

Telecommuting During COVID-19: One Headache After Another



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As if living in the era of a pandemic wasn't stressful enough, now many people have to consider the tax implications of their telecommuting for work over the last few months. This is becoming a hot topic as more and more states release guidance on this issue. And just like the states' stay-at-home orders, the guidance on the treatment of compensation earned while telecommuting is by no means consistent.

While some states have released guidance on how compensation earned while telecommuting should be treated, most have stayed silent. As of this writing, only Alabama,²³ Georgia,²⁴ Illinois,²⁵ Iowa,²⁶ Maryland,²⁷ Massachusetts,²⁸ Minnesota,²⁹ Mississippi,³⁰ Nebraska,³¹ New Jersey,³² Pennsylvania,³³ Rhode Island,³⁴ and South Carolina³⁵ have issued guidance. Massachusetts³⁶ and Rhode Island³⁷ have gone so far as to issue emergency regulations. And to make things even

more complicated, there is no consensus among the states that have issued guidance. For example, Iowa and Maryland said that the withholding requirements are not affected by stay-at-home orders, so compensation earned within the employee's home state is subject to income tax there, even if her employer and regular office are in another state. But most of the other states say the employee's regular place/state of work is due the tax; that is, the work-at-home days will be sourced back to the employer's location.

Double taxation, here we come! Say you live in Maryland and work in Pennsylvania. Pennsylvania's guidance says that if an employee is working from home in Maryland, that employee's compensation is still Pennsylvania-source income and subject to withholding and personal income tax.³⁸ But Maryland's guidance says withholding is based on physical presence in the state, so compensation earned while telecommuting in Maryland will also be subject to Maryland taxes.³⁹ What a terrible and unfortunate result.

Of course, coming from New York, I have seen this telecommuting issue for years. Under the oddly named "convenience of the employer" rule, when a New York-based employee works from her home outside the state, those days still generally count as New York workdays for income allocation purposes if the employee is working at home for her convenience, and not the employer's necessity. This rule has survived constitutional attacks,⁴⁰ but has been neutered slightly by a special safe-harbor test that does permit home-office workdays to count as non-New York workdays under specific circumstances.⁴¹ But we're expecting a whole new wave of convenience-rule issues to bombard New York now that so many New York City-based

²³ Alabama Department of Revenue Coronavirus (COVID-19) Updates (last visited June 1, 2020).

²⁴ Georgia DOR, Coronavirus Tax Relief FAQs (last visited June 1, 2020).

²⁵ Illinois DOR, Info. Bulletin No. FY 2020-29 (May 1, 2020).

²⁶ Iowa DOR, "COVID-19" (last visited June 1, 2020).

²⁷ Comptroller of Maryland, Tax Alert 5-04-20.

²⁸ Massachusetts DOR, TIR 20-5 (Apr. 21, 2020).

²⁹ Minnesota DOR, COVID-19 FAQs for Individuals (last visited June 1, 2020).

³⁰ Mississippi DOR, Release, (Mar. 26, 2020).

³¹ Nebraska DOR, Frequently Asked Questions About the Income Tax Changes Due to the COVID-19 National Emergency (last visited June 1, 2020).

³² New Jersey Division of Taxation, Telecommuter COVID-19 Employer and Employee FAQ (last visited June 1, 2020).

³³ Pennsylvania DOR, "Find Answers: Answer ID 3739" (Apr. 3, 2020).

³⁴ Rhode Island DOR, ADV 2020-22 (May 26, 2020).

³⁵ South Carolina DOR, Information Letter #20-11 (May 15, 2020).

³⁶ 830 CMR 62.5A.3.

³⁷ 280-RICR-20-55-14.

³⁸ Pennsylvania DOR, *supra* note 33.

³⁹ Comptroller of Maryland, *supra* note 27.

⁴⁰ *Huckaby v. New York State Division of Tax Appeals*, 4 N.Y.3d 427, 796 N.Y.S.2d 312, 829 N.E.2d 276 (2005), *cert. denied*, 546 U.S. 976 (2005); *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85, 769 N.Y.S.2d 464, 801 N.E.2d 840 (2003), *cert. denied*, 541 U.S. 1009 (2004).

⁴¹ TSB-M-06(5)I (May 15, 2006).

employees are telecommuting from their homes outside New York state. The tax department, up to this point, has been silent on the issue. But given that the governor was insistent on even taxing out-of-state nurses who came to New York to assist with COVID-19 patients,⁴² do you think that the Empire State would give office workers a pass? Me neither.

But that doesn't mean New York's convenience rule will carry the day here. Indeed, apart from the fact that this pandemic has been entirely inconvenient for everyone, to say the least, there's a question legally as to whether the state could even argue that state-ordered telecommuting falls under the convenience-rule provisions. And case law likely supports the argument that these days could qualify as necessity days, and not convenience days. For example, in *Matter of Devers*, an administrative law judge determined that the taxpayer worked outside New York by necessity when his employer eliminated his office, rescinded his access to the building, and "relocated" him to the Virginia office, while he simply worked from his home in Connecticut.⁴³ So we think that an employee who is prohibited from going into the office by the governor's orders could reasonably argue that the days worked at home are by necessity, not convenience. And the employee may have a similar claim even after the stay-at-home orders expire, because we expect many employers to continue to require their employees to work at home to comply with social-distancing edicts and to attempt to keep their employees safe.

You'd hope that states could do the right thing here and come up with some consistent rules to ensure that no one gets taxed twice. We're supposed to be all in this together, right?

⁴²Edward A. Zelinsky, "New York's Ill-Advised Taxation of Nonresidents During COVID-19," *Tax Notes State*, May 25, 2020, p. 1001.

⁴³*Matter of Devers*, DTA No. 819751 (N.Y. State Div. Tax App. 2005).

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