

# Multistate Compliance for Employers With Out-of-State Remote Employee

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The COVID-19 pandemic has shifted a number of previously in-person positions to remote work and telecommuting. In the meantime, many employees have moved out of state from their usual office locations for personal or financial reasons. As a result, many employers are left wondering what their legal obligations are for remote employees working out of state. The biggest concerns are local employment laws, workers' compensation insurance, and unemployment insurance obligations. Employers may also be subject to [out-of-state payroll tax obligations](#). Remote and telecommuting employees may also create sufficient nexus to establish that a nonresident employer is doing business in that state and is subject to state taxes such as corporate income tax, franchise tax, and sales and use tax, which is beyond the scope of this article.

## Local Employment Laws

Remote employees are generally subject to the laws of the city and state where they are physically located and perform work. Depending on state law and conflict of law principles, there may be exceptions for employees who are temporarily located in a state or not considered "based" within a state. With employees working remotely outside their usual office locations, employers may need to familiarize themselves with the state and local employment laws of other jurisdictions. Failure to comply with state and local posting requirements, leave entitlements, wage and hour laws, etc. can result in liability for lost wages, penalties, noneconomic damages, and attorneys' fees.

In some situations, the law of the remote employee's state may be more favorable than that of the employee's usual office location. For example, a private-sector Idaho employee who would not otherwise be entitled to sick leave may be entitled to paid sick leave if he or she worked remotely in Seattle for more than 240 hours during the year. That equates to roughly six weeks of full-time work; employees working remotely in Seattle since the pandemic began are far past that six-week mark.

State and local leave law entitlements also vary depending upon the number of employees within the state, duration of leave, and type of leave available. Wage and hour laws vary by state and may offer more generous minimum wage, overtime, and rest and meal break benefits. Employers may want to keep track of where their remote employees are working in order to determine whether state laws outside of employees' home offices apply. Employers may also consider tracking remote employees' hours of work to comply with [U.S. Department of Labor \(DOL\) guidance](#).

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## Workers' Compensation

Workers' compensation insurance provides benefits for injured workers and is generally required for most employers with some limited exceptions depending upon state law. When employees travel across state lines to work remotely in other locations another state's workers' compensation laws may apply. Uninsured employers of injured workers can generally face criminal and civil penalties, including liability for lost benefits and attorneys' fees.

Generally, employers are required to have workers' compensation coverage where the employee's work is localized. 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. States may apply different tests for determining workers' compensation applicability. When an employee regularly travels to several states to perform work, the determination becomes more complex. In most cases, remote employees will be considered localized in the state where they work remotely. Given these nuances, employers may want to seek out guidance on workers' compensation requirements for remote employees.

Public, private, and self-insured workers' compensation coverage obligations vary by state law. Some states have reciprocal agreements with other states about when and how they accept out-of-state workers' compensation insurance. These reciprocal agreements allow employers to bring employees temporarily into state from the reciprocal state without purchasing in-state workers' compensation insurance. Employers that wish to take advantage of reciprocity will generally need to obtain extraterritorial coverage from their existing insurers and provide proof of same to the remote employee's state agency. Employers may wish to determine whether extraterritorial coverage requirements apply in addition to considering employment practices liability and/or directors and officers liability insurance policies to avoid gaps in coverage.

## Unemployment Insurance

With respect to unemployment insurance, the state in which wages must be reported and unemployment tax is due might change as a result of remote work. The DOL's [Localization of Work Provisions](#) created a uniform four-factor test to determine to which state wages should be reported and unemployment insurance tax paid. The objective of the DOL's provisions is to simplify reporting of wages, allocate employee's wage credits to the state where the individual is most likely to become unemployed, and avoid dividing the employment of the individual among the states where services are performed.

The test considers localization (where services are performed), base of operations (established location where work begins and ends), place of direction and control (where direction and control emanate from), and residence of the employee. The test is applied in a "waterfall" approach with the first factor answered affirmatively to be dispositive. For example, a determination of localization where services are performed exclusively in Oregon sets Oregon as the reporting state for wages and payment of unemployment tax and requires no further analysis of the remaining factors.

Evaluating the four-factor test in the context of COVID-19 creates some unique challenges—namely, whether remote work performed in another state as a result of the pandemic is considered incidental or temporary compared to the work the employee typically conducts in the original state. In determining whether services are incidental or temporary state agencies that apply the Localization of Work Provisions consider the following factors: (1) intention of the employer and the employee that

the service “be an isolated transaction or a regular part of the employee’s work;” (2) intention of the employee to “return to the original state upon completion of the work” or “continue to work in the other state;” (3) whether the work performed “outside the state [is] of the same nature as” or “different from, the task and duties performed within the state;” and (4) “length of service with the employer within the state compare[d] with the length of service outside the state.”

Employees working remotely for the limited duration of government mandates to slow the spread of COVID-19 have a greater chance of being considered incidental or temporary compared to employees who have shifted to permanent remote work environments. Employers may want to conduct a fact-intensive review of these factors to determine the status that may apply to each employee who is working out of state. Employers may also want to consider revisiting or adopting remote work policies that address the duration and frequency of remote work compared to office work in the original state.

## Key Takeaways

Employers may want to take several steps to monitor compliance issues:

- Conducting an audit of employees to determine who is working remotely out of state
- Developing and maintaining a robust remote work policy
- Considering consulting insurers to seek extraterritorial insurance coverage

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