

# Navigating the Workplace of the Future

## Remote Working: Employment and Tax Law Considerations for Employers

Grow | Protect | Operate | Finance

May 10, 2022

# Agenda

## ❑ Trends in Remote Working

## ❑ Health & Safety

- Concerns as drivers for remote working arrangements
- Understanding liability concerns; fulfilling OSHA obligations
- Mental health challenges facing workers

## ❑ Tax Implications

- Employer-level considerations: sales tax and income tax
- Employee considerations: withholding and payroll tax
- International remote work/income tax treaties
- Best practices and considerations

## ❑ General Employment Issues

- Remote work requests by existing employees
- Hiring of employees in new states
- Employment Risks: state and local statutory and common law coverage
- International: doing business analysis

## ❑ Key Takeaways/ Q&A



# Speakers



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# Remote Work: Trends

- Remote working arrangements were already on the rise before the pandemic, but appear to be here to stay
- Searches for remote jobs are at an all-time high – from June 2019 to June 2021, candidates seeking remote work increased by 360%
- In workforce surveys, 2/3 of employees in banking, finance, accounting, insurance, and IT stated their jobs could be done entirely remotely
- Finance and tech industries seem to be leading the charge in the transition to remote work
- Even as pandemic restrictions have lifted, employees increasingly say they want flexibility to work from home, or a permanent work from home arrangement
- Bottom line: Remote work is here to stay.



# Health & Safety

# Health and Safety Issues in the Remote Context

- Health and safety concerns as the drivers for remote working arrangements
- Managing health and safety issues for remote workers
- Focus on mental health

# Health and Safety Concerns



# Health and Safety Concerns

## Obligations in the Hybrid Context

- Obligations under the Occupational Safety and Health Act
- Obligations in states with specific standards
- Practical considerations
  - Policy and handbook updates
  - Communication
  - Tracking of workplace access
  - Quarantine protocols

# Health and Safety Concerns

## Employees' own concerns

OSHA's COVID guidance:

Under the Americans with Disabilities Act (ADA), workers with disabilities may be legally entitled to reasonable accommodations that protect them from the risk of contracting COVID-19 if, for example, they cannot be protected through vaccination, cannot be vaccinated, or cannot use face coverings. Employers should consider taking steps to protect these at-risk workers as they would unvaccinated workers, regardless of their vaccination status.

See <https://www.osha.gov/coronavirus/safework>.

# Health and Safety Concerns

## Employee's own concerns, continued

To prove a claim that an employer has failed to accommodate an employee's disability, a plaintiff must demonstrate that:

- 1) They are disabled within the meaning of the ADA;
- 2) They were able to perform the essential functions of the job with or without a reasonable accommodation; and
- 3) The employer, despite knowing of the employee's disability, did not reasonably accommodate it.

“Failing to provide reasonable accommodations for a qualified employee's known physical or mental limitations constitutes discrimination, unless an employer can demonstrate that such an accommodation would impose an undue hardship.”

*Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 62 (D. Mass. 2020) (citations omitted).

# Health and Safety Concerns

## Employee's own concerns, continued

[The employer] claims that it has accommodated Plaintiff by providing KN95 face masks, hand sanitizer and wipes, an air purifier, and separate, private work space in the [ ] program area on the second floor which has less foot traffic than the first floor . . . . A majority of these so-called accommodations are workplace safety rules rather than an individualized accommodation to address Plaintiff's disability.

*Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 64 (D. Mass. 2020) (citations omitted).

# Health and Safety Concerns

## Employee's own concerns, continued

- Take appropriate steps to provide a safe and healthy workplace.
- Consider the rationale for returning to the office.
- Think about accommodations that could be offered.
- Be cautious with different responses to remote work requests.

# Health and Safety Concerns

## Employees as caregivers



# Health and Safety Concerns

## Employees as caregivers, continued

**When does discrimination against applicants or employees with caregiving responsibilities violate federal employment discrimination laws?**

Caregiver discrimination violates federal employment discrimination laws when it is based on an applicant's or employee's sex (including pregnancy, sexual orientation, or gender identity), race, color, religion, national origin, age (40 or older), disability, or genetic information (such as family medical history). Caregiver discrimination also is unlawful if it is based on an applicant's or employee's association with an individual with a disability, within the meaning of the ADA, or on the race, ethnicity, or other protected characteristic of the individual for whom care is provided . . . .

EEOC, "The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws." See [https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment?utm\\_co](https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment?utm_co).

# Rules for Remote Work



# Rules for Remote Work

## OSHA's Approach

OSHA Instruction, "Home-Based Worksites," Directive No. CPL 2-0.125, Feb. 25, 2000.

- 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.
- OSHA will only conduct inspections of other home-based worksites, such as home manufacturing operations, when OSHA receives a complaint or referral that indicates that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, including reports of a work-related fatality.

See <https://www.osha.gov/enforcement/directives/cpl-02-00-125>.

# Rules for Remote Work

## Reporting Injuries and Illnesses

Covered employers' obligations to record injuries and illnesses:

- Work-related
- Meets recording criteria, including:
  - Fatality
  - Injury or illness resulting in loss of consciousness, days away from work, restricted work, or transfer to another job
  - Injury or illness resulting in medical treatment beyond first aid
  - Other specific circumstances

# Focus on Mental Health



# Focus on Mental Health

## Discrimination Issues

To plead an ADA-qualifying mental disability, a plaintiff must allege that: (1) she suffers from mental impairment; (2) the mental impairment affects a major life activity; and (3) the impairment substantially limits the major life activity.

*Zuckerman v. GW Acquisition LLC*, No. 20-CV-8742 (VEC), 2021 WL 4267815, at \*10 (S.D.N.Y. Sept. 20, 2021).

# Focus on Mental Health

## Discrimination Issues, continued

With respect to her failure to accommodate claim, even if Plaintiff had adequately alleged that she suffered from an ADA-qualifying disability, the Court questions whether she adequately alleged that she could perform the essential functions of the job at issue with a reasonable accommodation.

...

Plaintiff's argument that her work from home proposal was reasonable because "Defendants afforded her the precise accommodation she requested before rescinding it," see Resp. at 9, is not persuasive. Plaintiff, like millions of other employees, was initially allowed to work from home because of the COVID-19 pandemic; Plaintiff alleges no facts from which the Court could infer that she could perform the essential functions of her job from home after her colleagues and other work contacts returned to their offices.

*Zuckerman v. GW Acquisition LLC*, No. 20-CV-8742 (VEC), 2021 WL 4267815, at \*12, n.16 (S.D.N.Y. Sept. 20, 2021) (citation omitted).

# **Tax Implications**

# It's 2022. Do You Know Where Your Employees Are?

- Many taxing authorities offered some grace in 2020 for pandemic-related temporary remote working arrangements, either formally or informally.
- However, states and localities are becoming more aggressive as revenue impacts have started to hit.
- Employers should begin reviewing their current policies and realities to prepare for federal, state, and local tax implications, which can include:
  - State Nexus for sales tax purposes
  - Withholding and employment tax obligations
  - Corporate income tax compliance/doing business
  - Permanent establishment (for foreign businesses)
  - Local license taxes



# Sales Tax & Income Tax

- States may impose a sales tax where there is physical presence
  - Can include employees
  - Having employees in a state may trigger sales tax collection and reporting obligations, even where the taxpayer does not meet economic nexus standards
- Many states impose corporate income tax or franchise tax on taxpayers that are “doing business” in their state
  - “Doing business” can include employees *but* don’t forget about PL 86-272
  - Prohibits states from imposing an income tax on a taxpayer whose sole connection to the state are employees who engage in mere “solicitation”



# Employee Withholding & Payroll Tax

- An employee is subject to tax on all of the employee's income in the state in which they reside.
- An employee is also subject to income tax in the state in which the employee performs services, and an employer is obligated to withhold state income taxes on such services, absent a safe harbor or a reciprocal agreement.
- Only a few states provide a safe harbor, meaning that an employee may work in a state for up to a certain number of days without triggering the employee's obligation to pay taxes and the employer's obligation to withhold taxes.
- However, most states do not have a safe harbor and tax is due for as little as one day's work in a state.
- Reciprocal agreements exempt state income from tax in the state in which the employee works, effectively making the employee's income subject to tax only in their state of residency.

# Employee Withholding & Payroll Tax

- Many states have reciprocal agreements with border states that allow taxpayers to pay tax only where they live, instead of where they work.
- Certain other states (e.g., New York, Delaware, Nebraska, Pennsylvania, and Connecticut) have rules and requirements for withholding that depend on whether the employee is working from home for his or her own convenience or the convenience of the employer.
- Localities may have license or occupational taxes based on where work is physically performed.
- Each of these issues can create withholding obligations for the employer, or more.

# Nexus and Telecommuting Example: Kentucky

- The Kentucky Department of Revenue does not administer license, occupational, or other excise taxes imposed by **cities, counties, and other local** jurisdictions in this state. For Kentucky state income tax purposes, employers employing Kentucky residents, and/or nonresidents who reside in states with which Kentucky has a **reciprocal agreement**, will not need to change their current withholding practices during the period when these employees are working from home. Requirements for withholding of tax in either case remain unchanged by restrictions related to the COVID-19 public health emergency. KDOR FAQ
- DOR will continue reviewing Kentucky state income tax nexus determinations on a case-by-case basis. KDOR FAQ

# International Remote Work

Additional costs, complexity, and burdens for both employer and employee:

Taxable  
presence risk

Tax return  
filings (even if  
no income tax  
due)

Payroll  
tax filings

Foreign tax  
withholdings  
obligations

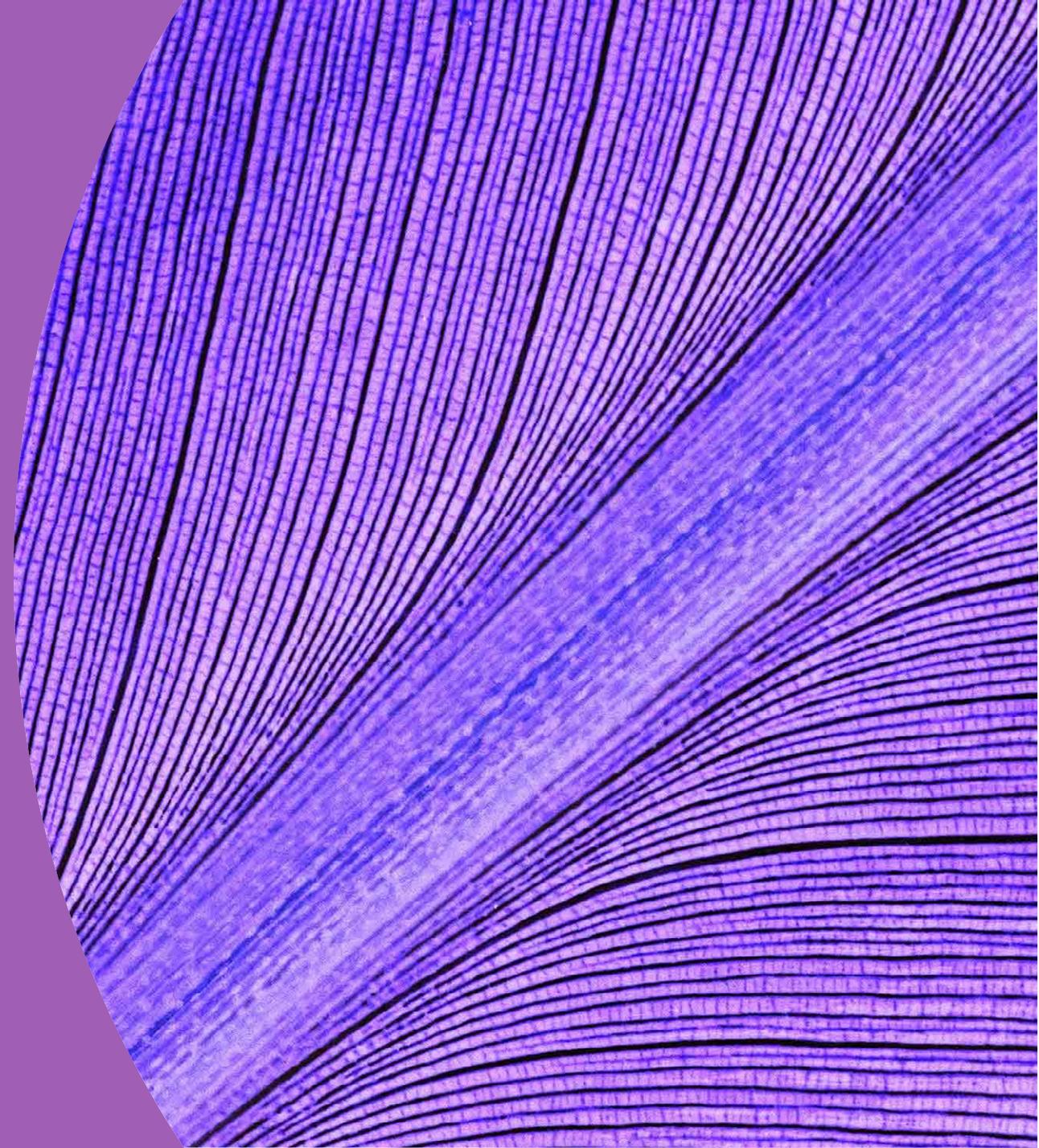
Right to  
work/visa  
compliance

Foreign  
employment  
law

Employee  
tax residency

# Inbound Illusion

- A foreign person must file a U.S. tax return and pay U.S. tax on its “effectively connected income” when it is “engaged in the conduct of a trade or business in the United States” (“ETOB”).
  - ETOB is somewhat of an amorphous standard. All facts and circumstances are considered.
    - If a foreign entity performs “personal services within the United States” through its employees, the foreign entity will be ETOB.



# Income Tax Treaties

- Does the U.S. have an income tax treaty with the foreign country?
- Will the foreign employer have a permanent establishment in the U.S.?
  - a fixed place of business through which the business of a foreign person is wholly or partly carried on.
    - This is typically an office or a place of management. An office of an affiliate that has space available for the foreign entity can be considered a PE.
  - An employee in the U.S. that habitually exercises in the U.S., an authority to conclude contracts in the name of the foreign entity.
  - “Services PE” – (i) the foreign entity performs services for third parties (and not the foreign entity itself) in the U.S. and (ii) the services are provided in the U.S. for an aggregate of 183 days or more in any twelve-month period with respect to the same or connected project for customers who are residents of the U.S.
- What functions will the employee be carrying out?

# Employee Considerations

- Employees must be aware of individual residency rules
- Even if the foreign employer does not have a PE in the U.S., the foreign employer needs to withhold U.S. income tax from employee's wages.
- Some treaties (e.g. Canada) allow for U.S. wage withholding to be avoided. However, it requires the employee to obtain an ITIN. Obtaining an ITIN can take months, because the employee must first apply for (and be denied) a social security number.
- Tax return filing requirements



# What Employers Can Do

- Gather relevant teams (HR, Legal, Accounting, Payroll) to best understand the current state of remote work at your company
- Locate or gather key information from employees. Have employees transitioned to remote work permanently? Where do they live? Do some employees work remotely part time?
- Are there policies in place for employees? Is there a system in place for recording work location?
- Ensure employees understand their personal tax responsibility vis a vis the employer's (*i.e.*, withholding)
- Review information and identify any new risks or compliance obstacles



# General Employment Issues

# General Employment Issues

Request by existing employees

Hiring of employees in new states

Employment risks

International



# Requests by Existing Employees

- Granting is critical retention tool
- Request for temporary remote work may lead to “permanent” request
- Granting of temporary accommodation becomes evidence of ability to grant regular accommodation
- Creation of precedent: potential for differential treatment
- Potentially more difficult to supervise/coordinate
- Heightened travel costs

# Exempt and Non-Exempt Employees

- Which jobs can be performed off site?
- Non-exempt employees present unique challenges
  - Recordkeeping of hours
    - California
      - Beginning and ending of work
      - Beginning and ending of lunches
      - Required breaks
  - Travel time

# Hiring of Employees in New States

## Initial legal requirements

- May mean company is “doing business” in new state
- Workers’ compensation
- Unemployment insurance
- Hiring documentation requirements

...E  
...5

...ER

...g., Temporary Services Agency; Employee Leasing  
... Employer Organization [PEO])?  Yes  No  
(if applicable):

...above):

...s (above box checked "Yes"), the following is the other entity

**INFORMATION**

Overtime Rate(s) of Pay: \_\_\_\_\_  
 Week  Salary  Piece rate  Commission

...pay? (check box)  Yes  No  
...ained in that written agreement?  Yes  No  
...cluding meal or lodging allowances):

...w, it does not constitute a "voluntary written  
...employee in order to credit any meals or lodging  
...t must be evidenced by a separate document.)

**WORKERS' COMPEN**

Insurance Carrier's Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone Number: \_\_\_\_\_  
Policy No.: \_\_\_\_\_  
 Self-Insured (Labor Code 3700) and Certificate Number fo

**PAID SICK LEA**

Unless exempt, the employee identified on this notice is entitled to law which provides that an employee:

- May accrue paid sick leave and may request and use up to \_\_\_\_\_ year;
- May not be terminated or retaliated against for using or r
- Has the right to file a complaint against an employer who:
  - requesting or using accrued sick days;
  - attempting to exercise the right to use accrued paid sick
  - filing a complaint or alleging a violation of Article 1.5 s
  - cooperating in an investigation or prosecution of an all or practice or act that is prohibited by Article 1.5 secti

The following applies to the employee identified on this notice: (Che

- Accrues paid sick leave only pursuant to the minimum require other employer policy providing additional or different terms f
- Accrues paid sick leave pursuant to the employer's policy whic requirements of Labor Code §246.
- Employer provides no less than 24 hours (or 3 days) of paid sic
- The employee is exempt from paid sick leave protection by Lal subsection for exemption): \_\_\_\_\_

**ACKNOWLEDGEMENT**

\_\_\_\_\_  
(PRINT NAME of Employer representative)

\_\_\_\_\_  
(SIGNATURE of Employer Representative)

\_\_\_\_\_  
(Date)

The employee's signature on this notice merely constitutes ack

Labor Code section 2810.5(b) requires that the employer notify set forth in this Notice within seven calendar days after the time applies: (a) All changes are reflected on a timely wage stateme section 226; (b) Notice of all changes is provided in another wri changes.

# Hiring of Employees in New States

- Ongoing legal requirements vary by state and locality
  - Sick leave
  - Leaves of absence
  - Protected statuses
  - Restrictive covenants
  - Confidential information and invention assignment agreements
- Treatment in written policies
- Termination requirements
  - Entitlements (e.g., vacation)
  - Drafting of compliant release agreements

# Use of Personal Employer Organizations (PEOs) For Compliance

- Benefits and risks of use of PEOs
- **INDEPENDENT CONTRACTOR STATUS IS GENERALLY NOT A GOOD OPTION**
- Independent contractor can make both misclassification and standard employment claims

# Employment Risks

- State and local statutory rights
  - Is there jurisdiction?
  - Effect of use of PEO
- Differing common law rights
  - No defense based on absence of sufficient employees in state
- May have benefits of more than one jurisdiction

# Request to Move Countries

- All of the aforementioned issues and more
- Is it practical?
- Doing business analysis
- Use of PEO
- Risks of independent contractor status in particular jurisdiction

# **Key Takeaways/ Q&A**

# Thank You!