

Uniformity Needed in State Teleworking Guidance, Practitioners Say

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The patchwork of teleworking guidance issued by states during the COVID-19 pandemic is creating withholding challenges for employers that could be unconstitutional, according to tax

practitioners.

According to Alysse B. McLoughlin of McDermott Will & Emery, the lack of uniformity in the guidance from states on how income should be sourced for employees who are teleworking during the pandemic could potentially lead to double taxation.

Speaking January 20 during the New York State Bar Association's 2021 annual meeting, McLoughlin explained that some states have taken the position that the income should be sourced to the employer's home state, while other states have said it should be sourced to the employee's home state.

Panelist Jennifer S. White of Reed Smith LLP noted that it isn't easy for employers to keep track of the various rules while simultaneously keeping track of the location of their employees to address their withholding obligations.

"There [are] different rules out there; and regardless of what we think is right and what is consistent with the books and records, this is practically a disaster for companies and the employees to apply," White said. "The obligation this puts on an employer is next to impossible, at least to get correct," she added.

Panelist Elizabeth Pascal of Hodgson Russ LLP said it's important to keep in mind that the guidance doesn't just apply to current-year wages. "Something that is already complicated can get even more complicated by other factors and the type of compensation employees receive," she said.

With businesses already collecting sales taxes in most states after the U.S. Supreme Court's decision in *South Dakota v. Wayfair Inc.*, McLoughlin said states may assume it isn't complicated for businesses to also comply with state teleworking requirements.

But McLoughlin said that isn't the case, explaining that not all companies have systems in place to deal with the complexities. "This could be unconstitutional for the states to do this, because this is really unworkable from an employer perspective to some extent to comply with all these rules," she said.

Agreeing with McLoughlin's point, White said the most workable situation would be one in which every state imposes the "convenience of the employer rule" standard used to source income for employees who perform remote work.

Delaware, Connecticut, Nebraska, New York, and Pennsylvania have a convenience rule. Arkansas has one via a legal counsel opinion, and Massachusetts imposed a convenience rule during the pandemic via an emergency regulation, according to the presentation. New Hampshire [is suing](#) Massachusetts over its regulation, and at least [10 states](#) have urged the Supreme Court to take up the case.

According to Pascal, one of the biggest problems with having so few states with a convenience rule is that it can lead to situations in which an employer is obligated to withhold in more than one state on the same wages. She said she thinks New Hampshire's challenge to Massachusetts's emergency teleworking rule amplifies the existing problem with the mismatch between states with convenience rules and those without them.

Pascal said there is an overall recognition that the teleworking issue is a burden to employers, noting that federal legislation has been introduced for years to address the convenience rule and also the mismatch in withholding thresholds. "Every year, that legislation has gone nowhere. There is some discussion of whether . . . this Congress will be the time," she said.

"I think New York and other states that have a convenience rule will continue to oppose any legislation that doesn't allow [them] to enact a convenience rule," Pascal added.

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