National Conference of State Legislatures

Remote Work Taxation Work Group

STATE AND LOCAL TAX CONSIDERATIONS OF REMOTE WORK ARRANGEMENTS

I. Introduction

Following the COVID-19 pandemic and the dramatic nationwide increase in remote work, employees, employers, policymakers, and government agencies face complex and novel multijurisdictional tax issues at the state and local levels. Remote work in a state implicates a multitude of tax issues, many of which may be unexpected for the employer and difficult to administer for tax agencies.[1] Such complications especially arise when a remote employee works in a state where the employer had not previously engaged in business.

As the U.S. moves further away from the impetus behind the surge in remote work, it is evident that certain arrangements will be implemented for the foreseeable future. These arrangements can be placed into three groups:

- Full-time remote work, including work-from-anywhere arrangements, which is more common for technology-intensive or computer-based jobs.
- Hybrid remote work, where an employer requires employees to be in a traditional office setting for a specified period, such as two to three days a work, with the option to work the remaining days remotely.
- Full-time in-office work, which may include the service industries, manufacturing, health care and others where in-person interaction of some form is required.

At present, the long-term viability of remote work is unclear, though it is significantly more popular than it was in pre-pandemic periods. Recently, the Wall Street Journal reported:

> After remote work surged during the pandemic, fewer employers now feel the need to lure talent with the promise of working from home. Remote jobs made up 13.2% of

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[1] For an overview of remote work tax issues and possible solutions, *see* Jared Walczak, Eight State Tax Reforms for Mobility and Modernization, Tax Foundation, Jan. 5, 2022, https://taxfoundation.org/remote-work-tax-reform-mobility-modernization/.

> postings advertised on LinkedIn last month—down from 20.6% in March. Other job sites such as Indeed.com and ZipRecruiter also report declines in remote listings.
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> Demand for these jobs remains high. Remote jobs attracted a majority, or 52.8%, of all applications submitted on LinkedIn, slightly higher than a year before.[2]

Similar downturns in remote work were reported by other news outlets, with especially significant declines in remote work in the financial services industry from 2021 (55%) to 2022 (33%).[3] Nonetheless, "[w]hite-collar industries still have a large share of folks working from home. In the information sector (which includes tech and media companies), 67% of firms had people working from home some or all the time last year."[4] And, perhaps more telling, only 5% of workers before the pandemic worked remotely.[5]

At the outset, it is important to distinguish remote work/telecommuting from business travel. While both practices are generally included within the larger "mobile workforce" category of employment, remote work involves an employee regularly working full time or part time ("hybrid" arrangements) at a location other than his or her employer's office or a client's office—typically the remote employee works from home. In contrast, business travelers visit clients or other employer locations from time to time, often on a more infrequent or sporadic basis.

Both remote work and business travel, however, give rise to important and complex tax policy considerations for state lawmakers. For instance, as discussed throughout this white paper, policymakers might consider (and balance) the burdens placed on employers, employees, and revenue administration, while weighing fiscal issues and traditional tax equities.

[2] Ray A. Smith, The Job Market for Remote Workers Is Shrinking, Wall Street Journal, Jan. 23, 2023, accessed at <https://www.wsj.com/articles/the-job-market-for-remote-workers-is-shrinking-11674526943> (May 3, 2023).

[3] Emily Peck, Remote Work Grew Less Popular Last Year, Axios, March 29, 2023, accessed at <https://www.axios.com/2023/03/29/remote-work-grew-less-popular-last-year (May 3, 2023)>.

[4] *Id*.

[5] *Id*., *citing* J.M. Barrero, et al., Working From Home Is the Trend of the Year—And Next Year Too, Time, Dec. 22, 2022, accessed at < https://time.com/6243148/working-from-home-is-the-trend-of-the-year-and-next-year-too/> (May 3, 2023).

II. Executive Summary of Policy Issues and Recommendations [TBD]

- Personal Income Taxes
- Employment Taxes
  - Employer Wage Withholding
  - State Unemployment Insurance
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III. Personal Income Taxes

The flexibility of remote work has created complex state tax residency issues, particularly for a company's C-suite and other white-collar jobs that may be accomplished anywhere, subject to the company's internal policies and workforce culture.

States generally tax residents on all their income, including wages, wherever earned. On the other hand, states generally only tax nonresidents on income if it is from sources within the state.[6] While states typically have two bases of authority to tax individuals—residency and source—the state of the taxpayer's residency yields its taxing authority to the state where the income is earned, or "sourced," as reflected in most states' resident credit for taxes paid to other states.[7] The U.S. Supreme Court has called this structure, where source taxation trumps residence taxation, the "near-universal state practice" of the states. As with most state tax issues and policies, however, states adopt a patchwork of

[6] *See* Hellerstein, Hellerstein & Appleby, State Taxation (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through December 2022) (online version accessed on Checkpoint (www.checkpoint.riag.com) May 3, 2023) at ¶20.05[4][e].

[7] *See below* discussion.

laws that include numerous exceptions to the general residency/source rules, some of which are discussed below.

There are two general ways states determine residency for tax purposes:

- "Domiciliary" residency, which is a fact-intensive determination based on an individual's subject intent and various objective criteria.
- "Statutory" residency, where the individual spends a specified amount of time in the taxing jurisdiction, usually 183 days (six months) or more of the tax year and maintains a place of abode in the state.

Once established, an individual's tax residency continues in that state until the individual revokes that status by affirmatively establishing domicile in another state or spending the requisite number of days in another state to establish statutory residency.

In the context of wage income, states generally impose personal income tax on employees based on where those wages were earned, for example, based on the ratio of working days within and without the state. While seemingly simple in scope, tracking employees' working throughout the U.S. can be complex, especially if the employer offers deferred compensation, such as to nonqualified stock options that are earned (vested) over a multiyear period.[8]

'Convenience of the Employer' Test

One exception to the residency/source rules is the so-called convenience of the employer test, or "convenience test," which is "more aptly … called the 'necessity of the employer' test."[9] Under the convenience test, a nonresident's entire wages from telework are allocated ("sourced") to his or her assigned office location, instead of the location where the employee is teleworking, unless the teleworking arrangement is due to necessity rather than the employee's convenience.

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[8] The employer withholding rules applicable to nonqualified deferred compensation are beyond the scope of this White Paper.

[9] *Zelinsky v. Tax Appeals Tribunal of State*, 1 N.Y.3d 85, 92, 801 N.E.2d 840, 846 (2003) at n. 3.

The underlying rationale of the convenience test has been explained by the Court of Appeals of New York: "[I]n the absence of the convenience test, opportunities for fraud are great and administrative difficulties in verifying whether an employee has actually performed a full day's work while at home are readily apparent."[10] However, an influential state tax professor and author of the leading treatise on state taxation, Walter Hellerstein of the University of Georgia, has described the convenience test that assigns 100% of a remote worker's wages to his or her employer's state as "vulnerable to constitutional attack" under the Due Process Clause and the Commerce Clause" because, in part, "[w]hen a nonresident employee works at home, the state, it may be argued, has neither a residence-based nor a source-based justification for taxing the income."[11]

Thus, as with many other state tax policy decisions, adoption or repeal of a convenience test involves balancing legitimate tax administration and enforcement goals with the limitations placed on the states by the U.S. Constitution, as well as other political and practical considerations identified below.
Only six states have adopted some form of the convenience test as a permanent policy—New York, Delaware, Connecticut (only as applied to residents of the other convenience states), Nebraska, Oregon (limited to executives and officers performing "exclusively" managerial services) and Pennsylvania.[12] Infrequently, other states seem to adopt the rationale of the convenience test. For example, an associate judge at the Alabama Tax Tribunal incorporated aspects of the convenience test in a fact-dependent order.[13] Two other states previously attempted to adopt a form of convenience test by way

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[10] *Zelinsky v. Tax Appeals Tribunal of State*, 1 N.Y.3d 85, 92, 801 N.E.2d 840, 846 (2003) at n. 4.

[11] *See* Hellerstein, Hellerstein & Appleby, State Taxation (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through December 2022) (online version accessed on Checkpoint (www.checkpoint.riag.com) May 3, 2023) at ¶20.05[4][e][ii].

[12] New York: 20 N.Y.C.R.R. §132.18(a); *see also Huckaby v. New York State Div. of Tax Appeals*, 4 N.Y.3d 427, 829 N.E.2d 276, 280 796 N.Y.S.2d 312, 316 (2005), *cert. denied*, 546 U.S. 976, 126 S. Ct. 546 (2005), *citing* 20 N.Y.C.R.R. §132.18(a); Connecticut: Conn. Gen. Stat. §12-711(b)(2)(C); Conn. Dep't Rev. Serv., IP 2019(1), *Conn. Employer's Tax Guide* 4 (1/31/2019); Delaware: *See* Dorothy A. Flynn, v. Dir. of Rev., Dkt. No. 1504, 3 (Del. Tax App. Bd. Sept. 14, 2011) (citing Delaware Individual Non-Resident Income Tax Return, Schedule W) (emphasis in original omitted); see also 30 Del. Code §1124(b)(1) (defining compensation sourced to Delaware to include "compensation...for personal services:...(b) [a]ttributable to employment in this State and not required to be performed elsewhere."); Nebraska: 316 Neb. Admin. Code 22-003.01(C)(1); Oregon: Or. Admin. R. 150-316-0165(3)(b); Pennsylvania: 61 Pa. Code §109.8; Pa. Dep't Rev. Tax Ruling No. PIT-03-031 (Sept. 16, 2003)

[13] *Bollinger v. Alabama Dep't of Revenue*, Dkt. No. Inc.22-390-LP, Ala. Tax. Trib., March 8, 2023; see generally Janelle Fritts, Alabama Tax Tribunal Says Out-of-State Workers Owe Income Taxes, Tax Foundation, March 31, 2023, https://taxfoundation.org/alabama-remote-work-tax/. In that order, the taxpayer worked for an Alabama-based company in Alabama until September 2020, at which time he moved to Idaho where he continued to work remotely. For the 2020 tax year, the taxpayer reported income earned while working in Idaho on his Idaho part-year return. The Tax Tribunal ruled that, although the taxpayer's domicile changed to Idaho when he moved, his

of administrative policy yet were superseded—Arkansas by the state Legislature and New Mexico by an administrative law judge, respectively.[14] Several cities also adopt a convenience test, including Philadelphia.[15]

Among the various adopters, New York's convenience test is the best known because of the state's economic importance; the widespread application of the test to residents of neighboring states (namely, Connecticut, Massachusetts, and New Jersey); and the breadth of the state's relevant case law and administrative guidance on the test.[16]

The other states' respective convenience tests have not garnered as much attention as New York's. And while largely derivative of New York's convenience test, those other tests are notable in several respects. For instance, the Connecticut convenience test is inextricably related to the New York test because it is retaliatory in nature, that is, it applies only to nonresidents of other states that also have adopted the test. Pennsylvania's convenience test is unique because, in practice, it is the only test adopted by a state that has reciprocity agreements with other states (Indiana, Maryland, New Jersey, Ohio, Virginia and West Virginia), which limits the application of its test to residents of Delaware, New York or other nonreciprocal states.

Employers, employees, administrators, and policymakers can benefit from distinguishing between the facts that would trigger application of the convenience test, which applies to teleworking/remote work arrangements, and those that would create nonresident withholding issues related to ordinary business travel. The Pennsylvania Department of Revenue explains this distinction, noting that its convenience

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income earned while working in Idaho was taxable Alabama-sourced income. And even though the Tax Tribunal in Bollinger its analysis was inconsistent with a 2013 order that "seem[ed] analogous to the present case," the Tax Tribunal looked to an Alabama Supreme Court decision describing what "doing business" in the state meant, concluding the Taxpayer's work fell within that description because he continued doing the same work he was doing when he worked in the state and reported to the same supervisors.

[14] Ark. Dep't of Fin. & Admin., Legal Op. No. 20200203 (Feb. 20, 2020) (legislatively overruled by Ark. Code § 26-51-202(c)(3); *In re Dill*, No. 17-42, NM Admin. Hearings Office, Oct. 5, 2017 (rejecting the Taxation and Revenue Department's convenience test).

[15] City of Philadelphia, *When are non-residents exempt from Philadelphia's Wage Tax?* (Sept. 27, 2018), available at https://www.phila.gov/2018-09-27-when-are-non-residents-exempt-from-philadelphias-wage-tax/;) see also City of Philadelphia, 5 Things to know about Wage Tax (Feb. 26, 2020), available at https://www.phila.gov/2020-02-26-5-things-to-know-about-wage-tax/.

[16] *See In the Matter of Edward Zelinsky* Nos. 830517 and 830681 (N.Y. State Div. of Tax Appeals April 2023).

test would not apply in the following situation: "[i]f the employee must travel to a place outside the state where he/she normally works to serve the employer's needs, such as by calling on a client of the employer or providing some service for one of the employer's clients or customers... ."[17]

Beyond deviating from the settled norm of residency/source taxation, there are two significant policy considerations relevant to the convenience test. First, by definition, the convenience test applies when remote work is arranged for convenience; it does not apply when the remote work arises out of necessity. However, the availability of any necessity exception is not well-developed among the adopting states. For example, the New York Department of Taxation and Finance has issued detailed guidance on the state's necessity exception, the qualification criteria for which are so narrow (by design) that the exception only applies in limited circumstances, which did not include the COVID-19 pandemic's work-from-home orders.[18] In contrast, Delaware simply applies its necessity exception where the remote work is required by the worker's employer.[19]

Second, the convenience test diverts personal income tax revenues from an affected teleworker's state of residence, if that state provides the resident a credit for taxes paid to a convenience test state. A state with residents affected by a convenience test is faced with a Hobson's choice—either provide the resident credit, which impacts the state fiscally, or deny the credit, subjecting residents to double taxation. This credit allowance can be significant; for example, New Jersey estimates its resident credit for taxes paid under the New York convenience test costs New Jersey *billions* in foregone revenue.[20] Otherwise, the resident's state could deny the credit for taxes paid by the resident, which would subject those wages to double taxation. Moreover, while there are clear political and practical implications of providing (or not) a resident credit for taxes paid to other states, when and how a state provides such credit also is controlled by an analysis of the "internal consistency" test under the U.S. Supreme Court's Commerce Clause jurisprudence, as described in *Comptroller of the Treasury v. Wynne* and discussed below.

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[17] Pa. Dep't Rev. Tax Ruling No. PIT-03-031 (Sept. 16, 2003).

[18] New York Tech. Svc. Bureau Memo. No.TSB-M-06(5)I (May 15, 2006).

[19] *Dorothy A. Flynn, v. Dir. of Rev.*, Dkt. No. 1504, 3 (Del. Tax App. Bd. Sept. 14, 2011).

[20] Brief for States of New Jersey, et al, on Motion for Leave to File a Bill of Complaint as Amicus Curiae in support of Plaintiffs, *New Hampshire v. Massachusetts*, No. 22O154, U.S.S.Ct., Dec. 22, 2020.

In response to New York's convenience test, and the related revenue loss as a result of providing its affected residents a credit for taxes paid, New Jersey considered legislation during the 2023 session that, among other things, would impose a reciprocal convenience rule against nonresidents who live in other states that employ one, similar to the current Connecticut law.[21] The proposed legislation, as amended, would also provide a tax credit to New Jersey residents who challenged a convenience test (presumably New York's) while working in New Jersey, in an amount equal to 50% of the taxes owed to the state due to the readjustment of the credit for tax paid to another state.[22]

> **<u>POLICY CONSIDERATION AND BEST PRACTICE</u>** – Prior to adopting a convenience test, the Task Force recommends that state policymakers may consider all aspects of the "convenience of the employer" test provided by the employee's resident state (or other remote work state) and/or the state where the employer's office is located, as relevant to the personal income taxation of wages and correlative employer withholding obligations. In this regard, policymakers ought to consider the other tax types that compensate the employer's state for its in-state presence, such as corporate income/business taxes, use taxes, property taxes.
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> Further, when evaluating the impact of a convenience test, this policy consideration intends to mitigate the difficult decision facing state policymakers to either provide a resident credit for taxes paid (and thereby harming the state treasury) or denying such credit (and thereby double taxing their constituents).

Other Exceptions to the Residency/Source Bases of Taxation

Though much less controversial than the convenience of the employer test, reciprocity is the most common exception to source taxation of wage income.[23] In fact, nearly half the states with personal income taxes have entered into reciprocity agreements with other states to alleviate personal income tax obligations for their residents.[24] Under the agreements, a reciprocal state relieves nonresidents from tax on wages earned in the state, so long as the other reciprocal state affords the same relief to its residents. Reciprocal states only tax the wages of resident employees who elect into the agreement, which contains certain preconditions, including a requirement that employers withhold tax from wages

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[21] N.J. S.B. 3128, 220th Legis. (2022).

[22] *Id*.

[23] *See generally*, Jared Walczak, <u>Do Unto Others: The Case for State Income Tax Reciprocity</u>, Tax Foundation, Nov. 16, 2022, https://taxfoundation.org/state-reciprocity-agreements/.

[24] Local taxes and/or withholding may apply to nonresident wages earned within the locality unless the given locality is party to the reciprocity agreement.

paid to those resident employees.[25] Among the notable preconditions to reciprocity, all reciprocity agreements require employees to file residency declaration forms with their employers.

Arizona, California, Oregon, Virginia, and Guam provide a "reverse tax credit,"[26] which is similar to a reciprocity agreement. In these states, when wages are subject to personal income tax in an employee's resident state and the nonresident work state, the employee credits the resident state tax paid against the nonresident work state tax otherwise due. This is the reverse of the general rule, described below, where the resident state credits the taxes paid to other states. Employers should be cognizant of reverse tax credits and how they might affect tax withheld from an employee's wages.

Another example where a withholding obligation turns on residency, instead of source, occurs where an employee's resident state imposes a personal income tax, but the state where the employee works does not. In that case, an employer may have to withhold tax for the employee's resident state if it maintains an office, derives income, or does business in that state.[27] Some states require employers to withhold in such cases, yet do not specifically impose a withholding obligation based on the employer maintaining an office, deriving income or doing business there.[28]

Finally, there may be unique constitutional or other issues that prohibit a jurisdiction from taxing nonresidents. For instance, the District of Columbia only imposes personal income tax on its residents and, hence, only requires employers to withhold from resident wages. Under the Home Rule Act of 1973, the District cannot impose personal income tax on nonresidents, except professional athletes,

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[25] See, e.g., Illinois Department of Revenue, Pub. No. 130 (Jan. 1, 2020); Wisconsin Department of Revenue Tax Pub. No. 121(Jan. 1, 2020).

[26] *See, e.g.*, Cal. Rev. & Tax Code § 18001(a), -(c); Cal. Franchise Tax Bd. Legal Ruling No. 2017-01, Feb. 22, 2017; and Ore. Admin. Reg. 150-316-0205.

[27] *See, e.g.,* Miss. Code §27-7-303(d), §27-7-305 (an employer doing business in or deriving income from sources in Mississippi and having control over wages paid to residents is subject to withholding).

[28] *E.g.*, La. R.S. §47:111(D) and La. Rev. Rul. 08-004 (Feb. 6, 2008) ("If instead the employee is a Louisiana resident and working in a state that does not have an income tax, like Texas or Florida, the employer will be penalized for failure to withhold Louisiana income taxes on the income earned from services performed in the other state'"); O.C.G.A. §48-7-100(4)(A), §48-7-100(5), §48-7-100(10); Georgia Department of Revenue Employer's Tax Guide (Nov. 9, 2018) ("Georgia residents are subject to the withholding tax laws of the state in which they work. If that state does not require withholding, tax should be withheld and paid to Georgia.").

unless the nonresident's source of income derives from District "local funds."[29] For different reasons, employers are not required to withhold the New York City tax from wages paid to nonresident employees because nonresidents are not subject to the tax.[30]

> **<u>POLICY CONSIDERATION AND BEST PRACTICE</u>** – States may consider entering into reciprocity agreements with other states for personal income tax and employer wage withholding purposes, to the extent they have not done so already. These agreements simplify tax enforcement and compliance by taxing individuals on a residence-basis.

Resident Credits for Taxes Paid to Other States

To avoid or mitigate the potential for double taxation of residents, states generally provide a credit for taxes paid to another state on income derived from sources within that other state. For example, if a resident of New Jersey works in New York, that individual files a New York state nonresident personal income tax and pays tax on wages earned in New York (with notable exceptions discussed below). New Jersey then provides its resident a credit on his or her New Jersey resident tax return for the amount of New York state nonresident tax paid during the same tax period.

Numerous exceptions apply to this general rule and the calculation of the credit for taxes paid, including limitations and disallowance of the credit, varies by state. For example, Maine limits its credit for taxes paid to income sourced under Maine law—not the source state's law.[31] Thus, Maine does not permit its residents to claim a credit for taxes paid to New York under the convenience test, as Maine has not adopted that rule.[32]

In certain—but not all—instances, a state may be required by the U.S. Constitution to provide its residents a credit for taxes paid to other states. In Comptroller of the Treasury v. Wynne, the Supreme Court held that Maryland's personal income tax regime, which consists of a state tax and a county tax, was unconstitutional because the state did not provide its residents a credit against the *county* tax for

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[29] D.C. Code § 1-206.02(a)(5); *but see, District of Columbia v. Bender*, 906 A.2d 277 (D.C. 2006), cert. denied U.S. Sup. Ct., Dkt. No. 06-719, 2/20/2007 (sustaining "the taxation of nonresident personal income if that income is derived from the operation of an unincorporated business within the District of Columbia").

[30] New York Department of Taxation and Finance, Nonresident and Part-Year Resident Income Tax Return, Form IT-203-I, 31 (2019); *City of New York v. State*, 94 N.Y.2d 577 (2000).

[31] 36 M.R.S. §§ 5217-A, 5412.

[32] *Id*.

taxes paid to other states.[33] Because Maryland also imposed a state and "special nonresident tax" on nonresidents earning income within the state, the Court determined that the Maryland regime discriminated against interstate commerce in violation of the dormant Commerce Clause.[34] The Court made clear that a resident state is not constitutionally *required* to "recede" taxing authority to the "source" state but nonetheless may need to depending on the specific regime, explaining:

> [T]he principal dissent claims that the analysis outlined above requires a State taxing based on residence to "recede" to a State taxing based on source ... We establish no such rule of priority. To be sure, Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States ... If it did, Maryland's tax scheme would survive the internal consistency test and would not be inherently discriminatory.[35]

Thus, the *Wynne* decision says that, while a state is not constitutionally required to provide its residents a credit for taxes paid to other states, a state that denies the resident credit cannot also tax nonresidents on income earned within the state—neither of which is politically or practically feasible in most instances.[36]

The Supreme Court acknowledged in *Wynne* that most (if not all) states that impose a personal income tax provide a credit for taxes paid to other states on wage income.[37] Complications arise, however, when an individual is subject to local taxes or earns investment income or income from capital gains.[38] For example, in *Zilka v. Tax Review Board City of Philadelphia,* which was heard in the Commonwealth Court of Pennsylvania, a resident of Philadelphia who worked in Wilmington, Del., requested a credit for the

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[33] Comptroller of the Treasury v. Wynne, 575 U.S. 542 (2015).

[34] The *Wynne* court determined that the Maryland regime discriminated against interstate commerce because it failed the so-called internal consistency test, which evaluates the constitutional validity of tax regime by hypothetically assuming every state has the regime under scrutiny and looking at whether interstate commerce is taxed at a higher rate than intrastate commerce. If so, the tax regime fails the test. *See, e.g., American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, (2005), *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995).

[35] *Wynne*, 575 US. at 568 (*citations omitted*).

[36] *See* discussion of New York's convenience of the employer test, below.

[37] *Wynne*, 575 U.S. at 561 (*citations omitted*).

[38] *See, e.g., Miller v. McColgan*, 17 Cal. 2d 432, 110 P2d 419 (1941).

remaining Delaware state-level tax she paid to be applied against her Philadelphia wage tax.[39] Her request was denied. The taxpayer argued that she was taxed, on average, 1.93% more than her intrastate counterparts and, therefore, the refusal of a credit amounted to an unconstitutional burden on interstate commerce. The court rejected the taxpayer's argument, stating that because Philadelphia gave a credit for the Wilmington tax paid by the taxpayer, the wage tax passed the so-called *Complete Auto* test—a reference to *Complete Auto Transit Inc. v. Brady*, in which the U.S. Supreme Court identified a four-part test to determine if a state tax violates the Commerce Clause.[40] The decision was appealed and the Pennsylvania Supreme Court heard oral arguments on March 7, 2023.

IV. Employment Taxes

Employer Wage Withholding

The following provides an overview of the complex framework of multistate withholding faced by employers. Generally, states impose wage withholding obligations on employers that:

- Maintain an office, derive income, and/or otherwise do business in a state.
- Have control over the payment of wages subject to tax by the state.[41]

With respect to multistate employment, states require employers to withhold tax based on where their employees earn taxable wages (source taxation) or, in some cases, where the employees reside (residence taxation).[42]

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[39] *Zilka v. Tax Review Board City of Philadelphia*, Case Nos. 20 EAP 2022 and 21 EAP 2022, Pa. Sup. Ct. (Mar. 7, 2023).

[40] 430 U.S. 274 (1977).

[41] Conn. Gen. Stat. §12-705; Del. Code 30 §1151(a); Mo. Rev. Stat. § 143.191; N.J.S.A. §54A:7-1(a); N.Y. Tax Law §671(a); W.Va. Code §11-21-71(a).

[42] Reflective of these general rules, the Alabama Department of Revenue explains the state's withholding obligations for in-state (resident) and out-of-state (nonresident) employers:

> An employer who is a resident of Alabama is required to withhold tax from the wages of his or her employees who are residents of Alabama, regardless of whether the wages are earned in Alabama or outside the State; except that if the employer is withholding tax for the state in which the employee is working, the employer is not required to withhold tax for Alabama.
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> An employer who is a resident of Alabama is required to withhold tax from the wages of employees who are not residents of Alabama only to the extent that the wages are earned in Alabama. In other words, a nonresident employee of an Alabama employer should have Alabama income tax withheld only on wages earned in Alabama.

At a more basic level, employers subject to state withholding obligations typically must withhold an amount that is "substantially equivalent" to the state's personal income tax "reasonably estimated to be due" on account of an employee's wages earned in the state.[43] This obligation may be particularly difficult for employers that have do not have the requisite information to correctly withhold tax under the "substantially equivalent" standard. For example, an employee's residency status may determine where to withhold and how much to withhold. An individual's residency can be a complicated issue, both legally and factually. Additionally, given the expected increase in permanent remote work, such residency complications may exacerbate an employer's state withholding compliance burdens. And, as noted above, states tax nonresidents' wages earned in the state—frequently based on a ratio of in-state to total working days—but tax residents' wages wherever earned, subject to a credit for taxes paid to another state.[44] States generally apply this "near universal practice" for employer withholding by:

- Requiring employers to withhold tax to the extent wages are earned in the state, based on the employee's working days spent in the state.[45]
- Allowing employers to take into account the credit for taxes paid when calculating the amount withheld for employees who reside in one state but work in multiple states to mitigate double withholding of residents' wages.[46]

> An employer who is not a resident of Alabama is required to withhold tax from the wages of employees to the extent that such wages are earned in Alabama, whether the employee is a resident or a nonresident of the State. A nonresident employer is not required to withhold Alabama income tax on wages paid for services performed outside of Alabama, whether such wages are paid to a resident or to a nonresident of Alabama.

Ala. Admin. Code §810-3-71-.01(5), §810-3-71-.01(6), §810-3-71-.01(7); *see also*, La. R.S. §47:112(A), §47:111(C); N.C.G.S. §105-163.1(4), §105-163.2(a); Cal. Unemp. Ins. Code §13020; D.C. Code §47-1812.08(b).

[43] Conn. Gen. Stat. §12-705; Del. Code 30 §1151(a); N.J.S.A. §54A:7-1(a); N.Y. Tax Law §671(a); W.Va. Code §11-21-71(a).

[44] *See*, *generally*, *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015); *see also* N.Y. Tax Law §620(a)("A resident shall be allowed a credit against the tax otherwise due…for any income tax imposed…by another state…."); N.J.S.A. § 54A:4-1(a)("A resident taxpayer shall be allowed a credit against the tax otherwise due…for the amount of any income tax or wage tax imposed…by another state…."); Conn. Gen. Stat. §12-704(a)(1)("Any resident or part-year resident of this state shall be allowed a credit against the tax otherwise due…in the amount of any income tax imposed on such resident or part-year resident...by any other state….).

[45] *See below* discussion.

[46] *See, e.g.,* New York State Dep't of Taxation and Finance NYS-50, Employer's Guide to Unemployment Insurance, Wage Reporting, and Withholding Tax (Rev'd Aug. 2019) at 31: "To avoid double withholding, the amount of New York State income tax that would otherwise be required to be withheld from wages paid to a New York State resident should be reduced by the amount of income tax required to be withheld according to the laws of other states, their political subdivisions, or the District of Columbia." *See also* 17 N.C.A.C. § 6C.0107 ("To prevent double

Withholding Thresholds

A multistate employer should first determine if it is subject to state withholding as a result of nonresidents, including remote workers, traveling into a state during their employment. Many states require employer withholding when a nonresident's wages exceed a *de minimis* personal income tax threshold, effectively requiring employers to withhold on a nonresident's first day of work.

In contrast to "first day" withholding, a number of states adopt bright-line withholding thresholds, although they vary by state. While the states' nonresident withholding thresholds predominantly apply to ordinary business travel, the thresholds also impact taxation of a remote worker's wages when an employer permits employees to work from anywhere, such as during an out-of-state vacation or at a relative's home for a short, temporary period (for example, two weeks). In those situations, the nonresident withholding thresholds may determine if the employer needs to withhold from wages earned while at that short-term work location.

As the most frequently cited example of a bright-line withholding threshold, an employer is required to withhold New York state[47] income tax from a nonresident employee's source income if the nonresident is in the state for more than 14 days in a calendar year.[48] Among the several other examples of bright-line withholding thresholds:

withholding and to anticipate any tax credits allowable to a North Carolina resident, withholding of North Carolina tax is not required from wages paid to a resident for services performed in another state if that state requires withholding. This relief from double withholding does not relieve the resident of his obligation to file a North Carolina individual income tax return and pay any balance due after tax credit.")

[47] Note that employers are not required to withhold the New York City tax from wages paid to nonresident employees because nonresidents are not subject to the tax. *City of New York v. State*, 94 N.Y.2d 577 (2000); New York Dep't of Taxation and Finance, Nonresident and Part-Year Resident Income Tax Return, Form IT-203-I, p. 31 (2019).

[48] Importantly, New York State's employer withholding threshold does not apply to a nonresident employee's obligations to file a personal income tax return on wages from New York State sources, which means an employee who spends 14 days or fewer in the state still may be required to file personal income tax return if their New York-source income exceeds the filing threshold (standard deduction). N.Y. Tax Law §671; 20 NYCRR §171.6(b); New York Tech. Svc. Bureau Memo. No TSB-M-12(5)I (July 5, 2012); *see also* N.Y. Tax Law §601(e) (imposing personal income tax on "taxable income which is derived from sources in [New York State] of every nonresident … equal to the tax base multiplied by the New York source fraction," which typically is based on working days for salaried employees).

- Connecticut's rule is similar to New York's, but the employee must perform work in the state for more than 15 full or partial days in a calendar year to trigger the withholding obligation.[49]
- Arizona and Illinois also use day-count thresholds but have more forgiving withholding thresholds at 60 days and 30 days, respectively.[50]
- Georgia's rule says that withholding is required if a nonresident employee is in the state for more than 23 days in a calendar year or if $5,000 or more or 5% or more of total income is attributable to Georgia.[51]

Nonresident Withholding and Wage Apportionment

Once an employer determines when and where it is subject to nonresident withholding based on a state's threshold, it must next determine how much to withhold from wages paid to nonresidents.[52] As they do with withholding thresholds, many states determine the amount of nonresident wages subject to tax according to an apportionment formula based on working days.

To facilitate compliance with these working-days formulas for allocating nonresident wages earned in a state, some tax agencies provide forms that an employee submits to his or her employer and on which the employer may rely when withholding tax. The New York Department of Taxation and Finance's Form IT-12104.1, for instance, allows nonresident employees to reasonably estimate their travel into New York at the beginning of the year. Employers should make the "necessary adjustments" to Form IT-2104.1 allocation throughout the tax year so as to ensure "that the proper amount of New York state personal income tax is withheld from the employee's wages."[53] But, employers are usually allowed to rely on the IT-2104.1 as long as the employer does not have any actual knowledge or reason to know the certificate is incorrect or unreliable.[54]

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[49] Conn. Gen. Stat. §12-711(b)(2)(A); Conn. Policy Statement 2015(6), (Dec. 30, 2015); Conn. Information Pub., No. 2019(1) (Jan. 31, 2019).

[50] Ariz. Rev. Stat. §43-403; Ariz. Withholding Tax Ruling No. 92-3 (Oct. 1, 1992); 35 ILCS 5/§701, 35 ILCS 5/§304(a)(2)(B)(iii); 86 Ill. Admin. Code §100.7010(a), §100.7090; PLR No. IT 09-0001-PLR (Aug. 25, 2009) ; Ill. Dep't Rev. Pub. 130 (Jan. 2020).

[51] O.C.G.A. §48-7-1(11), §48-7-100(10)(K); Georgia Employer's Tax Guide (Nov. 9, 2018).

[52] States conform to the definition of "wages" subject to federal withholding, subject to modifications. *See*, *e.g.*, Md. Code Ann. Tax-Gen. §10-905(e-1).

[53] 20 N.Y.C.R.R. 171.6(b)(2).

[54] New York Dep't of Taxation & Finance Pub. No. NYS-50 (May 1, 2011).

Residence-Based Withholding

While source taxation is the default rule, there are common situations where a state may require out-of-state employers to withhold tax from wages paid to that state's residents. This is especially true in a remote work environment where the employee—usually, but not always—works from his or her residence location. For example, this situation occurs when an employee's "resident state"—but not the "work state"—imposes an income tax. Specifically, when a resident works for an employer located in a state that does not collect an income tax, an employer may have to withhold tax for the employee's resident state if it maintains an office, derives income or does business in that state.[55] Other states require an employer to withhold from wages paid to residents working out of state, yet do not expressly condition withholding on maintaining an office, deriving income or doing business there.[56]

Some states also may require employers to withhold tax from wages paid to their residents to the extent the resident state rate exceeds the work state rate, as a resident's credit for taxes paid to the work state would not eliminate his or her resident state tax liability during the same pay period.[57] Other states, though, do not require employers to withhold tax from wages "subject to" another state's withholding, irrespective of applicable withholding rates.[58]

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[55] *See, e.g.,* Miss. Code §§27-7-303(d), §27-7-305 (an employer doing business in or deriving income from sources in Mississippi and having control over wages paid to residents is subject to withholding), and Conn. Gen. Stat. §12-705 (an employer that has an office of transacts business in the state and makes payment of taxable wages is required to withhold Connecticut tax from those wages).

[56] *See*, *e.g.*, La. R.S. §47:111(D) and La. Rev. Rul. 08-004 (Feb. 6, 2008) ("If instead the employee is a Louisiana resident and working in a state that does not have an income tax, like Texas or Florida, the employer will be penalized for failure to withhold Louisiana income taxes on the income earned from services performed in the other state"); O.C.G.A. §48-7-100(4)(A), §48-7-100(5), §48-7-100(10), and Georgia Dep't of Revenue Employer's Tax Guide (Nov. 9, 2018) ("Georgia residents are subject to the withholding tax laws of the state in which they work. If that state does not require withholding, tax should be withheld and paid to Georgia.")

[57] *See*, *e.g.*, 20 N.Y.C.R.R. §171.5(b), ex. 3 ("[i]f the amount required to be withheld under the respective weekly wage bracket tables is $2.60 for New York State and $1.53 for the Commonwealth of Massachusetts, the amount of New York State personal income tax required to be deducted and withheld is $1.07"); California Employment Development Department Dep't, 2020 California Employer's Guide, DE 44 Rev. 46, 16 (rev. Jan. 2020) (requires employers to "withhold the amount by which the California withholding amount exceeds the withholding amount for the other jurisdiction.").

[58] *See*, *e.g.*, O.C.G.A. §48-7-100(10)(H); Miss. Admin. Code 35.II.11.98(2); Pennsylvania Personal Income Tax Ruling No. PIT-05-016 (July 26, 2005); S.C. Code §12-8-520(C)(1).

The analysis of state employer withholding issues resulting from mandatory work-from-home policies is complicated. Following the general source- and residence-based taxation rules, extended teleworking changes the jurisdiction where an employer is required to withhold if the employee's work state differs from the residence state. Thus, a change in work location due to remote work may raise several difficult compliance and policy decisions involving all of the issues described above concerning when, where, and how much to withhold. In particular, when an employee's wages was not subject to withholding in a particular jurisdiction, the employer may need to:

- Move the employee's wages from one state to another and begin withholding based on the "resident state" rate/tables not the "work state" rate/tables.
- Stop withholding if the employee normally works in a state with a tax but teleworks in a state without a tax.

Absent guidance from a state that specifically addresses employer withholding, employers are required to evaluate the appropriate state laws, including the general source- and residence-based taxation rules (and the exceptions), in light of the potential risk associated with technical noncompliance.

Consequently, assuming an exception to source taxation does not apply, the likely effect for many employees teleworking as a result of work-from-home policies is that the employee's resident state tax should be withheld or, if applicable, the current amount withheld should be increased. Therefore, an employer's tax exposure may be with the resident state if such withholding is not adjusted to account for work-from-home policies.

> **POLICY CONSIDERATION AND BEST PRACTICE** – States may consider measures that would hold employers harmless from improper withholding so long as the employer collects a form, signed by the employee and without actual knowledge to the contrary, that the employee's resident state and/or source state withholding is accurate. States, like New York, that have implemented such forms, have streamlined audit and enforcement processes for taxpayers and revenue administrators.

Unemployment Insurance and Other Employment Taxes

Most state unemployment tax acts (SUTA) have standard rules—the "localization of work" provisions—that determine the state where wages must be reported and unemployment insurance (UI) taxes paid.[59] The purpose of this uniformity is to "cover under one state law all of the service performed by an

[59] *See* UIPL Letter No. 20-04 (May 10, 2004); *see, e.g.,* Va. Code §60.2-217.

individual for one employer, wherever it is performed."[60] Thus, the states' uniform adoption of the sequential "localization of work" tests, which result in an all-or-nothing determination of the assignment of wages from multistate employment, "prevent[s] overlapping coverage when an employee performs services in more than one state for a single employer."[61]

The Office of Unemployment Insurance in the U.S. Department of Labor's Employment and Training Administration (DOLETA), the federal agency that issues multistate guidance under the Federal Unemployment Tax Act framework, provides context for the localization of work rules:

> In general, under state unemployment laws, workers' wages are reported to the state where the work is performed. In order to avoid duplicate coverage or no coverage at all when a worker works for one employer in more than one state, states agreed in the early days of the UI program on how to determine where wages are to be reported in these instances. Model state legislation to put this agreement into effect was developed by the U.S. Department of Labor and incorporated into all states' UI laws in the 1940s. These provisions of states' UI laws are called "localization of work" provisions. In addition, the government of Canada agreed to the localization of work provisions in 1947, and the United States government encouraged states to follow the agreed upon provisions. In order for these provisions to accomplish their purpose, it is important that states interpret them uniformly.[62]

Typically, states include the localization of work rules in their SUTA definition of "employment," but some states have incorporated the rules into a separate allocation statute.[63] Irrespective of placement in a given SUTA, all states adopt the "waterfall" approach to allocation under the localization rules: the first test that applies determines where *all* of the employee's wages must be reported and, therefore,

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[60] UIPL No. 20-04 (May 10, 2004), Attachment 1.

[61] California Employment Development Dep't, Information Sheet—Multistate Employment No. DE 2310D Rev. 12 (Dec. 2017).

[62] UIPL No. 20-04 (May 10, 2004).

[63] *See generally*, Cal. Unemp. Ins. Code §601, §602,§603; D.C. Code § 51-101(2)(B); N.C. Gen. Stat. §96-9.5; Fla. Stat. § 443.1216(7), § 443.1216(8), § 443.1216(9) § 443.1216(10); Va. Code § 60.2-217.

where *all* of the employer's UI taxes must be paid. An employer must perform this analysis for each employee to which it pays wages subject to a state's UI laws.

Localized Employment

An employee's services performed entirely within one state are "localized" within that state and only subject to that state's UI laws. Likewise, work performed partly within and partly outside the state is also considered localized in the state if the work performed outside the state is incidental to the work performed inside the state, for example, temporary, transitory or isolated out-of-state work. The California Employment Development Department explains, for example, "[w]here the service performed outside of California is either permanent, substantial or unrelated, it cannot be treated as localized in California."[64]

DOLETA suggests the following factors should be considered when determining whether out-of-state service is incidental to in-state employment:

- Is it intended by the employer and the employee that the service be an isolated transaction or a regular part of the employee's work?
- Does the employee intend to return to the original state upon completion of the work in the other state, or is it the employee's intention to continue to work in the other state?
- Is the work performed outside the state of the same nature as, or is it different from, the tasks and duties performed within the state?
- How does the length of service with the employer within the state compare with the length of service outside the state?[65]

DOLETA cautions, however, that given "the wide variation of facts in each particular situation, no fixed length of time can be used as a yardstick in determining whether the service is incidental or not."[66] And further, it explains "[s]ervice longer than 12 months would not generally be considered incidental,

[64] California Employment Development Dep't, Information Sheet—Multistate Employment No. DE 2310D Rev. 12 (Dec. 2017).

[65] UIPL No. 20-04 (May 10, 2004), Attachment 1.

[66] UIPL No. 20-04 (May 10, 2004), Attachment 1.

however, flexibility should be applied and various circumstances under which the work is performed, such as the terms of the contract of hire, whether written or oral, should be considered."[67]

For example, a teleworking employee's service is localized in the state where the employee is physically working so long as the service is not incidental to work in another state, that is, the work is not temporary or does not consist of "isolated transactions." DOLETA provides guidance on the teleworking, which is based on an oft-cited New York case, *Matter of Allen*:[68]

A resident of New York was hired as a technical specialist for a financial information provider. All services were performed in New York for two years, after which the employee moved to Florida because her husband had changed jobs. Since the employer had invested time and money in training this individual, it agreed to allow her to telecommute from Florida. After the relocation took place, all of her assignments and work products were communicated via the Internet. Since this employee was now performing all duties in Florida, even though the employer was located in New York, her services were localized in Florida and subject to Florida law. Therefore, all wages from the date she began telecommuting from Florida, were reportable to Florida.[69]

A New Jersey court reached the same conclusion as the *Allen* court, under similar facts.[70] In Gundecha v. Board of Review, the New Jersey Superior Court, Appellate Division, a laid-off employee filed a claim for UI benefits in New Jersey, where her employer was based, even though she teleworked from her home in North Carolina. While the former employee claimed that the North Carolina teleworking arrangement was temporary and she intended to return to New Jersey, the court found that the facts did not support her assertions, observing:

> It remains feasible and most practicable for the employee's physical presence to be the determinative factor in determining "localization." It continues to be a straightforward solution

[67] UIPL No. 20-04 (May 10, 2004), Attachment 1.

[68] *See Matter of Allen*, 100 N.Y.2d 282, 794 N.E.2d 18 (2003).

[69] UIPL No. 20-04 (May 10, 2004), Attachment 1.

[70] *Gundecha v. Bd. of Review*, 441 N.J. Super. 339, 118 A.3d 366 (App. Div. 2015).

for an employee to know where to file for benefits and for each state to know its responsibilities.[71]

Likewise, the Colorado Court of Appeals found that the employment was localized in the state of a teleworker's physical location, not the employer's location.[72] Indeed, courts have long held that the "location of the employer's place of business is not material in determining whether the services performed for it are covered because, if the services rendered by an employee are localized in the state, there is no need for considering this [localized] factor…"[73]

Notably, the above cases involved remote workers who permanently worked out their homes – the out-of-state employment was not incidental to any work they performed at their respective employers' locations.

Alternative Tests for Multistate Employment

If an employee's services are not localized in any one state, the following series of tests apply to determine allocation of wages: the employee's base of operations, the employer's place of direction and control over the employee, and the employee's place of residence.

If an employee's work is not localized in a state, the employer must identify the employee's base of operations. DOLETA describes an employee's base of operations as "the place, or fixed center of more or less permanent nature, from which the individual starts work and to which the individual customarily returns in order to receive instructions from the employer, or communications from customers or other persons, or to replenish stocks and materials, to repair equipment, or to perform any other functions necessary to exercise the individual's trade or profession at some other point or points."[74] A base of operations may be the employer's office or the employee's home.[75] The base of operations test usually

[71] *Gundecha*, 441 N.J. Super. 339, 345, 118 A.3d 366, 369.

[72] *Found'n for Human Enrichment v. Indus. Claim App. Ofc.*, 339 P.3d 1046 (Colo. App. 2013) (Mem.).

[73] *Found'n for Human Enrichment,* 339 P.3d 1046 (citing Commonwealth ex rel. Div. of Unemployment Ins. v. Goheen, 372 S.W.2d 782, 784 (Ky.1963)).

[74] UIPL No. 20-04 (May 10, 2004), Attachment 1.

[75]UIPL No. 20-04 (May 10, 2004), Attachment 1.

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applies to frequent business travelers, who may only return to their office between trips. Importantly, as noted by DOLETA, the state where direction and control occurs is "immaterial" for these employees. If some portion of the employee's service is performed in the state where the base of operations is located, then the employer reports wages and pays UI tax in that state.

If an employee's work is not localized in a state and the employer cannot determine the employee's base of operations, the employer must next determine the location from which the employee receives direction and control. The place of direction and control is usually the location of the employer or the employer's representative that immediately—not ultimately—controls, or has the right to control, the employee's work. Given its place in the localization of work waterfall, the place of direction and control test only applies where the employee does not have a more-or-less permanent office, such as a multistate construction worker or a traveling salesperson who works out of a sample case in his or her car.[76] As for the base of operations test, the employee must perform some services for the employer for the place of direction and control test to apply.

If none of the above tests apply, such as when the employee does not perform any service within the base of operations or place of direction and control states, then the employer reports wages and pays UI tax to the employee's state of residence, so long as the employee performs some work in that state.

In addition to the general localization rules, states adopt several other rules for specific situations, including for residents performing services entirely outside the U.S. (or Canada[77]) for a U.S. employer. North Carolina law related to this type of employment is illustrative:

> A service is performed in this State if it meets one or more of the following descriptions:
>
> …
>
> The service is performed outside the United States or Canada by a citizen of the United States in the employ of an American employer and at least one of the following applies.

[76] UIPL No. 20-04 (May 10, 2004), Attachment 1.

[77] FUTA also allows states to enter into a reciprocal agreement with foreign countries with a contiguous border with the United States. 26 U.S.C. § 3304(a)(9)(A). But because states cannot individually enter into such agreements with foreign countries, the Department of Labor has reached an agreement with Canada (but not Mexico) regarding multijurisdictional employment.

For purposes of this subdivision, the term "American employer" has the same meaning as defined in section 3306 of the Code:

a. The employer's principal place of business in the United States is located in this State.

b. The employer has no place of business in the United States, but the employer is one of the following:

1. An individual who is a resident of this State.
2. A corporation that is organized under the laws of this State.
3. A partnership or a trust and more of its partners or trustees are residents of this State than of any other state.
4. A limited liability company and more of its members are residents of this State than of any other state.

c. The employer has elected coverage in this State in accordance with [state UI law].

d. The employer has not elected coverage in any state and the employee has filed a claim for benefits under the law of this State based on the service provided to the employer.[78]

The localization rules applicable to state UI laws differ from the sourcing rules applicable to personal income tax and employer withholding because of the different incidences of those taxes and the underlying policy reasons for imposing them.[79] The difference between the UI rules and income tax/withholding apportionment and allocation was explained in *Matter of Zelinsky*, in which the New York Court of Appeals distinguished the "convenience of the employer" test from the localization tests:

> The taxpayer [Zelinsky] also maintains that he is a "telecommuter" who, pursuant to *Matter of Allen* … may be taxed only according to the location in which he is physically present on any given day. *Allen*, however, involved neither taxes, nor the Commerce Clause, nor apportionment. Rather, in *Allen* we analyzed whether an employee physically present in Florida who "telecommuted" to New York by linking her laptop computer to her employer's Internet connection over telephone lines was "localized" in New York within the meaning of the Unemployment Insurance Law. In concluding that

[78] N.C. Gen. Stat. §96-9.5(4).

[79] *See* California Employment Development Dep't, Information Sheet—Multistate Employment No. DE 2310D Rev. 12 (Dec. 2017).

> she was not, we emphasized that the relevant uniform statute contained a definition of "employment" that served in part to advance the purpose of allocating all the employment of an individual to one state and not to divide it "among the several States in which he might perform services" Here, by contrast, the Commerce Clause requires that the tax be fairly apportioned among the various states from which one's income is derived.[80]

As explained above, the purpose of the localization rules is to assign wages earned from multistate employment to a single state. In fundamental contrast, the personal income tax and employer withholding apportionment and allocation rules assign wages based on "source" or residency of the employee.[81] Under those withholding rules, a nonresident's wages may be apportioned based on working days or compensation within and without the state.

Other Relief

Most states have adopted the Interstate Reciprocal Coverage Arrangement (IRCA), which allows employers to elect to report wages and pay UI tax to a specific state for a multistate employee.[82] Under the IRCA, employers may elect to be subject to a participant state's UI law, "with respect to an individual, with any participating jurisdiction in which (1) any part of the individual's services are performed; (2) the individual has his residence; or (3) the employing unit maintains a place of business to which the individual's services bear a reasonable relation." If an IRCA election for UI coverage is made, the employer includes in an employee's taxable wage base any wages paid to that employee for service in another state.

[80] Zelinsky v. Tax Appeals Tribunal, 1 N.Y.3d 85, 93, 801 N.E.2d 840, 846 (2003) at n. 6 (internal citations omitted).

[81] *See* Charlie Kearns and Chelsea Marmor, Covid-19 State Employment Tax Considerations Part I: Employer Withholding, 61 Tax Mgmt. Memo., No. 11 61 TMM 11 (Bloomberg Tax May 25, 2020).

[82] In fact, FUTA requires individual states to have reciprocal arrangements with other states if they are to participate in the uniform UI program that, among other things, allows employers in participating states to receive a credit against FUTA for state UI taxes paid. *See* §3304(a)(9)(B).

An election under the IRCA may be appropriate where service is localized in multiple states,[83] where the four-part localization test does not apply to that employee, in whole or in part.[84] Moreover, additional state-specific restrictions may apply, such as the number of employees whose multistate employment is allowed to be brought under the IRCA[85] and the term for which an election is given effect. For these reasons, employers considering making an IRCA election should contact the UI administrator in the applicable jurisdiction(s) under consideration. In any case, to perfect an election under the IRCA, an employer must submit a form documenting its election to the UI administrator in the appropriate state.[86] The election must receive approval from the elected jurisdiction and any other interested jurisdictions that might otherwise govern the employer's activities. Further, all states allow an employer to voluntarily elect coverage if the out-of-state employment at issue is not covered under any other SUTA or subject to an IRCA election.[87] In addition to IRCA and voluntary elections, an employer may be afforded relief to the extent it was required to report wages to another state under that state's SUTA and actually paid UI tax on such wages.[88]

Given the largely uniform localization of service rules applicable to UI to the SUTAs, the physical location of a full-time teleworker determines where his or her wages are localized for UI purposes. Where such remote employment occurs entirely outside of the state where the employer is located, it is not "temporary, transitory or incidental" to employment in another state. As noted above, DOLETA includes

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[83] UIPL No. 20-04 (May 10, 2004), Attachment 1 ("It is possible, however, that part of the service is localized in one state, and part in another. In such a case, it may be desirable for the employer to elect to cover all of such individual's service in one state under the Interstate Reciprocal Coverage Arrangement").

[84] *Compare* Ark. Code §11-10-544, Ariz. Rev. Stat. §23-644, O.C.G.A. §34-8-35 (Ga. Comp. R. & Regs. 300-2-3-.07) (prohibiting an IRCA election except where the four-part localization test does not apply) *with* California Employment Development Dep't, Employer's Election to Cover a Multi-State Worker Under the California Unemployment Insurance Code, DE 2325 Rev. 17 (Dec. 2017) (prohibiting an election where service is localized in one state, but may be approved where the other three prongs of the test may apply).

[85] *E.g.,* Kan. Stat. Ann. §44-714(j)(2).

[86] *E.g.,* Fla. Stat. § 443.1216(8); N.C. Gen. Stat. § 96-9.8; California Employment Development Dep't, Employer's Election to Cover A Multi-State Worker Under The California Unemployment Insurance Code, DE 2325 Rev. 17 (Dec. 2017).

[87] U.S Dep't of Labor Employment and Training Administration, *Comparison of State Laws* (2019), *available at* https://oui.doleta.gov/unemploy/pdf/uilawcompar/2019/complete.pdf.

[88] *See, e.g.,* Cal. Unemp. Ins. Code §930.1 ("For the purpose of determining whether an employer has paid remuneration with respect to employment in excess of the limitation prescribed by Section 930 to an individual during any calendar year, the remuneration shall be deemed to include any remuneration paid to the individual by the employer for services constituting employment under the unemployment compensation law of another state which the employer has reported to the other state as wages for contribution purposes").

an on-point teleworking example in UIPL 20-04, Attachment 1, which addresses localized employment. Further, the case law in New York, New Jersey and Colorado addressing localized service in teleworking is consistent with that UIPL example.

At the other end of the spectrum, a teleworking arrangement that permits an on-site employee to occasionally telework at an out-of-state home office, even as frequently as once a week, likely would be localized in the state of the employer's location under DOLETA guidance. The out-of-state employment likely would be "incidental" to the work performed at the employer's location.

But where the teleworking arrangement is less than full-time, such as where an employee spends equal time at his or her home office and an employer's location, the localization of work analysis is less clear and ripe for guidance from DOLETA.

> **POLICY CONSIDERATION AND BEST PRACTICE** – It is suggested that NCSL (or the states) request guidance from the Office of Unemployment Insurance in DOLETA on the application of the localization of service rules as relevant to remote work arrangements.

V. GENERAL BUSINESS TAX ISSUES

In addition to the employment-based tax obligations discussed above, remote work arrangements—whether full time or hybrid—may create general business tax obligations for employers. As explained in the appendix to this white paper, the physical presence of an employee in a state or local jurisdiction frequently creates sufficient contacts to impose a tax obligation on an out-of-state employer ("nexus" under the Due Process and Commerce Clauses of the U.S. Constitution), as well as statutory jurisdiction to impose such tax-related obligations under state law. As a result of a taxing jurisdiction's nexus with and jurisdiction over an employer resulting from employee presence, a jurisdiction may have the legal authority to impose various taxes on the employer depending on that jurisdiction's laws and policies, so long as the activity the state seeks to tax also has a minimum connection with the state.

The following issues are summarized below because the in-state presence of a remote worker changes the employer's tax obligations in a given state or locality, assuming no other contacts with the jurisdiction:

- Registration and licensing.
- Corporate income taxes.

- Other business taxes (for example, net worth, capital stock or gross receipts taxes).
- Sales and use taxes.
- Business personal property taxes.
- Local taxes and fees.
- Credits and incentives.

Next, we summarize efforts by the Multistate Tax Commission (representing tax administrators) and the Council On State Taxation (representing businesses). [**TBD**]

Finally, we identify certain nontax issues related to employment and labor laws to reflect the breadth of legal issues affected by remote work.

Registration and Licensing

In general, state and local tax authorities may require businesses with employees working in the jurisdiction to register with the respective authorities to pay, collect, or remit applicable levies, as well as file appropriate returns or reports. In addition to registration with the relevant tax authorities, an employer likely would be required to complete the registration process with the general corporate/business regulator (such as a secretary of state) and the employment-related agency (such as a state department of labor). Obtaining the appropriate registrations and licenses frequently is the first tax obligation incurred by an employer and often is a prerequisite to doing business in the state or locality.

Because an employer that maintains a *single* employee working from home in a state or locality likely may incur some form of legal obligation, whether tax- or nontax-related, that employer typically must first register with the jurisdiction's administrators before commencing business or within a certain time frame after commencing business in the jurisdiction, usually by submitting a form that describes the relevant business identifying information (name, address, federal tax identification numbers), the owners of the business, whether the business will have employees and how many, the type of activities that the business will conduct in the jurisdiction (performance of services or sale of tangible personal property, or both), and sometimes other information. Registrants usually pay a fee with their applications and frequently must submit annual reports or statements. In some cases, the registration process is online and streamlined in that the process covers all tax and fee types. In other cases, the registration process must be done through a paper submission for each tax or fee type to individual state and local tax authorities. There is little uniformity among states (or even within localities within a state) as to the tax registration process.

> **<u>POLICY CONSIDERATION AND BEST PRACTICE</u>** – It is suggested that states and localities, as relevant, consider a streamline agency processes by adopting online, multi-agency registration forms and licensing requirements. Further, clear guidance as to registration requirements should be issued addressing, e.g., when an out-of-jurisdiction employer whose only contact with the state or locality is a remote worker who does not hold their workplace/home out as an official employer location.

<u>Corporate Income Taxes</u>

The impact of an in-state remote worker on an out-of-state employer may change that employer's corporate income tax compliance obligations or liability, or both, depending on the state's corporate income tax structure, which includes the state's apportionment (division of income) method and the extent to which it conforms to the federal tax code. Under certain fact patterns and tax regimes, particularly in the states that retain a payroll factor in their apportionment formulas, the impact of an in-state remote worker on an employer may be significant. As discussed below, however, the pervasive adoption of single sales factor apportionment, market-based sourcing, and economic nexus has reduced the impact that a single remote employee may have on his or her employer's corporate income tax liability.

Apportionment

The division of the corporate income tax base is among the most important—and controversial—issues in state taxation. Similar to the state personal income tax, discussed above, states generally impose corporate income tax based on "residence" and "source" of the taxpayer, with the source of the income usually taking precedence over the residence—that is, state of incorporation or domicile—of the corporation in the context of income from ordinary business operations.

"Apportionment" divides income among the states that have the authority to tax a corporation's income. Corporations may apportion income when it is subject to tax in multiple states.[89] States apply the apportionment formula to their respective tax bases, with the formula generally being computed by reference to federal taxable income subject to state-specific adjustments to that amount.

Apportionment "formulas," discussed below, reflect the constitutional "minimum contacts" requirement of the Due Process Clause, as reflected in *Miller Bros*., and the "fair apportionment" requirement of the Commerce Clause, as reflected in *Complete Auto*, both of which serve to mitigate double taxation of multistate taxpayers.[90] Importantly, however, the U.S. Supreme Court has regularly explained that a state's apportionment formula need not result in a precise attribution of income; rather, a "rough approximation" of a taxpayer's corporate income liability in the state is constitutionally permissible.[91]

The states, by way of the model Uniform Division of Income for Tax Purposes Act (UDITPA) adopted by the National Conference Committee on State Laws in 1957, generally have used a method of apportioning income through a formula, which historically has consisted of an equally weighted ratio of gross receipts, the value of real and tangible property, and payroll within the state over those calculations everywhere. The more recent trend among the states, however, is to apportion income based on the sales factor alone, known as single sales factor apportionment, without reference to in-state property or payroll. Such formulary apportionment intends to assign income to the various states in which a multistate taxpayer does business. As Professor Hellerstein observes:

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[89] Other methods by which states attribute income of a multistate taxpayer include allocation and separate accounting. In general, those methods apply to specific revenue streams that represent an "investment" function such as interest, royalty, or dividend income.

[90] For discussion of these cases, see the Appendix.

[91] *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978) ("[formulary apportionment], unlike separate accounting, does not purport to identify the precise geographical source of a corporation's profits; rather, it is employed as a rough approximation of a corporation's income that is reasonably related to the activities conducted within the taxing State"); *Illinois Cent. R. Co. v. Minnesota*, 309 U.S. 157, 161, 60 S. Ct. 419, 422, 84 L. Ed. 670 (1940) (citations omitted) ("apportionment may not result in mathematical exactitude is certainly not a constitutional defect. Rough approximation rather than precision is, as a practical matter, the norm in any such tax system"); *Gen. Motors Corp. v. District of Columbia*, 380 U.S. 553, 561, 85 S. Ct. 1156, 1161, 14 L. Ed. 2d 68 (1965) ("The standard three-factor formula can be justified as a rough, practical approximation of the distribution of either a corporation's sources of income or the social costs which it generates").

> Since 1978, the states have increasingly abandoned the equally weighted three-factor formula for formulas that give greater—if not exclusive—weight to the sales factor for reasons that have little to do with sound state tax policy and everything to do with state "economic development" policy. Indeed, fewer than one-third of the states with corporate income taxes currently employ the equally weighted three-factor formula, and only five rely on it exclusively.[92]

Under Section 9 of UDITPA, "[a]ll business income shall be apportioned to this state by multiplying the income by a faction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three."

There are rules for each factor that establish what items are included in the "sales," "property" and "payroll" factors; the timing of entry and removal from the factors; the evaluation of items included in the factors; and how items are assigned (sourced) to a particular state and included in that state's apportionment factor numerator. The larger the numerators of the apportionment factors for that state, the more income will be apportioned to the state.

Payroll Factor. While the payroll factor is diminishing in importance due to single sales factor apportionment, the factor remains most relevant to remote work arrangements. The payroll factor attributes income to the state based on the salaries and other compensation of the taxpayer's in-state employees to such amounts paid to employees everywhere. As of the date of this white paper, only 13 states use a payroll factor—though several are considering single sales factor apportionment. The remaining payroll factor states include: Alaska, Arizona (election), Florida, Hawaii, Kansas, Massachusetts, Mississippi (election), Montana (until January 1, 2025), North Dakota, New Mexico, Oklahoma, Tennessee (until December 31, 2025), and Virginia.[93]

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[92] Hellerstein, Hellerstein & Appleby, State Taxation (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through December 2022) (online version accessed on Checkpoint (www.checkpoint.riag.com) May 3, 2023) at ¶ 8.06.

[93] Alaska Stat. § 43.19.010; Ariz. Rev. Stat. § 43-1139(A)(7); Fla. Stat. § 220.15; Haw. Rev. Stat. § 235-33; Kan. Stat. Ann. § 79-3283; Mass. Gen. L. 63 § 38; Miss. Admin. Code § 35.III.8.06(402.09); Mont. Code Ann. § 15-31-308; N.D. Cent. Code § 57-38.1-13; N.M.S.A. 1978 § 7-4-14; Okla. Stat. 68 § 2358(A)(5); Tenn. Code Ann. § 67-4-2012(e); Va. Code § 58.1-412.

Under Section 13 of UDITPA, the payroll factor includes amounts paid by the taxpayer in the regular course of its trade or business for compensation during the tax period. "Compensation" means "wages, salaries, commissions and any other form of remuneration paid to employees for personal services" but does not include amounts paid to independent contractors.[94] The UDITPA Comments and the MTC Regulations include additional, more-detailed rules with respect to the inclusion or exclusion of certain compensation included in the payroll factor.[95]

Because Sections 13 and 14 of UDITPA, as adopted by the states, generally incorporate UI tax defined terms and situsing rules into the payroll factor, states generally assign wages to the numerator of the factor to the extent that those wages are included in the state's unemployment wage reports.[96] Further, because of the similarity between the payroll factor's definition of "compensation" and the Federal Unemployment Tax Act's definition of "wages," states typically comport with the federal act's definition when applying the state payroll factor.[97]

More specially, Section 14 of UDITPA attributes compensation to the numerator of the payroll factor based on the hierarchical rules used in the UI "localization of service" rules used for situsing wages for UI purposes, as discussed above. These rules effectively attribute the employee's entire compensation to a single state unless the employee moves from one state to another during the year, unlike employer withholding from wages subject to personal income tax.

On occasion, courts have addressed fact patterns similar to remote work. For example, In *A.W. Chesterton Co. v. Commissioner of Revenue*, the Appeals Court of Massachusetts upheld an assessment of additional corporate income tax because the taxpayer could not show that wages paid to

[94] UDITPA § 1(c).

[95] *See, e.g.,* UDITPA § 13 Comment ("[p]ayroll attributable to management or maintenance or otherwise allocable to nonbusiness property should be excluded from the fraction"); MTC reg. §IV.13.(a).(2) (to the same effect); MTC reg. § IV.13.(a).(2) (including payroll capitalized in the cost basis of a self-constructed asset (in the factor).

[96] *See, e.g.,* UDITPA § 13 Comment, explaining "[t]his section is derived from the Model Unemployment Compensation Act. This is the same figure which will be used by taxpayers for unemployment compensation purposes."

[97] *See* 26 U.S.C. § 3306(b) (defining "wages" for FUTA purposes as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," subject to several exceptions).

certain employees were earned outside the state under the state's payroll factor sourcing rules.[98] At issue in Chesterton were certain salespeople who lived outside Massachusetts and did "the greater part of their work outside Massachusetts, often from their homes or hotel or motel accommodations."[99] The taxpayer did not put on evidence to show the salespeople performed all of their services outside the state, that their base of operations was outside the state or, if they had no base of operations, that their services were directed and controlled from outside the state.[100] The court concluded that the lower administrative tribunal was not required to infer that the salespeople's services were performed outside the state "merely from the fact that their residences and sales territories were out of State."[101]

Of note, some states have adopted special payroll factor rules for certain types of work arrangements (for example, loaned or leased employees).[102]

In addition, some states exclude certain forms of compensatory payments or wages from the payroll factor, either as an economic incentive or on the grounds that inclusion of high-wage employees may distort the factor. For example, states adopt special rules with respect to officer compensation, director compensation, and payments to independent contractors.[103]

Sales Factor. While apportionment generally is among the most controversial aspects of state taxation, the inclusion or exclusion of receipts in the numerator or denominator, or both, of the sales factor comprises the bulk of that controversy, particularly as relevant to income generated by the performance of services.[104] Due to these complexities, this paper focuses on the sales factor issues arising from

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[98] *A.W. Chesterton Co. v. Comm'r of Revenue*, 641 N.E.2d 1353 (Mass. App. Ct. 1994).

[99] *Id*.

[100] *Id*.

[101] *Id*. at 1354.

[102] *See, e.g., UPS Worldwide Forwarding, Inc. v. Commw. of Pennsylvania*, Nos. 62-65 F.R. 2001 (Pa. Commw. Ct. Mar. 1, 2004).

[103] *See, e.g.,* Alaska Admin. Code 15 § 19.211(d) and Ariz. Admin. Code § R15-2D-701(B) (excluding director compensation from the payroll factor); Fla. Admin. Code § 12C-1.0154(3)(a) and N.M. Admin. Code § 3.5.14.8(B) (excluding payments to independent contractors from the payroll factor).

[104] Nearly all states adopt similar destination-based rules for including receipts of tangible personal property in the numerator of the sales factor. Section 16 of UDITPA provides, "[s]ales of tangible personal property are in this state if: (a) the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or (b) the property is shipped from an office,

income derived from the performance of services. As described below, the attribution of sales to the numerator of the sales factor may be impacted by compensation paid to remote employees, particularly in states the source sales of services based on costs of performance.

Under Section 15 of UDITPA, "[t]he sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period." For purposes of assigning income from services to a given state's sales factor numerator, income is attributed to the state where the taxpayer's customer is located or where the customer receives the benefit of the receipts-generating transaction at issue. But until the last decade or so, most states' sales factor reflected the location where the taxpayer incurred costs to perform the business activity that produced the income sought to be taxed. The former approach is called "market-based" sourcing, whereas the latter—and more relevant here—approach is "costs of performance" sourcing.

> **Costs of Performance.** Section 17 of UDITPA adopts the costs of performance approach to sales factor sourcing. Section 17 provides that when the income-producing activity is performed in more than one state, the receipts are included in the numerator of the state in which a greater proportion of the income-producing activity is performed, as measured by costs of performance. Prior to adopting market-based sourcing as its model approach, the MTC defined "costs of performance" as "direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer to perform the income producing activity which gives rise to the particular item of income."[105] "Income producing activity" means "each separate item of income and means the transactions and activity engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of producing that item of income" and includes "each separate item of income and means the transactions and activity engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of producing that item of income."[106]

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store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States government or (2) the taxpayer is not taxable in the state of the purchaser."

[105] Former MTC Reg. IV.17.(3) (replaced as of Feb. 24, 2017).

[106] Former MTC Reg. IV.17.(2).(A) (replaced as of Feb. 24, 2017).

States have adopted two approaches to costs of performance sourcing—"predominant" and "proportionate." Under the predominant approach, all of the service receipts are added to the numerator of the service company's sales factor if more income-producing activity based on cost of performance is performed in the state than any other state, which may result in an "all-or-nothing" assignment of receipts to a certain state. Under the proportionate approach, however, a share of the service company's income is apportioned to the state on a pro rata basis, in which the company's sales are divided among the states in which it does business, depending on the performance level in each state as measured by costs of performance.

Market-Based Sourcing. In contrast to costs of performance, the market-based approach assigns receipts to the sales factor numerator based on where the benefit was received to determine the location of the "market." At first blush, the market-based approach appears simple, as it can be read to look solely to the location of the taxpayer's customer(s)—not where the taxpayer performed the services. However, numerous questions and controversies have arisen as to where the customer receives the "benefit" of the service rendered, including arguments to assign receipts to the location of the *customer* of the taxpayer's customer. The MTC's revised sales factor sourcing model statute, which as of June 30, 2014, replaced costs of performance in UDITPA Section 17, provides an example of the market-based approach: "Receipts, other than receipts [sales of tangible personal property], are in this State if the taxpayer's market for the sales is in this state. The taxpayer's market for sales is in this state: ... in the case of sale of a service, if and to the extent the service is delivered to a location in this state; and if the state or states of assignment ... cannot be determined, the state or states of assignment shall be reasonably approximated."[107]

Under the MTC's market-based sourcing regulation, approved on February 24, 2017, sales of personal services are sitused or "reasonably approximated" to the state where the customer receives the benefit of the service, depending on whether the transaction involved an in-person service, professional service or electronically delivered service.[108] For example, the MTC

[107] MTC IV.17(a)(3), -(b).

[108] MTC Reg. IV.17.(d).

regulation assigns receipts from professional services rendered to a business customer as follows: "first, by assigning the receipts to the state where the contract of sale is principally managed by the customer; second, if the place of customer management is not reasonably determinable, to the customer's place of order; and third, if the customer place of order is not reasonably determinable, to the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its receipts from sales of all services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer."[109]

Independent Contractors. Payments to independent contractors may impact the sales factor under either the costs of performance approach or the market-based approach. Under costs of performance, "income producing activity" includes "transactions and activities performed on behalf of a taxpayer, such as those conducted on its behalf by an independent contractor."[110] Moreover, the MTC defined "costs of performance" as inclusive of "[a] taxpayer's payments to an agent or independent contractor for the performance of personal services and utilization of tangible and intangible property which give rise to the particular item of income."[111] The MTC provided rules that assigned the independent contractor's activities to a particular state, if known by the taxpayer, or excluded the activities if certain information about the independent contractor's services is unknown.[112]

The MTC rules with respect to an independent contractor's performance of services "on behalf of" the taxpayer apply to the post-2017 market-based sourcing regulations, for example, as related to in-person sales.[113] Thus, for purposes of determining the market, as with determining income producing activity, it is irrelevant under the MTC regulations whether the person performing services "on behalf of" the taxpayer is an employee or independent contractor.

[109] MTC Reg. IV.17.(d).(4).(C).1.b.

[110] Former MTC Reg. IV.17.(2) (replaced as of Feb. 24, 2017).

[111] Former MTC Reg. IV.17.(3) (replaced as of Feb. 24, 2017).

[112] Former MTC Reg. IV.17.(4).(C) (replaced as of Feb. 24, 2017).

[113] MTC Reg. IV.17.(2).(d).2.

Property Factor. The property factor attributes income to a state based on the value of the taxpayer's in-state property, such as owned or leased real property, furniture, fixtures, equipment, and inventory, relative to the value of property it owns everywhere. Thus personal property, such as computers owned by an employer, may be included in the numerator of the property factor if located in the state.

Under UDITPA and the MTC regulations, the property factor consists of the taxpayer's real and tangible personal property owned or rented and used during the tax period in the regular course of the taxpayer's trade or business.[114] Intangible property is not included in the property factor.[115] Only property used to produce business income, not property that produces nonbusiness income, is included in the property factor.[116]

Of importance to remote work arrangements, the value of mobile or movable property, including laptops and other electronic equipment that may be located within and without a state during the tax period, is assigned to the numerator of the property factor based on total time within the state during the tax period. In contrast, an automobile assigned to a traveling employee is included in the numerator of the property factor of the state to which the employee's compensation is assigned under the payroll factor or the state in which the automobile is licensed.

> **<u>POLICY CONSIDERATION AND BEST PRACTICE</u>** – It is suggested that states consider adopting *de minimis* rules, including but not limited to "Section 18" relief, for remote workers in the state as a single remote worker may improperly reflect the employer's business in the state.

Tax Base—Federal Conformity Issues

The foregoing apportionment discussion addresses how to divide a business's tax base "pie" among the states entitled to tax it. There are equally important issues related to remote work affecting the ingredients that go into the tax base "pie."

In general, the state corporate income tax base heavily relies on federal law by incorporating ("conforming" to) the Internal Revenue Code, most commonly by starting with Line 28 or Line 30 of the

114 UDITPA §10; MTC Reg. IV.10.(a).

115 *Id*.

116 *Id*.

Form 1120, then making various state-specific additions and subtractions under state law to effectuate a legislature's policy decisions.

State conformity to the Internal Revenue Code simplifies enforcement by state auditors and likewise eases the compliance burden of taxpayers, creating a level of certainty for all stakeholders. Typically, states conform to the Internal Revenue Code by:

- Adopting the code as of a specific date ("static conformity"), which necessitates regular legislative updates to that conformity date (Arizona, Florida, Georgia, Maryland, North Carolina and many others).
- Adopting the code as it is amended by Congress ("rolling conformity"), which automatically incorporates federal tax law changes that may require subsequent "decoupling" from such changes in some cases (Alabama, the District of Columbia, Louisiana, Rhode Island, Utah and many others).
- Adopting federal tax law by reference to specific Internal Revenue Code provisions (Arkansas, Pennsylvania).
- Some combination of these approaches.[117]

There are several Internal Revenue Code provisions that impact remote workers and their employers, especially those related to accountable plans, transportation-related fringe benefits, and reimbursable travel expenses.[118]

> **POLICY CONSIDERATION AND BEST PRACTICE** – States may consider conforming to federal provisions most relevant to remote work to ease compliance, facilitate enforcement, and increase predictability.

Other Business Taxes

In addition to or in lieu of corporation net income taxes, numerous states impose an "alternative" tax such as gross receipts taxes, so-called margin taxes or net worth taxes. Many of these taxes have similar

[117] *See* Hellerstein, Hellerstein & Appleby, State Taxation (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through December 2022) (online version accessed on Checkpoint (www.checkpoint.riag.com) May 3, 2023) at ¶7.02.

[118] *See, e.g.,* Internal Revenue Code §§ 62(a)(2), 132, and 162(a)(2), regulations, rulings, and other guidance issued thereunder.

issues pertaining to remote work as those described above, including factor presence nexus, apportionment and tax base calculations.

For example, Washington's business and occupation tax defines "substantial nexus" to include "physical presence in the state, which need only be demonstrably more than a slightest presence."[119] For purposes of its commercial activity tax, Ohio adopts a factor "bright-line" presence standard similar to the MTC's model based on $50,000 of in-state payroll, which includes any amount subject to Ohio withholding, "[a]ny other amount the person pays as compensation to an individual under the supervision or control of the person for work done in this state," and "[a]ny amount the person pays for services performed in this state on its behalf by another."[120]

And under the Texas franchise (margin) tax, a taxpayer may elect to subtract compensation paid in the state to determine its tax base.[121] A Texas taxpayer that elects to subtract compensation for the purpose of computing its taxable margin may subtract an amount equal to:

- All wages and cash compensation paid by the taxable entity to its officers, directors, owners, partners and employees.
- The cost of all benefits, to the extent deductible for federal income tax purposes, the taxable entity provides to its officers, directors, owners, partners, and employees, including workers' compensation benefits, health care, employer contributions made to employees' health savings accounts, and retirement.[122]

Sales and Use Taxes

Remote work arrangements affect a state's ability to impose a sales or use tax collection obligation on sellers.[123] Indeed, the presence of a single remote worker in the state may remove a remote seller from

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[119] R.C.W. § 82.04.067(1)(c)(ii).

[120] O.R.C. § 5751.01(I)(2).

[121] Tex. Tax Code § 171.101(a)(1).

[122] Tex. Tax Code § 171.1013(b).

[123] In most states, local sales taxes are administered by the state and, therefore, a remote seller with the state has nexus with each of that state's constituent localities. Moreover, as a matter of U.S. constitutional law, where a remote seller has nexus with the state, it also has nexus with the state's local tax jurisdictions irrespective of whether the seller separately has independent nexus with each and every locality. See W. Hellerstein, "Are State and Local Taxes Constitutionally Distinguishable? Revised," Tax Notes State, Vol. 103, Feb. 14, 2022 at 743-755.

the state's so-called *Wayfair* thresholds, thereby imposing an unforeseen liability. In many cases, the obligation under that fact pattern would especially impact small businesses that, but for the remote work, would not be obligated to collect tax.

Similar to the corporate income tax, the in-state presence of a remote employee provides sufficient constitutional authority—and likely jurisdiction under state law—for a state to require sales or use tax collection or remittance, or both, where the employer-seller does not otherwise have nexus, including the *Wayfair*'s "sufficient economic and virtual contacts" (economic nexus) with a state.[124] Since the U.S. Supreme Court issued its *Wayfair* decision in June 2018, all states (and the District of Columbia) that impose a sales and use tax have adopted some form of remote seller threshold similar to the one at issue in that case. However, the economic presence thresholds modeled after the South Dakota statute at issue in *Wayfair* apply only to remote sellers, that is, those sellers without physical presence such as maintaining an employee in the state. Thus, seller-employers with a remote employee in a state may be subject to sales and use tax collection obligations irrespective of whether that seller-employer exceeds the state's *Wayfair*-based economic nexus thresholds.

While not specifically ruling on the constitutionality of the South Dakota statute at issue, the Supreme Court suggested that the South Dakota thresholds would likely pass constitutional muster because they provided a small-seller safe harbor, applied prospectively only, and the state had implemented the uniformity and simplification provisions of the Streamlined Sales and Use Tax Agreement, thereby lessening compliance burdens on multistate remote sellers. As a result, all states with sales taxes have adopted some version of the South Dakota statute, though the recent trend is to eliminate the transaction-based threshold and rely entirely on sales within the state.

In addition to the nexus-creating aspect of having a remote employee in a state where the employer does not otherwise do business, the employer may owe use tax on company-owned property used by the employee, such as laptops, printers, desks and other home office-related items, as well as potential liability for software and digital services used by the remote employee in the state. Especially where an employer does not currently collect or remit sales or use tax in a state, the employer may need to

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[124] *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

instruct its vendors where the property will be used for sales tax collection purposes, or consider where to appropriately remit use tax.

> **POLICY CONSIDERATION AND BEST PRACTICE** – It is suggested that states consider allowing certain "small sellers," however defined, to retain the benefit and certainty of *Wayfair* thresholds based on a *de minimis* number of remote workers in the state.

Business Personal Property Taxes

Business personal property tax compliance is a frequently overlooked, though potentially problematic, issue resulting from a remote employee in jurisdictions where the employer is not currently located. Because business personal property taxes are usually imposed and administered at the local government level, compliance difficulties may arise even when the remote worker is located in the same state—but a different county or other taxing district—than the employer's office location. Business personal property taxes may be owed on company-owned property, typically as of January 1 of the tax year, on items such as laptops, printers, desks, or other items. Frequently, however, taxing jurisdictions have adopted *de minimis* thresholds where tax may not be owed on property valued at less than a specified amount. If the tax is owed, the employer must self-report ("render") its property within a jurisdiction.

> **POLICY CONSIDERATION AND BEST PRACTICE** – It is suggested that taxing jurisdictions could allow businesses to report personal property within the state to a single location, whether headquarters or the location where most employees are located. Such single return location would facilitate compliance and maintain the jurisdictions' tax base.

Local Taxes and Fees

Local governments impose a variety of taxes and fees on businesses and individuals, many of which may be triggered by the presence of a remote worker. Some local taxes are functionally equivalent to state levies, such as personal income taxes, whereas other local taxes are unique. With respect to the former taxes, several states authorize their local jurisdictions to impose personal income taxes and the correlative employer withholding obligation. Of these, Indiana, Kentucky, Maryland, Michigan, Ohio, and Pennsylvania are among the states that authorize all or many municipalities or counties to impose a personal income tax. Other states authorize a limited number of cities to impose personal income or some other form of a payroll-based tax, including: Wilmington, Delaware; New York City (on residents only); Newark, New Jersey (payroll tax on employers); and St. Louis and Kansas City, Missouri; and

Multnomah County/Portland, Oregon. Still other states—namely Iowa and Arkansas—authorize certain local school districts to impose a surcharge reported and paid on the state personal income tax return.

Similar to their state counterparts, local income or other payroll-based taxes create problems for remote employees and their employers. In fact, most of the controversies directly related to remote work relate to those local taxes. For example, the following cases relate to temporary COVID-19 rules that sourced wage income of employees to the employer location, even though the employee worked remotely outside of the taxing jurisdiction during the periods at issue:

- *Schaad v. Alder*.[125] The Ohio General Assembly enacted emergency legislation during the pandemic that deemed any day that an employee worked from home to be a day worked at the employee's principal place of work. A taxpayer, who was a hybrid worker before the pandemic, sued and argued that the law was unconstitutional under the Due Process Clause "because it permits a municipality to tax nonresidents for work performed outside of the city." The appellate court affirmed the trial court's determination that the legislation was constitutional and held that the state's taxing jurisdiction may be exercised over all of a resident's income based on the state's *in personem* jurisdiction over the person. Since the legislation came from the legislature and because the taxpayer is a citizen of the state, the court determined that he received all the process he was due under the law. The Ohio Supreme Court heard oral arguments on Feb. 28, 2023.

- *Morsy v. Dumas*.[126] The Ohio General Assembly enacted emergency legislation during the pandemic that deemed any day that an employee worked from home to be a day worked at the employee's principal place of work. The city of Cleveland refused to issue a refund to the taxpayer, a resident of Pennsylvania who worked exclusively in Pennsylvania during the period at issue, even though before the emergency legislation Cleveland would issue a refund for days the taxpayer worked in Pennsylvania. The trial court granted summary judgment in favor of the taxpayer, stating that while the General Assembly has jurisdiction over Ohio residents, it cannot

[125] *Schaad v. Alder*, Case No. 2022-0316, Oh. Sup. Ct. (oral arguments on Feb. 28, 2023); *Schaad v. Alder*, 2022-Ohio-340 (Ohio Ct. App. 2022).

[126] *Morsy v. Dumas*, Ohio Ct. Com. Pl. No. CV 21946057 (Sept. 26, 2022).

create jurisdiction to levy a tax on the income of people who are not residents of Ohio when that income was earned from work performed outside of the state.

- *Boles v. City of St. Louis*.[127] The taxpayers, who were not residents of St. Louis, worked most of their time outside of the city; between 2018 and 2020, they received refunds for the tax on the wages attributable to the days worked outside of the city. In 2021, the city changed its position and refused to issue a refund because, in its view, the tax applied to a St. Louis employer that received the benefit of the services and was located in the city (that is, that the tax does not require that the taxpayers' work be physically performed in the city to be subject to the tax). The trial court granted summary judgment for the taxpayers with respect to their refund claims, stating that the clear and unambiguous language of the law only imposes the tax on work done "in" the city, and since the taxpayers work was not performed physically in the city, they were not subject to the tax. As of the date of this paper, legislation, H.B. 589, has been approved by the Missouri House of Representatives that would prohibit the city from imposing the earnings tax on telecommuters outside its jurisdiction.

In addition, many local governments impose variations of gross receipts taxes, licenses, and other fees on businesses. While not always the case, employers with employees in these jurisdictions may be subject to these levies and compliance obligations even if the employees work remotely from their homes. These local laws vary widely by jurisdiction, thereby creating significant compliance (and enforcement) issues, which may involve business interruption for failing to comply.

> **POLICY CONSIDERATION AND BEST PRACTICE** – Similar to the above, it is suggested that the application of local payroll-based to remote workers be evaluated by balancing the "protection, opportunities, and benefits" provided by the employer's and the employee's locations, respectively, as well as ease of administration and compliance.
>
> It is also suggested that localities consider whether the changes to the federal tax law affecting employee benefits significantly deviate from local policies such that their tax laws should not conform to the changes. For instance, some cities, such as Washington, D.C., New York City, and San Francisco, require employers to maintain transportation programs for their employees, and the repeal of employer deductions for the costs of those programs may frustrate local policy. Localities (and states) should also consider

[127] *Boles v. City of St. Louis*, No. 2122-CC00713, St. Louis City Cir. Ct. (Jan. 23, 2023).

the costs of complexity that arise for taxpayers when their tax systems do not conform to the federal tax system.

Credits and Incentives

Many state and local tax credits and incentives, of all tax types, require that the taxpayer establish or maintain some number of employees in the jurisdiction providing the benefit. Such requirements may be a statutory prerequisite to qualifying for the credit or incentive, or part of a negotiated package between the parties. Frequently, such qualifying jobs must be created or maintained over a specified period, whether by statute or negotiated incentive agreement. In some cases, a minimum number of jobs must be maintained for the taxpayer to retain the credit or incentive and, if the level is not met, the jurisdiction may "claw back" the benefit from the taxpayer. In many cases, qualifying jobs are reported using unemployment wage reports that show employment "localized" or based within the state. Thus, if employees moved outside the state where a credit or other incentive was previously earned or granted and that employee's wages are reported on the other state's unemployment wage report, then that continued qualification may be at risk.

As a result of the remote work environment, therefore, employers are evaluating their compliance with credits for which they previously qualified and incentives that have employment-related components, as well as credits and incentives for future projects and expansions. Likewise, policymakers may consider how best to address the impact of remote work on credits and incentives, which may vary depending on whether the incentive program is intended to attract investment/capital expenditures, with job creation as an ancillary factor, or the program is focused on job creation. For example, the Texas Legislature considered two bills (S.B. 733 and H.B. 2644) that would amend the state's enterprise zone program, which currently requires "qualified employees" to "perform at least 50 percent of the person's service for the business at the qualified business site," except where the person transports goods or services, in which case the person must "report to the qualified business site and reside[] within 50 miles of the qualified business site."[128] The introduced legislation would eliminate the requirement that off-site work be limited to the transportation of goods or services, allowing "qualified" work to be performed off-site so long as the person resides within 50 miles of the qualified business site.

[128] Tex. Gov't Code § 2303.003(7)(C).

While in some states, disqualification, clawback, or other loss of a credit or incentive may result from employees leaving a state to work remotely for their employer, in other states laws are being enacted to attract remote workers and provide benefits to their employers.

For instance, New Jersey considered legislation that would create a $25 million grant program for out-of-state businesses with at least 25 full-time employees that assign New Jersey-resident employees, currently working in other states, to in-state locations.[129] As amended, the bill would create a nonrefundable $2,000 tax credit for New Jersey residents if their employers grant them a request to relocate from an out-of-state work location to an in-state location.[130]

Louisiana enacted an exemption (La. R.S. § 47:297.18) from individual income tax for "digital nomads" equal to 50% of the gross wages of each qualified taxpayer, not to exceed $150,000. The exemption applies for a period of up to two taxable years during taxable years 2022-25. The exemption applies only to gross wages received from the services performed as a "digital nomad" and to income that is earned from remote work. Louisiana defines "digital nomad" as an individual who:

- Establishes residency in Louisiana after Dec. 31, 2021.
- Is considered a "covered person" with major medical health insurance.
- Works remotely full time for a nonresident business as provided for by the secretary of the Louisiana Department of Revenue.
- Is required to file a Louisiana resident or part-year resident individual income tax return for the taxable year in which the exemption is claimed.
- Has not established residency or domicile in Louisiana for any of the prior three years immediately preceding the establishment of residency or domicile after Dec. 31, 2021.
- Has not been required to file a Louisiana resident or part-year resident individual income tax return for any of the prior three years.
- Performs the majority of employment duties in Louisiana either remotely or at a coworking space.

[129] N.J. S.B. 3128, 220th Legis. (2022).

[130] *Id*.

The digital nomad exemption is limited to 500 individuals for the life of the program, which sunsets after Dec. 31, 2025.

Other Multistate Efforts [TBD]

- MTC
- COST and MTC Mobile Workforce Models

VI. Nontax Issues—Labor/Employment

As they do with tax compliance, employers face difficult process and compliance issues when authorizing employees to work remotely, which is often necessary to attract and compete for in-demand workers. For instance, employers evaluate nondiscriminatory processes in place for employees to request remote work, including processes for notification of change in work location. Moreover, employees may be subject to laws and regulations (such as minimum wage, vacation pay, noncompete agreements, etc.) at their remote work location that differ from their prior office work location.

As expected, remote work arrangements implicate a number of employment laws. As just a few examples:

- Wage/Hour: Relevant issues include applicable minimum wage, overtime pay and related wage/hour legal issues depending on location of the employee.

- Paid Leave: State and local employment laws, ordinances and other public policies apply to the employee where the employee works, such as paid sick leave, family and medical leave programs, vacation accrual and payout, and restrictive covenants. These laws may vary from the employer's office location. If the employee works a hybrid schedule, time spent within a certain jurisdiction may trigger local ordinances (for example, when an employee works a certain number of hours within the city limits, the employer may have to comply with that city's paid sick leave ordinance or family medical leave program).

- Reimbursable Expenses: Expenses may be reimbursable (fully or a reasonable amount) and the way in which the employee will be paid or reimbursed for such work-related expenses may vary by state.

- Notice: Jurisdictions vary with respect to employment notice requirements for remote employees, such as required employment posters.

- Workers' Compensation: Workers' compensation coverage, which covers any on-the-job accidents or injuries suffered by the employee at the remote work location, vary by jurisdiction. For example, if the workers' compensation coverage has certain requirements pertaining to the remote work location, such as ergonomic devices and safety checklists, the employer will need to convey that information to the employee and appropriately enforce them.

APPENDIX:
CONSTITUTIONAL AUTHORITY AND JURISDICTIONAL ISSUES

Nexus under the U.S. Constitution

The U.S. Constitution limits states' and localities' ability to impose tax on a person or activity, particularly as it relates to the taxation of interstate commerce or nonresident persons. The following summarizes that basic constitutional framework, which in turn applies to the various tax types discussed throughout this paper.[131] Under the Constitution, a state may impose a tax on a person or activity that has a sufficient connection or relationship with the state. This necessary connection or relationship is referred to as "nexus" and derives from the Constitution's Due Process Clause, in the 14th Amendment, and the Commerce Clause, found in Article I, § 8, Clause 3.

Under the Due Process Clause, "nexus" for state and local tax purposes means that the taxable activity (for example, generating income) is attributable in a meaningful way to activities taking place in the state and that "some definite link, some minimum connection" exists between the taxing state and the activities the state is seeking to tax.[132] A further condition is that a rational relationship must exist between the income taxed and the activities conducted within the state.[133] A state may tax only that part of a business's income that is fairly attributable to its income-producing activities in the state.[134] When nexus exists, then presumably the person is benefitting from the "protection, opportunities, and benefits" provided by the state, for which a tax is levied as the quid pro quo.[135] As described below, courts generally have not hesitated to find the requisite "definite link" and "minimum connection" between a state and out-of-state business when that business maintains an employee in the state.[136]

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[131] The white paper focuses on two constitutional provisions: the Due Process Clause of the 14th Amendment, as applied to the states, and the Commerce Clause. Importantly, numerous other provisions may impact remote workers or their employers or principals, such as the U.S. Constitution's Privileges and Immunities Clause, the Import-Export Clause and others. Moreover, many state constitutions have correlative provisions that may be implicated by a remote worker in a state.

[132] *Miller Bros. v. Maryland*, 347 US 340, 344-345, 74 S. Ct. 535 (1954).

[133] *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978); Container Corp. v. Franchise Tax Bd., 463 U.S. 159 (1983).

[134] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

[135] *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

[136] *Std. Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560 (1975); *Telebright Corp. v. Director, Div. of Tax'n*, 424 NJ Super. 384, 38 A3d 604 (App. Div. 2012).

The Commerce Clause grants Congress the power "[t]o regulate Commerce ... among the several states."[137] As recently explained by the U.S. Supreme Court:

> Although the Commerce Clause is written as an affirmative grant of authority to Congress, this Court has long held that in some instances it imposes limitations on the States absent congressional action. Of course, when Congress exercises its power to regulate commerce by enacting legislation, the legislation controls. ... But this Court has observed that "in general Congress has left it to the courts to formulate the rules" to preserve "the free flow of interstate commerce."[138]

In *Complete Auto Transit, Inc. v. Brady*, the Supreme Court explained, in what ultimately became a four-prong test, that a state's tax is permissible under the Constitution's Commerce Clause when:

- The tax is applied to an activity that has a substantial nexus with the taxing state.
- The tax is fairly apportioned.
- The tax does not discriminate against interstate commerce.
- The tax is fairly related to the services provided by the state.[139]

Within this framework, the Supreme Court also has explained that "the venerable maxim *de minimis non curat lex* ("the law cares not for trifles") is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.[140]

Of the four prongs in the *Complete Auto* test, "substantial nexus" is perhaps most relevant as to whether a state tax based on the in-state presence of an employee passes muster under the dormant Commerce Clause. As the Supreme Court described in *South Dakota v. Wayfair*, "the first prong of the Complete Auto test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State. 430 U.S., at 279, 97 S.Ct. 1076. '[S]uch a nexus is established when the taxpayer [or

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[137] U.S. Const. Art. I, § 8, Clause 3.

[138] *South Dakota v. Wayfair, Inc*., 138 S. Ct. 2080, 2089–90 (2018) (*citations omitted*).

[139] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

[140] *Wisconsin Dep't of Revenue v. William Wrigley, Jr*., Co., 505 U.S. 214, 231 (1992).

collector] '"avails itself of the substantial privilege of carrying on business" in that jurisdiction.' Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11, 129 S.Ct. 2277, 174 L.Ed.2d 1 (2009)."[141]

Despite prior distinctions between the nexus requirements of the Due Process and Commerce Clauses,[142] the Supreme Court in *South Dakota v. Wayfair* explained, "This [Commerce Clause] nexus requirement is 'closely related,' *Bellas Hess*, 386 U. S., at 756 to the Due Process requirement that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,' *Miller Brothers Co. v. Maryland*, 347 U. S. 340, 344-345 (1954). It is settled law that a business need not have a physical presence in a State to satisfy the demands of Due Process. *Burger King Corp. v. Rudzewicz*, 471 U. S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)."[143] The Court further explained, "[w]hen considering whether a State may levy a tax, Due Process and Commerce Clause standards may not be identical or coterminous, but there are significant parallels."[144]

On several occasions, the Supreme Court has made clear that maintaining an employee who carries on a corporation's business within a state is sufficient to pass muster under the Due Process and Commerce Clauses.[145] In *International Shoe Co. v. Washington*, the court concluded that a foreign corporation with no business location or stock of goods in Washington was nonetheless subject to tax within the state because it employed in-state salespeople who solicited orders (which were produced out of the state).[146] The majority noted:

> [T]he activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which

[141] *Id*. at 2099.

[142] In 1992, the U.S. Supreme Court in *Quill v. North Dakota*, 504 U.S. 298 (1992) distinguished the nexus requirements of the Due Process Clause and the Commerce Clause. However, the Court later determined that the bifurcation of the nexus requirement in Quill was flawed and that there is not much practical difference between Commerce Clause nexus and Due Process Clause nexus.

[143] *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2093 (2018).

[144] *Id*.

[145] *See, e.g.* Std. Pressed Steel Co. v. Washington Dep't of Revenue, 419 U.S. 560 (1975) (a single resident employee and sporadic visits by nonresident engineers was sufficient to create nexus between the state and the taxpayer, with the taxpayer's contrary arguments "verg[ing] on the frivolous").

[146] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

> appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. … It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there.[147]

In *Scripto, Inc. v. Carson*, the Supreme Court analyzed the extent to which an independent contractor (as opposed to an employee) creates benefits for a taxpayer in the taxing state.[148] The taxpayer, Scripto, was a Georgia corporation without offices or regular employees in Florida.[149] Scripto did, however, employ close to 10 "wholesalers" in Florida, who solicited sales of its products in the state.[150] As the majority noted, the taxpayer exploited Florida's consumer market and regularly and systematically engaging in business within the state.[151]

In *Tyler Pipe Industries v. Washington Department of Revenue,* the Supreme Court again considered the extent to which an independent contractor's activities in a state created nexus for a corporate taxpayer.[152] In this case, the taxpayer had no office, property or employees in the state and used independent contractors who acted daily on its behalf to solicit sales, call on customers and maintain and improve the seller's name and recognition.[153] Ultimately, the Supreme Court held that the independent contractors helped the taxpayer in advancing a market in the state, making the nexus sufficient for the imposition of tax.[154]

In the context of Tyler Pipe, Scripto, and state decisions addressing the presence of a single employee in the state, Professor Hellerstein concludes:

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[147] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) at 320.

[148] *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

[149] *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960) at 208-09.

[150] *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960) at 207.

[151] *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960) at 212.

[152] *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232 (1987).

[153] *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232 (1987) at 249-50.

[154] *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232 (1987) at 249-50.

> The only serious question raised by the case is one of policy—whether, in our increasingly mobile society in which telecommuting employees are commonplace, it is appropriate for the existence of a single employee to trigger an income tax obligation for an out-of-state corporation. Plainly, the state has a legitimate claim to the portion of the income fairly attributable to the corporation's employees in a state. This legitimate claim, however, must be balanced against the burden of tax compliance for a multistate company with a single telecommuter in one or more states throughout the nation. This could well be an area in which the establishment of a *de minimis* rule of jurisdiction (analogous to Public Law 86-272) might be appropriate.[155]

Jurisdiction to Tax under Federal Statutory Law

Congress has enacted federal statutes that relate to the ability of states to tax certain nonresidents.[156] Among the more significant of these, Public Law (P.L.) 86-272 prohibits states from imposing a net tax on a person's income from interstate commerce if the only business activities in the state, by or on behalf of such person, are limited to the solicitation of orders in the state for sales of tangible personal property, where the orders are sent outside the state for approval and shipped from a point outside the state.[157] Of notable import here, P.L. 86-272 only applies when an in-state employee's activities relate to the solicitation of tangible personal property. Thus, if an in-state, telecommuting employee's activities exceed solicitation or he or she solicits something other than tangible personal property, then such employee may trigger nexus and, hence, a potential tax obligation for the out-of-state employer (assuming no other contacts with the state). For example, according to recent California guidance, "an employee who telecommutes on a regular basis from within California" will be removed P.L. 86-272

[155] Hellerstein, Hellerstein & Appleby, State Taxation (Thomson Reuters/Tax & Accounting, 3rd ed. 2001, with updates through December 2022) (online version accessed on Checkpoint (www.checkpoint.riag.com) May 3, 2023) at ¶ 6.06.

[156] *See, e.g.,* 49 U.S.C. § 11502 (restricting state taxation of compensation paid to rail carrier employees); 49 U.S.C. § 40116(f)(2) (restricting state taxation of compensation paid to air carrier employees); 46 U.S.C. § 11108 (restricting withholding from wages for wages paid to masters or seaman on "vessel[s] in the foreign, coastwise, intercoastal, interstate, or noncontiguous trade"); 4 U.S.C. § 114 (limiting taxation of certain retirement income of an individual to the individual's resident state); 50 U.S.C. § 4001 (adopting federal rules for determine residency of military servicemembers and their spouses for state taxation purposes).

[157] P.L. 86-272, 73 Stat. 555 (1959).

protection unless the employee's in-state activities are entirely ancillary to solicitation of sales of tangible personal property.[158]

Jurisdiction to Impose Tax under State Law

Each state has rules about what activities constitute sufficient jurisdiction to impose a tax on an out-of-state business. Common activities creating nexus under state laws include:

- Physical presence in the state, such as maintenance of property or employees in the state for more than a *de minimis* amount of time.
- Economic presence in the state.
- So-called factor presence nexus based on the amount of economic activity in the state, according to threshold levels of the sales, property or payroll.[159]

Often, states extend their respective tax jurisdiction statutes to the extent allowed under the U.S. Constitution, such that the federal constitutional analysis may be coextensive with the state's ability to tax an out-of-state business.

By way of example of the factor presence nexus approach, the MTC's model "Factor Presence Nexus Standard for Business Activity Taxes" says:

> Substantial nexus is established if any of the following thresholds is exceeded during the tax period:
>
> (a) A dollar amount of $50,000 of property.
>
> (b) A dollar amount of $50,000 of payroll.
>
> (c) A dollar amount of $500,000 of sales.
>
> (d) 25% of total property, total payroll or total sales.[160]

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[158] California Franchise Tax Bd. Tech. Advice Memo. 2022-01, Feb. 14, 2022.

[159] In general, the amounts reflected in a factor presence nexus standard are determined in the same manner as the numerator of a taxpayer's sales, payroll, or property factors, discussed below.

[160] "Factor Presence Nexus Standard for Business Activity Taxes," Multistate Tax Comm'n (Oct. 17, 2002) (available here, https://www.mtc.gov/wp-content/uploads/2022/12/Factor-Presence.pdf).

Considering California's rules as a specific example, physical presence in the state—which includes the presence of an employee in the state—will create nexus and subject the employer to tax in the state.[161] Similarly, California has an economic nexus rule providing that every corporation doing business in the state, meaning actively engaging in any transaction for the purpose of financial or pecuniary gain or profit, will have nexus.[162] One way to be "doing business" in the state is by meeting the state's factor-based nexus thresholds. For instance, a taxpayer is doing business if its sales in California exceed the lesser of $637,252[163] or 25% of total sales.[164] Further, a taxpayer is also doing business in California if its payroll compensation in the state exceeds the lesser of 25% of total payroll or $63,726. Thus, traveling employees in California very likely create nexus and give the employer a California income tax obligation.

State Case Law and Guidance

Several states have issued guidance related to telecommuter-created nexus for business taxes. Of such guidance, the New Jersey *Telebright* case has been most frequently analyzed by commentators.[165] In *Telebright*, the taxpayer appealed a New Jersey Tax Court decision finding that, because the taxpayer had a full-time telecommuting employee in the state, the taxpayer was "doing business" in the state and thus was subject to the New Jersey corporation business (income) tax. The employee worked from home using a computer she purchased with her own funds to replace a computer the taxpayer previously provided to her for work. The taxpayer argued that applying the tax to its limited activities in the state would violate the Constitution's Commerce and Due Process Clauses. The appellate court disagreed, stating that there was no Due Process violation because the taxpayer had sufficient "minimum connection" with the state to permit taxation due to the employee's full-time work in New Jersey. The appellate court also rejected the taxpayer's Commerce Clause argument, stating that the employee was producing a portion of the taxpayer's product in the state and that the taxpayer

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[161] *See* Cal. Rev. & Tax. Code § 23101; Cal. Rev. & Tax. Code § 23501; *Appeal of Warwick McKinley, Inc.*, Cal. Bd. of Equal., Jan. 11, 2012.

[162] Cal. Rev. & Tax. Code § 23101(a); Cal. Code Regs. tit. 18, § 23101.

[163] This is the dollar amount threshold for tax year 2021. These thresholds are indexed annually for inflation. *See* Franchise Tax Board, *Doing Business in California*, *available at* https://www.ftb.ca.gov/file/business/doing-business-in-california.html.

[164] Cal. Rev. & Tax. Code § 23101(b), (d); Franchise Tax Board, *Doing Business in California*, *available at* https://www.ftb.ca.gov/file/business/doing-business-in-california.html.

[165] *Telebright Corp. v. Director*, *Div. of Tax'n*, 424 NJ Super. 384, 38 A3d 604 (App. Div. 2012).

benefited from the protections that New Jersey law afforded the employee. The following summarizes additional state tax rulings pertinent to remote work:

- Idaho: State Tax Comm'n Ruling Docket No. 0-704-071-680, June 22, 2018. The taxpayer asserted that it was not "transacting business" in Idaho, and thus was not required to file Idaho corporate income tax returns, because its one Idaho employee worked only on internal controls and did not generate any income for the taxpayer. The State Tax Commission found that the taxpayer was "transacting business" in Idaho because it owned property in the state (a computer provided to the employee for work) and the Idaho employee engaged in activity that supported the taxpayer's commercial business activity.

- California: Sales and Use Tax Ann. No. 220.0256, June 21, 1999. An out-of-state web-based retailer, not engaged in business in California, hired a website designer who was responsible for improving the quality of community on the retailer's websites and who telecommuted from home in California. Since the only business activities conducted at the designer's home were telecommuting activities and the home was not held out to be a business location of the retailer, the retailer was not regarded as engaged in business in California.

- Tennessee: Letter Ruling No. 97-04, Feb. 19, 1997. The business employed an officer who worked from home 50% of his time and traveled outside the state the other 50%, and the taxpayer wanted to know whether the officer's living in Tennessee and working out of his home would make the taxpayer subject to the corporate franchise, excise taxes. The Department of Revenue ruled that the business would not be subject to the tax because it had no office or place of business in the state, it had no property in the state (aside from a cellphone) and it did not hold itself out as doing business in the state.

- Utah: Private Letter Rul. No. 17-005, Aug. 23, 2018. A retailer, who did not have any contacts with Utah besides transporting its products to customers in the state via common carrier, wanted to know whether having a research and development employee (that is, nonsales role) working from home in the state would result in the obligation that the retailer collect and remit the sales and use taxes. The State Tax Commission found, as the retailer did not have a location or stock of goods in the state and because the taxpayer did not regularly engage in other activities that would create nexus, that the employee working from home would not result in the retailer having the obligation to collect and remit the sales and use taxes.

- Florida: Technical Assistance Advisement No. 09A-058, Nov. 9, 2009. A retailer wanted to know whether its utilization of a Florida-based independent contractor consultant, who provided improvement services regarding the retailer's research and sales processes, would create nexus with the state and require the taxpayer to collect and remit the sales and use taxes. The Florida Department of Revenue stated that, because the independent contractor's activities were provided to the retailer's principal place of business in another state and the activities did not help develop a market for the retailer's products in Florida, the taxpayer did not have nexus with the state and would not be required to collect and remit the sales and use taxes.