# So Your Employee Wants to Work Remotely Out of State

## Labor & Employment Law Update

By John Hayes on March 8, 2021

Given the "new normal" of remote work for many employees throughout the country, the question as to whether to allow an employee to work in another state – either permanently or temporarily – has become something employers are now scrambling to answer. However, it is not as simple as determining whether the employee can do the work remotely, there are numerous considerations and implications employers should be aware of if they have employees working in a different state than the location of their main operations.

First, employers should have clear guidelines and policies regarding what is expected of the employee in terms of hours, availability, and work product. That is true wherever they are remotely located. Some general areas to consider include:

- Detailing their normal work duties and responsibilities;
- Making clear the hours of work the employee is expected to put in along with strict adherence to any timekeeping policies;
- Setting the hours of availability to communicate regarding company business and job duties;
- Determining how to handle communication of work assignments and personal needs, including reporting absences of work due to injury, illness, or caring for a family member;
- Discussing the use of company equipment and materials;

- Ensuring the employee protects company information by following the company's policies and practices regarding information security and data protection; ensure that unauthorized individuals do not access company data, either in print or electronically; and not accessing restricted-level information in print or electronically unless approved by the supervisor; and
- Maintaining a safe environment in which to work.

Next, for employees wanting to work out of state either all the time or for a period of time, there are potential tax and payroll issues for both the employee and the employer. Unfortunately, there is no one size fits all answer. It will depend on the state the individual is performing work in, how long they are there, and a host of other factors. When an employee is working outside of the state where the employer operates the employer may be responsible for the other state's taxes, including income taxes. Each state's income tax and withholding requirements vary significantly, and may be based on both personal residence and/or work location. Making it even more complicated, states have differing thresholds for when an individual working remotely in that state triggers tax implications, for example in Illinois it is 30 days and in New York it is 14 days.

COVID-19 related remote work has dramatically impacted this area of the law, as it has exponentially increased the numbers of employees working in a different state than where the employer is located or where they reside, and many states have been slow to adjust to this. However, several states have implemented "COVID-19 Rules" regarding the tax implications for remote workers. Again, this is a state-by-state analysis that needs to be done by the employer for each employee wishing to work remotely out of state.

In addition to state and local taxes, the labor and employment laws of the state where a remote employee is working may apply to the employment relationship. An employer needs to examine the state's (and possibly the county's and/or the city's) employment laws to see whether there are specific laws that would affect the employee, such as posting requirements and paid family or sick leave, amongst others.

Employers should also be aware of state laws regarding workers' compensation insurance and unemployment insurance. Employers usually must obtain workers' compensation insurance in the state where the employee is actually working. It may be the case that the workers' compensation laws in the employer's state would not apply to the employee working remotely in another state. The same also applies to unemployment insurance, where the out of state employee would likely trigger the state's requirements that the employer register for and pay the unemployment insurance premiums through that state's particular unemployment insurance program.

Ultimately, the decision to allow remote location work is up to the employer and depends on the particular facts and circumstances of each employment situation. Given the complexity of having to figure out other states' employment, tax, and other state-specific laws, employers may be justified in saying no to such arrangements. The answer really depends on the employer's desire to hire/retain the individual, and whether remote work is a means to that end. And once such a remote work arrangement is granted to one employee, employers must be mindful in granting/denying it to others, as allowing it for one employee but denying it to another could potentially be considered discriminatory, depending on the facts of each situation.

Any remote work arrangement should be carefully considered in advance, a written policy and understanding between the employer and employee should be put in place, and the particular laws of the remote work location should be examined and understood, ideally by experienced counsel.