

# State and Local Tax Considerations of Remote Work

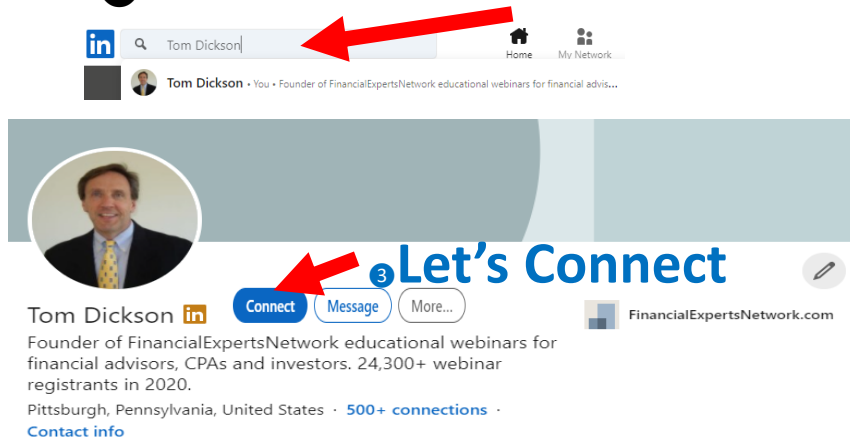
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# Agenda

- 1 State tax treatment of teleworking framework
- 2 Temporary state guidance addressing income tax withholding and business tax treatment
- 3 Litigation over controversial state remote work guidance
- 4 Practical implications for employers and employees
- 5 Remote work and state tax outlook beyond the pandemic



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## Teleworking and State Tax Framework

- Generally, state income tax withholding is required in the state in which an employee's services are performed, not where the employee resides
- Exception: reciprocal agreements between states where the employee works and resides (common in bordering states in the Mid-Atlantic and Midwest)
- "Convenience of employer" states: Nonresident employee subject to tax on income earned when working at nonresident location at the employee's convenience, rather than as a requirement of the employer
  - Examples: NYS, PA, Philadelphia, NJ, DE, NE
  - Result: employee subject to income tax withholding from both resident and nonresident jurisdictions



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# Impact of Remote Work on Tax Withholding

Unique personal income tax withholding issues in the age of COVID-19:

- Spring 2020: strict government lockdowns, business closures – move to remote work for non-essential businesses
- Change in jurisdiction where the employer is required to withhold tax on wages
- Summer/Fall 2020: gradual re-opening of the economy and more employer control over remote work policies, depending on industry
- Winter 2021: cases surge, states of emergency extended, return of state restrictions
- Income tax withholding considerations:
  - Typically, tax is withheld at the place where services are performed, i.e. employee location
  - New employee locations complicate withholding requirements for states, locals



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# Impact of Remote Work on Tax Withholding

Examples of COVID withholding guidance:

- **PA DOR guidance:** PA will not consider employee's remote work location to be a change in sourcing of employee compensation during the pandemic – remains PA-source income for PIT, employer withholding, and business income apportionment
  - Guidance updated 11/9: temporary guidance will end the earlier of 6/30/2021 **OR** 90 days after governor lifts state emergency declaration
- **Phila. wage tax guidance:** Following employer convenience rules, nonresidents otherwise working at a Phila. office are exempt from wage tax if required to work remotely – employer may need to withhold local income tax based on employee location
- **NJ guidance:** wage income will continue to be sourced as determined by the employer in accordance with the employer's jurisdiction during the period of the pandemic
- **CA guidance:** Nonresidents relocating to CA for any portion of the year are considered to have CA source income during the period of time they perform services in CA



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## Polling Question #1

Have you worked remotely in a different state than your traditional work/office location since the beginning of the pandemic?

- A. No, my office and remote work location are in the same state
- B. Yes, in my state of residence
- C. Yes, in a state other than my state of residence
- D. No change – I worked remotely before the pandemic
- E. I don't work remotely



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## Impact of Remote Work on State Tax Nexus

Business tax nexus issues in the age of COVID-19:

- Traditionally, employee presence in new states subjects out-of-state companies to state business taxes
  - NJ *Telebright* case: telecommuting employee in NJ created sufficient nexus for out-of-state corporation with no physical presence or payroll in NJ
- Employee presence in new states/localities may subject out-of-state companies to new business taxes (income/franchise, sales and use)
- “Status-quo” rules: Some jurisdictions (CA, NJ, PA, etc.) have issued guidance waiving business tax nexus thresholds for COVID-19 telework *for the duration of the pandemic/active state emergency orders*.
  - Similar rules for receipts and payroll sourcing for purposes of apportionment
  - *How long will the waivers last, when will they be lifted?*



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# Impact of Remote Work on Apportionment

## Apportionment issues in the age of COVID-19:

- Remote work may affect how businesses apportion taxable income, impacting current tax payments and future liabilities:
  - **Affect on receipts sourcing?** Remote workers may impact how receipts from sales of services are sourced
    - Consider cost-of-performance vs. market-based sourcing rules
  - **Affect on payroll factor?** Payroll may be sourced to either the work location or former employment location for remote workers, may differ from employer withholding
- Many states issued temporary sourcing guidance along with employer withholding and business tax nexus guidance:
  - Status-quo sourcing rules according to pre-pandemic employee location
  - Different end dates: end of year? Lifting of restrictions? Beyond?



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# Litigation Over Temporary State Tax Policies

## Controversial temporary guidance and litigation:

- **MA regulation** (Oct. 2020): sources nonresident employee income to MA even if teleworking from another state due to pandemic. NH brought suit against MA in **U.S. Supreme Court**, arguing due process, commerce clause violations
  - NJ legislation (passed NJ Senate): directs NJ treasurer to consider participating in NH lawsuit against MA
  - CT, RI and VT officials indicated they are considering intervening in litigation
- **NY guidance** (Oct. 2020): clarifies that for nonresidents whose primary office is in NY, days telecommuting during pandemic are considered days worked in the state
  - NJ legislation: directs NJ to study NY taxation of NJ residents and long-term fiscal impact beyond pandemic – NJ loses significant revenue from teleworking residents
    - 2016: NJ issued \$3.4 billion in credits for income taxes paid to other jurisdictions



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# Litigation Over Temporary State Tax Policies

Controversial temporary guidance and litigation (cont.):

- **Ohio COVID-19 legislation** (enacted April 2020): employees working in an Ohio municipality pre-COVID and now working remotely outside the municipality are still withheld based on the Ohio municipal location for the duration of the pandemic
  - *Buckeye Institute v. City of Columbus*: Columbus, OH facing legal challenge alleging U.S. and state due process violations, based on lack of nexus or fiscal relation between the city and the income being taxed



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## Polling Question #2

With respect to the states which have issued guidance regarding withholding requirements for telecommuting employees, which state's interpretation is of most interest to you or your business?

- A. Massachusetts
- B. New York
- C. New Jersey
- D. I have not yet considered the impact of these changes
- E. None of these changes will impact me or my business



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# Practical Implications for Employers/Employees

## Practical considerations for employers:

- Telecommuting arrangements may subject companies to additional income tax withholding liability on the compensation paid to teleworkers, with any failure to withhold potentially resulting in employer tax liabilities and penalties
- Many employers lack the resources and systems to track employee work locations on a regular basis for purposes of accurate payroll tax reporting and tracking business tax filing obligations
- Consider process improvements, revisiting remote work policies & procedures, given that remote work may last well beyond the length of the pandemic

## Practical considerations for employees:

- Implications of spending an extensive amount of time working in another state
- Statutory residency rules and potential to be considered a tax resident in two states
- Double taxation, credits for taxes paid to other states, return filing obligations



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# State tax outlook: remote work beyond COVID

## Federal legislation introduced (**not passed**) to provide state uniformity:

- Mobile Workforce State Income Tax Simplification Act (S. 604, H.R. 5674): creates bright-line 30-day threshold before state employer withholding and personal income tax liability applies
  - Supported by over 300 organizations, including AICPA, COST, GT
- Remote and Mobile Worker Relief Act of 2020 (S. 3995): builds upon Mobile Workforce, extends 30-day safe harbor to all taxing jurisdictions
  - COVID-19 related provisions: 90-day safe harbor for 2020, status quo taxation for employees working remotely, nexus relief for remote workers, end on 12/31/2020
  - Sec. 403 of Senate HEALS Act (S. 4318): contained provisions of S. 3995
- Multistate Worker Tax Fairness Act of 2020 (H.R. 7968): would prohibit states from imposing income tax on nonresident individuals unless physically present in state
- Chances of congressional action on legislation in 2021?



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# State tax outlook: remote work beyond COVID

Until there is further uniformity from Congress or the courts:

- Divergent/conflicting state approaches on taxation of remote work continue
- Consider timing of vaccine distribution and re-opening of economy:
  - Pay attention to lifting of state/local restrictions and expiration of temporary guidance
- Wording of employer policies regarding remote work, short- and long-term
- Likely rise of remote work after the pandemic
- Future of “convenience” rules in Northeastern, other states?
  - Questions about ability of states to tax income of nonresidents with no connection to taxing state



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## Polling Question #3

Do you expect to continue working remotely after the pandemic subsides?

- A. No, I expect to return to the office
- B. No, I don't work remotely currently
- C. Yes, at least part-time
- D. Yes, full-time
- E. Other/not sure



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# Questions? Thank You!



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