State Taxation of Remote Workers

Fiscal Affairs & Government Operations Committee
Southern Legislative Conference of The Council of State Governments

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Income Tax States not publishing specific guidance re nexus for teleworker presence due to COVID

• AR CO DE FL HI ID IL KS MO NC NH NM NY TN TX UT VT WV
Corporate income tax nexus issues arising from “stay home” order telework requirements

**AL, AZ, CA, CT, DC, GA, IA, IN, MA, MD, ME, MN, MS, NJ, ND, OK, OR, RI, PA, Phila., SC, WI:** no nexus from teleworker presence

**OH:** HB 197--teleworker presence will not count toward 20-day threshold for municipal income tax nexus

**MI, MT, NE, OH (CAT):** Current nexus rules apply

**KY:** case-by-case
Payroll factor numerator issues arising from “stay home” order telework requirements

California, Massachusetts, Minnesota, Mississippi, New Jersey, North Dakota, Pennsylvania, South Carolina: payroll factor numerator not changed by “stay home” order telework
P.L. 86-272 protection issues arising from “stay home” order telework requirements

California, District of Columbia, Indiana, South Carolina, Rhode Island: no loss of P.L. 86-272 protection for presence of teleworkers due to “stay home” orders during pandemic
Sales/use tax nexus issues arising from “stay home” order telework requirements

CT MA ME MN NJ OK PA RI SC WI: no sales/use tax nexus attributable solely to “stay home” order teleworker presence
New Hampshire v. Massachusetts, U.S.
Supreme Ct. Docket # 22O154

• NH Motion for Leave to File Bill of Complaint filed 10/19/2020
• Brief in Opposition filed by Massachusetts
• Amici Curiae Briefs filed by OH and nine other states: AR IN KY LA MO NE OK TX UT; NJ and three other states: CT HI IA; Prof. Edward Zelinsky; Southeastern Legal Foundation; National Taxpayers Union Foundation (joined by several other taxpayer-supported organizations); The Buckeye Institute, all in support of NH
• Acting Solicitor General invited to file brief on 1/25/2021
MTC model mobile workforce legislative proposal (adopted 2011)

• Exemption for nonresident employee income earned while present in-state for 20-or-less days in the tax year
• Exceptions: professional athletes and entertainers, public figures, construction services, key employees per IRC 416(i) (high earners)
• Employee’s state of residence must provide a reciprocal exemption.
• In-state presence for any part of a day counts as a “day” but transit time does not count.
• To avoid penalties, employer must use time and attendance system requiring employee to contemporaneously record work presence, or travel records or travel reimbursement requests required to be contemporaneously prepared and submitted by employee.
COST proposal and S. 3995 (116th Cong.) (Remote and Mobile Worker Relief Act)

• 30-day in calendar yr. exemption
• No “key employee” exclusion
• “Day” counted as “in-state” if nonresident employee spends more of that day working in-state than in any other state.
• Employer may rely on an employee’s annual determination of time expected to be spent by such employee in the taxing jurisdictions in which the employee will perform duties
• See www.mtc.gov to download comparison chart