The Performance Review Podcast

Episode 22

Greenberg Traurig

Speaker 1 (00:06):

Welcome to The Performance Review, Greenberg Traurig's, California Labor & Employment Law Podcast, where we discuss and review important trends and topics for California employers with host Ryan Bykerk and Philip Person.

Philip Person (00:18):

Welcome back to The Performance Review, your favorite podcast. As usual, I'm joined with Ryan Bykerk. And today we are going to be discussing tax implications of remote work, something that's on everybody's mind. Fortunately for you, you don't have to hear it from me or Ryan, we have Nikki Dobay, a GT shareholder who will be able to answer all of this stuff for us. But first, let's turn it over to Nikki so you can tell us about your work.

Nikki Dobay (00:48):

Well, thank you Philip and Ryan. It's really great to be here. So I'd like to say that I haven't been dealing with the remote work situation on the tax front for very long at all, but that would be a total lie. This is unfortunately, or fortunately, for me to have things to talk about, something that I've been working on for many years. Prior to joining GT and being back in private practice, I was in an organization called the Council on State Taxation, and that organization actually worked on federal legislation in this area, unsuccessfully, for well over 10 years to try to get a federal solution. That has not happened, and so we've got a lot of problems at the state level and then COVID happened, which really blew up this issue and so we've definitely got a lot to talk about today.

Ryan Bykerk (01:45):

And we'll get into depth on all of those different issues. But maybe to start with, what's maybe the main conundrum that employers face when it comes to teleworking and tax issues?

Nikki Dobay (01:57):

Well, I mean, this is where I think COVID really played a part. So if we fast-forward to before the pandemic, the big conundrum was your traveling workers or your workers that were out on the road, they were on planes all the time and they were in various states and jurisdictions for a couple days here and a couple days there. If we now shift to the new environment we're in, and even thinking about when we were in the pandemic, that all changed because people stopped getting on airplanes, but people started staying put in various locations that were generally not in commuting distance from an office. So we went really from a mobile workforce in the sense that people were traveling for meetings and conferences and doing things like that to now where a lot of employers are, which is that they want to be very flexible and they want to allow their employees to work remotely, potentially from anywhere. And what are the implications that this new kind of norm creates?

(03:17):

And now if we come full circle, we are back in this, I think, double conundrum of we've got the remote work and the flexibility that the employers want to provide for that group of employees, but then we've also now again, got people going back out on the road and traveling and going to various places on a very short-term basis. So there's a couple conundrums, maybe I'll put a pause at there and see where we want to... Because there's a lot of tax implications that are created by both of those situations.

Philip Person (03:53):

I think that could be the title of this episode is Almost The Tax Conundrums. But following up on your pause there is, I know we're going to be talking about State And Local Tax here, SALT, for those of you who are familiar in the tax world, what I want to know is can we talk about the process of tax withholdings for employers?

Nikki Dobay (04:16):

We can definitely talk about that process. And here again, it's really going to depend which situation you are in. And so if we're thinking about it from the perspective of an employer who is going to provide a lot of flexibility for their employees and really let them work from anywhere, so you're not one of these employers that's requiring your employees to be back in the office two to three days a week so they're not going to have to be within commuting distance from your office. So now you may be in a situation where you have employees that are working in other states very far away across the country.

(05:00):

And so what is really key here is that employers are going to have to know where their employees are, that's number one. And then they're going to have to know what their withholding obligations are in that state. And really it's the resident state or where that employee is working from that is going to dictate what their withholding obligations are. But assuming your employee is working remotely from a state with an income tax, the employer is generally going to be required to withhold on behalf of that employee in that state. And so if it's an employer where maybe this is a state you're not doing business in otherwise, that may create a new reporting obligation for that employer. There's also other implications on the unemployment insurance side, which could be created as well as other non-withholding tax issues that could fall out from that employee being in another state. So it is really just understanding where your employees are and understanding what the requirements are within all of those states.

Ryan Bykerk (06:20):

In the new world where employees can be anywhere, I mean, is there sort of a threshold where you've got to have five to 10 employees before it matters? Or is it just, "Hey, look, one and you're in, you've got to withhold properly?" How does that work?

Nikki Dobay (06:38):

Oh, I wish I could tell you that the states were, we had a threshold and the states all did the same thing and this was easy to figure out, but unfortunately it is really difficult to figure out. There's no general threshold that all the states abide by. And really the only guidance we have on this is a case that goes back now from about 13 years. It's the Telebright case out of New Jersey. And that case stood for the proposition that a single employee in a state can create nexus, which is the magic term in state tax that subjects a taxpayer, a business, an individual to the taxing regime of that state. And so in that case, there was a full-time software developer that was working remotely from New Jersey. The Telebright

Corporation had no other business in that state, and the New Jersey Supreme Court ultimately determined that that was sufficient to create nexus.

(07:51):

What has always bothered me about this case, especially post-pandemic, is we live in a totally different world now. After the Wayfair decision in 2018 where the state tax nexus threshold for sales tax collection and remittance purposes moved from a physical presence test to an economic nexus test, the world has just shifted. And so it is, again, I struggle that this is really what we have out there on this issue, but currently this is what we have out there on this issue is the New Jersey Supreme Court saying one employee in the state is sufficient to create nexus, and that is kind of our starting point when it comes to what are the potential risks.

Philip Person (08:44):

Well, that begs another question, in kind of the scenario that a lot of employers see themselves in is let's say there's a situation where a non-resident employee performs services for his/her or their employer, both within and outside of the state, what happens then?

Nikki Dobay (09:01):

So in this situation, the vast majority of the states do rely upon essentially a physical presence test, or what we think about is you would be required to withhold where the services were performed. So again, this is what most states do. So if you've got an employee, let's say I sit in Oregon, but sometimes working in California, the days that I'm physically working in California, that would be California source income, and my income should be withheld in California for those days, vice versa in Oregon. And so again, this is by far the vast majority of the states use this as their methodology.

(09:53):

We do unfortunately have a handful of states, there are currently four of them, which use what we call the convenience of the employer test. And this is really something that state and local tax practitioners have been adamantly opposed to and really working with clients to push back on for many years. But unfortunately, we have one really big state that is very aggressive on it, and that state is New York. And in New York, again, they impose this convenience of the employer test. And what New York says or what their position is if you have an employee that is based out of a New York office, that unless they are working outside of the state for the convenience of their employer, and I have to say, I've never been able to figure out what the heck the convenience of the employer means, that they are nonetheless required to pay, they're subject to New York income tax on those wages.

(11:05):

And so this has been something that's been litigated. It's currently being litigated in New York, and it is really a challenge for companies that have locations in these states. And again, the states, New York, again, the biggest, most aggressive on this, Delaware, Nebraska and Pennsylvania also have these rules in place. Arkansas had this rule in place that was repealed in 2021. And then we have a few other states that imposed this rule on a retaliatory basis. So New Jersey and Connecticut essentially will impose this rule if say they've got a business or they've got somebody working in their state from one of these other convenience of the employer states. But New York very aggressive on this and we are currently, again in really round three of litigation on this issue.

(12:05):

And unfortunately the taxpayers have not been successful so far. But again, we do have high hopes for the current round of litigation, although part of that litigation involves one of the pandemic years, which while we may gain some traction on this issue on pushing back, it might not be the final word. But that's a really scary rule, so if you've got offices in that tri-state area, really something that you need to have on your radar and make sure that you are doing some analysis around to make sure you don't run afoul of this rule. And of course, there are some ways to ensure that your employees wouldn't be subject to withholding on a hundred percent of their income in New York by making sure they are not linked to those New York offices, assuming there are other offices out of the state. So probably some follow-up questions there.

Ryan Bykerk (13:10):

Well, you sort of anticipated my next question, which was going to be, has there been litigation? You just said that there has. Can you maybe touch on a couple of the key cases, or maybe just one, whatever you think, but just to kind of give us a sense of what that litigation entails and how it's coming out.

Nikki Dobay (13:26):

So the case that's currently being litigated is in New York, and it is the Zelinsky case. It was just argued at the Court of Appeals. And so we do anticipate a decision coming out probably early next year, possibly later this year. That case Professor Zelinsky, he is a professor at NYU I believe, but he lives in Connecticut and he is a state and local tax professor. So it's kind of every state and local tax person's dream to litigate your own case. No, that's probably not true.

(14:06):

So in this round, he litigated this back in the early 2000s and was unsuccessful, but he's again litigating this based primarily on the fact that one of the years at issue, there was an order at the state level that he was not able to come into the state. And so that's one piece of that and we'll see that play out in New York. So that could be very significant.

(14:37):

We've got several other cases going on in Ohio. The Ohio localities also imposed this rule and did impose this rule through COVID. So we've got a couple cases in Ohio that have been working their way through the system. And then we've also got some cases in Missouri because again, this has to do with the local income taxes and how those are being imposed. And again, all of those cases are really wrapped up in the COVID pandemic and what the state's trying to keep in place some of their rules during those periods. So we will see how that litigation ultimately plays out.

(15:19):

The one state case that's just a little bit fun to talk about in this area, and it's now a little bit dated, but back in 2020, the state of New Hampshire sued Massachusetts. And the other thing state tax lawyers love is when the states sue each other because then they're not coming after our clients. But this was also really wrapped up in the COVID-19 lockdown orders, and the state of Massachusetts essentially was requiring any New Hampshire resident that worked for a Massachusetts employer to continue to pay Massachusetts income tax. New Hampshire, the live free or die state doesn't have an income tax and so obviously that was offensive to those residents. And so this was a case where New Hampshire attempted to sue Massachusetts in the US Supreme Court as a case of original jurisdiction. The court unfortunately did not take that case, and so that one was dismissed, but that would've been a real fun one to watch. But unfortunately we didn't get to go there.

(16:37):

So at this point, I think everybody's really looking at the Zelinsky case as the big one to watch coming out of New York to see if the dial will move at all on this issue.

Philip Person (16:51):

Got it. And Nikki, a lot of our listeners are in California. So speaking of California here, is there any update with California here? That's kind of what I want to know. What's going on with California in the context of out-of-state business with the California remote worker?

Nikki Dobay (17:07):

Yeah, so great question. California is one of those other big ones. So California is not a convenience of the employer state. We try to not really talk about that in California because we don't want them to get any ideas. And so really where California lands on this is they're in the camp of withholding would be required if you had a worker that was physically present in the state.

(17:32):

During the pandemic, and we saw this in several states, guidance was issued to essentially say, "Hey, we understand there's all these shelter in place orders or other things coming out, executive orders coming out requiring that people not travel or not come into the state, so really just kind of we're going to maintain our status quo rules." Meaning, if you were an employer, a California employer and one of your employees left the state to go work, California would've essentially have said, "I know that employee might've left, but we still think you should be withholding," because that was the status quo.

(18:19):

Vice versa, if you were an out-of-state employer and you had an employee coming into the state, California really was taking the position that they weren't going to do anything or make you change any of your withholding requirements during the time that the executive order was in place. They were also saying, "We're not going to say that this creates nexus or anything like that." However, most of the executive orders that were in place during the pandemic have since been rescinded. So since June 15th, 2021, so we're now a few years out from this, California is now saying, "The COVID rules are gone. We are back to... If you've got a remote worker in California, all the regular rules apply." That is where we're at with California. Just back to the general rules post-pandemic.

(19:19):

The other piece that is really important for folks to have on their radar with respect to California is not necessarily front and center on this remote work issue, but it really comes out of something that the Franchise Tax Board put out earlier this year. It was a technical advisory memorandum, 2022-1, which involves Public Law 86-272. And for your listeners that may not be familiar, what Public Law Public Law 86-272 does, this is a very old law, went into effect in the late 1950s, is it puts in place some protections for businesses on the income tax side where they're only selling tangible personal property into the state and they're doing some sales solicitation. And California has really gotten a lot more aggressive on this and really started to erode those protections. That technical advisory memorandum is the subject of litigation. So there is currently a case pending regarding the FTB's actions on that.

(20:32):

But what employers really need to know on this is if you're an out of state business who has traditionally been selling into California tangible personal property and you've been asserting protection under Public Law 86-272, that's really on shaky ground in California right now, and the FTB may assert that you no longer have that protection. And it's really based on if you've got a website and you're doing things that they think exceed solicitation that you could really... I would say they may become very aggressive on that. So again, this is just another area for out of state taxpayers selling into California to have on their radar. And I guess how to bring this back to remote work is having an employee in the state could play into this and create some additional challenges in that situation.

Ryan Bykerk (21:35):

I can sort of imagine, our listeners tend to be either part of management or maybe business owners, and I can imagine them maybe listening to this going, "Okay, there's some new and potentially scary information." What are some practical steps that an employer who's maybe either learning about this for the first time or thinking more deeply about this for the first time, what are some steps that an employer could take now to make sure that they minimize or maybe at least understand their potential tax liabilities here so that they don't get in trouble on a go forward basis?

Nikki Dobay (22:11):

Yeah, great question. I think the first thing to do is to take an inventory of where your employees are. And then try to connect the dots with your tax folks to understand, "Okay, I've got employees in 10 states. Am I already doing business in those 10 states or are these new states?" And so I think just kind of trying to inventory those types of things are really key.

(22:41):

The other thing that really should be happening is that the employer should start reviewing and thinking about what are their employee policies and procedures when it comes to where folks are going to be working for. So after you've done that initial inventory, if you've got states where you aren't doing business, there's no filing obligations, really thinking through, "Okay, are we going to let employees work in those states or do the tax implications that could be created by allowing an employee in a new state, are those two onerous?" So I think that some of that's going to have to come down to the employer's and businesses idea about their tax obligations and how much time and energy they want to spend on this state and local tax compliance. And then really building your policies and procedures around those things.

(23:49):

And so if there's going to be state A, B, or C where you don't want an employee in that state because it's just going to be difficult to deal with for whatever reason that your HR folks know that. So when the perfect candidate comes along and they want to work from that state, you can make a business decision.

(24:09):

And then the other really key thing about some of these policies and procedures are just making sure that you are on top of where your employees are located. If they're going to take a month long vacation and go work from a different state, when are they going to tell you that? So I think it's a good thing to just check in with some folks in this area to think through what are some policies and procedures and what does our individual business want to have in place so that we know how we can manage this issue? Because it's one where you really, especially in the new environment where folks are potentially working or can work from anywhere, you just want to really be able to manage the potential exposure you might have.

Philip Person (25:03):

Now, we talked a lot about the different states, but I'm also curious about how the federal government plays a role in this. How, if at all, has the federal government addressed state and local tax issues during the pandemic?

Nikki Dobay (25:18):

I would love to say they've figured it all out for us, and I don't have to think about this anymore.

Philip Person (25:24):

Then leave it there.

Ryan Bykerk (25:27):

We would love if you could say that too.

Nikki Dobay (25:29):

I know, but that would be a lie. So they've tried. Again, going back probably 15, maybe more years, there was this effort at the federal level to pass a bill called The Mobile Workforce. And what The Mobile Workforce would've done is it would've put in place a 30-day threshold that said unless an employee was in a state for more than 30 days, the state could not require any sort of withholding. Unfortunately, mobile workforce has never made it across the finish line. It has passed the House on several occasions. It even got to the 60 vote mark in the Senate, which I'm sure if anybody were looking at me in this podcast, they'd be like, "Well, why the heck hasn't this thing passed?" New York, New York has been very challenging on this issue mainly because they have been so successful with their convenience of the employer test and their withholdings.

(26:37):

So we've never gotten congressional action on the mobile workforce. There were also several proposals during the pandemic that would've created several other iterations of the mobile workforce, but in the pandemic version of that, and those didn't make it across the finish line either. So there continues to be efforts in this area at the federal level, but by and large, we don't anticipate that Congress is going to fix this issue.

(27:14):

So where things are at with, how do we fix this issue, how do we get somewhere, there's a few organizations that are working on this issue at the state level now. So the Council On State Taxation, COST, they have a model that they have been working on getting passed at the state level, and so that has been passed in a handful of states, but it is based on reciprocity with the other states passing it. So we're not going to get any national threshold unless all 50 states were to pass something like this.

(27:55):

And then working against them, unfortunately, is the Multistate Tax Commission has a competing model that some of the state folks have been pushing, which has also been passed in a few states. And unfortunately they have different day thresholds, and there's some nuances that do differentiate these proposals, and so we're not getting an across the board... Well, across the board uniformity, which is always the goal from my perspective, we're just not seeing that yet. NCSL, the National State Legislators Council is also working on this issue, but we haven't seen a model come out of that organization yet. So a lot of activity, a lot of people wanting some relief on this, but I don't feel like we've broke through and we're at a point where it's easy or you can kind of just say, "Oh, I don't have to worry about that anymore."

Ryan Bykerk (29:00):

That seems to be a common theme on the performance for your podcast, employers always have something more to think about. But really, Nikki, thank you. I mean, it's clear just by the summary that you've given us on all these different topics that there's so much going on here. So I mean, it certainly seems like one of the steps employers could take is call Nikki.

Nikki Dobay ([29:24](#)):

Right, yes, yes. Yes, I spend a lot of time just kind of talking with folks, helping them think through what's practical for their business and what are the potential risks or exposures out there, because this is one, you're never going to get it perfect, no matter... I mean, well, you could try really hard, but I think it'd be very difficult. So it's really a lot of, what are some practical solutions to how to handle this situation, and always happy to talk about that.

Ryan Bykerk ([30:01](#)):

Well, thank you, and thank you for talking with us about it today. Now that we're looking at the end of this episode, but Nikki, as I think we always like to end The Performance Review Podcast with a crazy story. Employment lawyers have tons of crazy stories, lawyers in general come across all kinds of crazy stories, so we're hoping that you have a crazy story to share that you've come across in your practicing time.

Nikki Dobay ([30:26](#)):

Well, I feel like I'm going to really disappoint because I don't know how crazy tax lawyers are in comparison to employment lawyers because we just supposedly sit around and look at spreadsheets all day. I don't want to disappoint you. I guess some of the crazier things that I deal with are just, really the work that I do trying to convince state tax administrators or state legislators how hard that businesses are really trying to comply with all of these different rules and how challenging that can be. So maybe it's not all that crazy, but I spend a lot of time just trying to figure out ways to educate policymakers to make state and local tax less crazy, but there are some crazy times there. So I've been to many crazy places when I've had to go and do these things. And so I got lots of fun travel stories, but I don't think I have crazy stories at the level you all do.

Ryan Bykerk ([31:44](#)):

Well, that's interesting you mentioned trying to convince policymakers. I've thought, what would it be like if you could give the Court of Appeal or California Supreme Court a handbook and say, "Can you just hand this back to us marked up, correct it all for us?" It sounds like you have kind of a similar experience in that regard where it's really about trying to get policymakers to understand, put yourself in the shoes of this business owner who has a product they're trying to bring to market and has employees and is just trying to figure out how to do that all correctly. And it is not simple, as you've explained today.

Nikki Dobay ([32:19](#)):

Yeah. I mean, it's something that when you try to explain... When I talk to a lot of states, I say, "Okay, you're working on one set of laws. You've just got these income tax or these sales tax or these withholding tax laws that you're working on. And one, these people are trying to run a business and they're trying to figure it out in all 50 states." And that, to me... They don't seem to appreciate that, which is very frustrating. But I mean, that's the crazy part to me of this job is trying to get them to understand, these guys, they're actually not running a how to comply with state and local tax laws shop. They're trying to sell X, Y, Z. They're trying to do this service. They're trying to create this product. They're trying to save the universe. They're trying to do something else, and this is just one nuisance that they've got to deal with. So yeah, they look at me like I have two heads, so those folks think I'm crazy all the time.

Philip Person ([33:29](#)):

So Nikki, you're telling me people aren't concerned about multi-state tax implications, that's not on everybody's to-do list?.

Nikki Dobay (33:40):

That's shocking to me too, because I think about them all the time, probably too much, but yes. Yeah, no, I mean, obviously my clients are tax people and we talk about this stuff all the time, but yeah, there's plenty of businesses I talk to where they're like, "This is insane." I'm like, "Yes, this is insane. I'm sorry to be the one telling you about this."

Philip Person (34:09):

Right. Well, thank you, Nikki, for joining us for The Performance Review. We had a great time talking about tax, which I never thought I would say. But for our listeners, if you have any questions, topics, or anything else you want to send our way, you can reach us at performancereview@gtlaw.com and we'll see the next time.

Speaker 1 (34:34):