

TEI Denver 2021

Isn't It Inconvenient? Teleworking Issues for Employers

May 18, 2021

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Agenda

- Learning Objectives
- Teleworking – SALT Issues and Updates
- Policies & Procedures

Learning Objectives



Learning Objectives

1. Identify state tax issues for employers that arise from employing remote workers throughout the U.S.
2. Learn about tax authority guidance related to mandatory work-from-home policies and travel restrictions adopted as a result of the Covid-19 pandemic.
3. Understand longer-term solutions to mitigate state tax risks caused by remote workers.

Polling Question #1

Who is your favorite WFH companion?

- A. Dog
- B. Cat
- C. Kids
- D. Spouse/Significant Other
- E. Other/prefer to be solo



Teleworking – SALT Issues



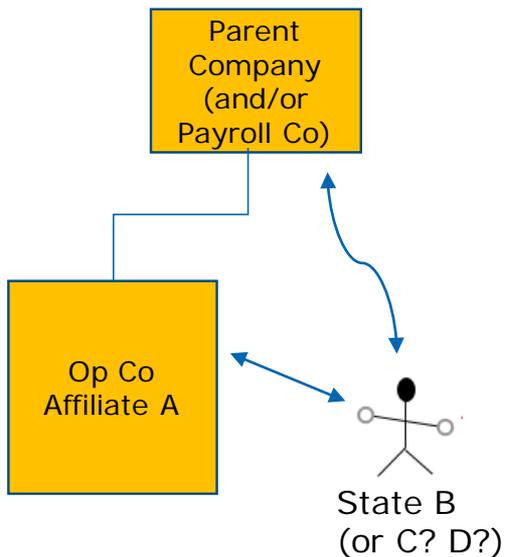
Teleworking – What's the Situation?

- Millions of U.S. workers have shifted to remote work arrangements due to the pandemic
- Trend of larger employers rethinking the need for expensive office spaces and shifting to a partially or fully remote workforce
- The shift towards remote work can have significant tax implications for companies
- “Working from anywhere”

The Conundrum

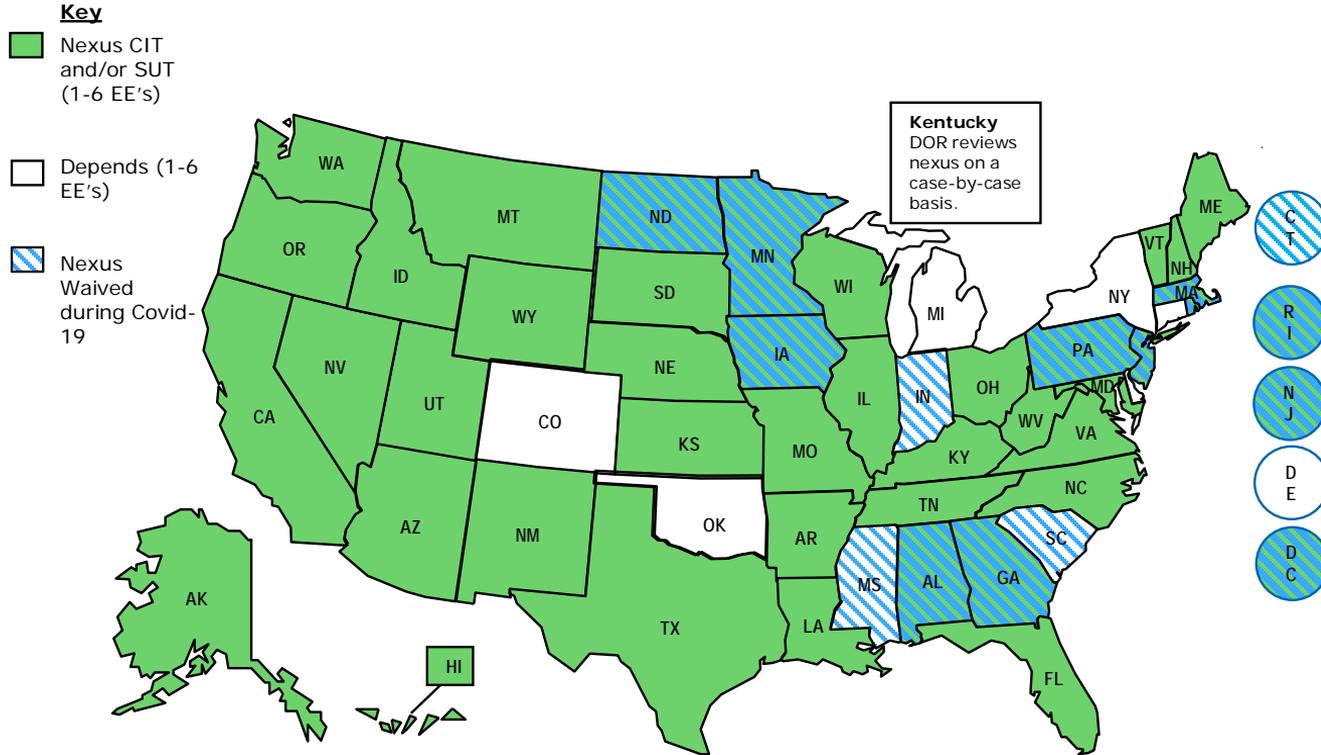


What is the Multistate Remote Work Problem?



- A remote employee is a full-time employee that performs their normal everyday work virtually, from outside of the office, while outside the state (or locality) of their employer
- Employee remains on employer's payroll
- Many more employees likely to work remotely in NE Corridor, Mid-Atlantic, Gulf Coast, or large metro areas near state lines (e.g., Portland, Charlotte, Kansas City)
- Teleworking from resident state, long-term rental/vacation home, or visiting relatives/friends in another state

State Business Tax Nexus COVID-19/Telework



Source: Bloomberg Tax & Accounting

State Nexus Waivers for COVID-19 Telework

Corporate Net Income Tax and Sales/Use Taxes

State	CNIT/SUT	State	CNIT/SUT
AL	Yes/Yes	MA	Yes/Yes
CA	Yes/N/A	MN	Yes/Yes
CT	All (statutory)	MS	Yes/Yes
DC	Yes/N/A	NJ	Yes/Yes
GA	Yes/Yes	ND	Yes/N/A
IN	Yes/Yes	OR	Yes/No Tax
IA	Yes/N/A	PA	Yes/Yes
KY	"Case-by-case"/N/A	RI	Yes/Yes
ME	Yes/Yes	SC	Yes/Yes
MD	No/No	WI	Yes/Yes



Consequences of SALT Nexus/Jurisdiction to Tax

Direct Taxes

Local Taxes
and Licenses

Indirect Taxes

Registration,
Qualification,
and
Compliance

Employment
Taxes

Other Non-Tax
Issues
(Labor/Wage)

Polling Question #2

Did your company have a multistate teleworking policy before Covid-19?

A. Yes

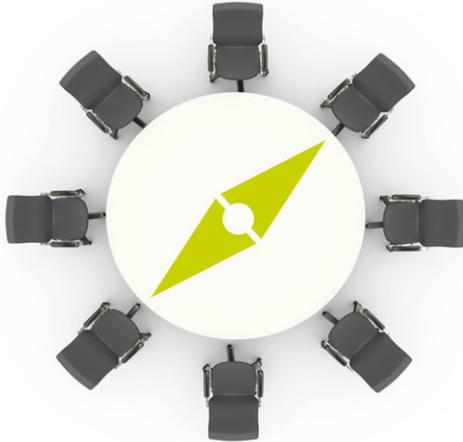
B. No



SALT Employer Withholding - Overview

Residence	Source	Exceptions
<ul style="list-style-type: none">• A resident's wages/income, wherever earned, is subject to tax<ul style="list-style-type: none">• Domicile v. Statutory• BUT, residence typically cedes primary taxation to source• Credits for taxes paid<ul style="list-style-type: none">• <i>Wynne</i>• Rate differentials	<ul style="list-style-type: none">• A nonresident's wages earned in the state are subject to tax• "Patchwork" of state laws/thresholds• Typically, working days allocation• Various approaches to taxing deferred compensation	<ul style="list-style-type: none">• Reciprocity• "Convenience of the Employer"• Federal laws

State Withholding Guidance During COVID-19



Three approaches to pandemic-related to teleworker withholding:

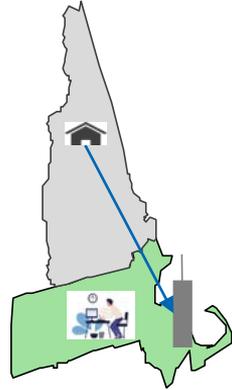
- 1) No guidance – normal withholding rules presumably apply;
- 2) Issue guidance that specifically confirms that the pre-pandemic rules remain in full force and effect; and
- 3) Adopt temporary laws, regulations, or other guidance that changes the normal pre-pandemic withholding rules.

Temporary Changes to the Normal Pre-Pandemic Withholding Rules – End in Sight?

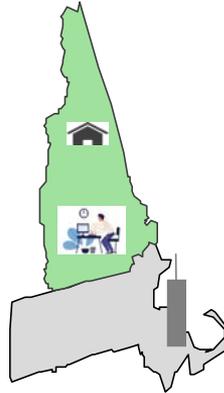
- Temporary withholding guidance generally results in:
 - Outbound Nonresidents – Status Quo; and/or
 - Inbound Residents – Hold Harmless.
- The “start” and “end” dates vary by state and are either tied to:
 - The federal government’s state-of-emergency.
 - The state’s state-of-emergency.
 - Employer’s mandatory work-from-home order.
 - A specific date (*i.e.*, starting on March 13, 2020 and ending on July 1, 2021).
- When should employers expect enforcement to begin?

Temporary Change: Massachusetts Example

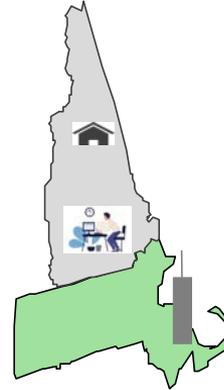
Pre-COVID-19
Commuting to
Massachusetts



Pre-COVID-19
Telecommuting
to Massachusetts



"Pandemic-Related
Circumstance"
Telecommuting to
Massachusetts



New Hampshire v. Massachusetts ... Again

- New Hampshire filed a Motion for Leave to File Bill of Complaint in the United States Supreme Court on behalf of its residents, requesting that the Court find the Massachusetts' temporary emergency regulation is unconstitutional "extraterritorial assertion of taxing power."
 - *New Hampshire v. Massachusetts*, No. 220154 (U.S. docketed Oct. 23, 2020) (petition pending review).
- The Court asked the Solicitor General to weigh-in.
- Will a state impacted by another state's permanent or temporary convenience test also seek review by the Court?
- Is the State of New Hampshire the right plaintiff?

Other Litigation Related to Remote Work

Ohio Municipalities and H.B. 197 (2020)

- The Buckeye Institute has filed five lawsuits challenging H.B. 197, which temporarily deems remote work performed during the Covid-19 pandemic to occur at an employee's principal place of business.
- *Morsy v. Dumans et al.*, No. CV21-946057, Cuyahoga County Court of Common Pleas (filed April 8, 2021).
 - Pennsylvania resident challenged Cleveland (and H.B. 197) on Due Process Clause, Commerce Clause, and state law (improper delegation) grounds.
- Four Ohio residents have filed suit challenging H.B. 197 on Due Process Clause and state law grounds.

Other Litigation Related to Remote Work

City of St. Louis

- St. Louis issued Covid-19 guidance that provides days worked outside the city while teleworking will be deemed worked at the nonresident employees' primary work location within the city.
- *Boles, et al., v. City of St. Louis*, No. 2122-CC00713, St. Louis City. Cir. Ct. (filed April 13, 2021).
 - Claims include: Federal Due Process and Fourth Amendment (unreasonable search and seizure of wages) and State Constitution (Hancock Amendment).
- S.B. 604 (passed Senate on April 1) and H.B. 688 (committee reported do pass on April 15).

Connecticut H.B. 6516 (Public Act 21-3)

- *An Act Mitigating Adverse Tax Consequences from Employees Working Remotely During COVID-19* was signed by the Governor on March 4.
- The new law provides CT residents a credit for taxes paid to:
 - Any convenience test state (NY) while teleworking in CT; and
 - Another state (MA/RI) that enacted a law or adopted a rule requiring a nonresident employee to pay tax while teleworking in CT due to the pandemic (in certain cases).
- The new law also provides that DRS cannot consider the activities of an employee who worked remotely in CT because of Covid-19 in determining whether an employer has nexus with the state.
- *See also* Comm'r Bull. (March 5, 2021).

West Virginia H.B. 2026 – Eff. June 28, 2021

- Signed into law on April 9, 2021, the Act exempts nonresident compensation earned in West Virginia if:
 - 1) The nonresident spends 30 days or less within the state during the calendar year;
 - 2) The nonresident worked in more than one state during the calendar year;
 - 3) The nonresident is not a pro athlete, entertainer; and
 - 4) The nonresident's residence state provides a substantially similar exempt (or does not impose an income tax).
- If the 30-day threshold is crossed, then withholding begins on day one.
- A “working day” means more employment in the state than any other state that day.
- Enacts single sales factor and market-sourcing for corporate income tax.

Arkansas S.B. 484

- S.B. 484 adopts a bright-line threshold for nonresident withholding (mobile workforce) and legislatively override the DFA's *ad hoc* convenience of the employer test.
 - The mobile workforce provisions are similar to West Virginia H.B. 2026, and a few other state laws, that adopt a 30-day threshold; but only applicable to residents that adopt a similar rule, i.e., “reciprocal.”
 - The bill also provides that nonresidents who earn income from Arkansas sources will only pay tax on the income that the nonresident earns while physically present in Arkansas when performing the work.

Connecticut S.B. 1106 – Payroll Tax

- SALT cap workaround would adopt an employer-level payroll tax that is elective by an employee.
- Overview of proposal
 - Open tax issues and problems
 - Open non-tax issues and problems
- Bill also includes a digital advertising tax, similar to Maryland's controversial tax.

Federal Legislation Addressing Remote Work Tax Issues



- **Remote and Mobile Worker Relief Act**
 - “State and Local Tax Certainty” During the “Covered Period”
 - Nexus Hold Harmless
 - Remote Work Location v. Primary Work Location
 - Broadly applies to a number of state/local taxes
 - Mobile Workforce Provisions
- **Multi-State Worker Tax Fairness Act**
 - Federal preemption of the convenience of the employer test

Credits and Incentives - Employers

- Employers should closely review all statutory and negotiated C&I as part of evaluation of a teleworking policy.
 - Numerous states have statutory jobs-based credits, e.g., Georgia QJTC, New Jersey Grow NJ, and New York Excelsior.
 - Negotiated frequently have a jobs-based component that the business must maintain to enjoy the benefit and/or avoid clawback.
- Teleworking specific credits?
 - E.g., NJ SB 1444 (providing corporation business and gross income tax credits for three tax years for employers that allow telecommuting)

Credits and Incentives – Employers (cont'd)

- Covid v. Post-Covid?
 - Will development authorities hold-harmless employers during Covid?
 - How long before benefits are lost?
- Tie-in to withholding and/or UI wage reports.
 - Impact of states with convenience tests before and after Covid?
 - Localization rules for UI v. source taxation for withholding.
- Planning consideration for “local” payroll entities/hubs.

Credits and Incentives - Employees

- A number of states offer or are considering offering credits, grants, or other incentives to lure teleworkers, e.g.:
 - Illinois H.B. 617 – Up to \$5,000 grants to workers that relocate to the state.
 - Indiana H.B. 1416 – Up to \$8,500 grants to workers that relocate to the state (depends on income).
 - Iowa S.F. 491 – Up to \$5,000 grants to workers that relocate to the state.
 - Louisiana S.B. 31 – income tax exemption for “digital nomads” and certain new residents (post-July 1).
 - Vermont S.B. 62 – Up to \$7,500 grants to workers (depends if they move to high unemployment area or have a high salary).

State Unemployment Insurance – “Localization”

Localized Service
(includes “incidental”
out-of-state service”)

If not localized, then
1) Base of Operations
2) If not 1), then
Direction and Control

Important Points:

- “All or nothing” sourcing regime (“localization of work”) is very different from withholding source taxation rules.
- Localization rules generally uniform.
- Application to other state employment taxes (PFL, SDI).
- See DOLETA, UIPL Letter No. 20-04

If none of the above,
then
Employee’s Residence

Other Considerations:

- Election under Interstate Reciprocal Coverage Agreement
- Election for Voluntary Coverage
- Credits

Polling Question #3

What keeps you up at night?

- A. Increased tax filings
- B. Creating nexus
- C. Increased taxes
- D. My dog, kid, and/or iguana



Telework— Policies & Planning



The Elephant on the Sofa – What are Other Employers Doing?



Step 1: Review Policies

Many companies currently have telework policies, but these probably did not anticipate the widespread remote work now required.

HR/Tax may not currently have reliable information about where employees are located, but other functions may be keeping records.

States can be expected to audit the issue and will be looking for records of compliance, particularly for payroll tax.

Step 2: Review Short-Term & Long-Term Goals

- Permanent v. Short-Term Teleworking
 - All Employees v. Departments/Business Segments
 - Regional Considerations
- Nexus and Filing Footprint
 - P.L. 86-272 protections?
- Quantification of Risk
- Analyze Feasibility of Options – Business and Tax
- Restrict, Restructure, or Reclassify?



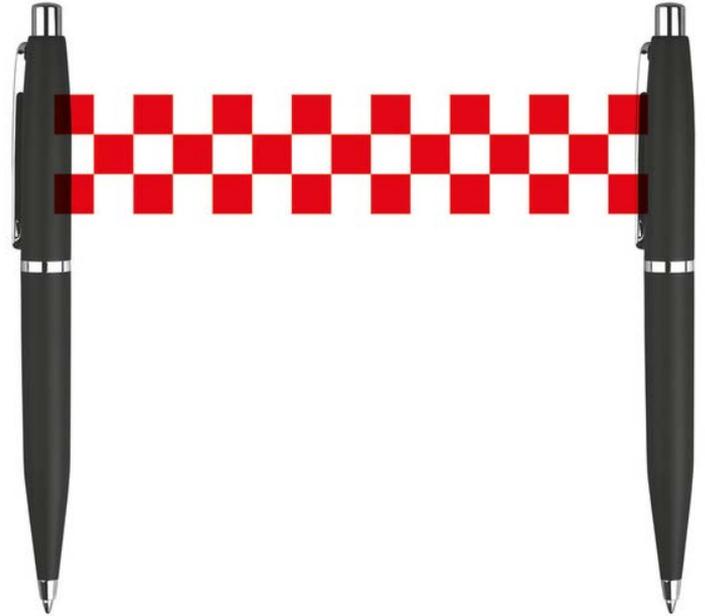
Step 3: Revise or Draft Policies and Other Documents



- Develop teleworking and/or business traveler policies with internal stakeholders, reviewing all employee-facing documents and conducting internal Q&A
- Can an employer manage SALT risk associated with a teleworking employee while maintaining the business' goal incenting telework to attract/retain talent?

Step 4: Implementation (...Seriously)

- Licenses and Registrations
- Employer Withholding
- Other Employment Taxes
- C&I Tracking and Compliance
- CNIT Considerations and Compliance
- Coordination with Legal, HR, etc.
- Maintenance, including Frequent Review/Best Practices



Polling Question #4

Has your company adopted a teleworking policy?

- A. Yes
- B. No
- C. In process
- D. My cat's breath smells like cat food

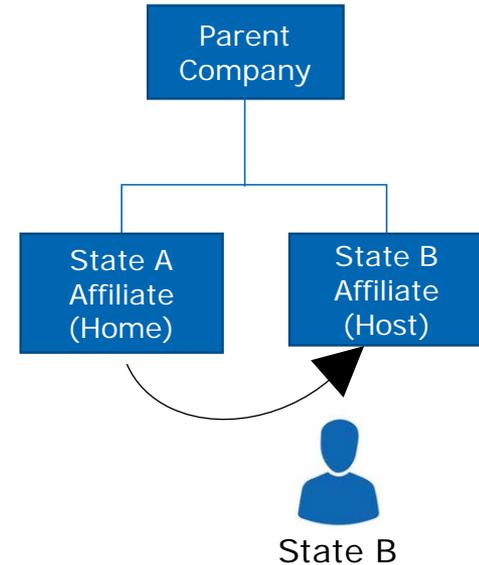


Prohibit Employees from Teleworking in Certain States

- As part of developing teleworking policies, tax departments should identify state(s) where the presence of an employee would unduly increase tax risk for the employing entity, e.g., non-nexus states, separate reporting states, P.L. 86-272 states, etc.
- Employers may prohibit employees from working in those higher risk states through policies, hiring, and other on-boarding processes.
- Consistency and communication are key!

Switch to “Local” Payroll – Long-Term WFH Employee

- Employee transfers from the Home payroll to the Host payroll
- Tax compliance issues are undertaken by the Host
- Often driven by SALT compliance in host state (generally not preferable for an entity to file payroll in another state)
- May involve multistate reporting/compliance, (new hire, UI, etc.) intercompany service agreements, and transfer pricing input on whether the employee’s role fits within the functions of the Host



Pros and Cons of Transfers to Local Payroll

Pros

Mitigates nexus risk

Administration

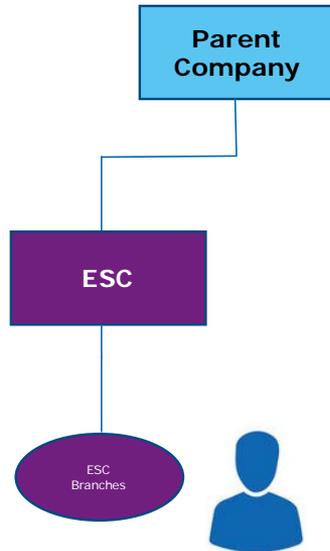
Cons

Employee may not maintain "home" benefits and RSUs

Employee salary may be reduced to local COLA

Not flexible or available for short periods

Employment Services Company (ESC)



- A separate legal entity that provides employee services to other entities in return for a management or service fee
- Generally used as the employer for employees which travel to or may be seconded to out-of-state/multistate entities within the group
- An ESC may fulfill several roles in an organization:
 - Permanent legal employer for mobile employees and/or employees with multistate/global roles
 - Payroll company
 - Temporary or permanent employer for remote workers (multistate and/or global assignees)
 - Administrator for multistate/global assignments
- Primarily useful in separate filing states where parent company has no nexus

Pros and Cons of ESCs

Pros

Limits nexus risk, starts statute of limitations

Employee maintains "home" benefits and RSUs

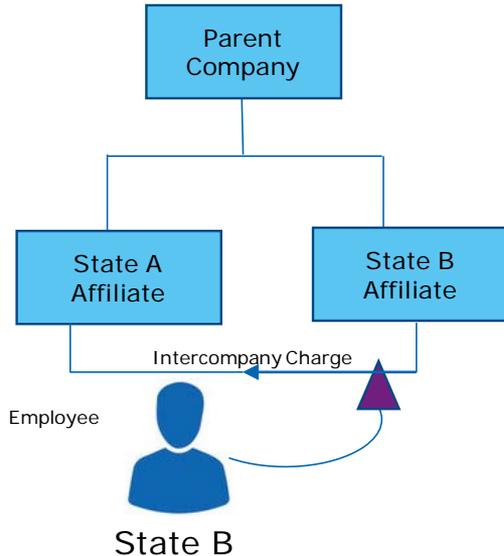
Cons

Filing requirements and expense in multiple jurisdictions

Complexity in administration

Intercompany payments

Secondment



- Long term assignment to perform work for a local affiliate but employee wants to retain benefits (not a new hire)
- A “Home” entity enters into an agreement with a “Host” entity whereby an employee will temporarily become the employee of the Host entity while remaining on the payroll of the Home entity
- The Host entity is often, but not always, an affiliate of the Home entity
- The Host entity is responsible for local law compliance
- The Host entity reimburses the Home entity for the labor, typically at cost

Pros and Cons of Secondment

Pros

Limits
nexus/corporate
income tax
exposure

Employee
maintains
benefits and
RSUs

Cons

May be
scrutinized in
some separate
company states

Multiple
intercompany
agreements

Administrative
burden and
expense



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