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California COVID-19 Webinar: Employer Tips for Returning Employees to Work and Managing a Hybrid WFH Workforce

The webinar will begin shortly.

Erin D. Leach
Tiffany Brosnan
Julie H. Quigley

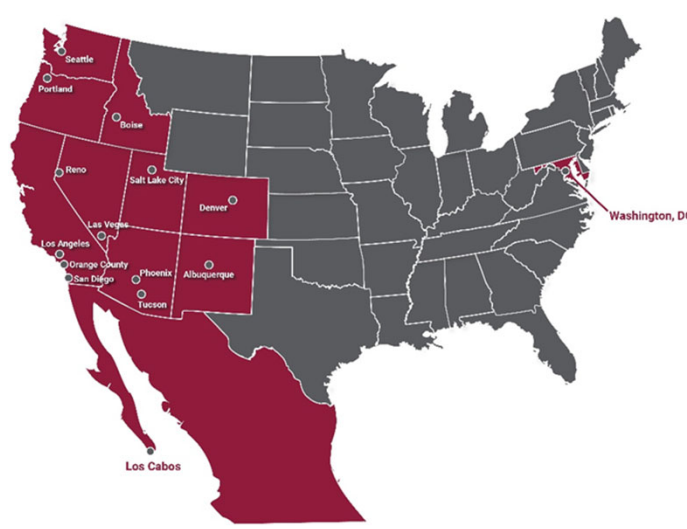
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About Snell & Wilmer



Founded: 1938

Geographic Reach: More than 450 attorneys in 15 locations in the United States and Mexico. Locations include Phoenix and Tucson, Arizona; Los Angeles, Orange County, and San Diego, California; Denver, Colorado; Washington, D.C.; Boise, Idaho; Las Vegas and Reno, Nevada; Albuquerque, New Mexico; Portland, Oregon; Salt Lake City, Utah; Seattle, Washington; and Los Cabos, Mexico.

We practice in the fastest-growing communities in the country, and we are ideally positioned to benefit from the West's historical economic strength. In the years ahead, we intend to continue the expansion of our existing offices and the addition of offices in other major metropolitan areas in the West, all of which will be served by highly skilled lawyers who share our commitment to excellence, client and community service, and the wellbeing of our staff and their families.

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Erin D. Leach

Labor and Employment
Counsel, Snell & Wilmer
714.427.7008
eleach@swlaw.com

- Erin has nearly 15 years of experience in employment litigation and counseling.
- She provides clients with ongoing counseling on a wide range of personnel matters including hiring and termination decisions, employment agreements, policy drafting, wage and hour issues, and employee medical leave.
- Erin represents employers in state and federal courts and arbitration, as well as before administrative agencies, in disputes regarding wrongful termination, discrimination, sexual harassment, unfair competition, trade secrets, reasonable accommodation of disabilities, retaliation, wage and hour (individual and class actions), and other types of employment matters.
- She received her J.D. from University of California, Hastings College of Law.
- Erin graduated cum laude from Harvard University with a B.A. in psychology.

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Tiffany Brosnan

Labor and Employment
Partner, Snell & Wilmer
714.427.7068
tbrosnan@swlaw.com

- Tiffany's practice is concentrated in employment litigation and counseling.
- Her employment-related counseling includes advising employers regarding wage and hour problems, leaves of absence, layoff planning, termination and disciplinary matters. Tiffany provides training to employers, including mandatory sexual harassment training. She also conducts independent workplace investigations.
- In litigation, Tiffany represents employers in individual matters and class actions including allegations of wrongful termination, whistle blower claims, discrimination, harassment, unfair competition, misappropriation of trade secrets and wage and hour violations.
- She received her J.D. from University of California at Los Angeles, School of Law.
- Tiffany graduated summa cum laude from University of California at Los Angeles with a B.A.

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Julie H. Quigley

Federal and State Tax
Counsel, Snell & Wilmer

602.382.6154

jquigley@swlaw.com

- Julie has over 15 years of experience in a wide variety of state and local tax matters including corporate income / franchise tax; indirect taxes (sales/use, employment and property); tax controversies and audits; tax compliance; tax credits and incentives; tax due diligence; and tax technical research and analysis.
- She leads the state and local tax practice in Snell & Wilmer's Phoenix office.
- Julie is a certified public accountant (CPA) with extensive experience at one of the "big four" accounting firms. She is a hands-on leader with managerial and supervisory experience in both corporate and public accounting focused on achieving outstanding results for clients in a fast-paced, deadline-driven, environment.
- She received her J.D. from Arizona State University.
- Julie graduated from New Mexico State University with a B.A. in accounting.

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Employment Claims Arising Related to COVID-19 – Plaintiffs' Lawyers Continue to Circle

- Class Action and PAGA Actions are still being filed daily
- Wage and Hour Claims:
 - Overtime
 - Minimum wage
 - Meal periods
 - Rest periods
 - Off-the-clock
 - Reimbursement of expenses
 - Misclassification as exempt outside sales
 - Paid sick leave
- Non-Wage and Hour Claims
 - Failure to accommodate
 - Disability discrimination

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Properly Paying Employees for All Hours Worked

- Must pay for all work time
- Tracking time when you cannot see employees come and go
- Time spent related to COVID-19 screening
 - Temperature screening / Screening machines
 - Daily wellness checklist
 - End-of-day tracking
 - Time to be tested

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Properly Paying Employees for All Hours Worked (*cont.*)

- Required recording of time worked – how?
- No exemption to record-keeping obligations merely because work from home
- Additional work time
 - Late-night emails and text messages
 - Weekend work
 - Sporadic work

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Meal Breaks Still Must Be “Provided” in WFH Environment

- Must provide 30-minute unpaid meal break
- Must have meal breaks recorded
- Must not interrupt meal breaks
- Considerations:
 - Set schedule
 - Use of out of office
 - Clear policies

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Rest Breaks Still Must Be Made Available in WFH Environment

- Must provide a 10-minute paid break for every four hours worked or major portion thereof
- Must be uninterrupted

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Reimbursement of Business Expenses for WFH and Hybrid WFH

- Cell phone
 - Forwarding business calls
 - To use daily wellness checklist / tracking apps
 - To complete Virtual Private Network (VPN) log-in
- WIFI
 - Home use
 - Increased use
- Web cam? Headset? Office Furniture?

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Reimbursement of Business Expenses for WFH and Hybrid WFH (*cont.*)

- Mileage
 - Going from home office to actual office
 - Going to be tested for COVID-19
 - Going to get COVID-19 vaccine?

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COVID-19 Supplemental Paid Sick Leave

- Up to 80 hours
- Basis for leave includes paid sick time to:
 - Get vaccine
 - Recover from vaccine
- Retroactive to January 1, 2021
- Set to expire September 30, 2021

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Key Provisions for Remote and Telecommuting Agreements – Logistics

- Office location
- Anticipated duration of the arrangement
- General work schedule and hours
- Expectations for availability
- Technical support hours offered
- Any required attendance for training and meetings
- Timekeeping requirements
- Reporting requirements

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Key Provisions for Remote and Telecommuting Work Agreements – Equipment and Supplies

- All reasonable and necessary business expenses must be reimbursed
- What equipment and supplies are being provided by the company
- Who is responsible for equipment maintenance
- Reimbursement of WFH-related expenses – cellphone, internet, etc.

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Key Provisions for Remote and Telecommuting Agreements – Information Security, Health and Safety, and Policies

- Elevated information security policy
- All employer policies still apply
- Ability to cancel WFH arrangement
- Detail how to report any injuries
- Affirm obligation of the employee to keep the designated work area free of hazards
- Remind employees of their obligation to report all work-time injuries consistent with your workers' compensation and safety policies, even if they occur at the remote worksite

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Safeguarding Confidential Information, Trade Secrets and IP with a WFH or Hybrid WFH Workforce

- Update or implement confidentiality agreements
- Password, dual authentication, encryption or a VPN
- Dealing with smart speakers in the home
- Train employees on how to transfer data
- Train employees on how to recognize when information is confidential or highly sensitive
- Manage what devices employees are using and storing company confidential information on
- Implement monitors on networks to flag suspicious activity

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How to Supervise and Manage a WFH or Hybrid WFH Workforce

- Special training for HR and supervisors to cover:
 - Engagement and motivation of employees
 - Evaluation of employee performance
 - Employee discipline
 - Communicating schedule and availability expectations
 - Applying conduct policies to a remote environment
 - Responding to internal complaints
 - Workplace injuries
 - Leaves and sick time requests

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State Tax and Payroll Implications Arising from WFH or Hybrid WFH

- Four work scenarios
 - Tax issues arise when more than one state is involved
- Employee taxation
 - Personal income tax
 - Employer withholding
- Employer taxation
 - Nexus creation
 - Apportionment impact

Commuter	Business Travel
Live in one state and work in another	Live and work in one state but at times conduct work in another state
Telework	COVID-19 Relocation
Live and remotely work in one state for an employer in another state	Remotely work in multiple states during the pandemic

Employee Taxation – Which State Can Tax the Income?

- General rule of taxation
 - State of domicile
 - Tax all income, regardless of source
 - Allow a credit for taxes paid to other states
 - Non-resident state
 - Only tax income earned in or sourced to the state
- Key variations
 - Reciprocal agreements for withholding
 - Agreement between states that allows a resident of one state to work in another state without having taxes withheld
 - Employee submits exemption form to employer
 - Convenience of the employer rules
 - Impose income tax liability where the employer office is located, regardless of where employee is working (NY)
 - Can create double taxation
 - Military / expat income

Employee Taxation – What are the Filing and Withholding Requirements?

- Working even just one day in-state and earning any amount of income can trigger an individual income tax filing requirement in many states
- Most states also impose a withholding obligation for employers
- Filing and withholding thresholds differ among states and may even differ within the same state

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Employer Taxation – Will Remote Workers Create Business Tax Liability for the Employer?

1-6 Employees Who Telecommute Create Nexus

AL, AK, AR, AZ, CA, DC, FL, GA, HI, IA, ID, IL, KS, LA, MA, MD, MI, ME, MO, MN, MT, NC, ND, NE, NH, NJ, NM, OR, PA, RI, TN, TX, UT, VA, VT, WI, WV, NYC

Nexus Temporarily Waived for COVID-19 Telework (as of November 5, 2020)

AL, AZ, CA, CT, DC, IA, IN, GA, LA, MA, MD, ME, MN, MS, ND, NJ, OK, OR, PA, SC, RI, WI

- Nexus
 - The determination of whether a business has sufficient economic presence in a state for the state to tax any of its activity
 - Having even one employee work remotely in another state can establish nexus for a company and create significant tax liability
- Apportionment
 - The determination of the division of the income between states for taxation
 - State laws vary with potential for a remote employee to impact tax liability in a number of ways
 - Apportionment factors (payroll, property, sales)
 - Sales factor sourcing for services (cost of performance vs. market sourcing)

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Tips When Requiring Employees to Return to the Workplace

- Require vaccinations?
- COVID-19 Preparedness Plan
 - Train employees on symptoms and prevention measures
 - Consider using wellness certificates
 - Consider doing temperature checks
 - Consider doing end-of-day tracking
 - Protocols if employee experiences symptoms (at work or home)

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Tips When Requiring Employees to Return to the Workplace (*cont.*)

- Plan for COVID-19-positive test results
 - Interview employee(s)
 - Contact tracing
 - Notification of others; notify workers' compensation carrier if required
 - Clean and disinfect
 - Quarantine per CDC guidelines
 - Notify government if required
- Travel and self-quarantine policy

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Tips When Requiring Employees to Return to the Workplace (*cont.*)

- Consider continued COVID-19 safety protocols and requirements even for those who have been vaccinated and / or who have already had COVID-19 (Do not ask if someone has had COVID-19, but you can listen!)
 - Still required under Cal-OSHA

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COVID-19 Vaccinations – Can They Be Mandatory?

- Yes, but notable exceptions include:
 - Disability
 - Religion
 - Potentially employees with an employment agreement
 - Potentially employees governed by a collective bargaining agreement
 - EUA Arguments (?)

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Required COVID-19 Vaccinations – Disability Accommodation

- Required to reasonably accommodate disability – which may include not requiring vaccine
- Engage in interactive process
- Undue hardship defense

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Required COVID-19 Vaccinations – Religious Accommodation

- Religion is a “moral or ethical belief as to what is right and wrong which is sincerely held with the strength of traditional religious views.”
- Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism and Buddhism
- Required to reasonably accommodate sincerely held religious belief or practice – which may include not requiring vaccine
- Engage in interactive process
- Undue hardship defense

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Required COVID-19 Vaccinations – Can an Employer Require Proof of a Protected Disability or a Protected Religion?

- Employers can require confirmation from a health care provider that an employee has a protected disability (without disclosing what it is) and needs to be accommodated
- Employers with a “bona fide doubt” about the religious basis of the request may inquire about the basis and make a **limited** inquiry into the relevant circumstances, as to whether a belief or practice is religious and sincerely held

Required COVID-19 Vaccinations – Accommodations to Consider

- When a disabled employee or one with a sincerely held religious belief requests not to be subject to a vaccine mandate, consider:
 - Allowing employee to work remotely
 - Implementing robust safety protocols
 - Modifying schedules
 - Modifying duties to avoid / limit interaction with others
 - Taking paid or unpaid leave
 - Requiring employee to determine whether a different vaccine may be safe for the employee
 - Do not automatically terminate!

Required COVID-19 Vaccinations – Pay and Reimbursement Requirements

- If vaccination is required must pay for:
 - Time it takes for the vaccination, including travel time
 - The cost of the vaccination
 - Necessary expenses incurred to travel to and from the vaccination location

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Alternatives to Mandating Vaccines

- Education and encouragement
- Incentives

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COVID-19 Vaccinations – Proof of Vaccination

- Can an employer request proof of a COVID-19 vaccination?
 - Yes
 - Caution – subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability
 - Do not ask for a copy of the vaccine card

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Thank you

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Erin D. Leach
Counsel, Snell & Wilmer
eleach@swlaw.com
714.427.7008



Tiffany Brosnan
Partner, Snell & Wilmer
tbrosnan@swlaw.com
714.427.7068



Julie H. Quigley
Counsel, Snell & Wilmer
jquigley@swlaw.com
602.382.6154

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