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SALT ISSUES FOR REMOTE WORKERS

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AGENDA

- Remote Workers Generally
- Nexus Impact
- Employer Issues
- Employee Issues
- Sales/Use Tax Issues

REMOTE WORKERS GENERALLY

- Remote working legal issues are not new, just exacerbated by COVID-19. Before COVID-19 we had:
  - Traveling salesmen and saleswomen
  - Negotiations and other business meetings in other states

    Executives and regional managers covering multiple facilities
  - Working while on vacation, home sick (or with sick children), or home on weekends and evenings, etc.
- COVID-19 took this issue not only to a new level, but to a new stratosphere.
- Lack of uniformity: Laws vary from state to state, and from country to country. The compliance burden can be enormous, if not feel unmanageable.
- Tax issues - just one of many considerations

REMOTE WORKERS GENERALLY

- Congress has been unable or unwilling to act:
  - Multistate Tax Commission (MTC) - 2011 – The Model Mobile Workforce Statute
  - Council on State Taxation (COST) State Model Legislation
  - Several bills introduced in Congress over many years. More recently, *see, e.g.,* The Mobile Workforce State Income Tax Simplification Act of 2021 (H.R. 429); The Remote and Mobile Worker Relief Act of 2021 (S. 1274); Multi-State Worker Tax Fairness Act of 2021 (S. 1887). Generally:
    - Bright line 30-day rule (except for athletes, entertainers, national figures on the speaking circuit, etc.)
    - Ability to rely on employee's representations (absent knowledge of fraud or collusion), <u>unless</u> employer maintains a tracking system
    - Eliminates convenience of the employer test (discussed later)

REMOTE WORKERS GENERALLY

- COVID-19: Prompted a massive remote working economy, out of necessity: most sizes and types of businesses
  - Initially a temporary stop gap Pandemic emergency remedy
  - Many workers found they liked it and believe they can do their jobs just as well from home
  - Substantial number of workers insist on some form work from home (WFH) going forward
  - The new reality or “new normal”: This isn’t going away
- Many issues; in many instances there may not be good, or at least clear, answers

ISSUE AWARENESS: NEXUS

- Employer nexus/filings/tax impact, due to physical presence of remote workers
  - United States Constitutional threshold under the Due Process Clause and Commerce Clause:
    - "Some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax" *See, e.g., Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777 (1992); *International Shoe Co.*
    - *v. Washington*, 326 U.S. 310 (1945), among others.
    - A state may have a higher threshold.
  - Income tax –A single telecommuting employee <u>may</u> create nexus. *See, e.g., Telebright Corp., Inc. v. Director, New Jersey Div. of Taxation*, 25 N.J. Tax 333 (Tax 2010), *aff'd* 424 N.J. Super. 384 (2012).
  - Substantial nexus for Commerce Clause purposes?
    - P.L. 86-272 protection only applies to: sales of tangible personal property, net income taxes, and the "mere solicitation of sales" with out of state ordering.
    - But see the MTC's latest guidance (CA and NY)
  - Sales tax – physical presence is outside *Wayfair* threshold protections and *Wayfair* effective date. Property tax – business personal property in state?
  - International considerations: Permanent establishments (PE) and more stringent reporting requirements.
  - Amnesty and amnesty expirations among some states.

ISSUE AWARENESS: EMPLOYER ISSUES

- Employer shifting apportionment factors Employer/employee effective tax rate shifts Registrations:
  - What to register for – scope.
  - Dealing with the “when did you first conduct business in our state” question. Will it trigger nexus questionnaires?
  - Will later terminations of filings trigger inquiries/audits?
- Service companies: impact on analysis for “cost of performance” states.
- Future audits.

ISSUE AWARENESS: EMPLOYER WITHHOLDING

- Wage withholding (and unemployment insurance):
  - Local income taxes (*e.g.,* Ohio municipalities). Not just a state issue.
  - Many states impose withholding on *first day* of work in the state. Other states have a multi-day or wage dollar thresholds.
  - Differing state sourcing rules:
    - reciprocity with *some* states, not

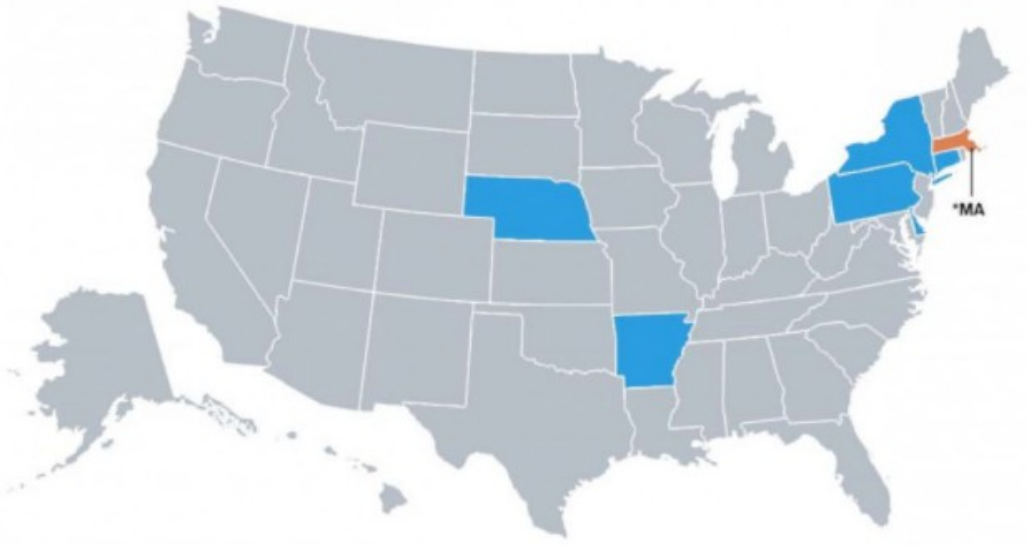
      others Reverse credit states
  - Risk of double taxation/confusion/challenges - the “convenience of the employer” rule (Ark., Conn., Del., Mass., Neb., NY, and Penn.)
    - On June 28, 2021, USSC declined review of New Hampshire’s Motion for Leave to File a Bill of Complaint in *New Hampshire v. Mass.*
    - Upheld in New York courts, pre-

      Pandemic Ability to claim a credit may

      be uncertain

"CONVENIENCE OF THE EMPLOYER"

- Connecticut, Delaware, Nebraska, Massachusetts, New York, Pennsylvania (as well as Arkansas until recently), and localities in Missouri and Ohio tax wages attributable to services performed by employees outside of the state if the services could have been performed at the employer's in-state office, unless:
- The out-of-state services were performed out of the employer's "necessity" (i.e., there must be a direct business benefit in having employee work away from physical office), and not for the convenience of the employee.
- For employers with offices in "convenience" states, allowing employees to work remotely in non-convenience states can result in potential double state income tax liability.



*MASSACHUSETTS ISSUED A TEMPORARY INCOME SOURCING RULE THAT TAXES EMPLOYEES STATE BUSINESSES WHO WORKED IN OTHER STATES THIS YEAR.

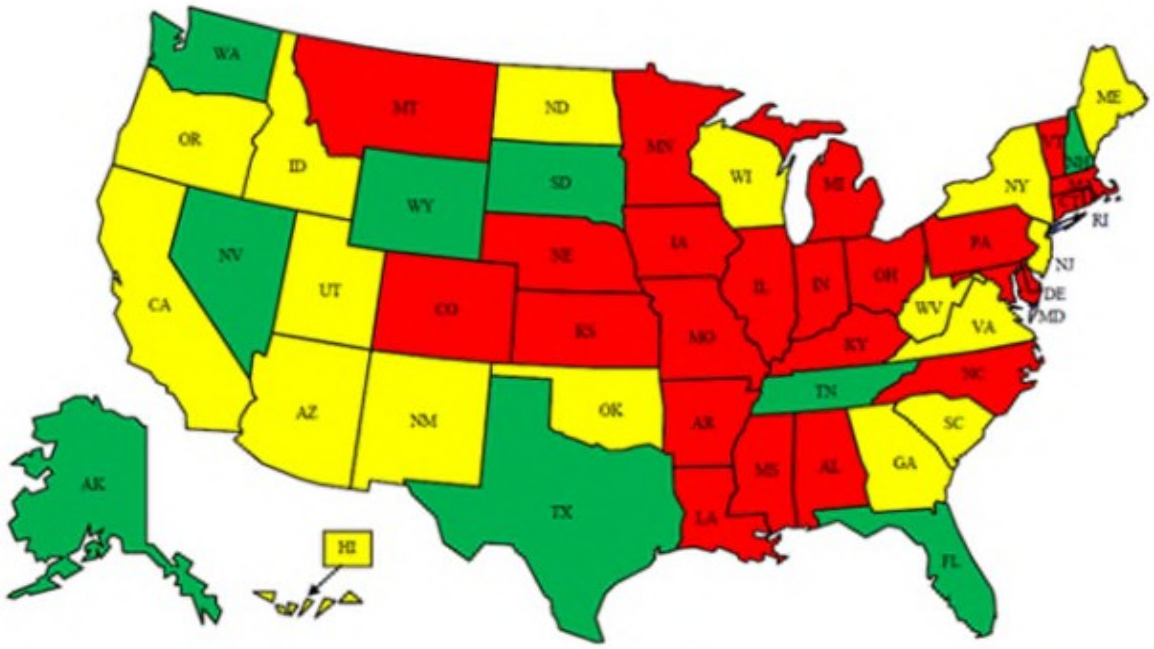
SOURCE: TAX FOUNDATION

ABC NEWS

Tax Foundation

"HEAT MAP" ON WITHHOLDING TRIGGERS, STATE-BY-STATE

Nonresident Personal Income Tax Withholding



Key

- Nonresident employees subject to tax withholding on *first day* of travel
- Nonresident employees subject to tax withholding after reaching threshold (see Appendix A for details)
- No general personal income tax (or, in the case of Washington, DC, no tax on nonresidents)

Source: Council on State Taxation

EMPLOYER ISSUES- WITHHOLDING

- Other tricky problems:
  - How do you count a “day”
  - IRS and state information sharing
  - Whistle blowers/disgruntled employees/misinformed employees
  - What to do if caught between two states (e.g., whipsawed) or two localities

ISSUE AWARENESS: EMPLOYER COMPLIANCE

- Compliance Burdens and Risks
  - Audit risk in states for under-withholding, and class action risk in states for over- withholding
  - No “credit” for paying the wrong state.
  - Potential Statute of Limitations issues for remittance to the wrong state No relief from penalties and interest for paying the wrong state
  - What type of record keeping will constitute adequate proof?
- Stock options, bonuses, severance payments, deferred compensation, retirement income (Public Law 104-95 protection for pension income)

EXAMPLE: REMOTE 100% OF THE TIME (EMPLOYEE HAS NO PHYSICAL OFFICE ASSIGNED)

- Employer Headquartered in a Convenience State:
  - Imperative for employer to document: (1) the remote work arrangement with the employee and within the payroll system, and (2) the "necessity" for such arrangement (e.g., employee no longer allotted office space).
  - Employer should withhold under state laws where employee works remotely.
  - Failure to thoroughly document an employee's transition to working remotely outside the convenience state increases the risk that "convenience" states will not recognize employee remote relocations and attempt to collect unwithheld state income tax from the employer.
- Employer Headquartered in a Non-Convenience State:
  - Employer should withhold under state laws where employee works remotely.

EXAMPLE: HYBRID WORK ARRANGEMENT: PRIMARILY REMOTE WORK WITH SOME IN-OFFICE WORK

- Physical Office in a Convenience State:
  - When an employee's remote work state is different from the physical office state, employers should continue to withhold on 100% of wages (i.e., for both in-office and remote work) for the convenience state, and on wages attributable to working remotely for the remote-work state (once the state income threshold has been reached).
  - An exception applies if it can be established that the employee has been instructed to work part of the time remotely at the direction of the employer (i.e., for business necessity, and not for the employee's convenience).
  - Documentation substantiating the necessity of the partial remote work arrangement is key; and so is tracking the number of days an employee works in the physical office versus remotely, so that the employee can claim tax credits for income taxes paid to other states.
- Physical Office in a Non-Convenience State:
  - Employer should apportion wages based on time an employee spends working in the physical-office state and the remote-work state.

ISSUE AWARENESS: EMPLOYEE ISSUES

- Employee burdens:
  - Multi-state filings; proper withholdings/disputes; risk of employer blame and relationship tension
  - Risks of double taxation – convenience of the employer rule (employer in one of those states; employee working in a “non-convenience” state)
  - Impact on residency
    - NOT the same issue as change of residency – potential for misunderstanding
    - Creation of statutory residency (and risk of double taxation) and recording keeping necessity
    - Impact on domicile claims
- Worker classification and state withholding on independent contractors – when enforcement initiatives collide – extensive or questionable use of independent contractors

SALES/USE TAX ISSUES

- Sellers use vs. sales tax if you're a remote seller but have a remote employee
- What's the employee's role?
  - Sales team – sourcing implications
  - Back office or HR – subject to sales tax
- Physical presence in state could impact
  - Tax Type
  - Sourcing
  - Tax Rate
  - Local Taxes
- See Illinois Leveling The Playing Field
- *Quad Graphics v. North Carolina Department of Revenue*

THANK YOU!

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