor Standards Act ("FLSA") and understand the importance of correctly classifying employees as either exempt or nonexempt from the law, and then paying them accordingly. For most of the "white collar" exemptions, employers must satisfy the duties test of the chosen exemption, pay at least the minimum salary ($684/week or $35,568 annually;

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