



ADJUSTING TO THE TELEWORKING ENVIRONMENT: TAX AND EMPLOYMENT LAWS TO CONSIDER

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Meet the Speakers



- ▶ **Thomas L. McCally** is an Equity Partner and has over 25 years of experience as a litigator, business advisor, and outside general counsel across a variety of industry groups for nearly every issue in business law and commercial litigation, employment and labor law, complex litigation, class actions, multidistrict litigation (MDL), civil rights, non profit, and religious institutions practice. As the lead Partner for Carr Maloney's Employment and Labor Law Practice Group, Tom regularly represents clients in Federal and State courts as well as practices before the EEOC and state/local EEO agencies across the Mid-Atlantic region.

D: 202.310.5506

E: Thomas.mccally@carrmaloney.com

Meet the Speakers



- ▶ **Judith P. Barnhard CPA, CFP®, CDFA®** is a Senior Vice President at Councilor, Buchanan & Mitchell, P.C. She chairs the firm's professional services committee and has been a key member of the firm's financial planning practice since the consultancy she co-founded, May & Barnhard, merged into CBM in 2017. With 35+ years of experience delivering accounting, tax, financial planning and advisory services, Judy is also a frequent speaker on emerging concerns including the impact of remote work on businesses and employees, Paycheck Protection Program loan forgiveness and the SECURE Act. Judy is a Certified Public Accountant, a Certified Financial Planner™ and a Certified Divorce Financial Analyst.

D: 240.781.6201

E: jbarnhard@cbmcpa.com

How COVID Temporary Shelter in Place Rules Will Affect Businesses

- ▶ Can Remote Employees Trigger Nexus with Another State?
 - ▶ Nexus determines whether a business must pay, collect and remit tax in another state or tax jurisdiction.
- ▶ What Creates Nexus Within a State
 - ▶ Economic Nexus
 - ▶ Physical Presence
 - ▶ Legality of taxation
 - ▶ U.S. Constitution
 - ▶ 2018 U.S. Supreme Court decision South Dakota v. Wayfair
 - ▶ Public Law 86-272

What is the Home Office “Convenience of the Employer Test”?

- ▶ If the work is performed at the home office that could just as easily have been performed at the employer’s office, then it is for the employee’s convenience and not for the employer’s necessity.
- ▶ The Nexus is the business location and not the home office state.
- ▶ In order for the Nexus to be the employee’s home office, generally there must be a compelling reason to work from that location; e.g. proximity to specialized facilities or other effort to treat the home office as a bona fide office of the business.
- ▶ Where the employee officially works may also impact their ability to be reimbursed for home office-related expenses.
 - ▶ The 2017 Tax Cuts and Jobs Act eliminated the deduction for unreimbursed business expenses as a miscellaneous itemized deduction.

How COVID Temporary Shelter in Place Rules Will Affect Employees

- ▶ When a person lives in one state and works in another, they may incur tax liabilities in both states.
- ▶ Seven states tax people where their office is located, even if they do not actually work in the state.
- ▶ So-called convenience rules apply to Arkansas, Connecticut, Delaware, Nebraska, New York, Pennsylvania and, recently, Massachusetts.
- ▶ This can trigger double taxation for individuals.
- ▶ Fortunately, most states allow for a credit to be taken on their state return for taxes paid to another state.

Economic Nexus & Physical Presence

▶ Economic Nexus

- ▶ Requisite minimum contact with the state
 - ▶ Some states have a bright line revenue test
 - ▶ Ex: California – \$601,967, Connecticut - \$500,000, New York - \$1 Million
- ▶ Generating revenue within the state
- ▶ Most states are using the economic nexus

▶ Physical Presence

- ▶ Company location (brick and mortar)
- ▶ Remote employee working from their home in the state
- ▶ Would a telecommuter create physical nexus given the shelter in place orders?

Are There Standard Rules Among States?

- ▶ Each state has its own set of rules and threshold
- ▶ Due diligence to be complying



Types of Taxes and Withholdings for the Employer:

- ▶ Payroll taxes (FICA, Medicare, FUTA)
- ▶ Federal and state/local withholdings
 - ▶ Threshold for withholding varies widely amongst states.
 - ▶ 41 states impose a personal income tax
- ▶ State unemployment
 - ▶ Four-prong hierarchy to determine the state where unemployment is paid.
- ▶ Workers compensation
- ▶ Exception - reciprocal payroll tax agreements

What is a Reciprocal Payroll Tax Agreement?

- ▶ An agreement made between neighboring states that would establish that the employee's income would only be taxed in one state, normally being the employee's residential state



Reciprocal Agreements:

- ▶ **Washington DC:** Maryland and Virginia
- ▶ **Maryland:** Pennsylvania, Virginia, Washington, D.C. and West Virginia
- ▶ **Virginia:** Kentucky, Maryland, Pennsylvania, Washington, D.C. and West Virginia
- ▶ **Pennsylvania:** Indiana, Maryland, New Jersey, Ohio, Virginia and West Virginia
- ▶ **West Virginia:** Kentucky, Maryland, Ohio, Pennsylvania and Virginia

Other Types of Business Tax:

- ▶ State and local business income tax
- ▶ Sales tax
- ▶ Personal property tax
- ▶ Gross receipts tax



How Do you Determine Revenue to that State?

- ▶ Apportionment method
 - ▶ Allocation of income among states by using a formula containing apportionment factors
 - ▶ **Types of Apportionment:**
 - ▶ Equally weighted three factors: sales, property and payroll
 - ▶ Three factors with heavier weighting of the sales factor
 - ▶ Single sales factor
 - ▶ States may define factors differently
- ▶ Separate accounting method or alternative apportionment formulas
 - ▶ May be permitted due to certain circumstances
 - ▶ Varies from state to state

Apportionment Method Around DMV:

- ▶ **Maryland:**

- ▶ Three factors, phase in over five years to single sales factor by 2022

- ▶ **District of Columbia:**

- ▶ Single sales factor
 - ▶ Two factors (sales and payroll) for financial institutions and transportation companies

- ▶ **Virginia:**

- ▶ Three factors with double weighted sales
 - ▶ Single sales factor for specific industries

Other Issues to Consider:

- ▶ State business registrations
- ▶ Local registrations
- ▶ DC - register your home office



Remote and Mobile Worker Relief Act of 2020 (S.3995)

- ▶ This bill was introduced into Congress on June 18, 2020. The bill provides relief to remote workers by protecting employees who have been working remotely due to the COVID-19 “shelter-in-place” order, to make sure they continue to have their income taxed as if they were still going to their physical office every day.
 - ▶ Through December 31, 2020, this prohibits the imposition of state income tax and withholding for employees temporarily working in a state due to COVID-19 for less than 90 days.
 - ▶ Provides nexus relief for purposes of imposition of state business taxes due to employees temporarily working in the state.

Health, Economic Assistance, Liability Protection, and Schools Act 2020 (S.4318)

- ▶ Exempts employers from liability under federal labor and employment laws for actions to comply with public health guidelines.
- ▶ Includes a temporary provision which partially restricts double taxation through 2024.
- ▶ Remote employees would only be subject to income tax in their state of residence and in any states where they work for more than 90 days during calendar year 2020 and for more than 30 days during calendar years 2021 – 2024.

Multi-State Worker Tax Fairness Act of 2020 (H.R. 7968)

- ▶ Introduced by the House Judiciary Committee in August, 2020.
- ▶ The bill limits the authority of a state to impose its income tax on the compensation of a nonresident individual to the period in which the nonresident individual is physically present in the state.

COVID-19 Relief Guidance for states

- ▶ Temporary waiver for state withholdings and tax liability for remote workers
 - ▶ 13 states providing relief in: AL, GA, IL, IN, MA, MD, MN, MS, NE, NJ, PA, RI and SC.
- ▶ Relief for creating nexus with a state due to telecommuting employees
 - ▶ 15 states providing relief in: AL, DC, GA, IA, IN, MA, MD, MN, MS, ND, NJ, OR, PA, RI and SC.



Remote Work Considerations During COVID-19 Pandemic

- ▶ Laws or standards that may apply or apply differently during the Covid-19 pandemic:
 - ▶ Occupational Safety Health Administration (OSHA)
 - ▶ Workers Compensation
 - ▶ Centers for Disease Control (CDC) Guidance
 - ▶ Fair Labor Standards Act (FLSA)
 - ▶ Americans with Disabilities Act (ADA)
 - ▶ Families First Coronavirus Relief Act (FFCRA)
 - ▶ Family and Medical Leave Act (FMLA)
 - ▶ Other laws that continue to apply (like Title VII)

Employers' Obligations under OSHA During the Covid-19 Crisis

- ▶ The Occupational Safety and Health Act of 1970 (OSHA) was passed to prevent workers from being killed or otherwise harmed at work. The law requires employers to provide their employees with working conditions that are free of known dangers.
- ▶ Covid-19 is now a known danger.
- ▶ Employers must take steps to provide a safe working environment and to protect against exposure to Covid-19 in the workplace.
- ▶ Failure to take adequate steps to provide a safe working environment can result in claims of violations under OSHA for failure to provide a safe working environment, as well as “whistleblower” (retaliation) claims if an employee reports concerns and is thereafter retaliated against.

OSHA Claims Related to COVID-19 are Already on The Rise

OSHA Whistleblower Claims Jump Amid Virus, Watchdog Says

By [Vin Gurrieri](#)

Law 360 (August 18, 2020, 10:00 PM EDT)

“Of the 4,100 whistleblower complaints OSHA received from February through May,about 1,600 of them were related to COVID-19, such as claims that someone was retaliated against for claiming violations of guidelines regarding social distancing or personal protective equipment.”

OSHA Claims Related to COVID-19 are Already on The Rise



Amazon Says Virus Safety Claims Are OSHA's Domain

By [Amanda Ottaway](#)

Law 360 (August 12, 2020, 5:38 PM EDT)

Amazon says: “workers who filed a suit claiming the company's Staten Island warehouse conditions pose a COVID-19 risk should take their complaints to the Occupational Safety and Health Administration..”

OSHA's Position on Remote Work During COVID-19:

- ▶ OSHA suggests allowing employees to deliver services remotely if possible during the COVID crisis.
- ▶ Do employers need to worry about the safety of home offices under OSHA?
- ▶ OSHA's compliance directive on home offices is clearly stated:
 - ▶ “OSHA will not conduct inspections of employees’ home offices.”
 - ▶ “OSHA will not hold employers liable for employees’ home offices and does not expect employers to inspect the home offices of their employees.”
 - ▶ “If OSHA receives a complaint about a home office, the complainant will be advised of OSHA’s policy. If an employee makes a specific request, OSHA may informally let employers know of complaints about home office conditions but will not follow-up with the employer or employee.”
 - ▶ CPL 02-00-125, “Home-Based Worksites” (Feb. 25, 2000).

OSHA's Position on Remote Work During COVID-19:

- ▶ Even though OSHA has stated it will inspect home offices, employers should still take steps to ensure that the employee's home-work environment is safe.
 - ▶ Employees who work remotely are still covered under a variety of other laws that may be impacted by unsafe working conditions at home – such as workers compensation laws.
 - ▶ There is also the possibility of claims by co-workers, clients or other third parties that are injured at the employee's home while conducting work-related business.



OSHA Guidance on Returning to Work During the COVID-19 Pandemic

- ▶ OSHA has issued guidance on what steps an employer should take to ensure that their workplace is safe in light of Covid-19. That information can be found on their [website](#) and is also contained in a booklet created by OSHA.
 - ▶ Generally, OSHA provides:
 - ▶ Perform hazard assessment: Determine where and how workers could be exposed to COVID-19 on the job.
 - ▶ “During all phases of reopening, employers should implement strategies for basic hygiene (e.g., hand hygiene; cleaning and disinfection), social distancing, identification and isolation of sick employees, workplace controls and flexibilities, and employee training that are appropriate for the particular phase.”
 - ▶ Create policies for returning to work after illness or exposure to COVID-19
 - ▶ “Employers should continue to consider ways to utilize workplace flexibilities, such as remote work (i.e., telework), and alternative business operations to provide goods (e.g., curbside pickup) and services to customers.”

Workers Compensation

- ▶ STILL NEED TO WORRY ABOUT WORKERS COMPENSATION ISSUES
 - ▶ 29 C.F.R. § 1904.5(b)(7) states: “Injuries and illnesses that occur while an employee is working at home, including work in a home office, will be considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting.”
 - ▶ May want to consider that the employee designate a work area and certify compliance with basic safety measures while conducting work at home.
 - ▶ Employers should require that employees who work remotely report all injuries and illnesses that occur while performing work functions.
 - ▶ Consider prohibiting employees who work remotely from hosting clients, co-workers or other third parties at their home for work purposes.
 - ▶ Check state workers compensation laws.

How the CDC's Guidance Applies to Remote Workers

- ▶ Compliance with CDC and state/local guidelines a must!
- ▶ Employees who work remotely should certify that they have a safe place to work.
- ▶ Employees should still notify employer if they have symptoms, test positive or have been in close contact with any individual that has tested positive – particularly if they have any contact with clients, vendors, customers or co-workers.
- ▶ Employers should follow [CDC guidelines](#) for employees who report exposure/suspected exposure to Covid-19.

CDC Guidelines

- ▶ What should employers do if an employee who is working remote tests positive for Covid, reports having symptoms of Covid, or reports having been exposed to Covid?
 - ▶ Advise employee to quarantine and seek medical assistance
 - ▶ Advise employee of sick leave policies including the FFCRA
 - ▶ Limit any contact with co-workers, clients or coworkers until appropriate quarantine period has expired
- ▶ What if employee reports that they are capable of working during quarantine period?
 - ▶ Let them continue to work but further limit any risks to others (no exchange of documents, face to face, meetings, etc.)
 - ▶ Failure to allow employee to continue to work remotely may result in claims under the ADA

Issues That Can Arise Under The FLSA and State Wage/ Hour Laws

- ▶ Remote work can lead to claims of failure to pay overtime under the FLSA and state wage and hour laws.
- ▶ Employers must ensure that they are accurately tracking time worked and paying overtime as required by law.
- ▶ Overtime includes work performed before and after work or during scheduled breaks.
 - ▶ Reviewing and responding to emails, calls, texts, virtual meetings, etc.
- ▶ DOL recently issued guidance emphasizing importance of scheduling work hours. Breaks for child-care or other COVID-related reasons need not be compensated but should be scheduled and documented so that it is clear that no work is expected by employer (and no work is to be performed by employee) during those scheduled break periods.

FLSA – What Should Employers Do?

- ▶ It is expected that there will be a significant increase in Wage and Hour litigation (overtime, docking of pay, paid leave/FFCRA)
- ▶ Implementing effective time keeping methods and communicating importance of reporting all hours worked is critical!
- ▶ Wage and Hour Division of Department of Labor Field Bulletin issued on August 24, 2020 states:
 - ▶ An employer should provide a reasonable reporting procedure for nonscheduled time and compensates employees for all reported hours of work, even hours not requested by the employer. “If an employee fails to report hours worked through such a procedure, the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours.” https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf
- ▶ DOCUMENT, DOCUMENT, DOCUMENT

Americans with Disability Act (ADA)

- ▶ Federal Law- Enforced by EEOC
- ▶ Prohibits discrimination based on disability or “regarded as” disabled
- ▶ Employers must engage in interactive process and provide reasonable accommodation
- ▶ Applies to those with 15 or more employees
- ▶ No limit to time employed



The ADA and COVID-19

- ▶ Those who are vulnerable to Covid-19 may be considered disabled (or “perceived/regarded as having a disability”) under the ADA (and state and local laws).
- ▶ Remote working may be a reasonable accommodation.
- ▶ Be careful not to assume accommodations are wanted by or necessary for the employee (avoid discrimination because of a perception that the employee is disabled).
- ▶ Additional accommodations may be necessary even for remote workers.
 - ▶ Access to files/documents
 - ▶ Access to adequate technology and resources

The ADA and COVID-19

- ▶ What should employers do?
 - ▶ Review job descriptions to ensure that they accurately reflect the essential functions of the job.
 - ▶ If a job or job function cannot be performed remotely, make sure that is clear from the job description.
 - ▶ No “magic words” needed to put employer on notice of “disability” or potential need for “reasonable accommodation”
 - ▶ Engage in the interactive process.
 - ▶ Request that any employee who has concerns about their particular circumstances (with respect to working during the Covid pandemic) advise employer and work with the employer to see if any reasonable accommodations can be made without undue hardship to employer.
 - ▶ Requests for accommodations related to family members may not fall within the ADA but may trigger other laws (FMLA/FFCRA).
 - ▶ If any requested accommodation is denied, document the reasons (show why it is not reasonable or would pose undue hardship).

Other Issues That Arise With Remote Working

- ▶ Childcare issues – telework generally not a substitute for childcare.
 - ▶ Review and revise policies regarding remote work – specifically addressing child-care issues.
 - ▶ Example: “Teleworking is not a substitute for child-care, and employees who are permitted to telecommute must make appropriate arrangements for child-care needs during working hours.”



Remote Working and Childcare During COVID-19

- ▶ Many employees at all levels have children that are home due to COVID-19.
- ▶ Daycare centers may be closed, school may be virtual.
- ▶ Employers must be flexible and creative.
 - ▶ Consider implementation of company wide policy prohibiting calls/virtual meetings during specified times (lunch) to accommodate remote workers who are home with school aged children due to school closures.
 - ▶ Make sure all breaks are scheduled and that employee is relieved of all duties during breaks related to childcare (FLSA/overtime).
 - ▶ Make sure all time worked is recorded accurately.
 - ▶ Remember – if remote working with children home is not feasible, the employee is entitled to take FFCRA leave.

Other Issues That Arise With Remote Working

- ▶ Be mindful of the FFCRA, the FMLA and other federal or state expansions of benefits.
 - ▶ DC Supplemental Emergency Act and Emergency Amendment Act – extends protections of DCFMLA and revised the DC Sick and Safe Leave Act

What Should Employers Do?

- ▶ Review Employment Policies
 - ▶ Advise Employees that all policies are still in effect when working remotely.
 - ▶ Ensure Compliance with EEO and Sexual Harassment Policies and remind workers of the need to report concerns about discrimination or harassment.
 - ▶ More casual environment may lead to more claims. Be vigilant!
 - ▶ Conduct virtual EEO training (emphasizing policies prohibiting discrimination and sexual or other illegal harassment).
 - ▶ Make sure employees know how to reports/ claims/concerns virtually.
- ▶ Remind employees of overtime policies and take action to ensure compliance with FLSA as well as state and local wage and hour laws.
- ▶ Advise employees who are working remotely to report any injury or illness that occur while performing work functions remotely (consistent with on site policies).
- ▶ Make sure all required notifications of rights under new laws (such as the FFCRA) have been provided to employees and “posted.”
- ▶ Consider creating virtual HR site where all required notices can be posted and accessed by employees

What Should Employers Do?

- ▶ Review Job Descriptions – Review for virtual work, make changes as necessary. If position requires employee to be in the office, the job description must say it!
- ▶ Continue performance reviews and document any performance deficiencies.
- ▶ Explore alternatives for onboarding, teambuilding, accountability and building corporate trust
 - ▶ Virtual Group Events (are these really effective?).
 - ▶ Updating technology and making sure employees have what they need to work remotely.
 - ▶ Ensuring availability for real time conversations/timely responses.
 - ▶ Open communications - Stop problems before they start.
 - ▶ Document issues as they arise.

Return To Work Considerations

- ▶ Compliance with regulations regarding return to work guidance.
 - ▶ CDC Pamphlet and fact sheet offers guidance
 - ▶ <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/returning-to-work.html>
 - ▶ <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>
 - ▶ Explore flexible work arrangements (staggered shifts, alternate on site work-days)
 - ▶ Keep in mind the importance of being able to contact trace (set up work groups)
- ▶ OSHA concerns (safe place to work)
 - ▶ Clean work-stations
 - ▶ Limit common use of work areas, phones and equipment
 - ▶ PPE
 - ▶ Landlord obligations (ventilation and common areas)
 - ▶ Hand washing stations/sanitizers

Return To Work

- ▶ What to do if an employee tests positive, has symptoms, or has had close contact with someone who has tested positive
 - ▶ FOLLOW CDC GUIDELINES!!!! Constantly review CDC Guidance as it is constantly updated and changes frequently.
 - ▶ State/local laws/ regulations: Stay up to date and in compliance
 - ▶ Ex. DC requires quarantine for people returning from “hot spots.” If employees traveled to a “hot spot” must quarantine before being allowed back to office.
 - ▶ Failure to follow guidelines might be used as evidence against employer in litigation.
- ▶ Keep apprised of changes in law or policy, including state and local guidance/ current reopening phase.
- ▶ Remember the ADA.
- ▶ Remember FFCRA and FMLA- ensure proper notification is given of rights, and track all leave taken.
- ▶ Implement effective time keeping methods and communicate importance of tracking all time worked.

Questions?

If your question does not get addressed within the time allotted for the webinar, please reach out to our presenters with any additional questions.

Thomas L. McCally
D: 202.310.5506
E: Thomas.mccally@carrmaloney.com

Judith P. Barnhard
D: 240.781.6201
E: jbarnhard@cbmcpa.com

Carr Maloney's Upcoming Events and Resources

"Hot Topics - Employment Law Updates"

Webinar with Association of Legal Administrators | October 6, 2020, 1:00 PM- 2:00 PM Eastern

As you know, things are changing daily with respect to federal and state mandates surrounding COVID-19. This 90-minute session with Tom McCally will address up-to-the-minute employment law updates including the status of local jurisdictions (MD, DC, and VA), the Family First Corona Virus Act (FFCRA); and proposed legislation for new stimulus packages that have been proposed.

[Click to register](#)

Carr Maloney's COVID-19 Resource Hub

With the rapid growth of COVID-19, the laws and rules of employment matters are constantly evolving and changing. Carr Maloney's Employment and Labor Practice Group is here to provide useful resources for employers on how COVID-19 is affecting various aspects of employment law and how different jurisdictions are addressing the outbreak.

There will be new governmental measures each day. Employers should consult with counsel for the latest developments and updated guidance on this topic. Carr Maloney P.C. is open for business and our attorneys are available to consult by client's preference of communication whether it be email, phone, or video chat. Please feel free to reach out to our Employment and Labor Practice Group partners with any questions during this time.

[Visit COVID-19 Resource Hub](#) | [Sign up for email notices](#)

Councilor, Buchanan & Mitchell's Upcoming Events

DATE	UPCOMING VIRTUAL EVENT
Thursday, September 17 12 pm – 1 pm	Market Update I (<i>part of our ongoing series of professional education sessions on financial planning considerations in today's market</i>)
Thursday, October 8 11 am – 12 pm	Grow Your Net Worth: Financial Planning for Mid-Career Professionals
Thursday, October 22 11 am – 12 pm	ABCs of Estate Planning
Wednesday, October 28 11 am – 12 pm	Retirement and Life Care Planning: Helping You Build the Path to a Peaceful Future
Thursday, November 19 11 am – 12 pm	Market Update II (<i>part of our ongoing series of professional education sessions on financial planning considerations in today's market</i>)
Register now at www.cbmcpa.com/events/	