COVID-19 Considerations: The Myriad of Corporate, Tax, and Employment Considerations With Remote Working

September 17, 2020

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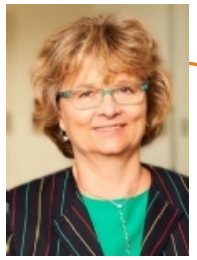

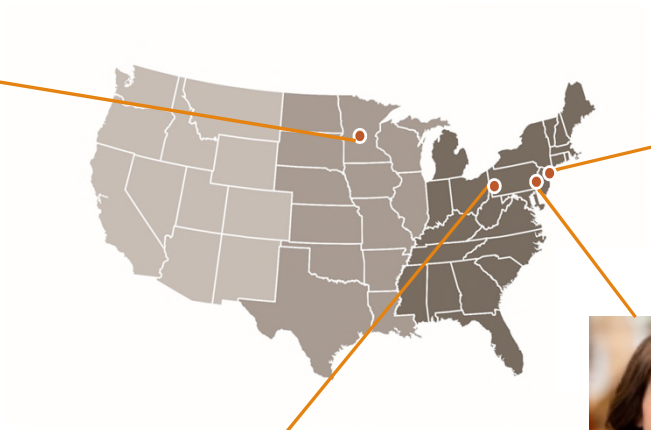

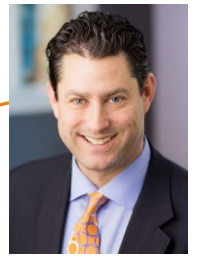

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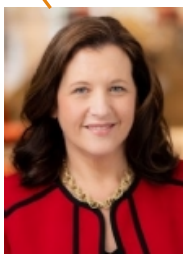

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Overview of Webinar Topics

- Business Registration, Licensing, and Other Corporate Practices With Remote Working
- Tax Implications With Remote Working
- Employment Law Recent Developments

Remote Working: Corporate and Business Considerations

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General Principles

- Each US entity is organized or incorporated in one specific state.
- In all states other than its state of organization or incorporation, such entity is a “foreign” entity.
- If the entity wants to do business in a state other than its state of organization or incorporation, it has to qualify to do business in that state.
- Failure to qualify may have consequences such as unenforceability of contracts entered into in the other state and/or imposition of taxes, civil penalties and fees.

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What does doing business mean?

- US states typically do not have a statutory list of business activities that require registration as a foreign entity.
- Rather, all US states have lists of activities that do not constitute "doing business" and therefore, do not require an entity to qualify as a foreign entity.
- Any determination whether a business entity has to qualify in a state as a foreign entity needs to be made based on all of the facts present in a specific case, and seemingly minor differences may change the outcome.

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Examples

Virtual Meetings:

- Most state statutes include a specific provision to the effect that "holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs" does not constitute "doing business."

Therefore:

- As long as the virtual meetings are internal meetings (checking on well-being of employees, discussing issues such as workload and similar matters), these meetings most likely do not constitute "doing business" for corporate law purposes.

However:

- If the virtual meetings are replacing in-person meetings of employees with (potential) customers that are located in a state other than the state of incorporation/organization, these meetings may constitute "doing business" in the state where the customers are located, depending on additional factors such as frequency of meetings, services provided in the meeting etc. (see also next example, "Sales Calls").

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Examples

Sales Calls:

- Typically, state statutes list two sales-related activities that do not constitute "doing business" in the state:
  - Sales are effected through independent contractors, i.e. independent sales reps
  - Orders are solicited or procured in a state, by mail or employees or agents or otherwise, but the order requires acceptance outside of the state where the order is solicited or procured
- Another typical exception from "doing business" that could apply to sales call is the exception for an isolat6ed transaction that is completed within a period of thirty days and is not part of a series of similar transactions in the same state.

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Examples

Sales Calls (cont.):

Therefore:

- An independent sales rep or a sales rep who is an employee call a customer in a state where the company is not qualified to do business – this does not constitute doing business, either because the sales rep is not an employee and/or the sales rep does not have the authority to enter into the contract with the customer. Rather, the contract is entered into at the headquarters of the company.

However:

- The director of sales has the authority (and the task) to enter into contracts for the company. If this individual works remotely from a state where the company is not qualified to do business, the repeated acceptance of orders at the director's home office may qualify as doing business and may require the company to register as a foreign entity in the state where the director's home office is located.

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Consequences of NOT Qualifying

- An unqualified foreign corporation may be prevented from bringing or maintaining an action in the courts of a state in which it does intrastate business.

Example:

- In an Alabama case, the plaintiff contracted to provide advertisements to be broadcast in Alabama. The court held that where the primary purpose of a contract between the plaintiff and defendant was for services that had to be performed in Alabama, the unqualified corporate plaintiff could not use Alabama's courts even though the contract was entered into out of state.

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Consequences of NOT Qualifying

- Under diversity jurisdiction, a foreign corporation barred by state law from suing in the state courts would generally find itself barred from the federal courts as well. However, if the unqualified foreign corporation is attempting to enforce a federal statutory or constitutional right, so that jurisdiction is based on a federal question, the federal court may allow the action.

Example:

  - A district court in Wyoming held that a corporation's failure to comply with state qualification requirements did not bar a federal copyright infringement action.

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Consequences of NOT Qualifying

- Contracts between a foreign corporation and a state, state agency, or political subdivision may be voidable by that state or state entity.

Example:

  - A Montana statute provides "A contract between the state of Montana, an agency of the state, or a political subdivision of the state and a foreign corporation that has failed to register to do business as required under [section 207(4)] is voidable by the state, the contracting state agency, or the contracting political subdivision."

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Consequences of NOT Qualifying

- Most states impose monetary penalties on foreign corporations that do business without qualifying.

Examples:

  - Louisiana has a fine of $25 to $500 and, upon failure to pay, the offender may be imprisoned from three days to four months. In Delaware and Oklahoma, the fine ranges from $100 to $500 “for each offense.” Maryland and Utah impose fines of up to $1,000. Offenders in Virginia may be subject to fines ranging from $500 to $5,000.

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Consequences of NOT Qualifying

- In a number of states, liability is not limited to the corporate entity, but is imposed on individuals acting on behalf of the corporation.

Example:

  - In Virginia it is a misdemeanor "for any person to transact business in this Commonwealth as a corporation or to offer or advertise to transact business in this Commonwealth as a corporation unless the alleged corporation is. . .a foreign corporation authorized to transact business in this Commonwealth." Fines are also imposed on each officer, director and employee who transacts business for an unqualified corporation in Virginia, knowing that qualification was required.

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Home Occupation Permit

- Various counties and/or cities all over the country require permits if residential homes are used for activities that are covered by their definition of “home occupation”.
- Some state, county and local authorities have contacted employers based on their employment related tax filings to find out if rules and regulations regarding home occupation permits were met.

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Example: New York City

- NYC Zoning Regulations require that the following criteria are met to run a home based business or have a home office:
  - The home must be primarily used for residential purposes, and the business use is clearly incidental or secondary to the residential use.
  - The business must be owned and operated by the person living in the home.
  - Only 1 person not living in the home may be employed to work there.
  - The home office or area of the home used for the business operations may not exceed 500 square feet or 25% of the total floor area of the home, whichever is smaller.

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Example: New York City (cont.)

- Certain businesses are allowed as home businesses:
  - Fine arts studios
  - Professional offices
  - Teaching (not more than 4 students at a time)
  - Musical instrument instructions (not more than 1 student at a time).
  - Other businesses are not allowed to be operated from a residential property as a home occupation or a home office, such as PR agencies or real estate or insurance offices.

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Example: New York City (cont.)

- General Restrictions for Home Based Businesses, such as:
  - No sales of anything produced outside of the home
  - No exterior signs visible from the outside (in some zoning districts a nameplate or sign may be displayed in connection with a “profession”)
  - No display of goods visible from the outside
  - No exterior renovations allowed that are not normal for residential purposes or change the character of a residential area
  - No offensive noise, vibration, smoke, dust, etc. may be produced

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Remote Working: Tax Considerations

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Introduction – Leading Issues

- There are two major issues for employers and employees in relation to state and local taxes and employees working remotely during the COVID-19 pandemic:
  - First, where an employee is now working in a state other than his or her usual place of employment, for which state(s) must an employer withhold income tax?
  - Second, will an employee's presence in a state while working remotely create nexus with that state for the employer, thus subjecting it to the state's income tax, gross receipts tax and/or sales and use tax reporting and remittance requirements?

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Employer Withholding Taxes

- The general rule for employer withholding taxes is that an employer must withhold income tax on an employee's wages based on the state in which the employee performs their work.
- There are some regular exceptions, such as where the employee's state of residence and state of employment have a reciprocity agreement. Another exception is where the state in which the employee regularly works has a "convenience of the employer" test for time spent working outside the state.
- New issues have arisen due to the COVID-19 pandemic as employees are now working from home, where such home is located in a state other than the state in which the employee's regular office is located.
- The question becomes for which state(s) must the employer withhold income tax on the employee's wages – the employee's state of residence where they are working from home, the state where the employee's regular office is located, or maybe both?

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Employer Withholding Taxes (cont.)

- The question becomes even more complicated when other factors come into play. For example, is the employee working from home because (1) of a government stay-at-home order or similar government order limiting the number of people that can be at the employer's office location, (2) the employer's work from home policy, even though not government mandated, or (3) the employee's preference to not be back in the office due to the employee's personal situation?
- Further, the answer can become complex when the two competing states have different rules or have not provided any guidance at all, potentially leading to double taxation. While some states have provided relief on this issue with respect to COVID-19 induced work from home situations, some states have not and some states have provided no guidance at all.

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Employer Withholding Taxes - Examples

- Pennsylvania has stated that if a PA-based employee is working from home in another state temporarily due to the COVID-19 pandemic, the PA DOR would not consider that as a change to the sourcing of the employee's compensation. It would remain PA source income for all tax purposes, including employer withholding and three-factor business income apportionment purposes.
- New Jersey has provided that while its sourcing rules generally dictate that income is sourced based on where the service or employment is performed based on a day's method of allocation, during the temporary period of the COVID-19 pandemic, wages will continue to be sourced as determined by the employer in accordance with the employer's home jurisdiction.
- New York, which has an extremely aggressive convenience of the employer rule, has provided no guidance whatsoever.

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Income, Gross Receipts and Sales and Use Taxes

- Generally, an entity will be subject to a state's income tax, gross receipts tax and/or sales and use tax reporting and payment requirements where the entity has sufficient nexus with the state under the U.S. Constitution.
- For pass-through entities, the issue of income tax reporting and payment on the company's earnings may be in relation to its owners, as opposed to the entity itself.
- The states vary on what is considered to create nexus for purposes of these taxes, although universally, having a physical presence in a state will be sufficient to create the nexus necessary to be subject to each of these taxes.
- In addition, based on recent U.S. Supreme Court jurisprudence, many states have adopted bright-line nexus standards based on the amount of sales and/or transactions an entity has in a state.

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Income, Gross Receipts and Sales and Use Taxes (cont.)

- Accordingly, where an entity does not usually have a physical presence in a state, and does not meet the state's bright line nexus standards, the issue becomes whether an employee's presence in the state due to working from home during the COVID-19 pandemic will be considered a sufficient physical presence in the state to subject an entity to the state's income tax, gross receipts tax and/or sales and use tax requirements.
- Absent specific relief provided by a state on this issue, the general answer is going to be that the entity will have nexus with the state while it has employee(s) working in the state.
- Even where a state has provided relief, that relief may not be available depending on whether the employee(s) are in the state because of a government mandated stay-at-home order, an employer's social distancing policy or the employee's own personal reasons that have arisen due to the pandemic.

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Income, Gross Receipts and Sales and Use Taxes - Examples

- Pennsylvania has provided that the PA DOR will not seek to impose Corporate Net Income Tax or Sales and Use Tax nexus solely on the basis of temporary activity by an entity's employees occurring within Pennsylvania during the duration of the COVID-19 emergency.
- New Jersey has provided that it will waive the usual nexus standards for New Jersey income tax and Sales and Use Tax purposes in the case of the temporary presence of employees working from their homes in New Jersey during the pandemic. In the event that employees are working from home solely as a result of closures due to the COVID-19 outbreak and/or the employer's social distancing policy, that activity will not be considered in determining whether the applicable nexus threshold has been met.
- New York has provided no guidance.

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Takeaway…

- The impact of employees working from home during the COVID-19 pandemic is going to have different consequences for each employer based on its individual facts, including where its home office(s) are located, where its employees are working, the reason(s) for an employee to be working from home, the rules and guidance in the relevant states, and the employer's other activities conducted in each state.
- It is important to remember that any determination made is likely fluid and subject to change in the future. As government mandates, employer policies and employee requests change throughout the pandemic, the company's state and local tax compliance issues will have to be re-examined.

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Remote Working: Employment Law Updates

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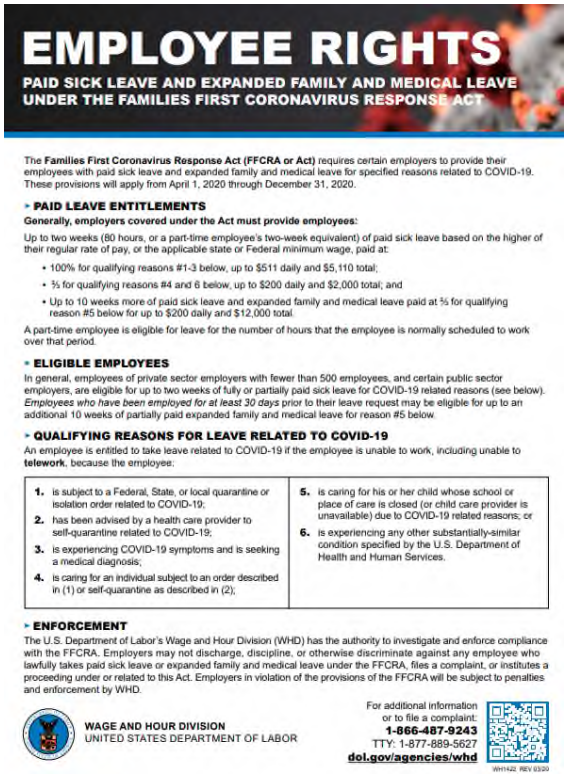
Families First Coronavirus Response Act
The Timeline



EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to $511 daily and $5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to $200 daily and $2,000 total; and
- Up to 10 weeks more of paid sick leave and expanded family and medical leave paid at ⅔ for qualifying reason #5 below for up to $200 daily and $12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). *Employees who have been employed for at least 30 days* prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to **telework**, because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
dol.gov/agencies/whd

WH1422 REV 03/20

- March 2020 – Congress passed the FFCRA (Eff. 4/1/20 – 12/31/20)
  - Emergency Paid Sick Leave ("EPSL")
  - Emergency Family and Medical Leave Act ("EFMLA")
- April 1, 2020 – United States Department of Labor ("DOL") issued regulations implementing the FFCRA
- April 1, 2020 – New York State filed a lawsuit in New York federal court challenging DOL authority and regulations
- August 3, 2020 – Federal court issued decision invalidating four components of the DOL regulations
- **September 11, 2020 – DOL issued revised FFCRA regulations in response to August 3rd federal court decision**

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State of N.Y. v. U.S. Department of Labor

August 3, 2020 and September 11, 2020

Work Availability

- **Relying on a causation argument and the meaning of "because" and "due to," the Court rejected the notion that an employee's inability to work must be caused *solely* by one of the qualifying events in the EPSL or EFMLA. Thus, the Court invalidated the DOL regulation that employees are not entitled to leave if the employer does not have work for them (8/3/20).**
  - The DOL maintains its position (9/11/20).

Health Care Provider Definition

- **The Court rejected the notion that the DOL was authorized to provide a more expansive definition of "health care provider" than what Congress provided in the FFCRA. Thus, the Court invalidated the DOL regulation broadly defining exempted "health care provider" employees, and instead requires one to look at the role of the employee rather than the identity of the employer (8/3/20).**
  - The DOL accepts the Court's position and revises its regulation (9/11/20).

United States District Court
Southern District of New York

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State of N.Y. v. U.S. Department of Labor

August 3, 2020 and September 11, 2020

Intermittent Leave

- **The Court upheld the portion of the DOL regulation that prohibits intermittent leave for certain qualifying events that increase risk of infection, but invalidated the DOL regulation requiring employer consent for intermittent leave (8/3/20).**
  - The DOL maintains its position (9/11/20).

United States District Court
Southern District of New York

Documentation

- **The Court upheld the portion of the DOL regulation that requires certain information/documentation to support an employee's request for leave, but invalidated the DOL regulation requiring that such information/documentation be provided to the employer *prior to* (as a precondition to) the employee being able to take leave (8/3/20).**
  - The DOL accepts the Court's position and revises its regulation (9/11/20).

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State of N.Y. v. U.S. Department of Labor

August 3, 2020 and September 11, 2020

Decisions, Decisions, Decisions:

United States District Court
Southern District of New York

- **Does this New York federal court decision apply outside of New York?**
  - Answer: It is (still) not clear, yet. There has (still) been no nationwide injunction, and DOL has not yet provided any tea leaves into its next steps.
- **Will this New York federal court decision apply permanently anywhere?**
  - Answer: It is not clear, yet. Perhaps the State of New York will re-file a motion and/or another lawsuit in another jurisdiction will be filed.
- **Can employers utilize a good-faith reliance defense for decisions made between April 1, 2020 and August 3, 2020 that relied on the invalidated DOL regulation?**
  - Answer: Maybe. While some portions of the FFCRA are based on the FLSA, other portions are based on the FMLA where it is unclear if such a defense is available.

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Remote Working Considerations
Recent DOL Guidance

- "Due to the coronavirus pandemic, more Americans are teleworking and working variable schedules than ever before to balance their jobs with a myriad of family obligations, such as remote learning for their children and many others. This has presented unique challenges to employers with regard to how to track work time accurately. . . .
- "Today's guidance is one more tool the Wage and Hour Division is putting forward to ensure that workers are paid all the wages they have earned, and that employers have all the tools they need as they navigate what may, for many, be uncharted waters of managing remote workers."

Cheryl Stanton, DOL Wage and Hour Division Administrator, News Release (8-24-20)

www.dol.gov/newsroom/releases/whd/whd20200824

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Remote Working Considerations
Recent DOL Guidance

- "In a telework or remote work arrangement, the question of the employer's obligation to track hours actually worked for which the employee was not scheduled may often arise. While this guidance responds directly to needs created by new telework or remote work arrangements that arose in response to COVID-19, it also applies to other telework or remote work arrangements."
- Employers must pay for all hours worked that it knows or has reason to know was performed (even if not requested, but "suffered or permitted"), including work performed at home or remotely.
  - Thus, employers are not required to pay for work it did not know about and had no reason to know about.
- Issue: If no actual knowledge of unscheduled work performed, whether employers should have acquired knowledge of such hours worked through "reasonable diligence."
  - One way to exercise "reasonable diligence" is to provide a reasonable reporting procedure for non-scheduled time, and then compensate employees for all reported hours of work (even if not requested or scheduled).
  - Caveat → If employee fails to report unscheduled hours worked through such a reasonable reporting procedure, the employer is not required to engage in impractical efforts to investigate further to uncover and compensate for unreported hours (*e.g.,* sorting through electronic device, phone, or other non-payroll records).
  - Caveat → An employer's reporting procedure will not be considered reasonable if the employer prevents or discourages an employee from accurately reporting all time worked (even if not requested or scheduled).

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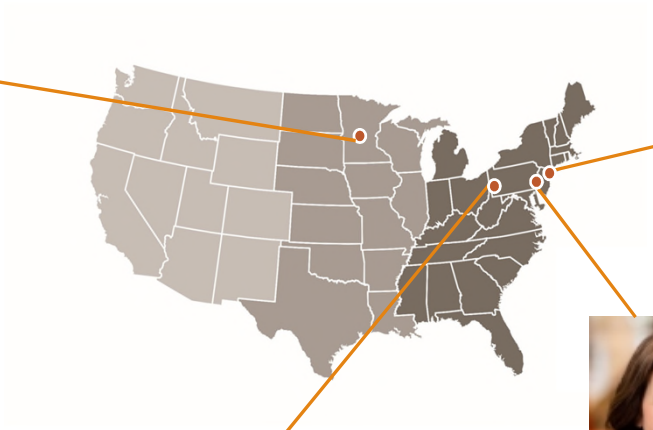
Thank You!



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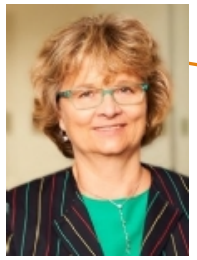

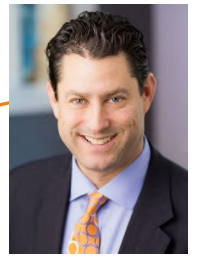

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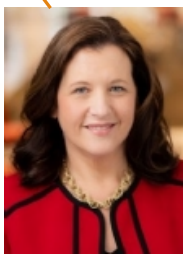

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