

An aerial, top-down view of a crowded city street, likely Times Square in New York City, showing many pedestrians walking. Overlaid on the image is a complex, semi-transparent geometric pattern consisting of intersecting lines and polygons in shades of blue and orange, creating a digital or architectural grid effect.

The Virtual Workplace: Top Employment and Tax Law Considerations for Employers with Remote Workers During Covid-19

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- Wage and Hour Laws
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- Workers' Compensation
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- Employer tax liability in states in which employees work remotely
- Employer changes in withholding for employees working remotely



Introduction

Remote Work On the Rise



U.S. BUREAU OF LABOR STATISTICS

One-quarter of the employed teleworked in August 2020 because of COVID-19 pandemic

SEPTEMBER 15, 2020

About 1 in 4 people employed in August 2020 teleworked or worked from home for pay because of the COVID-19 pandemic. The 24 percent of workers who teleworked in August was down from 35 percent in May, the first month these data were collected.

**Harvard
Business
Review**

CHANGE MANAGEMENT

Is Your Organization Ready for Permanent WFH?

by [Maxim Sytch](#) and [Lindred L. Greer](#)

August 18, 2020

The New York Times

What If Working From Home Goes on ... Forever?

Remote Work and COVID-19 Reopening

- Certain states/localities have requirements for remote work in their reopening plans. For example:
 - **California:** Offices are required or recommended to work remotely, by county.
 - **Georgia:** Employers “shall...implement teleworking as practicable.”
 - **New Jersey:** “[O]ffice spaces were never closed, but must allow employees to work remotely if their job can be performed remotely.”
- Many other states recommend – rather than require – remote work for all possible employees.

The Future of Remote Work

- A number of major companies have announced long-term remote work plans.
- Benefits of working from home:
 - Lower costs for businesses and employees (e.g., rent, utilities, commuting).
 - Lower employee turnover rate.
 - *Increased productivity* (e.g., travel time, distractions).
- According to one study, 56% of the U.S. workforce holds a job that is compatible (at least partially) with remote work (Source: Global Workplace Analytics).
 - 62% of employees say they could work remotely (Source: Citrix 2019 poll).

General Considerations

- Create a remote work policy.
- Provide training to workers on how to work effectively from home.
 - Best practices for remote meetings.
 - How to use remote systems (e.g., creating a WebEx meeting, editing a document remotely, using call forwarding).
- Set regular check-ins with teams.
 - Consider using video to help foster greater connection.
- Ensure adequate security measures are in place.



Employment Law Considerations

Employment Discrimination: Remote Work Considerations

- Remote work policies should not treat employees differently on the basis of a protected characteristic.
 - According to the EEOC, employers may generally not exclude employees from the workplace because they have disabilities potentially placing them at higher risk for COVID-19.
- Employees may be entitled to reasonable accommodations when working remotely.
 - According to the EEOC, this may be different than what is needed in the workplace.
 - **Examples:** Special equipment or technology, modified schedules, job restructuring.

Employment Discrimination: Remote Work Considerations

- According to the EEOC, employees who are working 100% remotely should **not** be screened.
 - Do not require questionnaires, temperature checks, or diagnostic tests for remote workers.
- Remember that discrimination and harassment can still happen remotely.
 - **Example:** Harassing statements, photos, or emojis on: (1) personal social media, or (2) company channels such as email, Slack, Jabber, WebEx, Zoom, etc.
 - Illinois has clarified that its anti-discrimination law covers harassment of remote workers taking place online or outside the workplace.



Employment Discrimination: Training Requirements

- Six states and a number of localities **require** that private employers conduct discrimination and harassment training.
 - Some states have delayed implementation of requirements; but they are still in effect.
 - More than a dozen states **recommend** training.

Jurisdiction	Employee Threshold	Length of Training	Frequency of Training
Connecticut	3 Employees*	Two Hours	Every 10 Years
Illinois	1 Employee	Not Specified	Annually
New York State	1 Employee	Not Specified	Annually
New York City**	15 Employees	Not Specified	Annually

*Employers with fewer than 3 employees must provide training to supervisory employees.

**Training must be extended to independent contractors, short-term employees, and interns who work: (1) more than 80 hours in a calendar year; and (2) for at least 90 days.

Employment Discrimination: Training Requirements *(cont'd)*

- **Which state's requirements apply?**
 - Employees working remotely in another state **may** trigger training requirements:

Jurisdiction	State Guidance
Connecticut	"[A]ny ... employees who are based in ... Connecticut will be subject to the requirements."
Illinois	"Any employees who work ... in Illinois must be trained, regardless of whether the employer is based in Illinois."
New York State	"[I]f an individual works a portion of their time in New York State, even if they're based in another state, they must be trained."
New York City	"Any employees who work or will work in New York City for more than 80 hours in a calendar year AND for at least 90 days must be trained."

Employment Discrimination: Other Jurisdictional Variations

- **Protected Classes:**

- **Federal:** Race, color, sex (sexual orientation, gender identity), religion, national origin, disability, age, military status, genetic information.
- **New York:** Familial/marital status, domestic violence victim status, criminal conviction.

- **Age Discrimination Statutes:**

- **Federal:** Covers individuals 40 and over (20 employee threshold).
- **New York:** Covers individuals 18 and over (4 employee threshold).
- **Florida:** Covers all employees regardless of age (15 employee threshold).

- **Harassment Standards:**

- **Federal:** Harassment must be “severe or pervasive.”
- **New York:** Need only be more than a “petty slight or trivial inconvenience.”

Employment Discrimination: Whose Law Applies?

- Federal law will set the floor.
- **California:** The relevant inquiry is not the location of employment but whether the conduct that gives rise to liability occurs in California.
- **Florida:** The state's anti-discrimination protections apply to Florida citizens working outside of the state.
- **New York:** Courts examine whether the discriminatory act had an *impact* in the state/city.

Choice of Law Analysis

- Considerations in Employment:
 - Relationship between the forum state and the parties.
 - State with greatest interest in the issue raised.
 - Governmental interest in safeguarding interests of its citizens.
 - Location where a contract was made and performed.
 - Location of subject matter of a contract.
 - Domicile of the parties.
 - PPB and place of incorporation for businesses.
 - Where employee is “laboring” and where employee has an office.
 - Where employee was hired to perform work.

Wage and Hour Laws: Areas to Consider

- Overtime
- Minimum Wage
- Rest and Meal Breaks
- Expense Reimbursement
- Paycheck Frequency
- Payment of Final Earnings
- Accrued and Unused Vacation



Wage and Hour Laws: Overview



- Best Practices:
 - Implement policies for tracking hours worked – especially for non-exempt employees.
 - Ask employees to e-mail supervisor at beginning and end of shift.
 - Use electronic time sheets.
 - Consider requiring non-exempt employees to request permission to work overtime.
- Federal law (FLSA) will always set the floor.
 - Applies to “work performed away from the premises or the job site, or even at home.”
 - Employers must count the time as hours worked “[i]f the employer knows or has reason to believe that the work is being performed.”
- Often, the laws of the state in which work is being performed are the ones that govern, but courts will likely engage in choice of law analysis.

Wage and Hour Laws: Overtime

- Most states either do not have laws governing the pay of overtime (federal law applies) or have laws that mirror the FLSA.
- BUT some states do have specific laws that may apply to employees working remotely in that state.
 - California employers must pay overtime to employees who work **more than 8 hours/day** and for the first eight hours on the seventh consecutive day in a workweek.
 - California also requires **double time to employees who work over 12 hours/day or more than eight hours on the seventh consecutive day** of work in a workweek.
 - Colorado employers must pay overtime to employees who work hours over: (1) **40/workweek**, (2) **12/workday**, or (3) **12 consecutive hours** regardless of starting and ending time (excluding rest or meal periods).

Wage and Hour Laws: Minimum Wage

Jurisdiction	Employer Threshold	Minimum Wage
California	>25*	\$13.00/hour**
Connecticut	All	\$12.00/hour***
Delaware	All	\$9.25/hour
District of Columbia	All	\$15.00/hour
Illinois	All	\$10.00/hour
Massachusetts	All	\$12.75/hour****
New York City	All	\$15.00/hour

*For employers with 25 or fewer employees, the minimum wage is \$12.00/hour and increases \$1.00/year to reach \$15.00/hour by Jan 1, 2023.

**Increases to \$14.00/hour on Jan. 1, 2021 and \$15.00/hour on Jan 1, 2022.

***\$1.00 per hour increase every eleven months, until reaching \$15.00/hour in June 2023.

****Increases gradually to reach \$15.00/hour by Jan. 1, 2023.

Wage and Hour Laws: Rest and Meal Breaks



- Federal law does not require that employers provide meal and rest breaks.
- State law requirements:
 - CA employees are entitled to a 30 minute meal period for shifts longer than 5 hours.
 - 60 minutes if the workday exceeds 10 hours.
 - The 30 minute meal period can be waived by mutual agreement if work day does not exceed 6 hours.
 - MA employees are entitled to a 30 minute meal period for shifts longer than 6 hours.
 - NC employees are entitled to a meal period of at least 30 minutes for shifts that exceed 5 hours if there are 2 or more employees on duty.
- Some states have additional break requirements for nursing mothers.

Wage and Hour Laws: Expense Reimbursement

- Under federal law, employees cannot be required to pay for business-related expenses if doing so would cause the employee's wage rate to fall below the minimum wage or overtime compensation thresholds.
- Some states require employers to reimburse expenses incurred while working remotely.

Jurisdiction	Reimbursement Requirement
California	All necessary expenditures or losses incurred by the employee in direct consequence or discharge of his or her duties.
District of Columbia	The cost of purchasing and maintaining any tools that the employer requires to perform the employer's business.
Illinois	All necessary expenditures or losses incurred by the employee in direct consequence or discharge of his or her duties.

Wage and Hour Laws: Paycheck Frequency & Payment of Final Earnings



Paycheck Frequency

- **Arizona:** Must have payday two or more days in a month, not more than 16 days apart.
- **Connecticut:** Up to monthly intervals permitted if approved by labor commissioner.
- **New York:** Weekly payday for manual workers. Semi-monthly payday upon commissioner approval for manual workers and upon agreement for clerical and other workers.*
- **Vermont:** Employers may implement bi-weekly and semi-monthly payday with written notice.

* Wages must be paid in accordance with the agreed terms of employment and not less frequently than semi-monthly..

Final Paycheck

- **California:** Within 72 hours or immediately if the employee gave at least 72 hours notice.
- **Massachusetts:** Whichever is first: next paycheck or the Saturday that follows an employee's resignation.
- **Minnesota:** Next payday that's at least 5 days after an employee's last day but no more than 20 days after the last day worked.
- **North Carolina:** Next scheduled payday.

Wage and Hour Laws: Accrued and Unused Vacation

- Most states do not have laws specifically requiring the payment of accrued and unused vacation, but some states do require employers to pay this out upon an employee's separation from employment.
- An employer's obligation is usually determined by contract.
- States requiring an employer pay out accrued and unused vacation:
 - **California:** All accrued, unused vacation time must be included in the employee's final paycheck.
 - **Colorado:** Any vacation pay “earned and determinable” must be paid on employment separation. The parties’ agreement determines when vacation pay is “earned.”
 - **Connecticut:** Employers that offer vacation time must pay the employee's accrued, unused vacation time.
 - **Massachusetts:** An employer must pay terminating employees all earned, unused vacation.

State and Local Leave Laws



- Some state and city leave laws specify when remote workers are covered:
 - California law covers employees who work in California for **30 or more days within a year** from the beginning of employment.
 - Connecticut’s paid sick leave law (which only covers “service employees”) applies to covered employees working in the state with **no minimum hours threshold**.
 - New Jersey’s law has no minimum hour threshold – it covers employees working in New Jersey **regardless of the amount of time spent working there**.
- States offering paid sick leave often provide up to 40 hours of leave, though employees accrue leave at different rates, and there are some variations with respect to who is covered.

State and Local Leave Laws: COVID-19 Leave



- Some states and localities have implemented COVID-19-related leave requirements:
 - **California:** Provides paid sick leave to **every California employee who is not otherwise covered** by the Families First Coronavirus Response Act (“FFCRA”).
 - **New York:** Emergency COVID-19 Paid Sick Leave law requires employers to provide paid (with narrow exceptions) and job-protected sick leave to **employees who are subject to mandatory or precautionary orders of quarantine or isolation** due to COVID-19.
 - **Washington:** Provides COVID-19-related supplemental paid sick leave (“SPSL”) to **food production workers**.

Unemployment Insurance

- States have adopted four tests for determining unemployment insurance coverage when services are performed in several states:
 1. **Localization:** Allocate services to the state in which they take place.
 - Don't consider "incidental" services: (1) **temporary**, (2) transitional, (3) isolated.
 - **According to the USDOL:** "Service longer than 12 months would not generally be considered incidental, however, flexibility should be applied across various circumstances."
 2. **Base of Operations:** Allocate services to the state where the employee's base is located.

Unemployment Insurance (cont'd)

- **Other Tests:**

3. **Place of Direction and Control:** Allocate services to the state where the employer directs and controls activities.
4. **Residence:** Allocate services to the state where the employee resides if some services are performed there.

- **Interstate Reciprocal Coverage Arrangement:**

- Most states are members.
- An employer may request written approval to report all wages paid of a multistate employee to any state in which services are performed, the employee has a residence, or the employer has a place of business.

Workers' Compensation: Remote Work Generally

- Remote workers may be covered by workers' compensation laws if:
 - (1) The injury occurs “in the course of” employment; and
 - Consider the time, place, circumstances of injury.
 - (2) The injury “arises out of” employment.
 - The injury must have a causal connection to employment.
- Examples:
 - Employee assaulted by neighbor in the home while working remotely → Injury does not arise out of employment.
 - Employee trips over her dog while working remotely → Answer may depend on why the employee was moving about when they tripped.

Workers' Compensation: Out-of-State Workers

- Some states have reciprocity agreements with other states regarding **temporary** work outside of the employee's home state.
 - Each state has its own reciprocity agreement.
 - States may reciprocate with a few or as many as 30 states.
 - When an employee is working temporarily in a state without reciprocity, the employer must usually buy an insurance policy for that temporary assignment.
- Employers should consult state law in:
 - (1) The state in which the employee typically works; and
 - (2) The state in which the employee is working remotely.

Workers' Compensation: Best Practices For Remote Workers

- **Best Practices for Remote Workers:**

1. Ensure that employees are able to safely WFH:
 - Provide information/training on workstation setup (e.g., ergonomically efficient workspaces).
 - Provide items such as a monitor, monitor stand, mouse, and keyboard.
 - Provide a checklist of potential hazards.
2. Define the employee's work area and normal working hours (including breaks).
3. Speak to your workers' compensation broker to ensure that your policy accounts for out-of-state remote workers.
 - Failure to list a state in your policy **may** result in denial of coverage.

OSHA/Workplace Safety Issues

- OSHA and Home Offices:
 - OSHA will not conduct inspections of employees' home offices.
 - OSHA will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their employees.
- Employers are responsible for (non-office) in-home worksites.
 - OSHA may conduct a limited investigation if it receives a complaint.
- Employers are required to report/record work-related injuries/illnesses experienced by telecommuting employees.
 - Policies should require employees to report work-related illnesses/injuries.



Tax Law Considerations

Tax Considerations

- Assume an employer operates in only one state and normally pays tax only in that state. Is the employer liable for income tax, and withholding, registration or other filing requirements in the states in which its employees are now working remotely?
 - For employees working remotely in CA, MA, NJ, and PA due to COVID-19: No. However, the relief is only temporary, and employers may be liable if employees continue working remotely after COVID-19 ends.
 - For employees working remotely in CT, generally no (depends on CT sales and services: permanent)
 - For employees working remotely in NY and NJ, their employers may be liable for tax.
- Assume that an employee lives in NJ and works in NY. If the employee is now working remotely from NJ, can the employer reduce the NY tax withholdings?
 - Not recommended for CA, CT, MA, NJ, NY, and PA employers.

Tax Considerations (continued)

- Under the Health, Economic Assistance, Liability Protection and Schools Act (HEALS Act), introduced by Senate Republicans on July 27, 2020:
 - If an employer would not be taxable by a state but for the fact that its employees living in that state are working remotely due to COVID-19, that state could not impose any registration, taxation, or other related requirements on the employer during the period beginning on the date the employee began working in that state to the date the employee returns to his or her primary work location or, if earlier, when 90% of the employer's permanent workforce returns to work, or December 31, 2020. (This period is the "covered period".)
 - Also, during the covered period, any wages earned by an employee would be deemed to be earned at the "primary work location" of the employee (i.e., the address of the employer where the employee is regularly assigned to work), regardless of contrary state law.
- The Health and Economic Recovery Omnibus Emergency Solutions Act (the HEROES Act), introduced by House Democrats on May 12, 2020 does not include these provisions.

Your Questions





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