



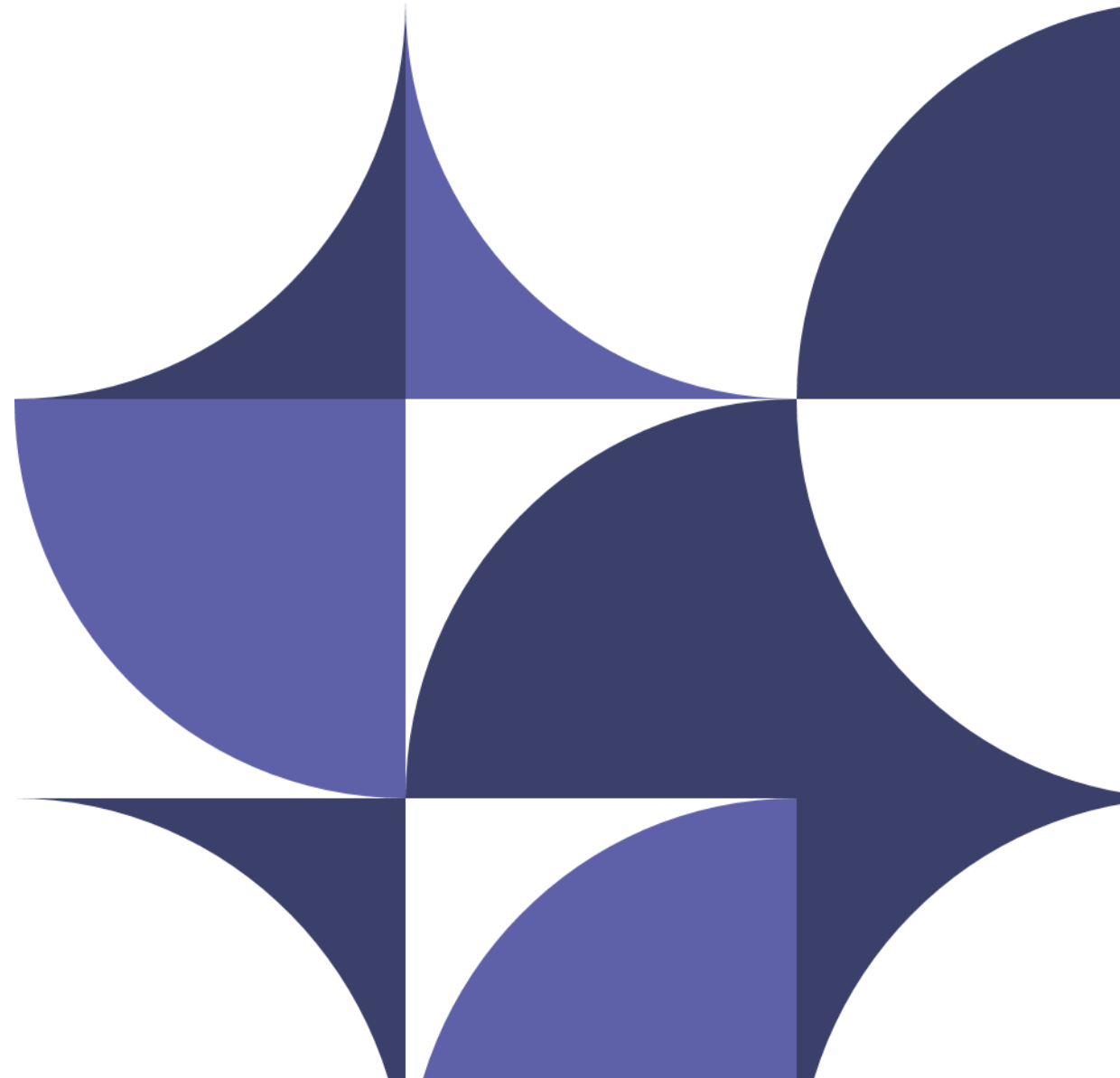
HR Forum

Remote Workforce Issues to Consider

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Seyfarth Shaw LLP

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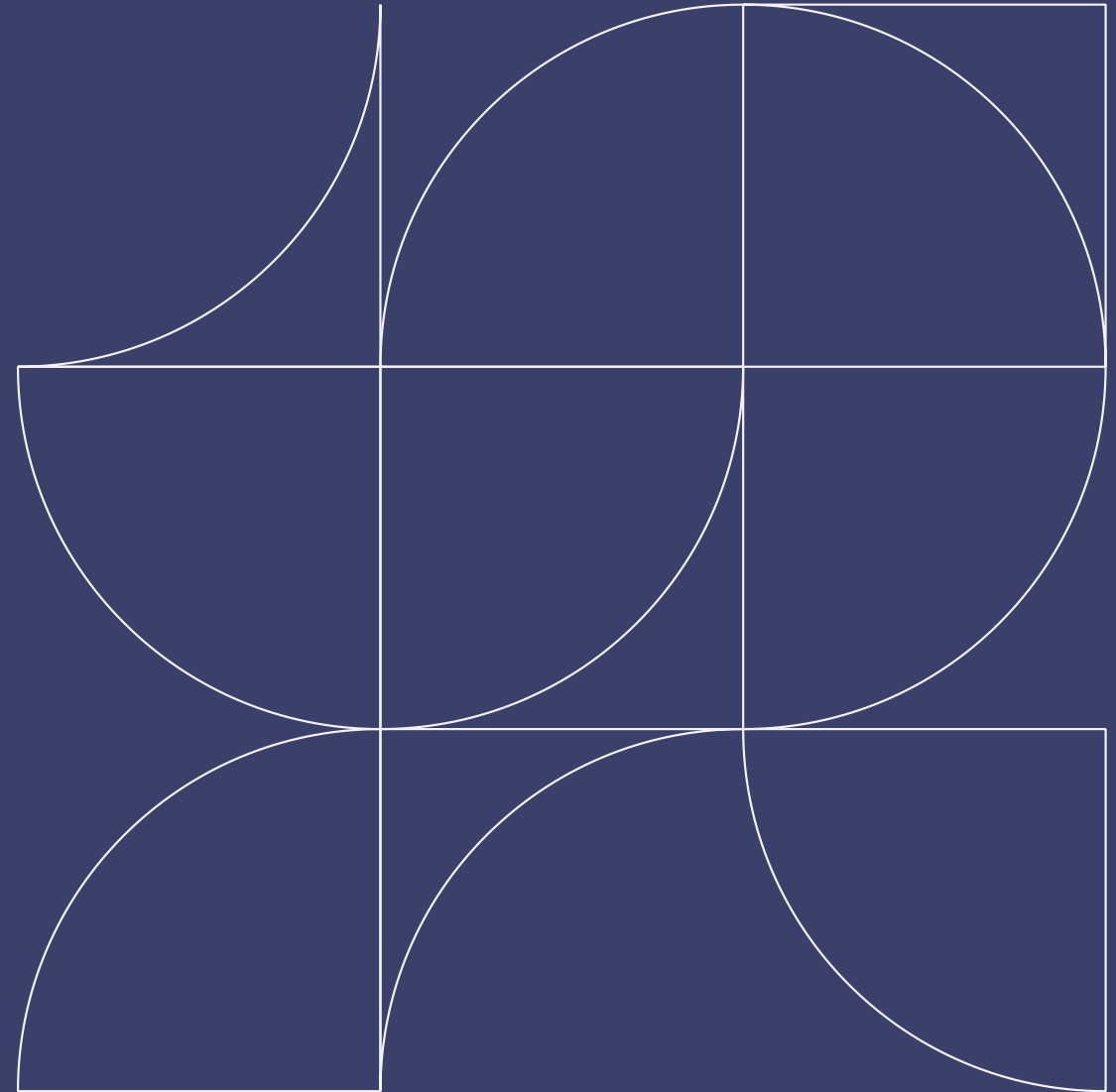
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Agenda

- 01** Applicable Laws for Remote Employees
- 02** Remote Work Tax Issues
- 03** Reimbursing COVID-19 WFH Expenses
- 04** Remote Work Policy

Applicable Laws for Remote Employees





Applicable Laws for Remote Employees

- Choice of leave laws
 - Company is based in New York, but Employee works in New Jersey. *Which law(s) apply?*
 - Very fact-dependent on how much work is being performed in NY vs. NJ
 - The answer does not stay the same if the states change!
 - Permanent change or temporary COVID arrangement?
- California is a whole different world...

The Empire State Strikes Back



- A Company, Rebel Alliance, is headquartered in New Jersey. In 2019, Employee Leia commuted every day from her home in New York to Rebel Alliance's headquarters.
 - *Which state law applies? For sick leave? Paid family leave? Discrimination claims?*
- In March 2020, Rebel Alliance directed Leia to work from home in New York due to COVID.
 - *NY or NJ law?*
- In April 2021, Rebel Alliance announced that it was going fully remote for all employees, for good. Leia continues to work from home due to COVID.
 - *NY or NJ law?*



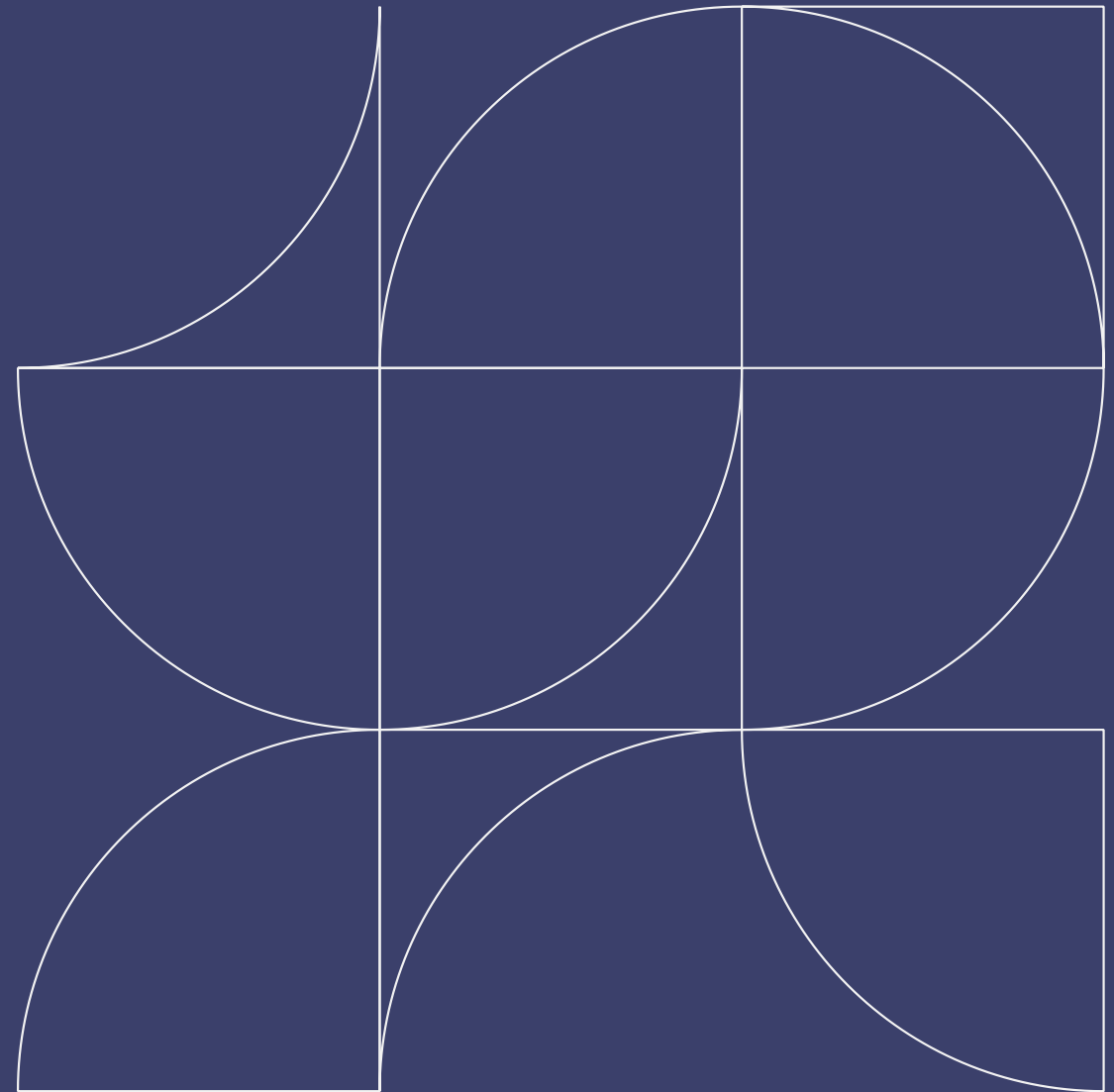
Applicable Laws for Remote Employees



Remember.....

- Anti-harassment training still required and important
- Accommodation requests must be handled appropriately

Remote Work Tax Issues



Remote Work Tax Issues

- Remote work arrangements (employees working and living in different states) may have tax implications for both employers and employees
- Pre-COVID Employer Issues:
 - Employers as withholding agents:
 - Employers are required to withhold state income taxes from their employees' wages
 - If an employee works and lives in different states, the employer may be required to withhold for multiple states
 - “Work state”: primary taxing jurisdiction
 - “Residence state”: secondary/residual taxing jurisdiction
 - However, an employer is only required to withhold state income tax from an employee's wages if:
 - the state can assert jurisdiction over the employer; and
 - the employee's wages are subject to tax after considering double-tax-avoidance rules



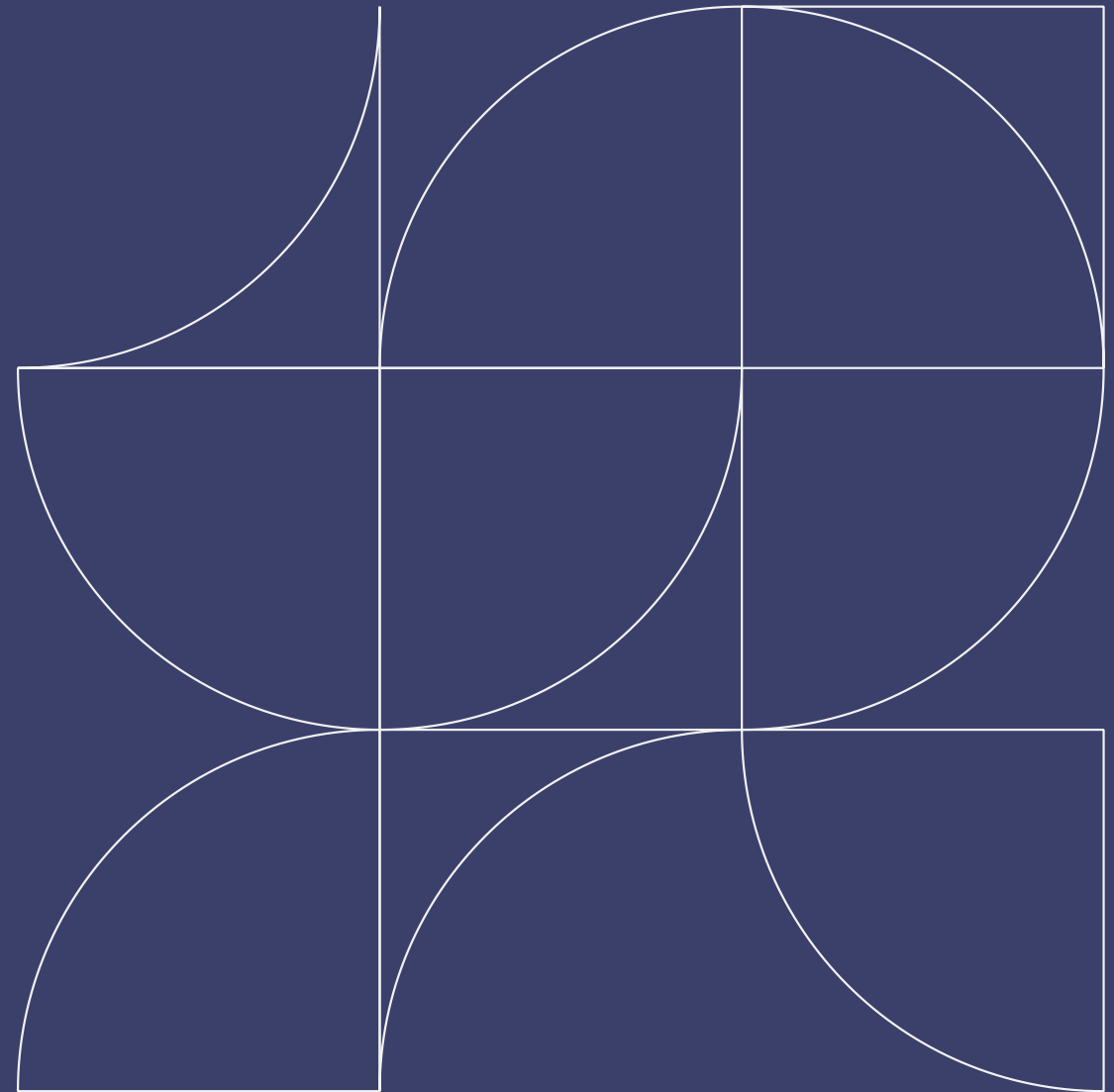
Remote Work Tax Issues

- Pre-COVID Employer Issues:
 - Employers as businesses:
 - States impose various income/franchise, sales, unemployment, etc. taxes on businesses that operate or have employees in their state
 - Employees working from home in a state may cause the employer to have “nexus” (physical or economic) in that state
- COVID-19 Impact:
 - Some states (only about a third) have acknowledged that compelling employers to shut down their offices and requiring employees to work from home (which may be in another state) might cause the employers incur additional obligations (withholding and business tax liabilities) that would not exist without COVID-19 and these additional obligations may not be fair
 - These states have created temporary rules that effectively ignore the employees’ presence in their home while working for purposes of withholding, nexus or both

Remote Work Tax Issues

- COVID-19 Impact:
 - However, this relief is not expected to last (probably only until shutdown orders expire) and most states (about two-thirds) have been silent
 - Once relief expires or if a state is silent, we have to assume that the normal rules apply and new withholding obligations and tax liabilities may be applicable
 - State examples:
 - New York:
 - In applying its convenience of the employer test, will treat employees working from out-of-State home as doing so for the employee's convenience (i.e., treated as working in NY)
 - No waiver of temporary presence for nexus purposes
 - Massachusetts:
 - Wages paid to non-MA-resident who was working in MA but is now working out of MA because of COVID-19 will continue to be treated as MA wages subject to MA withholding
 - New Hampshire sued Massachusetts because of this rule
 - Will not assert income or sales tax nexus because of employees working temporarily in MA

Reimbursing COVID-19 WFH Expenses



Overview



- Generally, the question of whether to reimburse employees for their work from home expenses will depend on federal, state, or local laws.
 - There is no federal requirement for reimbursement, but several local entities do require differing degrees of reimbursement.
- Even if not required by State law, it is certainly permissible to reimburse employees for reasonable out of pocket work from home expenses.

Common Work From Home Expenses



- Work from home expenses vary by industry.
- Some common expenses include:
 - Internet Services
 - Phone Service
 - Desks or Chairs
 - Computers
 - Related Equipment like monitors, speakers, keyboards, etc.



Federal Standard

- Under the Fair Labor Standards Act (“FLSA”) there is no direct requirement to reimburse work from home expenses.
- However, the FLSA has a narrow exception to this called the “kickback rule.”
 - Requires wages to be paid “free and clear” to ensure all employees are paid at least the minimum wage.
 - If an employee must pay back a portion of their wages, and this causes their salary to fall below the minimum wage, an employer will be required to reimburse those expenses.

Reimbursing WFH Costs in the Tri-State Area



- Generally, New York, New Jersey, and Connecticut follow the federal rule for reimbursing WFH costs.
 - New York has no additional laws regarding WFH reimbursement.
 - However, New Jersey and Connecticut will enforce an employer's agreed-upon obligation to provide a fringe benefit or that pursuant to an employment agreement.

Jurisdictions with laws about WFH expenses



- California
- Iowa
- Illinois
- Massachusetts
- Montana
- New Hampshire
- North Dakota
- South Dakota
- District of Columbia
- Seattle, Washington

Reimbursing WFH Costs in California

- California's reimbursement law is amongst the most stringent in the country.
- Under California Labor Code § 2802, employers are required to reimburse employees for reasonable and necessary expenses incurred related to work.
- The purpose of this statute is "to prevent employers from passing their operating expenses on to their employees." *Gattuso v. Harte- Shoppers, Inc.*, 42 Cal. 4th 554, 562 (2007).
 - This includes reimbursement for costs where employees incur no additional expense, such as unlimited data on a phone plan.
 - The case law provides little guidance regarding how much to pay, and simply states that the employer must pay some "reasonable percentage" of the employee's bill.

Crafting a Work from Reimbursement Home Policy

Considerations

- Any policy regarding the reimbursement of work from home expenses should be written clearly and concisely.
- Policies should comport with both federal and any applicable state/local laws.
- Whether reimbursement will be on a case by case basis or take a more “regular” form.

vs.

Concerns

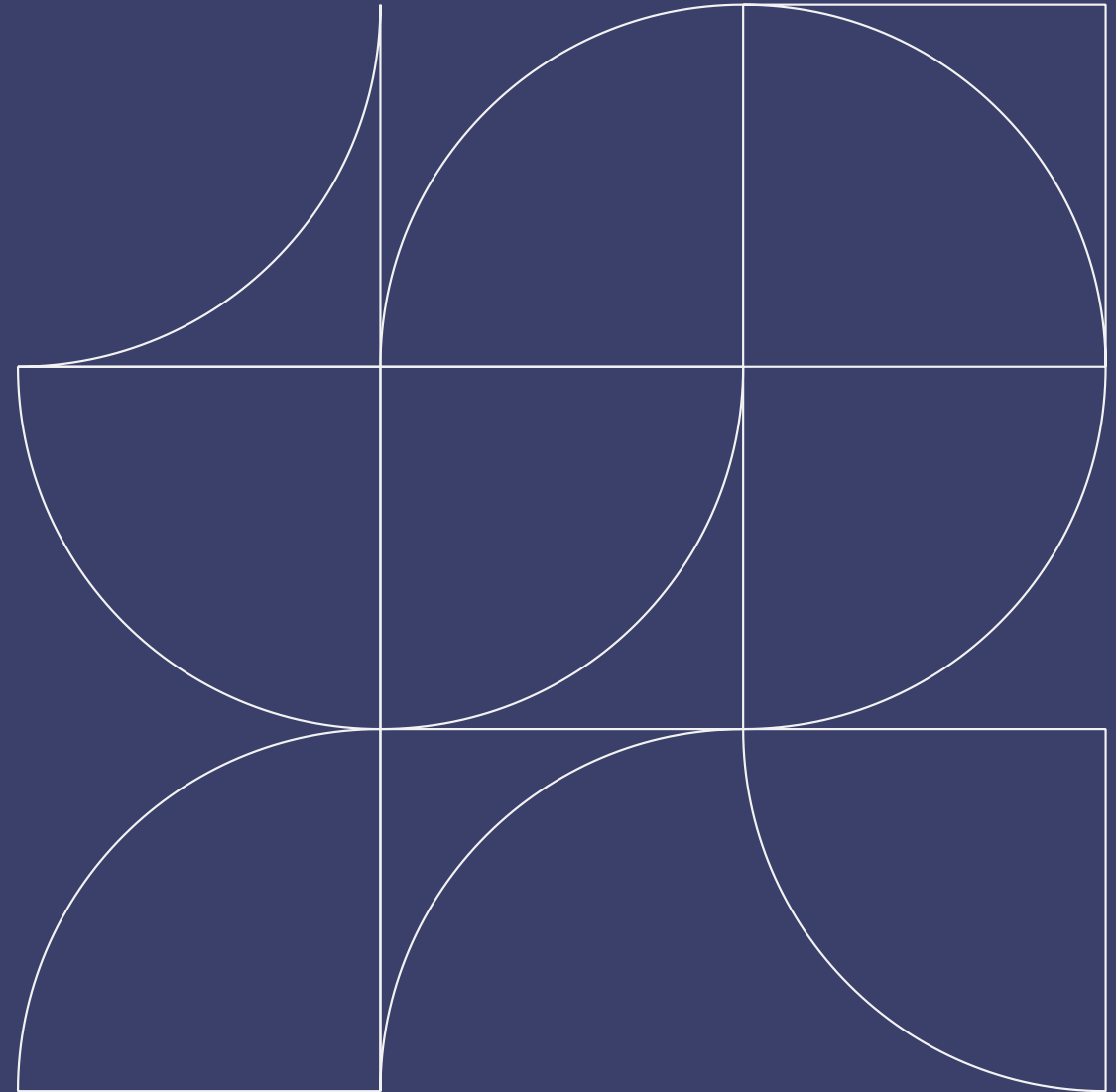
- A well written policy will include:
 - Clear explanation of what the policy covers.
 - Instructions for how employees will submit requests for reimbursement.
 - How and when those reimbursements will be provided.
 - Dates by which reimbursements should be submitted.

Final Considerations



- Many states follow the federal standard for reimbursing work from home expenses.
- Check local guidance to assess requirements for your relevant jurisdiction.
- If you conduct business in multiple states, you may prepare a policy that either reflects local requirements, or a blanket policy that reflects the most stringent jurisdictions' requirements.
- Many courts will enforce an employment agreement that includes a reimbursement policy, regardless of whether the jurisdiction requires such reimbursement.

Remote Work Policy



Drafting a Remote Work Policy

- Guidelines/Prevent Abuse
 - Make approval contingent upon safe and comfortable place to work efficiently, free from distractions, and with proper internet access and usage capabilities at appropriate speed.
 - Employees are expected to be available during regular business hours.
 - Remote work arrangements are not intended as a substitute for child care or other family care obligations. Employees are expected to be able to devote their full attention to their duties while working remotely.
 - Remote work arrangements are also not to be abused and taken as supplemental vacation time.
 - Permission to work remotely may be discontinued or modified at any time.
 - Reserve the right to approve a specific request to work remotely as a temporary measure and later require the employee to return to the office. Policy should state that you will attempt to provide advance notice of a change in remote work status to accommodate commuting, childcare, and other challenges that may arise. However, there may be circumstances where no notice is possible or warranted.

Drafting a Remote Work Policy

- Application of all company policies/standards of conduct
 - Appropriate workplace communications and company policies regarding discrimination and harassment.
- Accurate Recordkeeping
 - Records of all working time, just as if employees were working at the office.
 - Non-exempt/hourly employees must continue to follow company policies regarding time-keeping, meal breaks and rest breaks, and overtime.
 - Prohibit non-exempt employees from performing unrecorded or “off-the-clock” work under any circumstances. Non-exempt employees should not work any overtime hours without obtaining your supervisor’s permission in advance.
- Reimbursement of Business Expenses (if applicable, as discussed)
- Potential Worker’s Comp Coverage
 - Notify your manager immediately of any situation or circumstance that affects your health, safety, or welfare, or of any accidents or injuries suffered as you are working remotely.

Drafting a Remote Work Policy



- Importance of Information Security
 - Decide whether you are going to allow employees to work on or edit documents outside of the Firm’s secured networks.
 - Set standards and rules
 - Company equipment must be protected from damage, theft, or misuse.
 - Upon termination of employment, or at company’s request, you must promptly return any Company property.
 - Set parameters around the removal of hard copy documents and other physical records containing confidential information



Drafting a Remote Work Policy

- Impact of Relocation while working remotely
 - Relocation requests may impact business operations including: employer and employee taxes, payroll, wage/hour, and/or benefits eligibility, and must be reviewed and approved by your manager prior to the transfer/move.
 - It will be the employee's responsibility to determine any income tax implications of maintaining a remote/home office for remote work. The company will not provide tax guidance nor will the company assume any additional tax liabilities. Employees are encouraged to consult with a qualified tax professional to discuss income tax implications.



Q&A

thank
you

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