

Staying Remote, Returning to Work, or Both? Legal Considerations for Nonprofits

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Goals for Today's Program

- Provide a framework for determining whether reopening your office is the right choice
- Discuss potential issues that likely will arise with a decision to reopen the office
- Address tax and employment considerations related to a decision to permit permanent telework arrangements post-pandemic



**We haven't decided whether we should reopen our offices.
How do we make this decision, and what should we be
thinking about?**

How to determine whether your nonprofit should reopen its offices

1. How well are our current operations running in this remote environment?
2. What actions will we need to take before we reopen?
3. How much cost and effort will we need to expend to enable a reopening?
4. What are the risks, if any, associated with employees returning to the office?
5. Do the operational benefits outweigh the required cost and effort and potential risks?

Reopening Considerations

- COVID-19 protocols in the context of applicable law and guidance
- Impact of vaccination access and vaccination policy options
- Requiring proof of vaccination
- Accommodations in the absence of a mandatory vaccination policy



We have decided that some or all of our employees will be required to start reporting to the office. What should we anticipate? What should we be thinking about?

Requiring Employees to Report to the Office

- Employee requests to telework
 - Accommodations
 - Consistency in granting requests for non-legally protected reasons
- Employee relations issues
 - Responses to mandatory/non-mandatory vaccination policies
 - Temporary or permanent residency changes
 - Ongoing pandemic-related concerns (e.g., child care issues)



We are considering permitting permanent telework arrangements post-pandemic. What do we need to think about?

Employment Considerations

Implementing Permanent Telework Arrangements

- Eligibility
 - Objective criteria in decision-making
 - Exempt and nonexempt considerations
- Full-time and/or part-time telework
- Telework policy
- Documenting telework arrangements

Implementing Permanent Telework Arrangements (cont'd)

- Review
 - Employee handbook and policies
 - E.g., anti-harassment policy
- Performance evaluation system

- Evaluate need for training

Implementing Permanent Telework Arrangements (cont'd)

- Application of state employment laws
 - Wage and hour laws
 - Minimum wage and salary thresholds
 - Paid sick leave laws
 - Meal and rest breaks
 - Employee notices upon hire and separation
 - Business expense reimbursement
 - Pay out of paid time off upon separation
- Potential implications for part-time telework arrangements

We are considering permitting permanent telework arrangements post-pandemic. What do we need to think about?

Tax Considerations

Tax Considerations Resulting from Employee Presence in a State

- **Entity taxes**
 - Business registration
 - Provides access to a state's court system
 - Annual registration fee
 - Penalties for failure to register
 - Registration typically triggers income tax registration
- **Income tax registration**
 - Nonprofits
 - Need to qualify for exemption from income tax?
 - Taxation on unrelated business income sourced to the state

Tax Considerations Resulting from Employee Presence in a State (cont'd)

- **Sales Tax**
 - Does the organization sell any goods or services that are subject to sales tax?
 - Note MD's expanded application to digital goods
 - Will the nexus resulting from a newly remote employee create a collection/remittance obligation?
- **Payroll taxes**
 - Income tax withholding
 - Unemployment insurance premiums

Remote Workers – Tax Compliance Perspectives

- **Employer**
 - Nexus may result for doing business and tax compliance purposes
 - Another state may be added to payroll tax compliance
 - Additional tax compliance burdens – filing more forms with more states
- **Employee**
 - Minimizing state taxation
 - May want to be taxed based on where employee is working, due to lower tax rate
 - Minimizing state tax filing requirements
- **State tax authority**
 - Maximizing state income tax collections
 - Consistent filing by all taxpayers having nexus with the state
 - Ensuring contributions to unemployment compensation fund
 - Ensuring that sales tax collection occurs

The Basics of State Income Taxation

- **Two bases for a state to impose tax on an individual**
 - Resident of a state is taxed on income from all sources
 - Employee can also be taxed by a second state on compensation from working in that state
 - Avoid “double tax” by taking a credit on the resident state return
 - **DC – special rule – DC does not tax nonresidents who work in DC
- **Employer Payroll Tax Withholding**
 - General Rule: Based on the location of the employer’s office
 - Reciprocity agreements can alter the General Rule
 - DC, MD, and VA have such a rule
 - Withhold based on employee state of residence
 - Avoids employee having to file with two states

The Basics of State Income Taxation (cont'd)

- **Convenience of employer rule: NY, CT, PA, DE, AK, NE**
 - Typical rule for attributing employee income among states
 - Based on days worked in each state
 - Employee working 25% workdays in NJ, only taxable in NY on 75%
 - COE Rule alters the general rule by attributing to work state only if necessary to work there
 - Compensation earned while working remotely is attributed to office state if employee is working remotely for his own convenience and not the employer's necessity
 - Example: NY engineer working on CA project in CA allocates to CA for NY purposes
 - But not so for NY accountant working from home for company for own convenience
 - Massachusetts (new 2020) – Executive Order adopting form of COE rule (affects NH, CT, RI, NY)

Unemployment Insurance – Localization of Work Guidelines – A Hierarchy

- **DC unemployment insurance law as an example:**
 - The term “employment” shall include an individual’s entire service, performed within, both within and outside of, or entirely outside of the District if:
 - RULE (I) The service is localized in the District; or
 - RULE (II) The service is not localized in any state but some of the service is performed in the District and:
 - (a) The individual’s base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in the District; or
 - (b) The individual’s base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual’s residence is in the District;
 - (ii) Service shall be deemed to be localized within a state if:
 - (I) The service is performed entirely within such state; or
 - (II) The service is performed both within and outside of such state, but the service performed outside of such state is incidental to the individual’s service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.

Commonly Asked Questions

WHAT IF AN EMPLOYEE WORKS ALL THE TIME FROM HOME IN STATE R BUT OUR ONLY OFFICE WHERE THE EMPLOYEE WAS PREVIOUSLY BASED IS IN STATE O? THE EMPLOYEE'S SUPERVISOR IS LOCATED IN OUR OFFICE, THE EMPLOYEE IS "CONTROLLED" FROM THAT OFFICE, AND WE DO NOT RECOGNIZE THE EMPLOYEE'S HOME AS AN OFFICE FOR OUR ORGANIZATION?

- The service is performed entirely within one state.
- Thus, the employment is deemed to be localized within that state.
- Rule I applies such that State R is the state of employment.

WHAT IF THE EMPLOYEE IS EXPECTED TO WORK PRIMARILY FROM OUR OFFICE IN STATE O BUT OUR REMOTE WORK POLICY PERMITS THE EMPLOYEE TO WORK OCCASIONALLY FROM HOME IN STATE R?

- The service is not performed entirely within one state
- The service performed in State R is incidental to the work performed in State O.
- Rule II applies such that State O is the state of employment.

Commonly Asked Questions (cont'd)

WHAT IF OUR REMOTE WORK POLICY REQUIRES EMPLOYEES TO COME INTO OUR OFFICE IN STATE O AT LEAST ONE DAY A WEEK, BUT OTHERWISE THEY CAN WORK REMOTELY? SEVERAL EMPLOYEES RESIDE IN STATE R AND HAVE TOLD US THAT THEY INTEND TO TAKE FULL ADVANTAGE OF THE POLICY AND WILL WORK FROM HOME FOUR DAYS A WEEK.

- The service is not performed entirely within one state.
- Is the work in State R merely incidental to the individual's service within State O (temporary or transitory in nature or consists of isolated transactions) when most of the work will actually be done in State R?
- Or conversely, is the work in State O merely incidental to the individual's service within State R (temporary or transitory in nature or consists of isolated transactions) when most of the work will actually be done in State R?
- If Rule I does not provide a resolution, Rule II applies.
- Is some work performed in State O and is the office the base of operation and/or the situs of control?
- If yes, State O is the state of employment.

What's Changed? Has Anything Changed?

- **Past**

- Always had this issue
 - Employees doing some work remote from home office
 - Work on vacations
 - At conventions, trade shows
 - Some states with de minimis day count rules to deal with
 - If compensation large, then focus on:
 - Athletes and entertainers
 - Otherwise, not worth the compliance and audit effort

What's Changed? Has Anything Changed? (cont'd)

- **Present**
 - The State of Emergency – states go in all directions
 - No new guidance
 - Formal policies of leniency
 - Confirms pre-pandemic rules remain in effect
 - Typical compliance approach by employers: status quo, wait and see

What's Changed? Has Anything Changed? (cont'd)

- **Future**
 - Adoption of formal policies acknowledging the remote work location of employees
 - Employers documenting the location of remote workers
 - What will states do?
 - Revert to ignoring remote invisible workers?
 - Consider that they must acknowledge and implement compliance?
 - To what degree will the states care?
 - Whether the employee's location has a benefit to the employer
 - Employer is near the customers that they regularly visit
 - The portion of the employee's time that is spent at the remote location
 - Where is the tipping point? Is there a tipping point?

Where Can I Find Out What Guidance a Particular State Has Provided?

- The AICPA website provides a state-by-state list of pandemic-related tax guidance at:
 - <https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/coronavirus-state-filing-relief.pdf>

Questions?



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