EXEMPT ORGANIZATIONS
INFORMATION MEMO
MARCH 1, 2022

Employees Telecommuting Across State Lines? 5 Things Nonprofits Should Know

Let's consider a scene that has become increasingly familiar over the past two years:

Nonprofit "A," an organization exempt from federal income tax under Internal Revenue Code Section 501(c)(3) and headquartered in New York, is hosting its weekly staff meeting on Zoom. As we know, many staff members have been successfully working remotely since the early days of the COVID-19 pandemic. This is still the new normal, right?

Nonprofit A has had plenty of time to adjust its operations, implement remote-work policies and bring staff up to speed with the use of new technology platforms. At this staff meeting, however, one of Nonprofit A's employees excitedly announces that he has bought a new house – truly a cause for celebration in this housing market. Amongst the congratulations, the program director overhears the employee casually mention that the house is just over the border – in Massachusetts. Nonprofit A has never had employees working outside of New York, and the program director immediately begins to question the impact this may have on the organization.

So, what does Nonprofit A need to consider now that it has a telecommuting employee in another state? Generally, the critical legal considerations in this situation include a combination of business, tax and labor and employment requirements:

- **Employer Registration.** Nonprofit A will likely need to begin withholding personal income tax for the employee for services performed in the employee's new state of residence (there are, of course, several states which do not impose personal income tax). This requires the organization to register as an employer in said state, which will also usually include registration for unemployment insurance purposes, workers' compensation coverage, and in some states, disability insurance. Additionally, Nonprofit A will need to evaluate whether New York State's infamous "convenience of the employer" rule will also require it to withhold New York personal income tax on the employee's wages, possibly subjecting the employee's wages to double taxation at the state level. (We will revisit this uncomfortable topic in another article in the near future).
- **Authorization to Do Business.** Nonprofit A will typically have registration and annual reporting obligations with other states' Departments of State to the extent it is "transacting" or "doing" business within those states as a "foreign" nonprofit. The activities which constitute transacting business vary, but generally, the presence of an employee residing and performing services in another state on behalf of a foreign entity triggers this registration requirement and will result in annual reporting obligations.
- **Corporate and Sales Taxes; Exemptions.** Transacting business in another state may also require Nonprofit A's consideration of multi-state corporate income and franchise taxes, and collection and remittance of sales tax. For tax-exempt entities, such as Nonprofit A, most states offer exemption

from corporate income and franchise tax, but many require submission of a request or application to receive the exemptions. Typically, nonprofits are not exempt from collection and remittance of sales tax to the extent that they engage in the sale or provision of taxable goods and/or services, and what any given state considers subject to sales tax can vary widely. However, purchases in furtherance of an organization's tax-exempt purposes and activities are usually exempt provided that a given state's sales tax exemption certificate has been obtained.

- **Charity Regulator Registrations.** Many states require charities to register with, and annually report to, a state agency which protects charitable assets and provides oversight on behalf of donors and the general public. The threshold for registration tends to range from merely operating in the state, to actively soliciting contributions within the state, and in some circumstances, only if the organization uses a "fundraising professional." Depending on the particular state law, Nonprofit A will need to consider the extent to which having employees residing and working in other states will impact its charitable solicitation and other operating activities and if registration and reporting will be required.
- **Labor and Employment Considerations.** In addition to the foregoing business and tax considerations, having an employee residing and working in another state subjects nonprofits to the various labor and employment laws of said state. Additional compliance by Nonprofit A may be required with respect to payroll, including form and frequency of payment, record-retention policies, and leave laws, including, but not limited to, family leave, sick leave and military leave.

In the current environment, with telecommuting and remote work becoming more prevalent, nonprofits should communicate to employees the importance of discussing the option of relocating *prior* to doing so. Registration in foreign jurisdictions can become costly quickly, and there is liability and risk associated with having employees telecommuting unknowingly, including the potential for fines and fees for failure to properly register with various foreign state agencies.

If you have any questions or concerns related to telecommuting employees, registration of nonprofits in foreign jurisdictions, or other matters involving 501(c)(3) tax-exempt organizations, please contact Thomas W. Simcoe, Delaney M. R. Knapp or the attorney at the firm with whom you are regularly in contact.

BOND SCHOENECK & KING ATTORNEYS