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STRATEGIC PERSPECTIVES—Teleworking arrangements prompted by COVID-19 might impact employers' income tax withholding and paid leave obligations

By Courtney B. Amelung, J.D.

In response to the COVID-19 pandemic, employers have modified the ways in which they conduct business. In particular, many employers have been required or made the decision—in response to gubernatorial orders and recommendations from the CDC—to close their physical premises and permit their employees to telework from their own homes or from other remote locations of their choosing, such as vacation homes and the homes of relatives. These new workplace arrangements may have an impact on various legal obligations with which multistate employers must comply, including income tax withholding requirements and mandatory paid leave benefits.

Because many employees have begun teleworking from a different state than the one in which they typically work, questions have been raised as to whether employers are obligated to adjust their withholding practices and source income based on where employees are teleworking during the pandemic. Similar questions have been raised as to whether employers must comply with paid leave requirements in the states from which their employees are teleworking. Such questions are further complicated by local income tax withholding requirements and leave laws in some states.

Income tax withholding

Withholding requirements for teleworking employees. To date, employers' withholding obligations have been addressed by only a handful of states. In Maryland, for example, the Comptroller of Maryland released guidance¹ advising that it will not impose additional employer withholding requirements for teleworking employees during the COVID-19 emergency. Taxability in Maryland (and in most states) is determined by an employee's physical presence in the state. Generally, Maryland imposes income tax, and therefore a withholding obligation on employers, for employees who are residents of the state of Maryland, regardless of where the

wages are earned. In addition, employers are required to withhold taxes from non-residents who receive income from work performed in Maryland.

According to the guidance issued by the Comptroller's Office, the Office has no intention of modifying the factors it typically considers when determining whether an employee's income is sourced in Maryland and, therefore, subject to withholding. Knowing that many businesses have been required to temporarily close their workplaces in response to the COVID-19 pandemic, however, the Office has advised that it will recognize the temporary nature of a business' teleworking arrangement and will not use these temporary measures to impose business nexus, to alter the sourcing of business income, or to impose additional withholding requirements on employers.

Although this announcement may be a reprieve for some employers, it is unlikely to impact employers who operate solely in the Baltimore-Washington metropolitan area. That is because Maryland has entered into reciprocity agreements with a number of neighboring states, including Virginia, the District of Columbia, West Virginia, and Pennsylvania, which exempt residents from those states from Maryland state income tax for services performed in Maryland. Nevertheless, this announcement will bring relief to employers that would have otherwise incurred taxes merely because employees are temporarily teleworking within Maryland in response to COVID-19.

Employers should anticipate that more state and local governments will address the implication of telework on employers' withholding requirements going forward.

Other states' approaches. Other states have responded similarly to the new teleworking arrangements brought about by the COVID-19 pandemic. For example, Mississippi,² New Jersey,³ Minnesota,⁴ Indiana,⁵ and North Dakota⁶ have issued guidance advising that employers should not adjust their withholding practices because of telework arrangements implemented in response to COVID-19. In other words, additional withholding obligations have not been imposed on employers with employees temporarily teleworking from these states as a result of the pandemic.

Ohio⁷ specifically addressed income tax withholding requirements in its COVID-19 relief legislation. Pursuant to that law, any employee who telecommutes from outside of a municipality from March 9, 2020, until 30 days after the Governor rescinds his emergency declaration order, will not count toward the minimum day count that triggers that municipality's income tax and, therefore, an employer's withholding obligation. During this timeframe, Ohio will consider employees to be working at their primary place of work, rather than telecommuting from a different location.

Similarly, Pennsylvania⁸ has said that an employee who normally works in Pennsylvania and earns Pennsylvania source income, but is temporarily working from another state due to COVID-19, will still be treated as having Pennsylvania-sourced income, even if the services are performed from out-of-state.

Massachusetts⁹ promulgated an emergency regulation which provides the same. In addition, the Massachusetts regulation provides that if a Massachusetts resident typically works out-of-state but is required to telework in Massachusetts due to the pandemic, that person will be eligible for a tax cut if he or she continues to incur income tax liability under the sourcing rules of the state in which he or she typically works. The employer of such an employee is also exempt from withholding requirements if it is required to continue withholding income tax in the other state.

The Michigan Department of Treasury¹⁰ has taken a different approach to withholding requirements. The Department has stated that a nonresident is not subject to a Michigan's city income tax on wages earned while the employee teleworks from outside that city. However, employees are obligated to allocate their wages between days they physically work in the city (which will be subject to the tax) and days they telework from home (which will not be subject to the tax). The Department of Revenue has recommended that employees and their employers keep records of the days worked outside of the city versus those worked inside.

Michigan's response may be one that more states consider as they begin to lift their stay-at-home restrictions and allow employees to return to their offices and other physical workspaces. Even as stay-at-home orders are lifted, however, employers will likely continue to allow their employees to telework on a permanent or sporadic basis throughout the pandemic and beyond. Accordingly, employers should anticipate that more state and local governments will address the implication of telework on employers' withholding requirements going forward. Consequently, employers should stay abreast of the different withholding requirements accompanying their new teleworkers.

Paid leave benefits

Another issue triggered by the COVID-19 pandemic is whether an employer is obligated to provide paid sick leave benefits to an employee who, because of the pandemic, is currently teleworking from a state that offers such benefits.

The Commissioner of Labor and Industry at the Maryland Department of Labor has informally advised that, with regard to the Maryland Healthy Working Families Act (which requires employers with 15 or more employees to provide paid sick and safe leave to certain employees), the obligation to provide such leave to employees temporarily teleworking in Maryland would depend upon the particular facts at issue.

Typically, the Department of Labor takes the position that the MHWFA applies to employees who spend the majority of their time working within Maryland. According to the Commissioner, whether an employee teleworking in Maryland on a temporary basis due to COVID-19 is

considered to be spending the “majority” of his or her time working in Maryland will be determined on a case-by-case basis.

Massachusetts,¹¹ which has a paid family and medical leave requirement, has more clearly advised that an individual who previously worked out-of-state, but is temporarily teleworking in Massachusetts due to the pandemic, will not become subject to the state’s paid family leave requirement. Likewise, an individual who previously performed services in Massachusetts but is temporarily working from home outside of Massachusetts solely due to COVID-19 continues to be entitled to paid family leave.

Is an employer obligated to provide paid sick leave benefits to an employee who, because of the pandemic, currently teleworking from a state that offers such benefits?

As with employers’ income tax withholding obligations, this is likely to be a subject that more states and municipalities with paid leave obligations address as employees continue to telework during the COVID-19 pandemic. Therefore, employers must stay up-to-date on any guidance that is issued which addresses employees’ eligibility for paid leave benefits.

Practical steps to ensure compliance

Employers navigating these issues should be sure to take the following steps to ensure compliance with the law:

1. Check applicable state and local laws regarding income tax withholding and paid leave benefits to determine whether they apply to teleworking employees;
2. Check your state or local government’s Department of Labor and/or Department of Revenue to determine whether it has issued guidance regarding the administration of income tax and paid leave benefits during the COVID-19 pandemic;
3. Make clear, preferably in writing, that any telework arrangements implemented in response to the COVID-19 pandemic are temporary, and that employees are expected to return to their normal work arrangements, including work location, as soon as the current state of emergency has ended;
4. Maintain up-to-date records of your employees’ telework locations and, where necessary, the days spent teleworking; and
5. Consult a local attorney with any questions concerning your compliance obligations.

About the author: [Courtney B. Amelung](#) is an Associate at Shawe Rosenthal LLP. She represents employers with regard to a wide range of labor and employment matters in court and before federal and state agencies, including the National Labor Relations Board, the Equal Employment Opportunity Commission, and the Department of Labor. She also prepares and revises employee handbooks, personnel policies, and employment agreements. Before joining Shawe Rosenthal, Amelung practiced at a regional civil litigation firm where her practice emphasized management-side employment and labor law, medical malpractice defense, and commercial and business litigation. She also served as a judicial law clerk for Magistrate Judge Beth P. Gesner in the U.S. District Court for the District of Maryland.

¹ Maryland Tax Alert 05-04-20, <https://www.marylandtaxes.gov/covid/documents/TaxAlert050420-EmployerWithholdingonTeleworkers.pdf> (last visited May 8, 2020).

² Mississippi Department of Revenue Response to Requests for Relief, <https://www.dor.ms.gov/Documents/COVID%20Extensions%20Press%20Release.pdf> (last visited May 8, 2020).

³ <https://www.state.nj.us/treasury/taxation/freqqite.shtml> (last visited May 8, 2020).

⁴ Minnesota Department of Revenue, COVID-19 FAQs for Businesses, <https://www.revenue.state.mn.us/covid-19-faqs-businesses> (last visited May 8, 2020).

⁵ <https://www.in.gov/dor/7078.htm> (last visited May 8, 2020).

⁶ <https://www.nd.gov/tax/covid-19-tax-guidance/> (last visited May 8, 2020).

⁷ House Bill 197, <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA133-HB-197> (last visited May 8, 2020).

⁸ https://revenue-pa.custhelp.com/app/answers/detail/a_id/3739 (last visited May 8, 2020).

⁹ 830 CMR 62.5A.3, *available at* <https://www.mass.gov/regulations/830-CMR-625a3-massachusetts-source-income-of-non-residents-telecommuting-due-to-covid> (last visited May 8, 2020).

¹⁰ City Income Taxes and Telecommuting FAQs, <https://www.michigan.gov/taxes/0,4676,7-238-73294-522100--,00.html> (last visited May 8, 2020).

¹¹ Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic, <https://www.mass.gov/technical-information-release/tir-20-5-massachusetts-tax-implications-of-an-employee-working#v-paid-family-and-medical-leave> (last visited May 8, 2020).