

## Finding It, Researching It, and Complying With It: The Multistate and Remote Work Challenge for Employers

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### **Introduction**

This paper discusses the trends, techniques, and tools to practically address the multistate employment law challenge of complying with the vastly contrasting laws across the states, the considerations for employee onboarding, state tax compliance, employment termination, and much more.

In essence, an employer must have a working knowledge of major state and local law obligations in every jurisdiction in which it is recruiting, hiring, and employing employees to ensure it can analyze potential obligations, implement necessary policies, and make certain risk assessments.

### **Issue #1 Evaluation of Business Needs and the Hiring Process**

#### **What You Need to Know — the Bottom Line**

The workplace has changed in the wake of the COVID-19 pandemic. Remote technology and employee preference has changed how and where employees perform their job duties. The first step in the hiring process for nearly all employers is to determine whether the role must be performed in person at the worksite or whether it may be eligible for a remote or hybrid arrangement. Once that decision is made, employers can continue with shaping the role and job posting accordingly.

#### **Why You Need to Know — Information and Analysis**

##### **Early Considerations**

As we ride the wave of technology and shifting job requirements and individual preferences, our work policies need to keep pace. Employers must continue to take a fresh look at how they decide which roles are a good fit for remote work. Figuring out the key factors and standards for assessing which positions make the cut for remote work, and who in those roles will work from home, is a vital piece of the puzzle.

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Employers must understand that while a remote workforce may help expand the hiring pool further than geographic limitations would allow, it will also open a potential Pandora's box of new laws. When making hiring decisions, a fair question about who to hire is whether the company already does business where the applicant lives and, thus, is already subject to those employment laws. Or will hiring this person mean having to expand into a completely new state or jurisdiction that may require such steps as tax registration and registering with the state unemployment system?

Next, it is important to implement written policies and procedures on which roles must be performed on location and which roles can be performed remotely. Effective policies will start with looking at the essential functions of each role to make this determination. All managers and those participating in the hiring process should be trained to discuss job candidates' questions regarding expectations of where work will be performed. Additionally, all job descriptions and applications should state in writing that all work must be performed in the jurisdiction in which the employee was hired, absent authorization. Employees should be informed at the time of the hiring process, and again if hired, that if an employee plans to move or work extended periods outside the jurisdiction they were hired (whether within the United States or internationally), they must request and get written approval for such a move.

## **Pay Transparency and Salary Inquiry Laws**

If the role can be performed remotely, employers must be prepared for the flood of jurisdictional issues this may create. Depending on where the employer is located, there may be requirements for the job posting itself. Pay transparency laws continue to be enacted, many requiring salary range information to be included in the posting — even for remote employees living in other states. States are approaching the issue differently, so employers need to be diligent. New York State, for example, requires the salary range for remote employees if they will be working in the state or reporting to someone within the state.<sup>1</sup> Colorado also has extremely detailed requirements. When Colorado's pay transparency law was first effective in 2021, employers attempted to skirt the job posting requirements by specifically excluding remote Colorado employees from applying, which the state quickly addressed as a violation of the law.<sup>2</sup> States and localities also continue to implement salary inquiry bans, so hiring managers will need to be trained about salary discussions during the interview process.

## **Criminal History and Ban the Box**

Additional considerations for the hiring process for remote and hybrid employees include whether state law limits the timing and scope of an inquiry about criminal history. If a jurisdiction allows employers to ask, there may be laws on how that information must be treated. Many states have created "ban the box" laws that bar employers from including questions about criminal history on initial applications as well as laws on how background checks must be conducted after an employment offer is made, building on the federal requirements under the Fair Credit Reporting Act for background checks made by third parties. As with all the laws discussed here, it can be complicated understanding which state laws will control and whether that will be based

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on where the company is located or where the applicant will be working. Depending on the law, the answer may vary.

## **Non-compete Agreements**

Noncompete agreements and restrictive covenants also represent a complex area of law for multistate employers. It often becomes ambiguous as to which state's law holds jurisdiction over these matters. Even in most jurisdictions that permit and enforce noncompete agreements, there are certain requirements. Employers are obligated to demonstrate that the agreement promotes a legitimate business interest and that it imposes reasonable geographic restrictions (which remote work parameters complicate as well). Employers will want to reflect on whether the position really warrants a non-compete and, if yes, discuss with counsel if it will be a viable agreement.

## **Tax Considerations**

Employers need to consider whether they are registered for tax reporting and unemployment insurance tax purposes in the states where remote employees will live and work. Employers will also need to analyze whether having employees work in a state in which the employer does not otherwise conduct business will create a "nexus" between the employer and such state that could give rise to a variety of potential tax liabilities (including sales tax, franchise tax, corporate tax, and local taxes). Additionally, many states have "convenience of the employer" laws that could result in double taxation for some employees and can complicate withholding and reporting state taxes. This also requires employers to ensure they do not mislead applicants or relocating employees.

## **Now That You Know — Key Takeaway(s)**

Remote employees provide employers a bigger pool of qualified candidates than previously available. With this benefit, however, comes many additional jurisdictional issues that employers must be ready to tackle, even before posting for the position. Employers considering hiring remote employees should be aware of whether they are already subject to the state's or jurisdiction's laws and, if it is not, what it will take to comply with that jurisdiction's employment laws. This is also a discussion to have with employees looking to relocate to a new area where they would be the first employee under a new jurisdiction's laws for the employer. This is a valid reason to deny a remote worker's request to relocate, and a policy, written and consistently enforced, should help avoid the appearance of unequal treatment and discrimination claims.

## **Issue #2 During Employment**

### **What You Need to Know — the Bottom Line**

Employers must set employees' expectations for where they may perform their work. Most employees have no idea of the ramifications to an employer if they choose to move to another state and continue working. Many employers experienced this firsthand during the height of the COVID-19 pandemic, when employees casually mentioned they

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moved or have been working abroad for months, leaving employers scrambling to figure out if they have been in violation of various state or local employment laws and how to remedy if necessary.

## Why You Need To Know — Information and Analysis

### Onboarding

During the onboarding process, employers will need to know what new hire notices they are required to provide, such as wage theft notices. Additionally, a handful of states require anti-harassment training for all new hires. These trainings vary not only by state regarding duration, content, and whether it can be virtual or must be in person but also by how quickly a newly hired employee must receive initial and follow-up training. Other onboarding considerations to think about include analyzing how expanding to a new jurisdiction may impact E-Verify requirements. Often these issues should be discussed with counsel.

### Wage and Hour Laws

Proper compliance with wage and hour considerations in a multistate workforce takes a great deal of care. Employers must first understand the working time requirements in each jurisdiction. Does the state require certain breaks for nonexempt employees in a given number of hours of work? How stringent is the state on rounding procedures? Does overtime begin after the 40th hour of work in a week, or are there daily overtime requirements? The list goes on.

An additional wage and hour wrinkle that employers may not be familiar with is state laws addressing which employees are considered exempt and nonexempt. Most states simply follow federal law on exemption designations and salary requirements. A handful of states (the usual suspects), however, created either different duties requirements or increased the minimum salary rate for an employee to meet an exemption under state law. A few states have gone so far as to not recognize the computer professional exemption under state law. What does this mean for employers? An employee considered exempt under the Fair Labor Standards Act may be entitled to overtime under state law, even if the employer is not in that state. When expanding into multistate operations and navigating the wage and hour minefield this creates, employers may find it helpful to seek guidance.

### Leave Laws

Another difficult area to navigate — and one only getting more complex — is that of state and local leave laws. Both paid sick leave and paid family leave policies are on the rise throughout the country (both at the state and the local level). Employers must decide whether to attempt to create separate state policies for each relevant jurisdiction to comply with these states or a national policy consistent for all employees and compliant with the most stringent of these laws. The laws do not make this easy for employers, but it is worth considering for employee morale and company culture.

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Another consideration with leave laws is to understand how the Family and Medical Leave Act (FMLA) addresses (or fails to address) remote employees. Any proficient HR practitioner knows that to be eligible for leave under the FMLA, an employee must work at a location where the employer has at least 50 employees within 75 miles. If that were taken at face value, then few-to-no remote employees would ever qualify for leave. In 2023, the Department of Labor issued long-awaited guidance addressing the issue, concluding that an employee's personal residence is not a worksite. Rather, the guidance states:

their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made. Thus, if 50 employees are employed within 75 miles from the employer's worksite (the location to which the employee reports or from which their assignments are made), the employee meets that FMLA eligibility requirement.<sup>3</sup>

## **Tax Considerations**

Employers should review what they can reasonably administer and the risks they are willing to take with respect to tax and nexus issues. They should then craft a policy outlining where employees may work remotely and where they may not work remotely. For example, an employer may wish to permit employees to work in specified states where the employer is already registered and understands the applicable nexus risks.

## **Now That You Know — Key Takeaway(s)**

It is difficult trying to comply with wildly different state laws on so many issues while still creating consistent policies and navigating a healthy corporate culture. Employers are encouraged to be transparent with employees. If employers elect to implement different policies in different jurisdictions, ensure all managers and supervisors are trained and retrained on an ongoing basis on what policies apply to which locations.

## **Issue #3 Termination/Offboarding**

### **What You Need to Know — the Bottom Line**

When it comes time for the employment relationship to end for whatever reason, state law considerations must also be considered at this stage. State requirements include wage and hour considerations such as final pay timing and concerns related to charging employees for unreturned property, along with termination notice requirements. Additionally, there may be contractual considerations governed by state law.

### **Why You Need to Know — Information and Analysis**

#### **RIFs**

When a reduction in force (RIF) impacts remote workers, their employment status could be recognized in multiple states. The federal Worker Adjustment and Retraining Notification Act (WARN Act) does not provide clear guidance on how to account for and

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treat remote workers in the context of a triggering event. Instead, it focuses on out-stationed employees, like traveling salespeople, who do not report to a specific work facility.

Typically, employment laws come into play based on the physical location where an employee performs their work. Thus, final pay and severance agreements would generally fall under the jurisdiction of the state where the employee works, which is often their home. However, when it comes to the WARN Act, the determination of which employment laws apply can be more ambiguous. For instance, a remote employee living and working in Florida for a New York-based company would receive pay according to Florida's laws. Yet they might be considered a New York employee under the WARN Act (and likely the FMLA) if they report to or receive instructions from that location.

In the context of a RIF, it is crucial for employers to conduct a privileged analysis to understand how remote workers will be counted and affected before making any changes. This will help them assess whether the WARN Act and any applicable state mini-WARN Acts are triggered.

## **Notice Requirements**

Many states have their own state-based COBRA-like requirements that either expand covered employers and employees or expand what coverage is required after employment termination. States also may require unemployment insurance notices no matter the basis of termination or whether the employer believes the employee is entitled to unemployment benefits.

## **Contractual Agreements**

If a noncompete was entered into at the time of hire, it is advisable to revisit the agreement at the employee's departure to determine whether the noncompete is enforceable or worth attempting to enforce. These agreements likely could have been entered into before applicable state law changed or before the employee moved to their remote work location, both of which may make the agreement unenforceable.

If the decision is made to enter into a separation or settlement agreement at the time of departure, be sure to determine which state law should control and what claims can and cannot be included in such agreements. The process of drafting a separation or settlement agreement at the time of departure is a delicate one. It requires careful consideration of the governing state law and a clear understanding of the claims that can be incorporated. By doing so, you ensure a fair and legally sound agreement, paving the way for a smooth transition for all parties involved.

## **Tax Considerations**

Employers should make sure they are withholding and reporting properly when paying terminating employees. If employees move following employment termination and during the year in which they received termination compensation, employers should review which state withholding requirements apply and to which compensation. For

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example, compensation earned based on services performed in one state may keep that state's "taint," even following the employee ceasing to be a resident of, or working in, that state. Employers should also understand that most in-kind items (such as computers, phones, and the like) they allow employees to retain are generally subject to tax withholding and reporting requirements.

## **Now That You Know — Key Takeaway(s)**

Properly scope the relevant states and issues so effective legal and practical decisions can be made.

The entire employment relationship — from brainstorming the job duties and job posting to helping your esteemed colleague pack up their office after a long tenure together — is riddled with multijurisdictional issues, laws, and complications. The more thought and research that goes into deciding where to create business ties and hire employees, the more understanding the company will have of what is necessary for legal compliance. Discussions with your employment counsel before implementing procedures and making decisions can help and reduce risk.

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<sup>1</sup> New York Department of Labor Pay Transparency Frequently Asked Questions, <https://dol.ny.gov/pay-transparency-act-frequently-asked-questions>.

<sup>2</sup> Colorado Department of Labor and Employment, Equal Pay for Equal Work Fact Sheet, [https://cdle.colorado.gov/sites/cdle/files/documents/Equal\\_Pay\\_for\\_Equal\\_Work\\_Fact\\_Sheet\\_Web\\_0.pdf](https://cdle.colorado.gov/sites/cdle/files/documents/Equal_Pay_for_Equal_Work_Fact_Sheet_Web_0.pdf).

<sup>3</sup> Department of Labor, Field Assistance Bulletin No. 2023-1, <https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-1.pdf>.