

NEW YORK TAX DEPARTMENT FINALLY ISSUES GUIDANCE ON COVID-19 TELECOMMUTING

Hodgson Russ State & Local Tax Alert
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As we have chronicled in blog posts over the past several months, many states have issued guidance related to how state personal income taxes will be handled during the COVID-19 pandemic, with a specific focus on telecommuting employees. Last month we also published an article in Tax Notes State on the issue. The primary question has been whether an employee telecommuting from outside a state due to the pandemic owes personal income tax in their home state or in their employer's state (or both!).

As our blog post indicates, states are all over the map on this issue. Just last week, for example, New Hampshire announced a lawsuit against Massachusetts, seeking to enjoin the Commonwealth from enforcing its new telecommuting regulation against New Hampshire residents. And while all this has been happening, we were waiting for some word from the New York Tax Department as to how it was going to handle the issue, especially given the fact that no state in the country could realistically be more impacted by out-of-state telecommuting than New York. But for months, we heard nothing.

However, just this week, with little fanfare and no announcement, the Tax Department quietly updated a Residency FAQ on its website to address "questions due to the COVID-19 pandemic." Most of what is included here contains basic residency and domicile guidance, mostly plain-vanilla stuff that everyone would already know. But tucked in these FAQs – which the site indicates was updated on October 19, 2020 – is the following:

My primary office is inside New York State, but I am telecommuting from outside of the state due to the COVID-19 pandemic. Do I owe New York taxes on the income I earn while telecommuting?

If you are a nonresident whose primary office is in New York State, your days telecommuting during the pandemic are considered days worked in the state unless your employer has established a bona fide employer office at your telecommuting location.

Attorneys

Paul Baldwin Jr.
Richard Campbell
Katherine Cauley
Thomas Collura
Paul Comeau
William Comiskey
Arielle Doolittle
Christopher Doyle
Catherine Eberl
Joseph Endres
Debra Herman
Daniel Kelly
Joshua Lawrence
Timothy Noonan
Elizabeth Pascal
K. Craig Reilly
Emma Savino
Andrew Wright

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There are a number of factors that determine whether your employer has established a bona fide employer office at your telecommuting location. In general, unless your employer specifically acted to establish a bona fide employer office at your telecommuting location, you will continue to owe New York State income tax on income earned while telecommuting.

The above excerpt is a direct copy-and-paste from the FAQ, and it includes a hyperlink to TSB-M-06(5)I, which is a Technical Services memorandum setting forth the “bona fide employer office” safe harbor rules. These safe harbor rules allow an out-of-state telecommuter credit for days worked out-of-state if they can establish a “bona fide employer office” in their home. And although the FAQ does not specifically reference New York’s “convenience of the employer rule” directly, this is the exact rule New York follows in the telecommuting context. Many of us wondered whether the New York Tax Department would seek to apply the convenience-rule concepts to telecommuting during the pandemic (which, by the way, has been decidedly inconvenient and most certainly necessary due to office closures, executive orders, and the like), but we now have our answer!

Given how impactful the telecommuting issue is in New York, it is surprising that this additional guidance came out with such little fanfare or publicity. But the guidance itself is not surprising. We did not expect New York to relax its convenience rule; with perhaps hundreds of thousands of new telecommuters, how could it afford to do so? But we also believed that the “bona fide employer office” safe harbor could and should be used to alleviate some of the potential problems that could be created by telecommuting. This guidance confirms that strategy.

So summed up, New York’s guidance is now pretty clear: nothing has changed! If a taxpayer is working from home, whether during a pandemic or not, the state is going to treat the telecommuting days as days worked in the state. However, as was the case before the pandemic, the employee can avoid this result if they can work with their employer to establish a bona fide employer office at their telecommuting location.

This, of course, is not the only way to alleviate this problem. Under the guidance contained in the 2006 TSB-M, New York’s convenience rule only applies to an employee if the employee’s “assigned or primary office” is in New York. So by opening up a real office in an out-of-state state location, and by making clear that the employee’s new primary or assigned office is located at that new location, the convenience rule would presumably not apply anymore. And of course, there is also now an obvious rationale for an employer to open another office, given that most employers have either kept their office closed in New York or have been subject to extreme limitations about the number of employees able to work in New York. Employees and employers should keep this option in mind as well.

It would be foolish to suggest, however, that this is the last we’ll hear on the topic, from New York or other states. So, as always, stay tuned!

If you would like more information about the above tax issues, contact Timothy Noonan (716.848.1265), Elizabeth Pascal (716.848.1622) or Andrew Wright (716.848.1254).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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