

Tax and Accounting Compliance from a (Social) Distance

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EMPLOYER TAX ISSUES – REMOTE WORK FORCES

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State Employment Taxes - General Principles

- One employee who works in a state is generally sufficient to create nexus with a state for employment tax purposes
- Some question as to whether an employee who works at home once in a while is sufficient
- But – No doubt that a regular home office in a state allows a state to require withholding

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General Principles – State/Local Income Taxes

- Generally, residents of a state are subject to tax on income from worldwide sources
 - Credit rules can vary, especially for local taxes, but virtually all states offer credits for taxes paid to other states
- Nonresidents, however, typically are subject to tax only on income earned in a state

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General Principles – State/Local Income Taxes

- Employee A – Works in State 1; lives in State 2
 - Employer withholds State 1’s income tax and remits it to State 1;
 - Employee A files a return in State 2 claiming a credit for the tax withheld by his or her employer against tax owed to State 2
 - May owe additional tax to State 2, **but**
 - No refund for amounts paid to State 1

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General Principles – State/Local Income Taxes

- Reciprocity –
 - Designed to eliminate some of the headaches caused by the default rules;
 - Allows employers to essentially ignore work location and to withhold tax based on where employees live
 - Only by agreement of the states
 - **Not** typically applicable to local taxes

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Multi-State Workforces – Pre- and (Post-?) COVID Remote Work

- In a perfect world, employers would be able to determine where an employee works every day (hour?) and would withhold tax accordingly
- In practice, many short-term reassignments are ignored
 - Some states have de minimis rules, but many do not
 - Technically, most de minimis rules are applicable only to employers, not employees

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Multi-State Workforces – Pre- and (Post-?) COVID Remote Work

- Most employers apply a reasonableness test
 - *I.e.*, Is an employee working in State 1 for a reasonable enough period of time that we will treat State 1 as a regular work location of the employee?
 - Requires compliance with all state level taxes/fees/contributions if applicable
 - *E.g.*, Unemployment taxes, Workers' Comp
 - **May also have major non-tax consequences**

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Multi-State Workforces – Pre- and (Post-?) COVID Remote Work

- Convenience of the employee doctrine
 - Many states take the position that employees who regularly work in a location are still working there, even if they are working remotely, unless the remote work is for the convenience of the employer
 - Makes sense when employee stays home to wait for a repair person, to stay with a sick family member, etc.
 - But: query whether there are Constitutional problems with that approach applied to long-term arrangements

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Multi-State Workforces – COVID Chaos

- March 2020 –
 - Employees end up working throughout the country with any rhyme or reason
 - Employers therefore found themselves with new “offices” through the country
 - States – while facing budget crises – were forced to adopt new rules on the fly
 - Most states have been silent but...

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COVID - Nexus Guidance of Many States

- Employment Tax Nexus
 - Employee who typically works in State 1 and is working remotely outside of State 1
 - Still State 1 source income
 - Employee who typically works outside of State 1 and is working remotely in State 1
 - Presumably still **not** State 1-source income to employee and no withholding by employer
 - Only an issue with respect to states without reciprocity
 - Now several such states however

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COVID Guidance - Fallout

- *New Hampshire v. Massachusetts*
 - Massachusetts adopted the approach described before – *i.e.*, people who usually work in MA but are working remotely due to COVID are still subject to MA tax
 - New Hampshire does not have an income tax

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COVID Guidance - Fallout

- *New Hampshire v. Massachusetts*
 - NH has sued MA at the Supreme Court to say that the MA approach is unconstitutional
 - Could have major (retroactive) consequences if the Court finds in favor of NH

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COVID Guidance - Fallout

- Congressional Action
 - Remote Worker Fairness Act
 - Would impose a 90-day rule
 - Applicable to health care professionals but could have broader application
 - Possible solution – Allow employers to *either* track employees' locations or withhold based on the typical office location

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COVID Guidance - Fallout

- Double Taxation?
 - Unlikely, but possible
 - State A takes the position it can tax employees who usually work in State A but who are working from home in State B
 - State B takes the position that the usual work location is irrelevant and it can tax employees working there
 - State B *should* give a credit for tax paid to State A
 - But, could there be double withholding?

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Post-COVID Landscape

- Even if the approach of states like MA is upheld, it's necessarily going to be temporary
 - PA has indicated that it's position will apply through June 30, 2021
- Once the temporary rules expire, employers need to figure out how to comply with state rules everywhere employees are located

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Post-COVID Landscape

- No “one-size-fits-all” approach
- Bad news for employers/good news for state and local tax lawyers – every state law (where employees are located) needs to be considered
- Requires working with payroll services/internal systems to determine what even is possible

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Post-COVID Landscape

- Employers generally should presume that they will – at least – be required to withhold tax in all states where employees work regularly
- May require setting up new accounts, etc.
- It’s also advisable to work on some type of system to “know” where employees are working

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Other Tax Issues

- Nexus is not limited to employment taxes
 - Presence likely will cause an employer to have nexus for other state tax purposes
 - Income Taxes
 - Sales Tax Collection
 - Other, “special” taxes
 - Washington State B&O Tax

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Special Problems – Quick Mention Bonuses and Deferred Comp

- Many states (and localities) have types of lookback rules
 - Comp earned in Year 1 (including bonuses) paid in Year 2 may be taxable based on where the employee worked in Year 1 (even though that may no longer be the employee’s work location).
- Can employers even track this?

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THANK YOU!

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CAPLAW Covid 19 Series

Remote Work issues and

Finance Departments

Trainer: Denes L. Tobie, CPA, Partner

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Agenda

Finance department changes/challenges

Remote workers

- What you should and shouldn't reimburse
- IRS Code 139
- Home Office Workspace

New policies

- Incentive pay
- Remote working arrangements

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Finance department changes/challenges

The pandemic has changed how we work today and will forever how we work in the future.

- Many have seen changes in processes and procedures
- For most your internal control structure has changed
- Many have faced software challenges
- Additional funding has brought opportunities as well as challenges
 - ▶ New regulations
 - ▶ Cost allocation challenges
 - ▶ Tracking COVID dollars
 - ▶ Administrative limits
 - ▶ What's allowable

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Remote workers



Remote working has brought opportunities as well as challenges



Making sure ee's have access to required hardware (i.e., laptops, VPN, internet, printers, paper, etc.)



With everyone's different challenges, when do they have to/need to be working



How is time recorded? Still manual or electronic? How are you tracking activity?



What should be reimbursed if anything? (Aren't they saving time and money by not commuting to work?)

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Reimbursing remote workers

- Many organizations and employees have asked about being reimbursed for expenses for working remotely.
- Covid money is to be used to “prevent, prepare for and respond to” Covid 19. Remote working could be considered “responding to.”
- First question, what does your policy say? As with most agencies no such policy exists.
- What would be reasonable expenses? Think what costs are they incurring by working remotely that they were not incurring previously?

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Reimbursing remote workers

Internal Revenue Code Section 139

- This Section allows employers to assist employees during a federally declared disaster with “qualified disaster relief payments” that are tax-free to the employee and fully deductible to the employer.
- Without this code Section, any payment to an ee is considered compensation (cash, gift cards, etc.)
- A “qualified disaster relief payment” under Section 139 includes payments by an employer, not compensated for by insurance or otherwise, paid to or for the benefit for its employees to reimburse or pay **reasonable and necessary** personal, family, living, or funeral expenses incurred as a result of a qualified disaster.
- These payments could be paid in 2020 and 2021 and could be one-time payments or multiple

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Reimbursing remote workers

Internal Revenue Code Section 139 cont.

- There is not a lot of guidance around this code Section
- Organizations considering these types of payments need to think about drafting a policy
 - ▶ Who is eligible
 - ▶ What expenses are going to be covered
 - ▶ How often and is there a maximum
 - ▶ What kind of documentation will you want from the employees
 - ▶ Repercussions for abuse
 - ▶ Again, think about the costs they may be incurring

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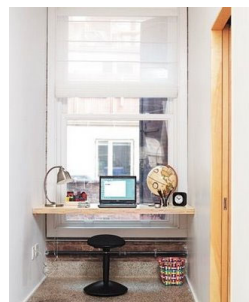
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Reimbursing remote workers

Home Office Workspace – reimburse or not reimburse?

§200.465 Rental costs of real property and equipment

(f) The rental of any property owned by any individuals or entities affiliated with the non-Federal entity, to include commercial or residential real estate, for purposes **such as the home office workspace is unallowable.**



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New Policies



Incentive compensation

§200.430 Compensation—personal services.

(f) Incentive compensation. Incentive compensation to employees based on cost reduction, or efficient performance, suggestion awards, safety awards, etc., is allowable to the extent that the overall compensation is determined to be reasonable and such costs are paid or accrued pursuant to an agreement entered into in good faith between the non-Federal entity and the employees before the services were rendered, or pursuant to an established plan followed by the non-Federal entity so consistently as to imply, in effect, an agreement to make such payment.

- The question becomes why do you want to pay it?

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New Policies

Remote working

- No regulations on this
- Should create policies so it is fair to all
- Consider “hoteling”
- Going forward will this change space needed?



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Documentation, Documentation, Documentation

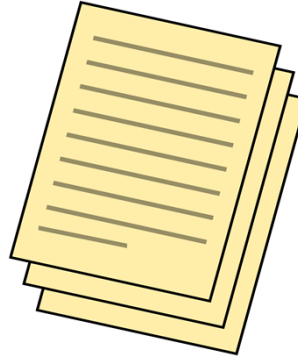
Consider what has changed?

What is new?

What are you missing?

You need to document so that there is a way to support why or why you haven't done something and it can be audited and monitored.

Even if you are missing a policy, get it in place asap.



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Questions?

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