



ask



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**Dear HR Knowledge:** We are considering having work-from-home locations even after the pandemic; what should we be thinking about from a payroll, benefits, and HR perspective before we make this decision?

The significant increase of remote workers because of the COVID-19 pandemic has created unanticipated new challenges, particularly as businesses consider the longevity of telecommuting arrangements. In fact, some companies are grappling with whether to keep their worksites remote altogether. There are many factors that will need to be considered for remote employees.

#### **Payroll and Wage Considerations**

**Payroll Requirements:** If a remote employee is located in a state in which your business previously did not register for payroll taxes, you may need to register and file for withholding and unemployment taxes. The general rule of thumb is that the employees must pay taxes to the state where they are located and where the work is carried out; known as the “physical presence” rule, this rule requires you to withhold state and unemployment taxes in the state where your remote staff members work. Companies should stay up to date with applicable [state and local tax rates](#), as well as general payroll guidance including:

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- [Pay Frequency](#)
- [Direct Deposit Requirements](#)
- Vacation Payout Requirements and [Final Pay Guidelines](#)
- Information that must appear on paystubs (for example, paid time off balances)

**Minimum Wage:** In most cases, [minimum wage](#) is determined by the jurisdiction in which an employee performs the work. If more than one law covers a worker, normally the more generous law would apply.

**Fair Labor Standards Act (FLSA)/Overtime Obligations:** Your employee may have been exempt under the federal FLSA, but now you need to consider if they are exempt under the wage and hour laws of the state in which they are regularly working. In addition, state laws vary regarding [overtime pay obligations](#), and they also may exceed federal requirements. Businesses may discipline employees for violating overtime policies (for example, not obtaining manager approval prior to working overtime), but employers can never withhold overtime pay.

**Commission Obligations:** These are also state-specific guidelines for payment of commissions.

**Wage Theft Requirements:** Some states and localities have legally mandated wage theft ordinances (wage theft means denial of wages or benefits rightfully owed to an employee) that are different and may require special information that must be included on paystubs; employers need to ensure they are complying with state, city, and local laws.

**Meal & Rest Break Obligations:** These are also state-specific guidelines for meal and rest breaks.

### Workplace HR Compliance Considerations

**Paid Sick Leave or State Family and Medical Entitlements:** These programs will differ depending on the state or local law, the amount of time an employee spends working in the state, and potentially the dollar amount an employee has contributed to a program via payroll tax. Keep in mind that the employee count (and how employees are counted) may affect governing laws. Do not forget about local ordinances such as time off for voting, small necessities leave laws, domestic leave laws, mandatory PTO.... the list goes on and on.

**Federal and State FMLA Considerations:** Keep in mind that eligible, remote employees must be permitted to take any required leave under the federal Family and Medical Leave Act (FMLA). According to FMLA regulations, an employee's personal residence is not considered a "worksite." In the instance of a remote employee, a worksite "is the office to which the employee reports and from which assignments are made." Many states have stronger requirements above and beyond the federal FMLA and you need to ensure that the local law applies to that employee.

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**Anti-Harassment Training:** While having an anti-harassment policy is certainly best practice, it is also a requirement in many states. Additionally, many states require specific information, language, and training to be incorporated into their company policies. [See HRK's Guide to Sexual Harassment Prevention for Employers.](#)

**Workplace Employee Notices:** Many federal, state, and local employment laws require an employer to display posters outlining an employee's rights. The Department of Labor (DOL) recently outlined guidance regarding electronic distribution of labor law notices; see HRK's summary of that guidance [here](#).

**Employee Handbook Updates:** The line between work and personal may become blurred when an employee uses the same location for both purposes. To avoid any confusion, employers will want to set clear guidelines around the job duties and work hours of their remote employees.

**Noncompete/Arbitration Agreement Laws:** Some jurisdictions, such as Illinois, New Jersey, and New York City, have sought to prohibit noncompetes for low-wage employees. The Massachusetts law bans noncompetes for employees who are classified as "nonexempt" under the FLSA. These laws are driven by where the employee is located and working. In addition, many states have arbitration agreement clause laws; employers need to be sure they understand where their employees are working and address those employees' agreements based on that information.

#### **Other Tax and Operational Considerations**

**Business License Requirements:** Employers will need to confirm if the jurisdiction the employee is working from requires the business to have a general business license on behalf of the company; in addition, some states and cities require home occupation permits for the remote employee. It is important to check county zoning or local city laws where your remote employees are operating to see whether a permit for remote workers is required.

**Employee Benefits:** Companies with employees in multiple states face challenges when it comes to offering health insurance coverage. Currently five states (Massachusetts, New Jersey, Vermont, California, and Rhode Island), as well as Washington, DC, have an individual mandate at the state level, and the list is growing. State individual mandates mean not only that employees may pay a penalty for not having coverage; the mandates also impact an employer's state reporting obligations. In addition, there may be city-level requirements within a particular state. For example, San Francisco, where employers are subject to the San Francisco Health Care Security Ordinance, requires covered employers to satisfy an employer spending requirement by making health care expenditures for their covered employees, among other reporting and notice requirements.

**Providing Employees with Tools and Equipment:** Some states have a requirement that an employer

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pay the cost of providing certain tools and equipment (either a requirement that the employee not be held responsible for the cost, or a specific requirement that the employer reimburse the employee or provide them with the tools or equipment).

**State and Local Tax Implications:** Doing business in an alternative state(s) may subject the employer to that state's various tax requirements, including income, gross receipts, sales and use taxes, and unemployment. With respect to income taxes, many states, like Maryland, follow the [183-day rule](#) that serves as a guideline for determining employee tax residency — meaning a state with a 183-day residency rule will consider the employee a full-year resident for tax purposes if they spent more than half the year there.

Normally, the employer's state tax withholding obligation is owed to the jurisdiction where the work is actually performed. However, this general rule is subject to several exceptions, including state-to-state reciprocity agreements and other considerations. Some states have temporarily waived certain tax obligations for out-of-state employers with employees *temporarily* working remotely because of the pandemic. However, even in those states, the "home state" employer may still have to withhold and remit foreign-state income taxes on behalf of their out-of-state employees. Employers need to be aware of [State and Local tax requirements](#).

**Expense Reimbursement:** In an office environment, employers typically provide what employees need to complete the job. The opposite may be true in a remote work environment, where employees must provide what they need to do the work. Employers should determine everything employees need to work remotely, taking into account demands on productivity, and then decide whether to provide it or reimburse employees for it.

**Workers' Compensation:** States generally require that an employer obtain workers' compensation insurance where the employee is performing the services.

**State Unemployment Insurance (SUI) Tax:** There are several factors that should be considered when determining the correct state for Unemployment Tax:

1. **Localization of Services:** Where the employee works the majority of the time
2. **Base of Operations:** Where the employee has a base of operations, and performs some services
3. **Place of Direction and Control:** Where the employee receives direction and control from the employer, and performs some services
4. **Residence:** Where the employee resides, and performs some services
5. **Reciprocal Agreements:** If the states [have reciprocity](#), the employer can choose the state of coverage

## What Can Businesses Do to Stay Compliant?

As we've shown here, the "remote" solution can present a myriad of unanticipated issues. As an employer, you need to be prepared to take on all of the required compliance obligations. Here are HRK's suggestions to remain in compliance:

- Ensure you know where your employees are working. It may be time to resurrect the seldom-enforced policies that require employees to notify their employer of a change of personal information. Businesses could find themselves in hot water if they do not keep track of their employees' offsite work locations. It is prudent for employers to create and publish policies of where their employees can and cannot work, based on where the business is licensed.
- Establish a framework. Employers need to enter into remote employee agreements with eyes wide open and understand all the complications and compliance requirements created when an employee works outside the employer's primary state. Employers will want to create solid remote work policies and time and attendance policies, as well as understand the cybersecurity risks in managing remote workers. This Ask HRK only touches on the basics of what a business needs to consider with a remote workforce. It is not an all-inclusive list, although it certainly highlights the need for employers to not make these decisions in a vacuum. The transition to remote workplaces will depend on a variety of factors, including an employer's size, location, organizational structure, and industry. Employers who are proactive and prepared can maintain or even improve employee morale and productivity; it will take a well-trained leadership team to successfully manage a fully remote workforce.
- Continue to monitor guidance. Remote work has created tax compliance risks for employers. Understand that this is not an exact science and there is not necessarily an exact formula for all circumstances. We advise you to speak with your payroll providers, accountant, and HR consultants for complex issues.

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