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CONTINUING LEGAL EDUCATION SEMINAR

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Work in the Post-Pandemic World: Legal Considerations

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Today's Agenda

Employment Law Issues in the Post-Pandemic Workplace

Data Privacy and Cybersecurity Issues in the Post-Pandemic Workplace

Multijurisdictional Tax Issues in the Post-Pandemic Workplace

About this presentation

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Multistate Tax Issues in the Post-Pandemic World

- Key Issues: Withholding and Nexus
- Multi-State Income Tax Withholding
- Background: Nexus Concepts
- Corporate Income & Franchise Taxes
- Local Taxes

Multi-State Income Tax Withholding





General Principle: Employers Must Withhold


- Resident taxation vs. nonresident taxation
- States generally require every employer paying wages in the state to withhold tax from compensation paid to an employee for services rendered in the state.
- Exception: Reciprocity Agreements
 - No "Work State" Withholding if Employee Provides Valid Exemption Certificate
 - Withholding Residence State Tax
- Exception: Dollar or Day Thresholds
- Exception: "Convenience of the Employer"
 - *Zelinsky v. Tax. App. Trib.*, 801 N.E.2d 840 (N.Y., 2003)

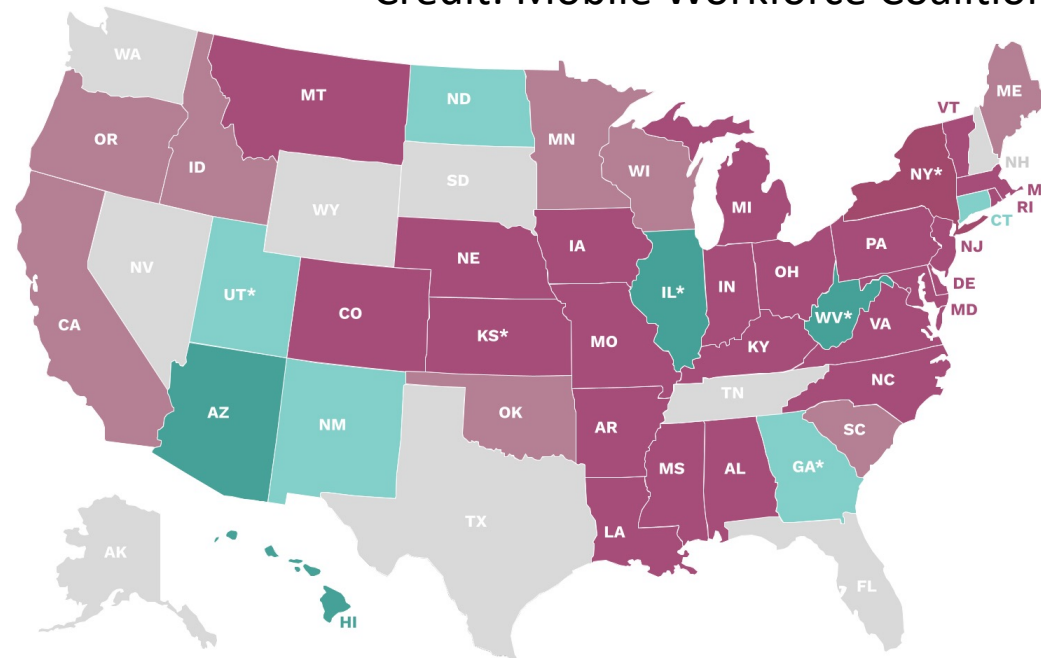
Multi-State Income Tax Withholding

Credit: Mobile Workforce Coalition

Which states are the most friendly to mobile workers and their employers?

-  **Very Friendly.** State allows employees to work within the state for 30 or more days before employer is subject to withholding (AZ, HI, IL, WV).
-  **Moderately Friendly.** State allows employees to work in the state between 15 and 29 days before employer subject to withholding (CT, GA*, NM, ND), or has other accommodating provisions (UT*).
-  **Unfriendly.** State only allows employees to work in the state between 2 and 14 days before employer is subject to withholding (ME), or has a wage-based threshold (CA, ID, MN, OK, OR, WI).
-  **Very Unfriendly.** State requires employer withholding on first day an employee works within the state (24 states), or requires an individual to file on first day even if employer isn't required to withhold on first day (NY).

 Not applicable. No state income tax.



Notes: Data as of May 2021. In **Georgia**, employer must withhold if the employee is in the state for more than 23 days in a calendar year, or if \$5,000 or more or 5% or more of total income is attributable to Georgia. In **Illinois**, the 30-day threshold applies for tax years beginning after December 31, 2020 (this is the result of legislation enacted in 2019). **West Virginia** lawmakers enacted HB 2026 in 2021, imposing a 30-day threshold. This takes effect on June 28, 2021. In **Utah**, employer must withhold if the employer (not the employee) does business in the state for more than 60 days in a calendar year. ***Kansas** considered 30-day legislation in 2020.

Multi-State Income Tax Withholding

Do I Have to Withhold?

- Am I “doing business” in this state?
- Does the state have a dollar or day threshold?
- Does the state employ the “convenience of the employer” test?

Multi-State Income Tax Withholding

Do I Have to Withhold?

- Has the state issued special COVID-19 guidance?
- *New Hampshire v. Massachusetts*, Motion for Leave to File a Bill of Complaint, Original No. 154, No. 22O154 (Motion Denied, Jun. 28, 2021)
- Corporate officer penalties or liability for failures

Multi-State Income Tax Withholding

Do I Have to Withhold?

- Legislative Proposals:
 - Remote and Mobile Worker Relief Act of 2021 (S. 1274, proposed)
 - Pre-pandemic work location sourcing for 2020 and 2021; 30-day *de minimis* standard for 2022 and later
 - Multi-State Worker Tax Fairness Act (S. 1887, proposed)
 - Proposed physical presence standard for withholding
- If I withhold, do I have to pay Unemployment Tax?

Practical Questions

How Am I Supposed to Know Where They Are???

- Agreement with Taxing Authority
- Software Gathering Data Incidentally
- Tracking Software – Legality Concerns
- Payroll System Limitations
- Deferred Compensation

Background: Nexus Concepts

Nexus: connection to a state that allows that state to impose tax obligations

- Due Process Clause
 - "some definite link, some minimum connection, between a state and the person, property or transaction..." *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954).
 - "Purposeful availment" of state market. *Quill Corp. v. N.D.*, 504 U.S. 298, 307-308 (1992).
- Commerce Clause
 - State action cannot unduly burden interstate commerce
 - State action cannot discriminate against interstate commerce

Background: Nexus Concepts

Must I Collect or Pay Sales/Use Tax?

- Physical Presence Was the Standard for 50+ Years
- *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018)
 - Overruled *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), eliminated physical presence standard
 - Did not set new standard
 - Undue burden on interstate commerce not permitted
- Many states adopted South Dakota's standards:
 - \$100,000 in sales into the state; or
 - 200 discrete transactions with customers in the state
- What about physical presence?

Corporate Income & Franchise Taxes

If I Withhold, Must I Pay Corporate Net Income Tax?

- States long asserted *Quill* did not apply to income tax
- P.L. 86-272 Limitations
 - Prohibits state net income tax where activities limited to:
 - Solicitation of orders for tangible personal property
 - Orders accepted and fulfilled out-of-state
 - Is it a net income tax?
 - MTC Revised 2021 Position Statement

Corporate Income & Franchise Taxes

If I Withhold, Must I Pay Corporate Net Income Tax?

- “Doing Business” Standard
- “Factor Presence” Standard
 - Factors traditionally used to apportion income
 - Generally presence in the state of:
 - Property of \$50,000;
 - Payroll of \$50,000;
 - Sales of \$500,000; or
 - Or 25% of any one factor
- Special COVID-19 Guidance

Local Taxes

Must I Withhold?

- Tax on Entity, Withholding Tax, or Both?
 - “Doing Business” defined under local law?
 - With whom do you file the return?
- Regional States with Local Income Taxes
 - Kentucky
 - Pennsylvania
 - Michigan
 - Indiana
 - West Virginia
 - Ohio

Local Taxes

Must I Withhold?

- Withholding Limitations from State Law
 - Ohio pre-pandemic 20-day rule
 - Ohio H.B. 197
 - Sourced to Work City for 30 Days after Governor's Order
 - Withholding Rule or Taxability Rule? Refunds?
 - *Buckeye Institute* Lawsuits
 - Ohio H.B. 110: Withholding Rule & Penalties
 - Return to 20-day rule for 2022
- Other Limitations from Local Ordinance

Questions?



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