



The Future of Work for New England Employers - Part 6: Expense Reimbursement for Hybrid/Remote Employees

Patrick Bannon
Alison Silveira

June 29, 2023

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2023 Seyfarth Shaw LLP. All rights reserved. Private and Confidential





Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2023 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Speakers



Patrick Bannon
Partner
BOSTON

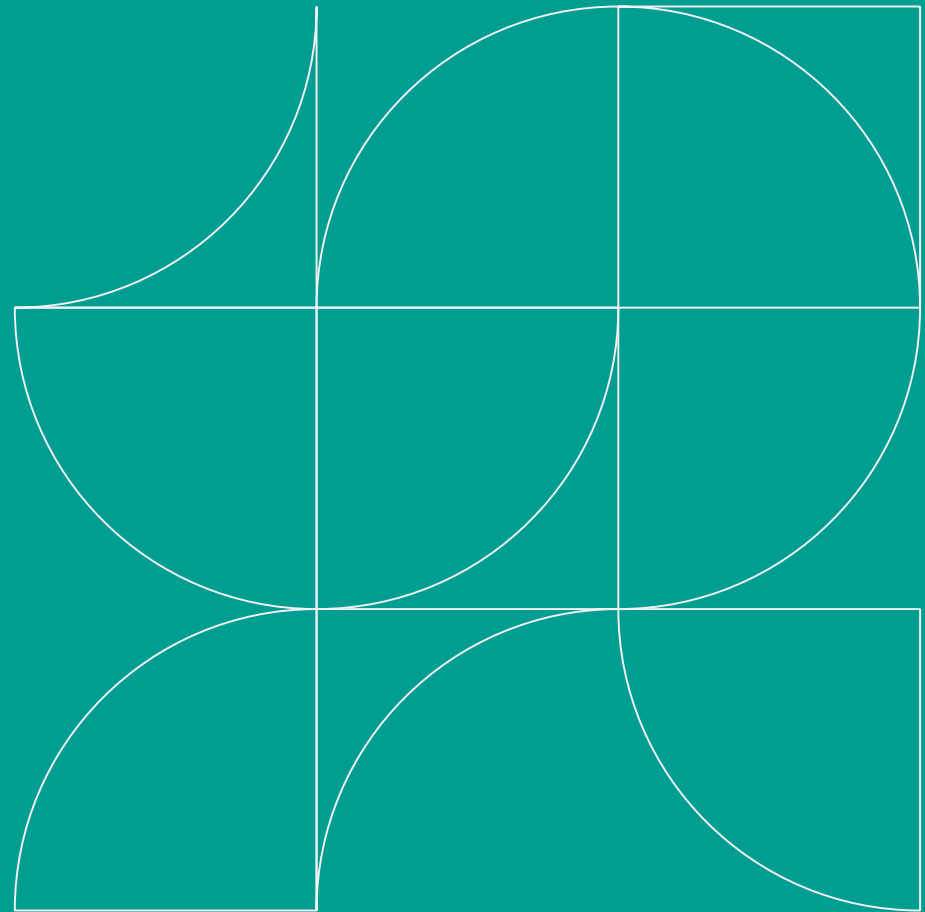


Alison Silveira
Partner
BOSTON

Agenda

- 01** Legal Landscape – Federal and New England
- 02** Travel and Commuting Expenses
- 03** Policies, Stipends, and Recommended Next Steps

Overview: The Legal Landscape of Business Expenses





Legal Landscape Around Business Expenses

- Federal law: No requirement to reimburse an employee for business-related expenses
 - Requires only that employees receive at least *federal* minimum wage and overtime for all hours worked
29 U.S.C. § 206
 - Wages must be “free and clear.”
29 CFR § 531.35
- A handful of states have more strict requirements around reimbursement of expenses
 - Only two in New England: Massachusetts and New Hampshire

The New England States of Concern: New Hampshire and Massachusetts

New Hampshire – Rev. Stat. 275:57

- Requires reimbursement of expenses incurred “in connection with [employee’s] employment at the request of the employer, except those expenses normally borne by the employee as a precondition of employment . . .”

Massachusetts

- Expenses incurred must not reduce compensation below *state* minimum wage
- 2020 – In a webinar, AG’s office provided informal guidance: employers should assess whether the expense is ***unavoidable*** and ***necessary*** for the employee to perform job responsibilities from home

What is an “Unavoidable” and “Necessary” Expense?

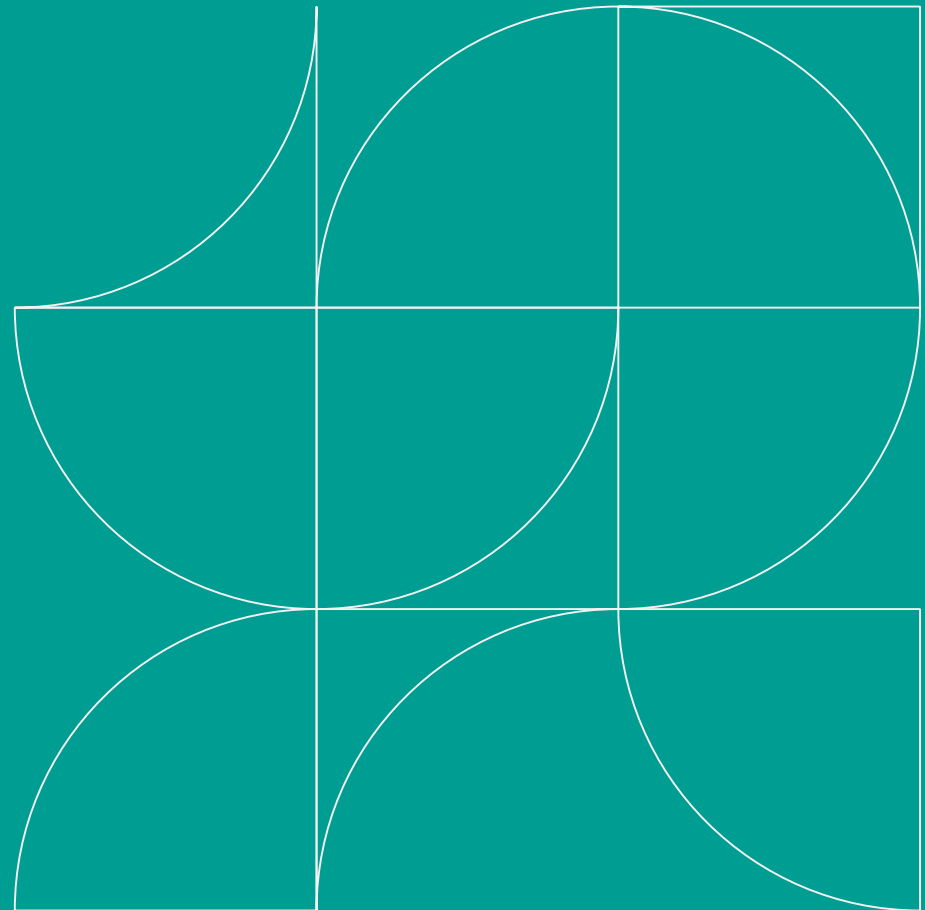
Fully Remote Employees

- Is the employee fully remote by choice, or because the Company made a decision that the position is remote? If employee chose to work remotely, were the expenses really unavoidable?
- What equipment is necessary for the employee to do the job?
- Does the Company provide equipment to employees? Is it available to remote employees?

Hybrid Employees

- Does the employee have the option to be fully in-person? If so, are costs of working from home actually unavoidable?
- Is equipment necessary to do the job available to the employee while in the office? Do Company rules permit the employee to take that equipment back and forth?

Travel and Commuting Expenses



Massachusetts Regulations Re: Travel Expenses

454 Code of Massachusetts Regulations § 27.04(4)(b):

“If an employee who regularly works at a fixed location is required to report to a location other than his or her regular work site, the employee shall be compensated for all travel time in excess of his or her ordinary travel time between home and work and shall be reimbursed for all associated transportation expenses.”

454 Code of Massachusetts Regulations § 27.04(4)(d):

“An employee required or directed to travel from one place to another after the beginning of or before the close of the work day shall be . . . reimbursed for all transportation expenses.”

What If . . . Employee Can Choose?

Contract A

- Salary of \$60,000 per year
- Normal benefits
- Employer agrees to reimburse travel expenses

Contract B

- Salary of \$600,000 per year
- Normal benefits
- Employee agrees to pay travel expenses without reimbursement



Commuting Expenses vs. Travel Expenses

Q1. How does the travel in question differ from the employee's ordinary commute?

- mid-day rather than at the beginning or end of day?
- longer?
- employee doesn't normally have any commute?

Q2. Are the differences for the benefit of the employee or the employer?

- Consider non-obvious benefits to employer
- Try to avoid losable arguments about employee compensation

Commuting Expenses v. Travel Expenses

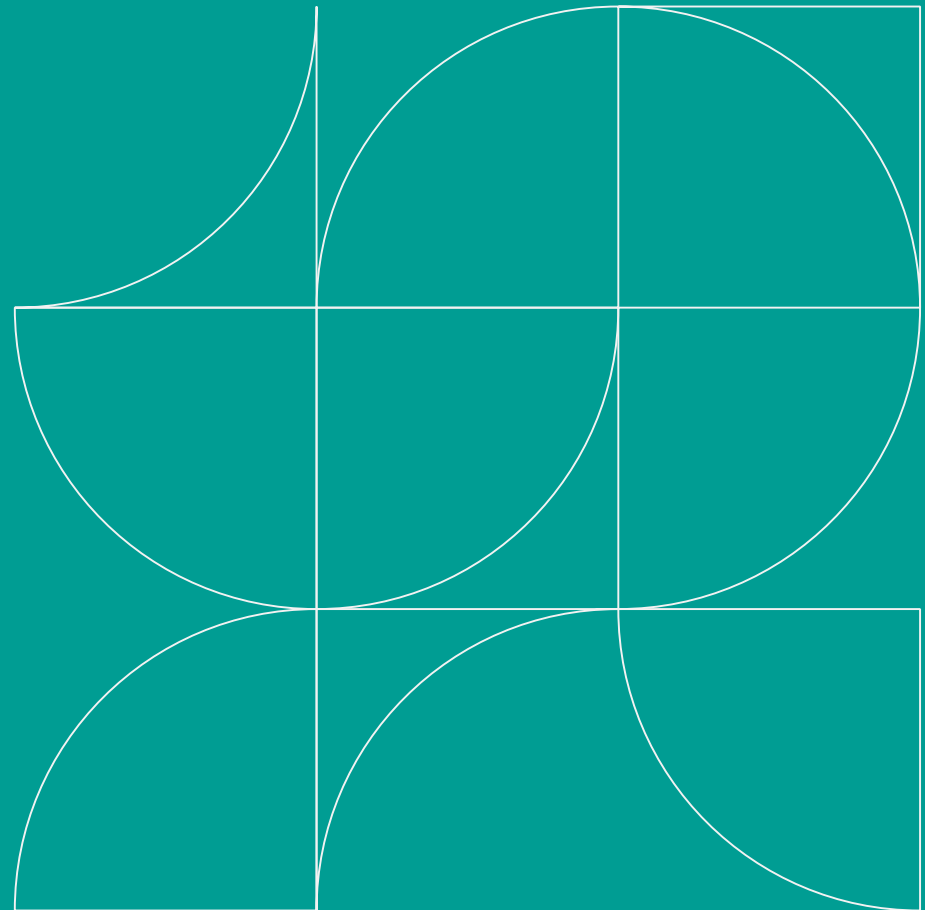
Commuting



1. EE working from home by choice drives to office by choice
2. EE working from home per ER request drives to office by choice
3. EE working from home by choice drives to office by ER request
4. EE working from home by choice drives to CL office
5. EE working from home per ER request drives to office per ER request
6. EE working from home per ER request drives to CL office

Business Travel

Stipends and Closing Thoughts





Stipends

Pros:

- saves work for EE and ER
- avoids need to calculate hard to calculate amounts

Cons:

- if stipend amount is too low, EE can still claim unreimbursed expenses
- if stipend amount is too high, for non-exempt employees, it could cause an overtime violation

Practical Options

- Pay a stipend for hard-to-calculate expenses and be clear about what kind of expenses the stipend does and does not cover
- Set stipend amount realistically and maintain documentation showing basis for amount
- Allow EEs to request additional reimbursement if they claim to have incurred expenses exceeding stipend
- Maintain written proof that EEs know that they can submit expenses for reimbursement
- Allow submission of expenses broadly while retaining right to review expenses based on a flexible standard such as reasonable and necessary

Thank You

**For more information please
contact:**

Patrick Bannon

Email: pbannon@seyfarth.com

Phone: (617) 946-4987

Alison Silveira

Email: asilveira@seyfarth.com

Phone: (617) 946-4808