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PAUL J. HARTMAN
STATE AND LOCAL TAX FORUM

VANDERBILT UNIVERSITY LAW SCHOOL

Managing the Risks of a Remote Workforce


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Kelvin M. Lawrence, Esq.
Partner, Dinsmore & Shohl LLP
Columbus, OH

Kimberly Magner
Vice President, Corporate Taxes, JM Family Enterprises, Inc.
Deerfield Beach, FL


Mark W. Yopp, Esq.
Partner, Baker & McKenzie LLP
New York, NY



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Agenda

- Background
 - Withholding Solutions: Legal Framework
 - Withholding Solutions: Compliance Challenges
 - Managing Income Tax, Sales Tax, and Non-Tax Implications
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Background

- General Income Tax Withholding Principles
 - States may generally tax nonresident wages paid for services performed in state, and all resident wages (with a credit for taxed paid elsewhere)
 - In-state employers generally required to withhold income tax on wages paid to employees – typically with personal liability
 - Some states impose thresholds before withholding is required
 - States often enter reciprocity agreements by which employers may be exempted from withholding for certain nonresidents
 - Federal tax rules and treaties govern U.S. employer withholding on U.S. persons abroad and foreign nationals in the U.S.

Background

- Pre-COVID: Employers Often Faced “Mobile Workforce” Issues:
 - Income tax withholding on truly multistate employees, professional athletes, performers, etc.
 - Nonresident employees in taxing state for discrete, relatively short periods
 - Deferred compensation, stock options for former or statutory residents

Background

- Special Rules During the COVID-19 Pandemic
 - Rules Changed – Remote Work Normalized; Maintain the *Status Quo Ante*, Regardless of Where Working (e.g., AL, GA, NJ)
 - Typically limited to period of mandatory government orders or medical diagnosis and quarantine
 - Some included a trailing grace period
 - Local taxes also implicated: e.g., Ohio municipal income tax litigation

Background

- Special COVID-19 Pandemic Rules
 - Rules Didn't Change – Withhold Where Actually Working (e.g., S.B. 484 in AR)
 - Subject to other applicable law, thresholds, and reciprocity agreements
 - Some states allowed penalty abatements for employers (e.g., IL)
 - Many states offered no formal guidance

Background

- Post-Pandemic: “Back to the Future”
 - “Traditional” Mobile Workers
 - Executives & Highly-Compensated Workers
 - Fully Remote and Hybrid Work
 - Includes FLSA non-exempt employees
 - May include exempt workers on holidays, vacation, and PTO

Withholding Solutions: Legal Framework

- Mobile Workforce Legislation
 - Federal Legislation
 - Mobile Workforce Coalition
 - Versions passed House three times
 - Remote and Mobile Worker Relief Act, S. 1274, introduced Apr. 21, 2021, referred to Senate Finance Committee
 - MTC Model Act
 - Approved by MTC in 2011
 - Adopted by North Dakota

Withholding Solutions: Legal Framework

- Mobile Workforce Legislation
 - COST Model Act
 - Focus on state enactments since federal proposals stalled
 - Some states have adopted with modifications (e.g., WV)
 - AICPA
 - Sent 2020 letter with COST and 45 State CPA associations to Congress supporting the federal Remote and Mobile Worker Relief Act; longstanding support for federal law
 - Advocated for “status quo” position during COVID-19 pandemic for withholding and P.L. 86-272 applicability

Withholding Solutions: Legal Framework

- Rules in Implicated Jurisdictions: Nonresident Withholding
 - Nonresident day-counting thresholds (e.g., Arizona, Connecticut, Georgia,* Hawaii, Illinois, Louisiana, New Mexico, North Dakota, Utah,* West Virginia)
 - After crossing threshold, withhold back to day one?
 - Nonresident dollar, activity, or other thresholds (e.g., Georgia*)
 - Reciprocity agreements

Withholding Solutions: Legal Framework

- Rules in Implicated Jurisdictions: Nonresident Withholding
 - Apportionment
 - Special Nonresident Credit (AZ, CA, IN)
 - “Convenience of the Employer” Rule (CT, DE, NY)
 - Retiree Compensation & 4 U.S.C. § 114
 - Local Income, Payroll, and Other Taxes

Withholding Solutions: Legal Framework

- Rules in Implicated Jurisdictions: Resident Withholding
 - Often unclear from statute and lacking regulations; state's policy or administrative interpretation often applied
 - May not be required for services performed in another state (e.g., Idaho), or if not subject to withholding in work state (e.g., Georgia)
 - Often required if residence state rate exceeds work state rate and employer has nexus (e.g., New York)

Withholding Solutions: Legal Framework

- Rules in Implicated Jurisdictions: Other Law
 - Employment Laws
 - Unemployment Insurance
 - Uniform Federal Sourcing Rules:
 - Localization of services
 - Base of operations
 - Place of direction or control
 - Place of residence
 - Workers' Compensation

Withholding Solutions: Implementation

- Examine Remote Work Policies and Procedures
 - What rules do we want?
 - Who do we want subjected to which rules?
 - How do we communicate that message?
- Worker Census
 - Classes of workers
 - Residency of workers
- Jurisdiction-Specific Rules Implicated

Withholding Solutions: Implementation

- Technological Limitations
 - Worker location & time tracking, reporting, and policies
 - Internal and third-party payroll software
- Personnel Responsible
 - Setting up internal systems – HR, Payroll, Tax, IT involved
 - Interface with third-party payroll and software providers, state agencies
 - Ongoing compliance, monitoring, and reporting; not a “fix it and forget it” solution

Landscape of Remote Work Changing

- Workforce
 - 3 in 5 workers who worked remotely during the pandemic would prefer to continue working remotely.¹
 - 60% of workers say that they are confident they can efficiently do their job remotely²
 - 50% of workers believe they are equally or more productive working from home than at the office³


¹Megan Brenan, "[U.S. Workers Discovering Affinity for Remote Work](#)" *Gallup*, April 3, 2020; ^{2,3}Roy Maurer, "Majority of Employees Embrace Remote Work," *SHRM*, April 22, 2020.

Landscape of Remote Work Changing

- Employers
 - Nearly 3 in 4 CFOs plan to shift at least 5% of previously on-site employees to permanently remote positions post-COVID 19¹
 - Nearly 1 in 4 CFOs plan to shift at least 20%²
 - 38% of organizations have increased remote work opportunities to redesign work around well-being³

^{1,2} Justin Lavelle, "[Gartner CFO Survey Reveals 74% Intend to Shift Some Employees to Remote Work Permanently](#)" *Gartner*, April 3 2020; ³ Deloitte HC Trends 2020 "<https://www2.deloitte.com/us/en/insights/focus/human-capital-trends.html>" *Gartner*, May 18, 2020

Non-tax Issues

- Financial modeling and accounting
 - HR Compliance
 - Immigration
 - Real estate and office planning
 - Talent scouting and retention
 - Safety, security and privacy
 - IP & Data Security
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Corporate Tax Issues

- Income Tax
 - Nexus & P.L. 86-272
 - Apportionment
 - Credits and Incentives
- Sales and Use and other Transactional Taxes
 - Nexus
 - Increased Filings and Compliance
 - Sourcing

Nexus and PL 86-272

- Out-of-state employers should consider whether an employee working from home will create nexus or exceed Public Law 86-272 protection.
- This can trigger potential income tax issues, and can be particularly problematic in combined return states.
- Although during the height of the pandemic, many states, either directly or indirectly, granted some leniency with respect to remote work, that is likely over.

Apportionment

- Employers should consider whether an employee working from home will impact the employer's apportionment factor.
- Potential apportionment factor issues:
 - Sales factor
 - » Does the state source service receipts based on cost of performance? If so, an employee performing services in the state could impact the apportionment factor.
 - Payroll factor
 - » Does the state's apportionment factor include a payroll factor? If so, an employee working in the state could impact the apportionment factor.

Credits and Incentives

- Many credits and incentives depend upon workforce location.
- As workforce distribution begins to change, companies should be careful that they are meeting whatever requirements are in place for their incentives.

Transactional Tax Issues

- The movement of employees may change how and where the company is taxed.
 - Post-*Wayfair*, local taxes may be the most important issue here
- Increased compliance, e.g., filings and audits, have significant consequences.
- Workforce may change sourcing of transactions, e.g. multiple points of use (MPU) sourcing.

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Questions?



Kelvin M. Lawrence

Dinsmore & Shohl LLP
191 West Nationwide Blvd, Ste. 200
Columbus, OH 43215
(614) 628-6964
Kelvin.Lawrence@Dinsmore.com

Kimberly Magner

JM Family Enterprises, Inc.
150 Jim Moran Boulevard
Deerfield Beach, FL 33442
(954) 420-3304
Kim.Magner@jmfamily.com

Mark W. Yopp

Baker McKenzie LLP
452 Fifth Avenue
New York, New York 10018
(212) 626-4552
Mark.Yopp@Bakermckenzie.com

