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Working from Home:
Unraveling the Employment Law Implications of the Remote Office

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The New “Where” of Work: Unraveling the Employment Law Implications of Remote Work

“At the onset of the Covid-19 crisis,” begins an article in the Harvard Business Review, “talent literally left the building, and we’re now beginning to realize that in many places, it is unlikely to come back. Technology is moving humanity away from the office and back into homes across our nation every day.”¹ The pandemic has created an unprecedented shift towards remote work.² Large segments of the workforce are unlikely to return to anything like the traditional pre-Covid office.³ In our new normal, many experts predict employers will “conceptualize office space as an add-on to virtual work, as opposed to the default for where people work.”⁴

While remote work has numerous benefits for both employees and employers—such as improving employee happiness, boosting workplace productivity, and reducing office costs⁵—remote work also creates a web of new legal obligations for employers and new entitlements for employees.⁶ This is because both employers and employees may become subject to the employment, tax, and corporate laws of the states in which remote employees live and spend their workdays.⁷

Let us take as an example an employer that is based in New York City and has employees who live in Connecticut and New Jersey. When those employees work from Manhattan, their employer is subject to New York employment laws.⁸ When some of those same employees work from home, the employer becomes subject to Connecticut and New Jersey employment laws in addition to those of New York.⁹ If we further assume that this employer has a District of Columbia office with employees who live in Maryland and Virginia, then the employer, which was once obligated to comply with the employment laws of just two states, must now comply with those of six.¹⁰

The sudden shift to working from home during the pandemic untethered “work” as a verb—what people *do*—and “work” as a noun—*where* people do it. While we cannot predict the extent to which current events will permanently reshape the future of work, it is clear from innumerable public declarations of large employers that many employees will have more choice about where they work than they did before the crisis. This paper is intended to help employers and their professional advisors understand what they need to know about some of the more common legal

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¹ Becky Frankiewicz & Tomas Chamorro-Premuzic, *The Post-Pandemic Rules of Talent Management*, Harv. Bus. Rev. (Oct. 13, 2020), https://hbr.org/2020/10/the-post-pandemic-rules-of-talent-management?ab=at_articlepage_relatedarticles_horizontal_slot2.

² See, e.g., Susan Lund et al., *What 800 Executives Envision for the Postpandemic Workplace*, McKinsey Glob. Inst. (Sept. 23, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/what-800-executives-envision-for-the-postpandemic-workforce#>

³ See *id.*

⁴ Ethan Bernstein et al., *The Implications of Working Without an Office*, Harv. Bus. Rev. (Jul. 15, 2020), <https://hbr.org/2020/07/the-implications-of-working-without-an-office>

⁵ Isaac Mamaysky, *The Future of Work: Exploring the Post-Pandemic Workplace from an Employment Law and Human Resources Perspective*, UC Davis Business Law Journal (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3769366.

⁶ See Ian Wahrenbrock & Julia Judish, *Pandemic Work-From-Home Arrangements Have Tax and Employment Law Consequences*, Pillsbury Alert (Nov. 30, 2020), <https://www.pillsburylaw.com/en/news-and-insights/Remote-Work-Tax-Employment-Concerns.html>; *6 compliance considerations for remote employees*, Wolters Kluwer (Sept. 1, 2020), <https://www.wolterskluwer.com/en/expert-insights/6-compliance-considerations-for-remote-employees>.

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

issues that arise when employees work in a state or city that is different from their own. In the pages that follow, we consider the following areas of employment law in the context of remote work:

- Minimum wage and overtime laws
- Family, medical, pregnancy, and Covid-19 leave entitlements
- Home office expense and technology reimbursements
- Antidiscrimination laws, policies, and training requirements
- Workplace notices
- Unemployment insurance, workers compensation, and disability insurance
- Tax and corporate registration obligations

We conclude with a discussion of how organizations are navigating these waters and meeting the new compliance challenges that stem from having a partially or fully remote workforce. While most of the laws and regulations we address are not new, many have yet to be tested in the context of widespread remote work. We expect that the ways in which these laws are interpreted, along with employer solutions to compliance, will continue to emerge and evolve in the months and years ahead.

I. Background: The New “Where” of Work

Before the pandemic, less than 5 percent of the workforce considered home their primary place of work¹¹ and for many, those homes were in the same state as their employer.¹² By contrast, 75 percent of office workers and 56 percent of all U.S. workers were working from home, at least some of the time, in June of 2020.¹³ Notably, more than 28 percent of employees who worked remotely during the pandemic did so in a state or country that was not the same as that of their employer.¹⁴

Among those employees who worked from a new location during the pandemic, a full two-thirds failed to notify their employer of their interstate work status for some or all of that time—putting both employers and employees at risk of non-compliance with the laws and regulations of the host states.¹⁵ While some jurisdictions agreed to not pursue pandemic-related relocations that would otherwise make employees and their employers subject to their laws, early indications suggest the gloves will be off when the crisis is over.¹⁶

A longitudinal survey of over 15,000 employees by the Becker Friedman Institute found that 76 percent of employees whose jobs can be done at least partially from home want to work remotely at least once a week after the pandemic is over.¹⁷ A full 27 percent want home to be their permanent place of work.¹⁸ Corporate support for remote work has been changed by the pandemic too. According to McKinsey, nine out of ten executives envision a hybrid model, one where people spend some time working at home and some in the office, for their future.¹⁹

¹¹ *American Community Service*, U.S. Census Bureau, Report B08128, 2019

¹² *Out of State and Long Commutes: 2011*, United States Census Bureau, February 1, 2013, <https://www.census.gov/library/publications/2013/acs/acs-20.html>

¹³ *Seven in 10 U.S. White-Collar Workers Still Working Remotely*, Gallup.com, May 17, 2021, news.gallup.com/poll/348743/seven-u.s.-white-collar-workers-still-working-remotely.aspx

¹⁴ *Adapt to a Flexible New Normal*, Topia, 2021, <https://www.topia.com/adapt-survey-report-2021/>

¹⁵ *Id.*

¹⁶ *Covid-19 Telework Triggers State Tax Withholding Guidance*, JDSupra, Apr. 21, 2020, <https://www.jdsupra.com/legalnews/Covid-19-telework-triggers-state-tax-61603>.

¹⁷ *Why Working From Home Will Stick*, Becker Friedman Institute, December 1, 2020, <https://bfi.uchicago.edu/working-paper/why-working-from-home-will-stick/>

¹⁸ *Id.*

¹⁹ *What Executives Are Saying About the Future of Hybrid Work*, McKinsey & Company, May 17, 2021, [mckinsey.com/business-functions/organization/our-insights/what-executives-are-saying-about-the-future-of-hybrid-work](https://www.mckinsey.com/business-functions/organization/our-insights/what-executives-are-saying-about-the-future-of-hybrid-work)

II. “The Perils of Multistate Employment”²⁰

In a recent article in *The Week*, National Correspondent Ryan Cooper argued that the “basic fact standing in the way of a remote work boom is the federal structure of the United States.”²¹ Many business leaders do not realize just how much our employment laws, tax obligations, business registration requirements, and other legal regimes vary between states and localities. “Each state has its own unemployment system, its own tax laws, its own labor regulations, its own legal requirements for businesses, and so on,” said Cooper. “Having an employee move to another state can thus trip a whole slew of regulatory and tax requirements that businesses might not even know about.”²²

Large employers that already had employees working in numerous states and countries are likely comfortable with expanding the “where” of work, but many small and medium-size companies, and even some large ones whose presence in multiple states was limited before the pandemic, will be new to the game and have yet to learn the rules. Many do not even realize that are out of compliance with relevant laws and regulations until, for example, an employee files for unemployment in a state where the employer does not have coverage, a wage and hour complaint is filed, or an audit brings the violation to the surface.

A. Minimum Wage and Overtime

The applicability of new state laws may require salary increases for employees whose home states have lower minimum wage and overtime requirements than those of their employer.²³ The current federal minimum wage is \$7.25 per hour.²⁴ While that sets a floor across states, many states and cities have set the bar much higher.

For example, if an employee lives in New York State, they are entitled to a minimum wage of \$12.50 per hour. That increases to \$15 per hour if they live in New York City.²⁵ Consider the case of an employee who lives in Hancock NY and works for a company that is based five minutes away in Starlight PA. When that employee worked from Pennsylvania prior to the pandemic, they were entitled to \$7.25 per hour. However, when they work from home, just over the Pennsylvania border, they become entitled to \$12.50 per hour.²⁶

Likewise, federal law creates a baseline by which employees earn time-and-a-half if they work more than 40 hours in a particular week.²⁷ But like the minimum wage, many states impose more stringent overtime requirements. For example, employees who work in California are entitled to double-time when they exceed a twelve-hour workday or work more than eight hours on their seventh weekday of work.²⁸ This is a substantially different requirement from that of neighboring states, many of which mirror the federal overtime approach.²⁹

²⁰ See Jathan Janove, *The Perils of Multistate Employment*, SHRM, May 1, 2012, <https://www.shrm.org/hr-today/news/hr-magazine/pages/0512legal.aspx>.

²¹ See Ryan Cooper, *America Needs a Remote Workers Law*, *The Week*, Mar. 1, 2021, [theweek.com/articles/967313/america-needs-remote-workers-law](https://www.theweek.com/articles/967313/america-needs-remote-workers-law).

²³ Hugo deBeaubien and W. Jan Pietruszka, *Client Alert: Employer Considerations for Remote Workers During and After Covid-19*, JD Supra, June 8, 2020, <https://www.jdsupra.com/legalnews/client-alert-employer-considerations-47389>; *New York State’s Minimum Wage, Business Responsibilities Under the Law*, N.Y. State, <https://www.ny.gov/new-york-states-minimum-wage/new-york-states-minimum-wage> (last visited Jan. 10, 2021).

²⁴ *State Minimum Wage Laws*, U.S. Dep’t of Labor (Oct. 1, 2020), <https://www.dol.gov/agencies/whd/minimum-wage/state>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Overtime Pay*, U.S. Dep’t of Labor Wage & Hour Div., <https://www.dol.gov/agencies/whd/overtime> (last visited on Apr. 11, 2021)

²⁸ See *State Minimum Wage Laws*, *supra* note 24.

²⁹ *Id.*

Other wage and hour obligations that vary by state include meal and break requirements, pay rate notifications, and the timing of pay at separation.³⁰ Connecticut, for example, requires a 30-minute meal break for certain employees who work more than seven and a half hours per day. It must be given after the first two hours of work and before the last two.³¹ By contrast, in New Jersey, mandatory breaks only apply to minors.³² As another example, New York requires something that many states do not: namely, employers must provide their employees with a notice of wage rate form, which includes the employee's hourly rate, overtime pay, pay date, and related information.³³ To further complicate matters, the form and content of this type of notice may differ in each locale that requires it.

B. Family, Medical, Pregnancy, and Covid-19 Leave Entitlements

Family, medical, and Covid-19 leave laws vary significantly between states.³⁴ Under federal law, employees may be entitled to job-protected *unpaid* leave for certain medical and family events by the Family and Medical Leave Act.³⁵ Again, this creates a baseline across states, but multiple states and dozens of localities require paid time off to address short-term health needs and preventative care, serious illnesses, caring for an ill family member, or welcoming a new child.³⁶ According to The Kaiser Family Foundation:

Since the first law was passed by voter initiative in 2006 in San Francisco, 12 states, plus D.C., and 21 other localities have passed laws requiring that eligible employees get paid time off to care for themselves or sick children. Two additional states (ME and NV) have general paid leave laws that allow employees to use accrued leave for any reason, including illness. Eight states' and eleven localities' requirements explicitly apply to public health emergencies, such as closure of a business or child's school to protect public health. All state and all local paid sick leave laws permit use of accrued leave for reasons associated with sexual assault, domestic violence, and stalking, except Pittsburgh's. Current paid sick leave laws generally work on an accrual basis, dependent on previous hours worked. The pay rate and the amount of paid sick time that can be accrued varies by policy.³⁷

While there has been much talk about the Biden administration implementing a federal paid leave law, it is highly likely that many states will continue to impose their own, more stringent requirements.³⁸

Covid-19 leave also varies across states. While the federal Families First Coronavirus Response Act created paid leave for certain Covid-related reasons, its paid leave obligations have now expired.³⁹ Now employers have the option to receive a tax credit for providing paid Covid leave, but it is not mandated.⁴⁰ By contrast, dozens of states

³⁰ See Paul E. Cirner, *Multistate Compliance for Employers With Out-of-State Remote Employees*, National Law Review, Apr. 23, 2021, <https://www.natlawreview.com/article/multistate-compliance-employers-out-state-remote-employee>

³¹ *Workplace Laws*, Sec. 31-51ii, Meal Periods, Connecticut, available at <https://www.ctdol.state.ct.us/wgwkstnd/laws-regs/statute31-51ii.html>

³² *Wage and Hour Compliance FAQs*, State of New Jersey Department of Labor and Workforce Development, https://www.nj.gov/labor/wagehour/content/wage_and_hour_compliance_faqs.html#q44

³³ *Notice of Pay Rate*, NY Department of Labor, <https://dol.ny.gov/notice-pay-rate> (last visited on Apr. 11, 2021)

³⁴ *Family Medical Leave*, Nat'l Conference of State Legislatures, <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> (last visited December 5, 2020).

³⁵ *What's the Difference? Paid Sick Leave, FMLA, and Paid Family and Medical Leave*, U.S. Dep't of Labor (Sep. 2016), <https://www.dol.gov/sites/dolgov/files/oasp/legacy/files/paidleavefinalrulecomparison.pdf>; *Paid Family and Sick Leave in the U.S.*, KFF Women's Health Policy (Dec. 14, 2020), <https://www.kff.org/womens-health-policy/fact-sheet/paid-family-leave-and-sick-days-in-the-u-s/>

³⁶ *Id.*

³⁷ *Paid Family and Sick Leave in the U.S.*, KFF Women's Health Policy, Dec. 14, 2020, <https://www.kff.org/womens-health-policy/fact-sheet/paid-family-leave-and-sick-days-in-the-u-s/>

³⁸ Barbara E. Hoey & Alexandra B. Agnostak, *Paid Sick Leave Trends: States and Localities Step In Where Federal Law Falls Short*, JD Supra (Apr. 9, 2021), <https://www.jdsupra.com/legalnews/paid-sick-leave-trends-states-and-6816203/>

³⁹ *Id.* (noting that Congress did extend the entitlement to tax credits for employers that voluntarily provide sick leave).

⁴⁰ *Id.*

and localities have adopted Covid-specific leave laws, all with their own rules, requirements, and end dates.⁴¹ For example, New York provides paid sick leave and job protections to employees who must quarantine due to the pandemic, while Pennsylvania has no comparable law.⁴²

C. Home Office Expense and Technology Reimbursements

Under federal law, employers must reimburse non-exempt employees for any business-related expenses that would effectively result in a pay rate that is lower than the minimum wage.⁴³ In many states, nothing more is required.⁴⁴ However, some states require employers to compensate employees for internet, phone service, and other equipment used in furtherance of their work, regardless of minimum wage considerations.⁴⁵ As one practitioner explains:

Employees may be incurring necessary expenses for tools and equipment incidental to their working remotely, such as personal cell phone and computer usage, high-speed internet access, use of telecommunications and timekeeping applications, printer consumables like ink or toner cartridges and paper, and day-to-day office supplies and related equipment that are typically provided by the employer and used by the employee when not working remotely (*i.e.*, pens, pads, paperclips and staples). For instance, an employee working from home who uses his or her personal cell phone to make and receive work-related calls, or personal printer paper and ink for business-related correspondence, may need to be separately reimbursed for these types of expenses, depending on the jurisdiction.⁴⁶

In California, for example, “the statutory language requires employers to reimburse ‘all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of the employee’s duties’ or at the direction of the employer.”⁴⁷ California courts have held that this “require[s] reimbursement of a ‘reasonable percentage’ of the employee’s monthly cellular data and internet costs even if the employee had unlimited data plans and home internet network for personal use and even if the employee’s monthly bills did not increase as a result of the business use.”⁴⁸ A Baker McKenzie partner tells SHRM:

In California, reimbursement also may extend to the use of an employee's car for work purposes, but not to expenses that employees would incur under normal circumstances. Some plaintiffs’ counsel have suggested that employers also have an obligation in today’s workplace to reimburse employees for overhead

⁴¹ *Id.* (As a result of the gaps left by the federal response, state and local lawmakers have stepped in to legislate paid sick leave for workers. While we will focus on California and New York, other states and localities have also adopted new Covid-19 leave laws or expanded or supplemented existing paid sick leave laws, such as Arizona, Colorado, Connecticut, Chicago, Illinois, Cook County, Illinois, Massachusetts, Michigan, Duluth, Minnesota, Minneapolis, Minnesota, St. Paul, Minnesota, Nevada, New Jersey, Oregon, Philadelphia, Pennsylvania, Pittsburgh, Pennsylvania, Rhode Island, Vermont, Washington, and Washington D.C.); *Family Medical Leave*, *supra* note 34.

⁴² Lisa Nagele-Pazza, *States and Cities Update Covid-19 Paid-Sick-Leave Laws*, SHRM, April 13, 2021, <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/states-and-cities-update-covid-19-paid-sick-leave-laws.aspx>

⁴³ See *Covid-19 and the Fair Labor Standards Act Questions and Answers*, U.S. Dep’t of Labor, <https://www.dol.gov/agencies/whd/flsa/pandemic#q11>; Carter Norfleet & Shareef Farag, *FAQs: Expense Reimbursement Amidst the New Work-From-Home Normal*, Lexology (Aug. 24, 2020), <https://www.lexology.com/library/detail.aspx?g=4f55a3c6-96c5-44ea-8fc8-25384680c882>.

⁴⁴ *Navigating Expense Reimbursement for “Work From Home” Employees*, McGuireWoods (Mar. 30, 2020), <https://www.mcguirewoods.com/client-resources/Alerts/2020/3/navigating-expense-reimbursement-for-work-from-home-employees>; *Expense Reimbursements in the Era of Remote Working*, JD Supra (Jan. 22, 2021), <https://www.jdsupra.com/legalnews/expense-reimbursements-in-the-era-of-3350909/>

⁴⁵ *Id.*

⁴⁶ *Navigating Expense Reimbursement for “Work From Home” Employees*, McGuireWoods (Mar. 30, 2020), <https://www.mcguirewoods.com/client-resources/Alerts/2020/3/navigating-expense-reimbursement-for-work-from-home-employees>.

⁴⁷ *Expense Reimbursements in the Era of Remote Working*, JD Supra (Jan. 22, 2021), <https://www.jdsupra.com/legalnews/expense-reimbursements-in-the-era-of-3350909/>

⁴⁸ *Id.*

expenses, such as utilities, rent or mortgage, and the cost of furniture. These claims are not likely to succeed.⁴⁹

By contrast, remote employees in New York are not entitled to any expense reimbursement.⁵⁰ So while California employers are obligated to offset work-related expenses, New York employers have no such obligation unless they made a promise to the contrary.⁵¹ A January 2021 JD Supra article identifies ten states that have expense reimbursement laws.⁵² As is the case with minimum wage laws and leave entitlements, employers may have very different obligations depending on the state in which each employee works from home.

D. Antidiscrimination Laws, Mandatory Policies, and Trainings

Various federal laws, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Pregnancy Discrimination Act, and the Americans with Disabilities Act, protect employees from discrimination in the workplace on the basis of characteristics including race, color, religion, sex, national origin, disability, and pregnancy.⁵³ However, many states go much further. Federal antidiscrimination laws exclude certain smaller employers and leave out certain protected characteristics, so state and local laws often fill those gaps by including employers of all sizes in their mandates and protecting vulnerable groups that are not included in the federal laws.⁵⁴

For example, some states explicitly prohibit discrimination on the basis of gender identity and gender expression.⁵⁵ Neither of these was protected under federal law until a recent landmark Supreme Court decision expanded the interpretation of the word “sex” in Title VII of the Civil Rights Act.⁵⁶ By contrast, California statutorily protects sexual orientation and gender identity, making the protection immune from the ebbs and flows of judicial interpretation.⁵⁷

Along the same lines, some states require certain types of employee training that are not required by federal law or neighboring states. New York employers must train their employees on preventing sexual harassment, “whereas other [states] may require training for certain occupations or employees engaging in certain activities, such as Maine’s law requiring video display terminal training. There may also be individual and employer obligations to ensure the training of certain licensed occupations, such as Texas’ requirement that licensed childcare facilities provide various clock hours of training.”⁵⁸

⁴⁹ Kylie Ora Lobell, *When Should Employers Reimburse Expenses for Remote Workers?*, SHRM, Nov. 5, 2020, <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/when-should-employers-reimburse-expenses-for-remote-workers.aspx>

⁵⁰ *Sec. 198-C Benefits or Wage Supplements*, New York Labor Law, https://newyork.public.law/laws/n.y._labor_law_section_198-c

⁵¹ *Id.*

⁵² *Expense Reimbursements*, *supra* note 44.

⁵³ *Managing Equal Employment Opportunity*, SHRM Toolkit, June 17, 2020, <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingequalemploymentopportunity.aspx>

⁵⁴ *Id.*

⁵⁵ *Id.* See also *State Equality Index 2020*, Human Rights Campaign, <https://www.hrc.org/resources/state-equality-index> (last visited on May 1, 2021).

⁵⁶ Melissa Legault, Daniel Pasternak, Laura Lawless and Lew Clark, *Landmark U.S. Supreme Court Ruling Prohibits Sexual Orientation and Gender Identity-Based Discrimination In Employment (US)*, Employment Law Worldview, June 15, 2020, <https://www.employmentlawworldview.com/landmark-u-s-supreme-court-ruling-prohibits-sexual-orientation-and-gender-identity-based-discrimination-in-employment-us/>

⁵⁷ see also Lisa Nagele-Piazza, *Not All State Employment Discrimination Laws Are Created Equal*, SHRM, Sept. 15, 2017, <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/state-employment-discrimination-laws.aspx>

⁵⁸ *Id.*

Employers need to be aware of these expanded protections and training obligations in the states where their employees work, even if the state where the employer is located does not have corresponding obligations or protections.

E. Workplace Notices

Both state and federal laws mandate that various physical posters be visibly displayed in the workplace. This raises two distinct issues: First, which state's posting obligations apply to a remote employee working from home? Second, how should employers meet the posting obligation for employees who work remotely? Let us consider both issues.

Federal law requires various posters regarding topics such as minimum wage and equal employment opportunity, among many others.⁵⁹ Many cities and states have their own posting obligations which are both different from each other and different from federal law.⁶⁰ A SHRM article uses New York and California as examples: "New York's Department of Labor requires certain posters for minimum wage information, job safety and health protection, and the like. California requires employers to post information related to medical leave and pregnancy disability leave, minimum wage, and workplace discrimination and harassment."⁶¹ Employers need to comply with both federal and local requirements in each location where they have employees working.⁶²

With respect to the posting requirement for remote employees, the U.S. Department of Labor has issued guidance which SHRM summarizes as follows:

Employers may satisfy one-time notice requirements by e-mail delivery if employees customarily receive e-mails from the employer. . . For continuous-posting requirements, the guidance makes a distinction between employers with only some remote employees and employers with an entirely remote workforce. For employers with some remote workers, physical posters are required for onsite employees, and the DOL encourages electronic posting for the teleworking employees. Employers with an entirely remote workforce may satisfy continuous-posting obligations using electronic-only means if all employees exclusively work remotely, customarily receive information from the employer via electronic means and have readily available access to the electronic posting at all times.⁶³

Like so many elements of employment law, state requirements may be more stringent.⁶⁴ Moreover, since this is such a new consideration for legislatures, many states are still silent on the topic. "[M]any of these laws were passed decades before the first portable computer," explains a practitioner, "and few of them specifically address the concept of distributing notices using electronic means."⁶⁵

To be safe, we advise clients to comply with federal Department of Labor guidance *and* mail all relevant postings to each remote employee by sending one consolidated poster.⁶⁶ In this way employees have the physical poster in their

⁵⁹ *Workplace Posters*, US Department of Labor, <https://www.dol.gov/general/topics/posters> (last visited on Apr. 18, 2021)

⁶⁰ Susan Gross Sholinsky, Eric Emanuelson & Cynthia J. Park, *How to Comply with Notice and Posting Requirements During the Age of Remote Working*, Epstein, Becker & Green, Jan. 8, 2021, <https://www.workforcebulletin.com/2021/01/08/how-to-comply-with-notice-and-posting-requirements-during-the-age-of-remote-working/>

⁶¹ *Id.*

⁶² Wahrenbrock, *supra* note 6.

⁶³ Roy Maurer, *DOL Issues New Guidance on Posting Notices for Remote, Hybrid Workplaces*, SHRM, Jan. 25, 2021, <https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/DOL-Issues-New-Guidance-Posting-Notices-Remote-Hybrid-Workplaces.aspx> (internal citations omitted).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See, e.g., 2021 Labor Law Posters*, Labor Law Center, <https://www.laborlawcenter.com/labor-law-posters> (last visited Apr. 18, 2021).

home office, and employers can show a good faith effort to comply with posting requirements despite a particular state's silence on the topic.

F. Unemployment Insurance, Workers Compensation, and Disability Insurance

Federal and state requirements for Unemployment Insurance, Workers Compensation, and Disability Insurance must also be considered when employees work in a locale other than that of their employer.

1. *Unemployment Insurance*

Unemployment insurance provides benefits to eligible employees who are unemployed or underemployed.⁶⁷ “Each state administers a separate unemployment insurance program, but all states follow the same guidelines established by federal law.”⁶⁸ Those guidelines dictate that employers only need to obtain coverage in one state, and state laws provide uniform guidance about which state that should be.⁶⁹ Simply put, employers should obtain coverage in the state in which each employee works, rather than the state where the employer is located.⁷⁰

Regardless of where an employer obtains coverage, employees benefit from the unemployment insurance program of the state in which they work. The New York Department of Labor's guidance may be representative of the guidance employees receive in other states: “To receive unemployment insurance benefits, you need to file a claim with the unemployment insurance program in the state where you worked.”⁷¹

In practice, employees often file for unemployment in the state where they live. For this reason, states have processes to facilitate “interstate claims” for employees who worked in a state other than where they live.⁷² For example, the District of Columbia Department of Employment Services instructs applicants as follows:

Initial claims against the District of Columbia may . . . be filed at a State Workforce Agency in any of the 50 states These are called “interstate” claims. An example of an interstate claimant would be an individual who relocated to the state of New York after being laid off from employment in the District of Columbia. That individual would file an unemployment claim against the District of Columbia through a State Workforce Agency in the state of New York. . . .⁷³

While the above is fairly straightforward, the opposite situation is far less so. Consider an employer based in the District of Columbia that has an employee working remotely from New York. Having little experience with a multistate workforce, that employer may only carry unemployment insurance in the District of Columbia. So, when their New York employee applies for unemployment coverage in New York, the New York Department of Labor will not find any evidence of a policy in New York. An interstate claim also would not apply because the employee did not work from the District of Columbia.

⁶⁷ *Multi-State Rules for Remote Employees*, Halpern & Scrom, Nov. 10, 2020,

<https://www.halpernadvisors.com/multi-state-rules-for-remote-employees/>

⁶⁸ *Id.*

⁶⁹ *Localization of Work Provisions*, U.S. Department of Labor, https://wdr.doleta.gov/directives/attach/UIPL20-04_AttachI.html (last visited Apr. 25, 2021).

⁷⁰ Stephen Miller, *Out of State Remote Work Creates Tax Headaches for Employers*, Soc’y for Human Res. Mgmt. (Jun. 16, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/out-of-state-remote-work-creates-tax-headaches.aspx>.

⁷¹ *Unemployment Insurance Relief During Covid-19 Outbreak*, U.S. Department of Labor, <https://www.dol.gov/coronavirus/unemployment-insurance#:~:text=To%20receive%20unemployment%20insurance%20benefits,%2C%20by%20telephone%2C%20or%20online.> (last visited Apr. 18, 2021).

⁷² *Multi-State Rules*, *supra* note 67.

⁷³ *Frequently Asked Questions for Claimants*, Government of the District of Columbia, Department of Employment Services,

https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/UI%20Website%20FAQs%20-%20For%20Benefits%20%28Updated%204-30-2015%29.pdf (last visited on Apr. 25, 2021).

Here is how all this might play out. The *NY Employer's Guide to Unemployment Insurance, Wage Reporting, and Withholding Tax* states that employers who do not pay unemployment insurance contributions at the time they are due are charged interest at 12%.⁷⁴ While this penalty may apply, the provision really contemplates late payments to New York, rather than timely payments to the wrong state.⁷⁵ What happens when an employer made a good faith effort to pay into unemployment insurance but did not pay in the right state? This, and many questions like it, have yet to play out in the courts.

Reflecting on this very situation, RSM, a global tax and audit services firm, shares: "If an employee's wages were reported to the incorrect state, most states will waive interest and penalty charges associated with an amended filing. Additionally, employers who overpaid unemployment tax, or paid the tax to the incorrect jurisdiction, may be eligible for refunds."⁷⁶ So in the best-case scenario, New York waives the interest, and the District of Columbia refunds the payments for the New York employee; the employer is left with a big administrative headache, but no real harm has been done.⁷⁷

However, that is the best-case scenario. The *NY Employer's Guide* also explains that New York imposes a potentially-significant penalty for failing to register as a New York employer.⁷⁸ New York does create a safe harbor for employers that voluntarily fix the issue *before* receiving notification from the state.⁷⁹ However, this requires employers to catch the problem before the state becomes aware of it.⁸⁰ In practice, many employers only become aware that they paid into the wrong state's program when an employee files for coverage in a state where no coverage exists.

Unemployment offices have been inundated with these types of issues due to the pandemic. One would hope leniency would prevail in cases where an honest mistake was made but relying on that is a poor replacement for compliance. Paying into the right program from the start—that is, the programs of the states in which their employees work—is the only way sure way to avoid penalties.

2. *Workers Compensation*

Workers' compensation insurance provides cash benefits and medical care for employees who are injured as a result of their job.⁸¹ Employers are typically required to have workers' compensation in the states where an employee's work is localized.⁸² "The determination of where an employee's work is localized is typically fact-dependent and includes considerations of whether an employee works regularly at an employer's place of business and the location where an employee is domiciled and spends a substantial part of his or her working time."⁸³ Remote employees are typically "localized" in the state where they live and work, rather than the state where their employer is located.⁸⁴

According to Workers' Compensation provider Society Insurance: "A common mistake an employer can make is to buy workers compensation insurance in one state while having employees working and/or living in another state. This creates a liability exposure in which the policy [the employer] purchased may not have coverage for claims generated

⁷⁴ *Employer's Guide to Unemployment Insurance, Wage Reporting, and Withholding Tax*, New York Department of Labor, Dec. 2020, <https://www.tax.ny.gov/pdf/publications/withholding/nys50.pdf>

⁷⁵ *See id.*

⁷⁶ Tim Ellenwood, Lorraine Bodden, Eric Oscarson, Joe Grimes, *Navigating Multistate Unemployment Tax Reporting and Remittance*, RSM, Feb. 8, 2018, <https://rsmus.com/what-we-do/services/tax/state-and-local-tax/payroll-and-employment-tax/navigating-multistate-unemployment-tax-reporting-and-remittance-.html>

⁷⁷ *See id.*

⁷⁸ *NY Employer's Guide*, *supra* note 74.

⁷⁹ *Id.*

⁸⁰ *See id.*

⁸¹ *What is Workers' Compensation?* New York Governor's Office of Employee Relations, <https://goer.ny.gov/workers-compensation> (last visited on Apr. 25, 2021).

⁸² Cirner, *supra* note 30.

⁸³ *Id.*

⁸⁴ *Id.*

by these employees.”⁸⁵ Employees are entitled to choose the jurisdiction in which they file a workers compensation claim, generally choosing from: (1) the state where their work is principally located; (2) the state where they were injured; and (3) the state where they live.⁸⁶

In most cases, the state is the same for all three. For example, when employee’s job is principally localized in the state of Wisconsin, she lives in Wisconsin, and she was injured in Wisconsin, the injured worker’s only available recourse is to file her claim in Wisconsin.

However, if the employee’s job is principally localized in Wisconsin, he lives in Illinois, and he was injured in Indiana, the employee could file his claims against the employer in any one of these three states. Unless the employer’s policy specifically lists all three states, they may have a gap in coverage.⁸⁷

“States generally require that the employer register for and obtain workers’ compensation insurance in the state where the employee is performing the services,” says SHRM. “Failure to do so may expose the employer to liability, including penalties for noncompliance with the state’s workers’ compensation laws.”⁸⁸ Much like our discussion of unemployment insurance above, many employers do not realize they need to have workers compensation coverage in the states in which their remote employees work, rather than the state where the employer is located.

3. *Disability and Paid Family Leave Coverage*

Certain states have additional insurance requirements beyond unemployment and workers compensation. A handful of states mandate disability insurance,⁸⁹ and others require specific riders such as paid family leave coverage.⁹⁰ Employers should check the specific insurance coverage obligations in the states where their employees work.

G. Tax and Corporate Registration Obligations

While we have focused on the employment law implications of having a multi-state workforce, we would be remiss not to mention that employers with a remote workforce may also have new corporate and tax obligations in the states where their employees work. Remote employees establish a business presence in their home state, which may obligate employers based in other states to withhold state and local payroll tax, corporate income tax, franchise tax, and sales and use tax in the states where their employees work.⁹¹

Also, seven states and some cities tax employees based on the location of their *employer* regardless of where the *employee* is working.⁹² Those that do not may see a substantial loss of employment-related tax revenue if employees

⁸⁵ *Workers Compensation: Out of State*, Society Insurance, <https://www.societyinsurance.com/assets/1/AssetManager/Society-CaseStudy-Workers-Comp-OutState.pdf> (last visited on Apr. 25, 2021)

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Miller, supra* note 70 (internal citations omitted).

⁸⁹ *Which States Require Employers To Have A Short-Term Disability Plan?*, SHRM, Feb. 11, 2019, <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/stateswithstd.aspx>

⁹⁰ *Employer Responsibilities and Resources*, New York Paid Family Leave, <https://paidfamilyleave.ny.gov/employer-responsibilities-and-resources> (last visited on Apr. 25, 2021).

⁹¹ Randle B. Pollard and Deborah Andrews, *Multi-State Payroll Withholding Issues and Potential Relief for Telecommuting Employees*, *The National Law Review*, May 8, 2020, <https://www.natlawreview.com/article/multi-state-payroll-withholding-issues-and-potential-relief-telecommuting-employees>; *see also* Stephen Miller, *Out of State Remote Work Creates Tax Headaches for Employers*, SHRM, June 16, 2020, <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/out-of-state-remote-work-creates-tax-headaches.aspx> (“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’ Employers could be subject to state income taxes, gross receipts taxes, and sales and use taxes Tax requirements imposed at the city or county level could come into play”)

⁹² *Teleworking Employees Face Double Taxation Due to Aggressive “Convenience Rule” Policies in Seven States*, Tax Foundation, Aug. 13, 2020, available at taxfoundation.org/remote-work-from-home-teleworking.

formerly based there now live and work in another locale.⁹³ The whole battle over tax revenue is likely to trigger increased scrutiny from tax authorities. As one example, in early 2021, New York began sending employees of New York-based entities reminders of their tax obligations with the state regardless of where they worked last year.⁹⁴

Remote employees may also trigger the requirement for their employer to register as a foreign corporation. A Wolters Kluwer article explains: “In order to transact business in a foreign state, [companies] are required by the foreign state’s business entity statute to obtain the state’s authorization first. . . . A statutory entity doing business without authority is subject to penalties that can be severe. There are monetary penalties for the entity, and under some statutes, for the people doing business on its behalf. Additionally, it will not be able to maintain an action in the courts of the state until it is properly qualified.”⁹⁵ Along with the various filing obligations, employers that are required to register in a new state may also need to maintain a registered agent in the state, an office location, and a local mailing address.⁹⁶

Once again, it is critical that an employer—even if they only have one employee working full-time or part-time in a *foreign* city or state—takes the time to understand not just the tax and corporate registration laws, but the related case law as well.⁹⁷

III. How Organizations are Approaching Compliance

According to a PWC survey of 300 companies conducted in late 2020, 60 percent of employers indicated they would restrict remote work to locations in which they already have an established business presence.⁹⁸ For example, in announcing its new flexible approach to remote work, Novartis included the caveat that employees may only be allowed to work in states and countries in which the employer is located, so as not to trigger “corporate tax, individual tax and social security regulations” that “require special attention” in foreign jurisdictions.⁹⁹ Since most employers already have compliance programs focused on the employment laws of the states in which they have a physical presence, allowing employees to work from home only in those states minimizes the creation of new compliance obligations.

⁹³ *Talent on the Move: Where People Will Live & Work After Covid-19*, Cushman & Wakefield, May 2021, <https://www.cushmanwakefield.com/en/united-states/insights/talent-on-the-move-where-people-live-and-work-after-covid-19>

⁹⁴ *New York Tax Officials Crack Down on Remote Workers*, The Wall Street Journal, March 6, 2021, <https://www.wsj.com/articles/new-york-tax-officials-crack-down-on-remote-workers-11620314590>

⁹⁵ Sandra Feldman, *Does A Remote Workforce Trigger Foreign Qualification Requirements?*, Wolters Kluwer, Dec. 21, 2020, <https://www.wolterskluwer.com/en/expert-insights/does-a-remote-workforce-trigger-foreign-qualification-requirements>

⁹⁶ *Id.*

⁹⁷ Randle B. Pollard and Deborah Andrews, *Multi-State Payroll Withholding Issues and Potential Relief for Telecommuting Employees*, *The National Law Review*, May 8, 2020, <https://www.natlawreview.com/article/multi-state-payroll-withholding-issues-and-potential-relief-telecommuting-employees>; see also Stephen Miller, *Out of State Remote Work Creates Tax Headaches for Employers*, SHRM, June 16, 2020, <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/out-of-state-remote-work-creates-tax-headaches.aspx> (“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’ Employers could be subject to state income taxes, gross receipts taxes, and sales and use taxes Tax requirements imposed at the city or county level could come into play”)

⁹⁸ Remote work policies: Why leading companies are opting in, PWC, <https://www.pwc.com/us/en/services/tax/hr-international-assignment-services/global-mobility-remote-workforce-policies.html> (Among the respondents: 28 percent of employers said they would allow remote work in another country; 24 percent said they would allow remote work within the same country including across state lines; and 46 percent said they would not allow any cross-border remote work.)

⁹⁹ Choice with Responsibility: Reimagining how we work, July 29, 2020, <https://www.novartis.com/news/choice-responsibility-reimagining-how-we-work>

Regardless of whether an employer restricts remote work to states where they have an existing presence, many larger employers will address their new compliance obligations the same way they address all their compliance needs: by relying on in-house attorneys and compliance teams, and turning to outside counsel and other external compliance consultants as needed.¹⁰⁰ Of course, larger companies have access to resources to which smaller companies do not; this solution is untenable for a company without a significant in-house legal and compliance team.¹⁰¹

Smaller employers often outsource various elements of their HR compliance function to external service providers which, through economies of scale, provide affordable compliance solutions for smaller multi-state employers.¹⁰² A related solution involves the use of Employers of Record (EORs) or Professional Employment Organizations (PEOs), which as one provider advertises, allow employers to “build distributed teams without registering in multiple states.”¹⁰³ The skyrocketing number of remote employees has created fertile ground for entrepreneurial third party providers and their backers, some of which are rapidly growing and raising tremendous funding to expand their business model.¹⁰⁴ These third parties will play an increasingly prominent role in remote work compliance coming out of the pandemic.

Regardless of how an employer achieves compliance, a common approach is to craft employment policies that comply with the most stringent laws of each applicable state.¹⁰⁵ Implementing uniform policies across the workforce often results in providing benefits in excess of those legally required in individual states. For example, implementing a uniform sick leave policy typically means giving an individual employee more paid leave than their state requires—because another employee works in a state with a more significant paid leave entitlement. By operationalizing the strictest requirement of each applicable state, certain employees receive more benefits than they are entitled to by state law. The alternative is to have different policies for employees in different locations, which

¹⁰⁰ Remote Work & Multistate Compliance, SHRM, <https://www.shrm.org/resourcesandtools/tools-and-samples/exreq/pages/details.aspx?erid=1719> (last visited on Jul. 22, 2021)

¹⁰¹ See Isaac Mamaysky, *Understanding Ethics and Compliance*, Journal of Regulatory Compliance, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789983.

¹⁰² HR Compliance, SHRM, <https://vendordirectory.shrm.org/category/hr-services/hr-compliance> (last visited on Jul. 22, 2021).

¹⁰³ Employee Management Services: Choosing between a PEO and EOR—pros and cons of each, Pivotal Solutions, <https://www.pivotalolutions.com/employee-management-services-choosing-between-peo-and-eor-pros-and-cons-of-each/>; Hire Talent Anywhere in the U.S., Velocity Global, https://explore.velocityglobal.com/contact-gs-eor-us.html?utm_source=google&utm_medium=cpc&utm_campaign=contact-us&gclid=CjwKCAjwruSHBhAtEiwA_qCpqqyqrwkFZS3KkbXdmGLj89xeg-nG_zu-19vZjYA5kTGupjCaxeQMKBoC_iUQAvD_BwE&gclid=aw.ds

¹⁰⁴ *Topia Raises \$15 Million in Series D Funding*, Topia Press Release, Apr. 28, 2020, topia.com/company/news/topia-raises-15-million-in-series-d-funding/ (“Topia cut its teeth in the employee relocation business. In April of 2020, just a month into the global pandemic, Topia topped off its over \$100M in Anventure funding with a \$15M Series D round that included Workday Ventures and paved the way for an approved software integration with the HR software behemoth. ‘A smart global talent mobility strategy is no longer optional for businesses to remain competitive,’ said Jazmin Medina, principal, NewView Capital who also participated in the 2020 round. ‘Companies must think and act like global citizens and move from a micro to a macro approach to talent acquisition and management.’”); *Velocity Global Acquires Iworkglobal To Accelerate Remote Work And Global Expansion Platform*, Velocity Global, Apr. 6, 2021, <https://velocityglobal.com/blog/velocity-global-acquires-iworkglobal-to-accelerate-remote-work-and-global-expansion-platform-receives-100m-growth-investment-from-ffl-partners/> (“Professional Employer Organizations and Employers of Record have been around since the 1960s but are enjoying renewed attention from investors as the world of remote work expands. Both are professional service organizations that help companies hire, manage, and maintain compliance in places the employer does not have a presence. Velocity Global [is] the largest U.S. domestic and global EOR following a \$100M investment that funded a strategic acquisition in April of 2021. ‘This strategic acquisition combines scale and expertise in a single platform for companies to employ top talent in another state or another country, quickly and compliantly,’ said Ben Wright, Velocity Global founder and CEO in the company’s press release announcing the transaction.”).

¹⁰⁵ Hoey and Agnostak, *supra* note 38.

can create a significant administrative challenge for employers with a large and distributed workforce.¹⁰⁶ The former approach not only simplifies the administrative burden of having a multi-state workforce but makes for happier employees in the process.

* * *

Perhaps as remote work continues to be accepted as “just the way we work,” the federal government will take steps to simplify employers’ obligations. Indeed, a federal solution would not be without precedent. In 1990 Congress solved a similar challenge for transportation employees who could otherwise have been liable for state taxes in all the states through which they travel as part of their work.¹⁰⁷ Since making transportation workers file in dozens of states made little sense, the Amtrak Act, which was passed more than 30 years ago allows them to file only in their home state.¹⁰⁸

The reality is that regulations have not kept pace with where, when, and how people have been working for decades. It is ironic that it has taken a pandemic—the very reason the federal government wrote that employees were to telework to the maximum extent possible into its continuity of operations plan more than two decades ago¹⁰⁹—to reveal the disconnect between modern workplace strategies and the local, state, and federal regulatory framework that governs how we work. Unfortunately, a recent Supreme Court decision to *not* hear arguments related to double taxation of remote workers keeps us one step further from a federal solution.¹¹⁰

The increase in remote work did not increase the complexity of multi-state tax and regulatory compliance, but it certainly revealed a complex compliance puzzle that many organizations had not attempted to solve before. The bottom line is, whether an organization has five employees or five thousand, it is critical that the employer understands and complies with the legal and regulatory requirements of all the places in which its people work.

¹⁰⁶ *Id.*

¹⁰⁷ Cooper, *supra* note 21.

¹⁰⁸ *Id.*

¹⁰⁹ *Telework*, Telework Legislation, telework.gov/guidance-legislation/telework-legislation/legislation (last visited on Jun. 2, 2021).

¹¹⁰ Supreme Court Punts on State Tax Question About Remote Work, Tax Policy Center, June 28, 2021, <https://www.taxpolicycenter.org/taxvox/supreme-court-punts-state-tax-question-about-remote-work>