



## Remote Work, Return-to-Work and Benefits – When the New Normal Conflicts With the Old Normal and How to Provide Compliant Benefits

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# Presenters

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A modern, open-plan office space with long white desks, black ergonomic chairs, and multiple computer monitors. Large windows in the background provide a view of a city skyline. A green semi-transparent rectangle is overlaid on the right side of the image, containing the title text.

# Lessons Learned About Remote Work



# Wage and Hour Laws Haven't Changed

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- Exempt salaries can be reduced due to diminished work but it should be set prospectively and NOT fluctuate week-to-week or month-to-month.
- Non-exempt employees must accurately track their hours.
- Remember, Plaintiff lawyers are hungry, too.
  - Lawsuits claiming unpaid time logging in to networks
  - Claims that rounding systems are unfair
  - Employee expense reimbursement claims (CA and IL)



# Wage and Hour Compliance Headaches

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- Set expectations with managers and subordinates about off-the-clock work. Remember, checking e-mails is work whenever it happens.
- Make sure time is entered accurately, not just hour totals or a “standard day”.
- Avoid auto-deductions whenever possible.
- Pay employees for unauthorized “work” but be prepared to counsel, reprimand and discipline those who abuse it.

# Telecommuting and Accommodations

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- The argument it is not practical has been put to the test and will be harder to sustain going forward.
- Look closely at job descriptions to make sure they spell out essential duties that will require presence at work.
- Employees with special workplace accommodations will likely be entitled to them at home.
- A general fear of COVID-19 will not likely excuse reporting to work but employees with medical complications and higher risk due to age may be entitled to stay home.

# Advantages of Supplying Equipment

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- Easier to protect employer proprietary information.
- Easier to monitor employee activities, but make sure you have given adequate privacy notices.
- Control work gateways to limit off-the-clock work.
- Easier for help desk to support.
- Better for employee morale.



# Drinking and the Teleworker

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- Drinking during working hours on the rise.
- Overall 33% of teleworkers report drinking during working hours.
- Rates vary by state. Try ordering by sobriety:
  - Arkansas
  - California
  - Hawaii
  - New York
  - Ohio

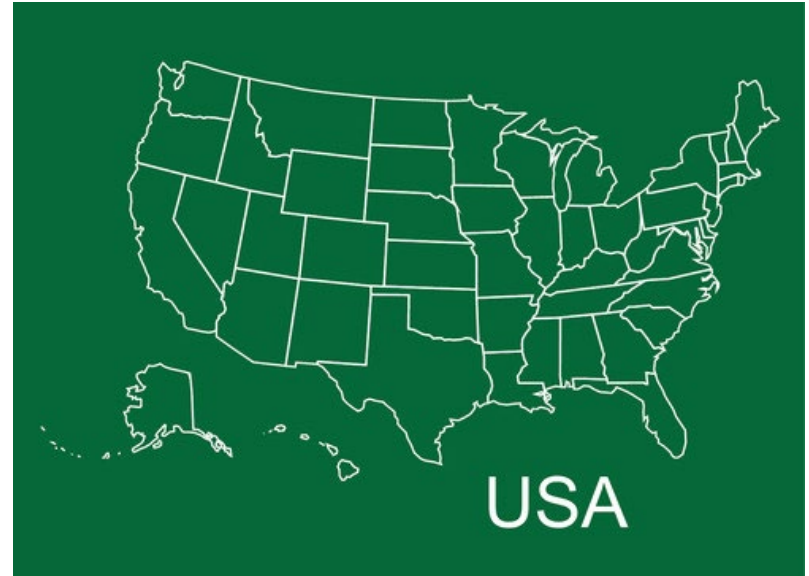




# Drinking and the Teleworker

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- The winner is . . .
  - Arkansas . . . 8% of telecommuters report drinking alcohol at home during working hours
  - Ohio . . . 22% (Note, poll was taken before the Alabama game.)
  - NY and CA . . . 38%
- The worst state is . . .
  - Hawaii . . . 67%
- Know the applicable state laws about substance abuse testing and use video conferences regularly to help assess how employees are doing.



A close-up photograph of a person's hand using a silver calculator on a wooden desk. The hand is holding a pen. In the background, there are papers, a pair of glasses, and a spiral notebook. A teal semi-transparent box is overlaid on the right side of the image, containing the title text.

## Employee State and Local Income Tax Withholding

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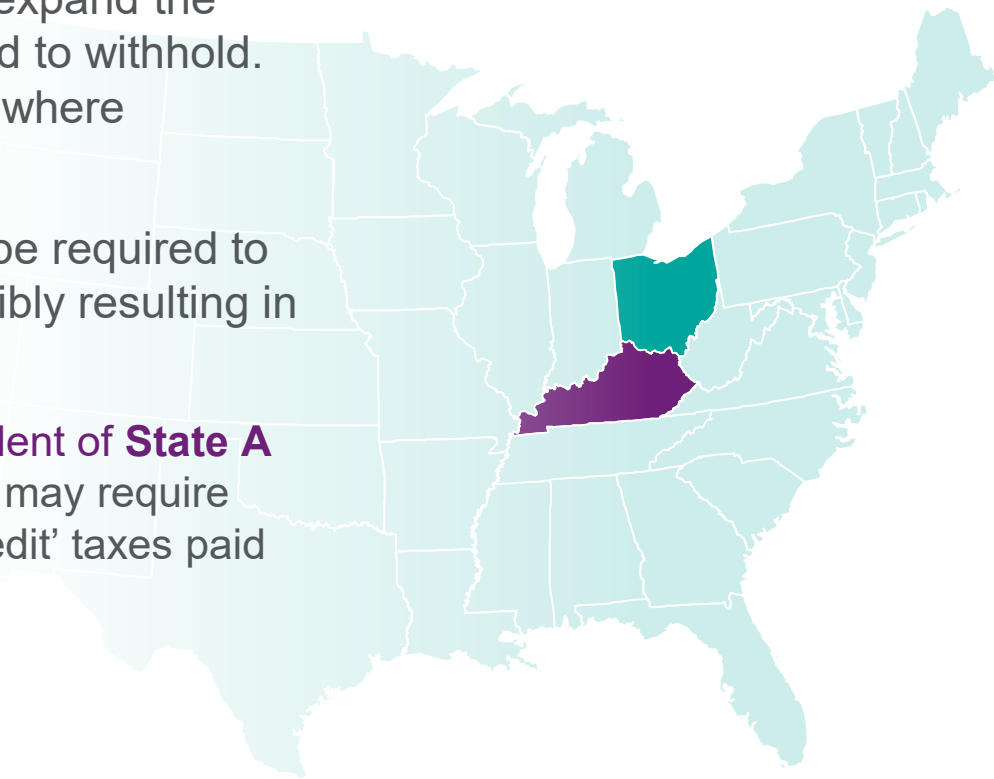
- Employers are generally required to withhold and remit state and local income taxes from employee pay, and failure to withhold can result in employer liability
- Most states with personal income taxes require businesses to withhold taxes on wages paid to (1) residents of the state and (2) non-residents who are working in the state.
- What changes should be made due to COVID remote working?



# Employee State and Local Income Tax Withholding (continued)

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- Remote working environments could expand the states in which employers are required to withhold. Some employers may not even know where employees are working from.
- It is also possible that employers will be required to withhold in more than one state, possibly resulting in double withholding for the employee.
- For example, if an employee is a **resident of State A** but working from **State B**, both states may require withholding. Oftentimes states will 'credit' taxes paid to other states, but not always.

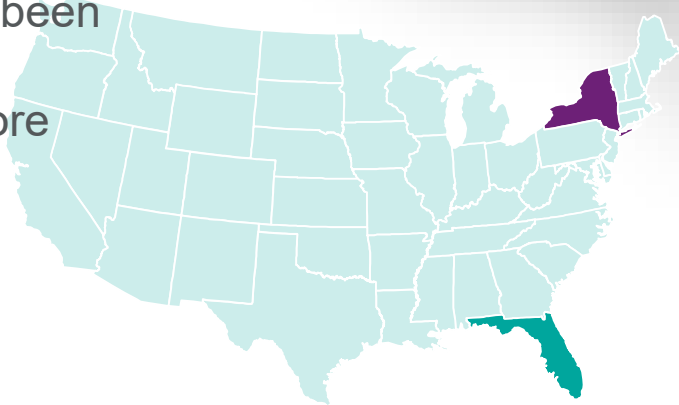




# Where is an employee's “Resident” for tax purposes?

Residency determinations can be straightforward, but oftentimes they are not.

Consider, for example, an employee who **owns a home in State A** and **usually works in State A**, but due to the pandemic the employee has been “temporarily” working from their **vacation home in State B**, for more than a year.



Is the employee a resident of State A or State B? Both?



# Where is an employee's "Resident" for tax purposes?

Unfortunately, each state has it's own definition of residency. For example –



California defines a resident as every individual who is in California for other than a temporary or transitory purpose, and every individual domiciled in California who is outside California for a temporary or transitory purpose. Cal. Rev. & Tax. Code 17014(a).



Colorado defines a resident as a natural person who is domiciled in Colorado, or who maintains a permanent place of abode in Colorado, and who spends in the aggregate more than six months of the taxable year in the state. Colo. Rev. Stat. 39-22-103(8).

**Watch out for state declarations as well!**



**HB 197**

For example, Ohio House Bill 197 provides that employers are required to continue to withhold municipal income taxes as though the employee was still working in the office.

# Beyond Withholding and Residency. Income Tax Nexus.

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Even though employers *collect* employee's income taxes, the true incidence of the tax falls on the employee. However, remote workers can also trigger corporate income tax “nexus” for their employers.

- If a business has tax “nexus” with a state, then the state can require the business to file income tax returns. A remote workforce can dramatically affect a company's tax nexus footprint.
- Public Law 86-272 is a federal safe harbor that prohibits states from imposing income tax on business activities that are limited to the solicitation of sales for tangible personal property. Remote workers conducting activities *other than* solicitation of sales may fail this safe harbor.
- Similar to residency, “nexus” rules differ for each state but generally depend on whether the entity is “doing business” in the state. Many states have passed temporary relief measures specifying that employees temporarily working from home will not cause the employer to have income tax nexus.
  - See, e.g., South Carolina Information Letter #20-29 (extending temporary nexus relief until June 30, 2021).

# COVID-19 Remote Worker Relief

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Many states have enacted measures to reduce administrative burdens during the COVID-19 remote work environments.





# COVID-19 Remote Worker Relief (continued)

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- Employee Withholding Relief
  - Many states have determined that they will not require withholding for employees who are temporarily working in the state due to COVID-19.
- Income Tax Nexus Determinations
  - Similarly, many states have determined that the presence of employees who are working from the state due to COVID-19 will not create income tax nexus for their employers.

A photograph of medical professionals in white coats and scrubs. One person in white scrubs is writing on a clipboard with a black pen. Another person in a white coat is holding a tablet. A third person in light blue scrubs is visible in the background. A purple semi-transparent box is overlaid on the right side of the image, containing the title text.

## Health and Dependent Care FSA Changes

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- With day cares being closed, many employees may want to change their dependent care FSA elections. Normally, employees would need a life event (such as divorce, marriage, etc.) to make a change, but new guidance now makes those changes possible without a life event.
- IRS Notice 2020-29 (Issued May 12, 2020)
  - Allowed employers to amend their FSA plans to allow employees to make prospective health and dependent care FSA contribution amount changes without a qualifying life event.
  - Required a plan amendment and applicable for 2020 only.
- Consolidated Appropriations Act, 2021 (CAA, 2021) (Signed into Law December 27, 2020)
  - Significantly expanded IRS Notice 2020-29

# Consolidated Appropriations Act

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- Allows employees to carryover unused health and dependent care FSA amounts from 2020 to the plan year ending in 2021 and further carryover of any remaining 2021 amount to the plan year ending in 2022
- Allows up to a 12-month grace period for 2020 and 2021 – normally 2 ½ months
- Allows midyear election changes in 2021 without a life event





# Consolidated Appropriations Act (continued)

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- For 2020 and 2021, allows terminated health FSA participants to continue to receive reimbursements through the end of the year during which they stop participating (including grace periods)
- Allows for an age increase from age 13 to 14 for an “eligible dependent” if the dependent otherwise would have exceeded the age 13 limit in 2020 and the employee participated in the dependent care FSA for 2020

# Partial Plan Termination Relief

# Partial Plan Termination Relief

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- Tax qualified retirement plans, such as 401(k) plans, may have a vesting schedule that must be met for employer contributions, such as an employer match.
- Such plans must be mindful of the partial plan termination rules.
- In general, Internal Revenue Code (“Code”) Section 411(d)(3) requires that the accrued benefits of affected participants must be fully vested on the date of a partial termination.
- A partial termination is presumed to occur if the turnover rate is at least 20%.
  - The turnover rate is determined by dividing the number of participating employees who had an employer-initiated severance from employment during the applicable period by the sum of all of the participating employees at the start of the applicable period and the employees who became participants during the applicable period. The applicable period is generally the Plan Year.

# Partial Plan Termination (continued)

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- Many employer sponsored retirement plans were facing partial plan termination concerns due to COVID layoffs.
- Consolidated Appropriations Act, 2021 Relief
  - A plan shall not be treated as having a partial termination during any plan year which includes the period beginning on March 13, 2020, and ending on March 31, 2021, if the number of active participants covered by the plan on March 31, 2021 is at least 80 percent of the number of active participants covered by the plan on March 13, 2020.





Bringing Employees  
Back

# Staged Returns

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- Consider your plan from an EEO perspective.
  - Are you favoring or disfavoring some protected group such as women, minorities, seniors?
  - Do you understand employee preferences?
    - Some parents may welcome returning to work while others may consider it a burden
  - Are you calibrating with local school schedules?
    - Schools with staggered schedules offer unique challenges for parents
  - How flexible are you going to be?
  - Can you initially solicit volunteers?

# No good deed goes unpunished . . .

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- Maintain and enforce safety protocols
- Document legitimate business reasons for choices about who gets ordered back
- Document rationale for limiting future telework based on business needs
- Remember, the flexibility you show today may be demanded by employees tomorrow



# Questions? Please let us know.

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