

Out-of-State Remote Work Creates Tax Headaches for Employers

Businesses may face unexpected state and local taxes

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If a business has employees who reside and work in a state different from where the business is physically located or operates, it could face unexpected state and local taxes next year. Remote workers also could find that they'll need to pay income taxes to more than one state on the same earned income.

"COVID-19 opened the possibility for employees to work from anywhere," said Nishant Mittal, senior vice president and general manager at Topia, which makes software for managing remote workers. "This introduces new concerns when it comes to legal and tax compliance."

Employers can take steps to help manage cross-border taxes on the business and to help employees understand their own tax obligations. First, however, business managers must understand the tax laws of their home state and the state where employees are working remotely, Mittal advised.

Business Taxes on Out-of-State Employers

When an employee is working outside of the state or states where the employer operates, it "creates physical nexus, subjecting the employer to the tax regimes of that jurisdiction (<https://www.foster.com/larry-s-tax-law/tax-traps-remote-employees-covid19>)," wrote Larry Brant, a tax attorney in the Portland, Ore., office of law firm Foster Garvey. Employers could be subject to state income taxes, gross receipts taxes, and sales and use taxes, he explained. Tax requirements imposed at the city or county level could come into play.

"Being subject to state and local taxes generally requires both the preparation and filing of tax returns, and the payment of taxes," Brant said.

For COVID-19-related remote work on behalf of out-of-state employers, some states have temporarily waived the creation of a business nexus for state taxes (<https://www.taftlaw.com/news-events/law-bulletins/states-waive-business-tax-nexus-for-covid-19-related-remote-work>), according to Cincinnati-based law firm Taft Stettinius & Hollister. Out-of-state employers, however, may still have to withhold state income taxes for remote workers residing in these states.

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

Local Labor Laws

In addition to state and local taxes, employers should be mindful that the labor and employment laws of the state where a remote employee is working generally will apply to the employment relationship. "These laws may relate to...wage and hour rules, termination of employment, noncompetition, trade secrets, and sick and family leave rules," Brant noted.

In particular, he recommended that employers understand state and local rules applying to:

- **Workers' compensation insurance.** States "generally require that the employer register for and obtain workers' compensation insurance in the state where the employee is performing the services," Brant explained. Failure to do so may expose the employer to liability, including penalties for noncompliance with the state's workers' compensation laws.
- **Unemployment insurance.** For remote workers employed by an out-of-state business, a state where the employee is working "generally requires that the employer register for and pay the unemployment insurance premiums for the employee through the state unemployment insurance program where the employee is performing the services," Brant noted. Failure to do so may expose the employer to liability, including penalties for noncompliance with the state's unemployment insurance laws.

[SHRM members-only how-to guide: *How to Engage Remote Employees During the Coronavirus Pandemic*

(www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/how-to-engage-remote-employees-during-the-coronavirus-pandemic.aspx)]

Double-Taxing Remote Workers

For remote workers, "if your job is based in New York, you may be on the hook for taxes there—even if the pandemic has you seeking refuge across state lines (<https://www.wsj.com/articles/the-long-arm-of-state-tax-law-threatens-telecommuters-11591954207>). The same is true in five other states"—Arkansas, Connecticut, Delaware, Nebraska and Pennsylvania, tax reporter Laura Saunders wrote in *The Wall Street Journal*.

These states follow what's known as the "the convenience rule": If an employee's job is based with an employer in one state, but he or she lives and works in another state out of convenience rather than because the employer requires it, then that employee owes income tax to the state where the job is based.

"In other words, someone with a New York-based job who lives and telecommutes from another state still owes full income tax to New York on that compensation," Saunders reported. "If the other state taxes that income as well and doesn't give a credit for the New York tax, the worker will likely be double taxed."

Mark Klein, chairman of New York City-based law firm Hodgson Russ, told Saunders that "it would be fair for New York to give a break from the convenience rule for 2020. But I don't think it will, given the history of this issue and the present budget crisis."

Keeping Track of Employees

Businesses should keep their employees informed on all state tax regulations and mandates, Topia's Mittal advised. "They should provide consistent updates on tax changes and remain clear on the penalties that could come with tax violations. Employers also need to remember that employee obligations are separate from their own business obligations, and it's up to the employee to ensure their personal taxes are in compliance as well."

HR technology can help employers track their employees' location (<https://www.topia.com/blog/how-does-global-talent-mobility-function-during-a-pandemic/>) "to ensure they are following the proper tax regulations and to better understand where their employees are and where they have been working," he noted.

Staying Current with State Rules

Online resources that can help employers keep up with the tax requirements imposed on them by states where employees may be working remotely include:

- A chart of state and local tax authority positions (<https://www.wipfli.com/-/media/wipfli/downloadable-files/tax-salt-coronavirus-tracker-other.pdf>) on tax matters related to telecommuting, posted online by Wipfli, a nationwide accounting and business consulting firm.
- A chart of websites for state and selected local tax authorities (<https://cdn2.hubspot.net/hubfs/127975/State%20%26%20Local%20Taxing%20Authorities.pdf>), useful for keeping up-to-date on state compliance requirements, was posted online by Philadelphia-based accounting firm Drucker & Scaccetti.

[Visit SHRM's resource page on Remote Work (www.shrm.org/resourcesandtools/pages/remote-work.aspx),]

Related SHRM Articles

Employers Face Decisions Over Keeping Telework Options (www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/employers-face-decisions-over-keeping-telework-options-coronavirus.aspx), *SHRM Online*, June 2020

COVID-19 Is Creating Telework Converts (www.shrm.org/hr-today/news/hr-news/Pages/COVID19-Is-Creating-Telework-Converts.aspx), *SHRM Online*, May 2020

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