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ASSOCIATION**

Employees Are Where?



**Presence, Nexus, and Employment Taxes:
A Payroll Analysis**

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OVERVIEW

Purpose of the Report

The American Payroll Association (APA) set out to review existing state and local laws and regulations on business nexus and employment tax withholding and reporting to identify the challenges in correctly identifying tax responsibility for employers and workers. This report is intended to help payroll professionals and their employers identify business nexus and tax withholding issues. Government policy-makers may find this report useful to understand the concerns for payroll professionals and their employers.

Employee work locations are an underlying criteria by which state and local governments identify business nexus. When business nexus is imposed, employers are obligated to file and pay corporate/business income taxes and other taxes, register with the secretary of state, and comply with any other state requirements. Similar requirements may be imposed by local governments. These business considerations are in addition to the state and local income tax withholding and reporting for employees.

In this report, the APA identifies the challenges through examples, describes existing state and local criteria for decision-making, and offers recommendations on potential solutions.¹ There are state payroll taxes for unemployment insurance and non-tax issues associated with business nexus that are not the subject of this report, and are briefly described in an appendix.



About the APA

Established in 1982, the APA is a not-for-profit association serving the interests of about 20,000 payroll professionals nationwide. APA's primary mission is to educate its members and the payroll industry about the best practices associated with paying America's workers while complying with applicable federal, state, and local laws and regulations.

APA members are directly responsible for calculating wages and tax withholding for their employers. Therefore, the requirements for state and local employment tax withholding and remittance are important for their roles within the employer community. The tax decisions by payroll administrators also directly affect employees, who are held responsible for paying the full amount of their annual taxes.

WORK LOCATIONS



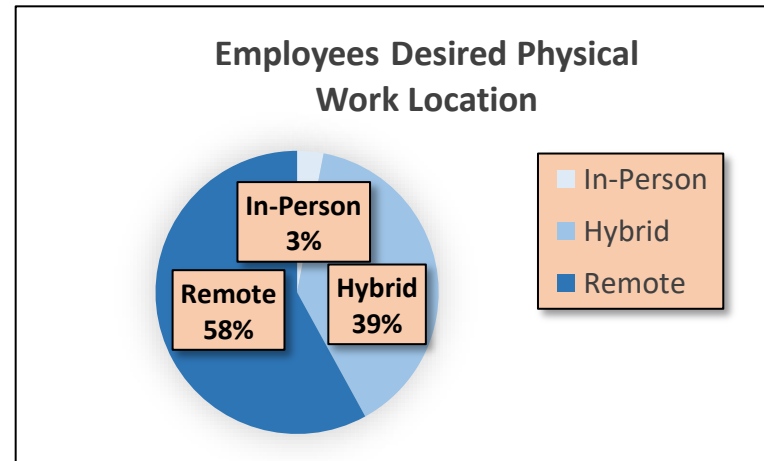
Today, physical work locations include employer facilities, home offices, remote locations, and a hybrid of the three. These locations can be temporary or permanent and shift during a tax period.

The COVID-19 pandemic and “stay home” orders initially created an anomaly with government entities allowing temporary variances from business nexus and employment taxes. In time, as employers studied employee performance levels, ability to manage employees working from home or remotely, effectiveness of virtual communication technologies, and the available labor pool, the number of employees engaged in off-site and hybrid work environments grew exponentially.

Data shows a dramatic shift in employee work locations. Prior to the COVID-19 outbreak, Pew Research Center found that about 20% of the adult workforce were able to work remotely.² That same study found that by October 2020, 71% of the adult workforce were working remotely with only 11% indicating they wanted to return to the office after the COVID-19 pandemic ends. Owl Labs and Global Workforce Analytics had similar findings in a September 2021 study with 69% of workers performing remotely.³

According to Gallop’s September 2021 employment trends update, 45% of full-time U.S. employees worked from home either all (25%) or part of the time (20%).⁴ FlexJobs’ 10th Annual Survey showed that 58% of respondents reported a desire to work as full-time remote employees post-pandemic, while 39% said they wanted a hybrid work situation.⁵ Together, that is 97% of workers who want some form of remote work.

A KPMG survey of APA members in October 2021 found that slightly more than half of the organizations had at least 5% of their employees working in a state other than their primary home office. In 20% of the organizations, 1 in 5 employees were working in states where they were not residents.⁶



An earlier, March to April 2021, survey by FlexJobs showed that 58% of workers would “absolutely” seek new employment if they could not continue to work remotely.⁷ That percentage coincides with Upwork’s prediction that businesses expect 58%

of their workforces will be fully remote in the next five years and Global Workforce Analytics estimate that 56% of workers will work from home all or part of the time when the COVID-19 crisis passes.⁸ The KPMG survey indicated that 81% of organizations had plans for hybrid work locations.⁹

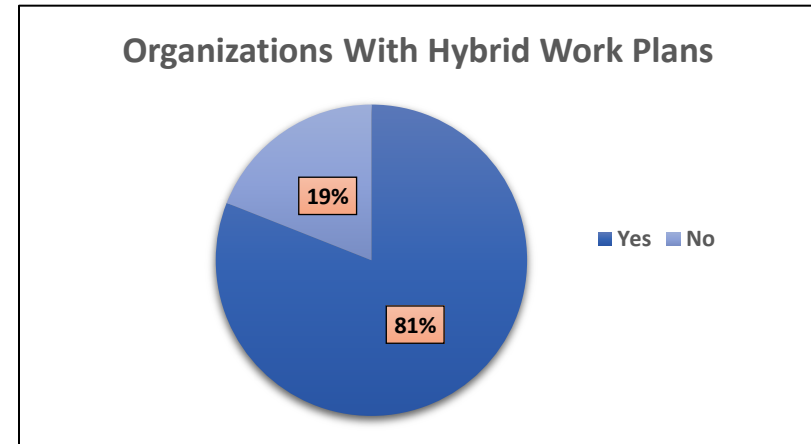
PAYROLL MANAGEMENT PROBLEM SCENARIOS

State and local governments hold employers responsible for knowing where employees are located for purposes of determining income tax withholding and reporting as well as business nexus requirements.

APA members offered some examples on the payroll management situations they face in determining state and local income taxes. The examples are provided to acknowledge payroll management challenges and not to excuse employers from their responsibility. A discussion on the problem-solving tools available to employers and what states can reasonably expect of employers is found in the solutions section of this report.

When state and local tax jurisdictions change, the result can be high costs for employers, especially if new business nexus and tax requirements are triggered. Employees may be double taxed in the original location and in new or temporary locations, may pay taxes that they did not previously pay, or no longer pay local taxes.

When tax withholding and reporting errors occur, employers are often required to adjust or reconcile withholding, file corrected



tax forms, and comply with added business nexus requirements. In addition, employees may find errors when filing their annual personal income tax returns. In some instances, tax penalties may be assessed on employers and employees for errors.

State Non-Emergency Examples

The following examples portray challenges for state requirements during normal work situations:

- Employees delayed in notifying their employers about the states in which they were working. When payroll managers were informed, they faced retroactive corrections to employment taxes and the potential need to comply with business nexus registration requirements in states and localities in which their employers did not previously conduct business.



- Employees worked remotely and changed locations multiple times during a tax period. For example, an employee who initially worked from a permanent residence and then from a vacation home, or while visiting with family for an extended period of time. Payroll managers may not have been informed or have a means of tracking these movements to address employment taxes and business nexus requirements in each jurisdiction in which the employee worked.
- Remote employees changed work addresses in the employee portal because they wanted to receive correspondence in those locations; however, they did not actually work at those locations. Without accommodation to changing work locations, payroll managers may be forced to rely on the information in employee portals regardless of accuracy.

- Employers have adopted a hybrid work location model resulting in some employees working in two different states or localities. This adds steps to time-keeping processes to correctly record the hours where employees are working and for payroll managers to withhold and remit taxes to the appropriate locations, accordingly.

State Emergency Examples

The following problem scenarios can happen as a result of emergencies:

- As a result of a government-declared emergency, employees must relocate to a different physical work location. The length of the emergency is temporary but unknown, raising questions about whether to adjust state and local employment taxes and whether corrections are required retroactively when the emergency ends. This situation is more complicated when state and local governments issue different emergency tax and nexus requirements that may be in conflict.



- A government-declared emergency ends, but for health and safety reasons, employers decide to extend employees temporary remote work locations raising the need to adjust state and local employment taxes. These changes may occur multiple times during a tax year.
- An emergency situation occurs at an employer's physical work location and employees at that location are temporarily relocated to work from home or another facility for an unknown length of time. For example, a facility catches fire and damages must be repaired or the facility rebuilt before employees can return to that physical work location. There is not a government-declared emergency triggering tax and nexus relief. If the home or alternative facility are in a different state from the original work location, adjustments to tax withholding and reporting may be required.



Local Government Complications

Withholding and remitting employment taxes becomes more complicated when local government ordinances require withholding for income and school taxes. Localities, like states, have very diverse thresholds for triggering these tax withholding and reporting requirements. Examples include:

- Employees worked in a jurisdiction with a local tax and because of COVID-19 or other declared emergency are now working remotely outside the jurisdiction's borders in jurisdictions with no employment tax requirements or with different employment tax requirements.
- Employees, temporarily, are working in a local tax jurisdiction where the employer previously did not have business nexus triggering tax withholding, registration, and other requirements.
- A locality enacts a telecommuting income tax requirement. When employees previously worked within the jurisdictional borders and now work in different locations because of an emergency, the locality considers the work location for employees' convenience and tax withholding and reporting is still required.

EXISTING LAWS AND REGULATIONS



A state's ability to tax resides in the U.S. Constitution in which there must be a minimum connection between a state and the person subject to the tax.¹⁰ As a result, many states have turned to economic factors to trigger business nexus. In

general, each state establishes its nexus and taxation policies based on its economy and financial needs. What is good for one state may not be good for another, which creates an inherent potential for conflicts.

Business Nexus

Generally, states have adopted three basic criteria for determining business nexus:

1. Physical presence of employees or employer property in a state.
2. Economic or financial presence based on gross receipts in a state.
3. Factor presence based on thresholds for physical and financial considerations.

In 2018, the U.S. Supreme Court decided that physical presence is not the sole factor to be used when deciding if sales taxes must

be collected and remitted by a business.¹¹ As a result, states are turning more to economic factors to trigger business nexus. For example, states may assert nexus if payroll in the state exceeds a certain percentage or amount. Most states have said that the physical presence of just one employee in the state would trigger employment tax obligations for an out-of-state employer.¹² Bloomberg Tax's survey on how states determine nexus and employment tax policies found that 32 states base nexus on economic presence, 6 states use a physical presence test, and 13 states use a totality of factors.¹³

In states with local taxing authority, nexus is more complicated. For example, local governments in Pennsylvania may establish their own definitions of nexus.¹⁴ In the Township of Radnor, nexus is determined by an employer's base of operations defined as "a physical location used by a taxpayer to conduct significant business activities."¹⁵



Income Tax Withholding and Remittance

Each state has its own rules for income tax withholding and remittance by employers with the exception of nine states without income tax requirements (Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming). Usually, income tax withholding is imposed primarily in the state where the work is performed,¹⁶ although there are exceptions to this criteria. If an employee lives in the same state as the physical location of the employer, income taxes are paid in that state, even if the work is performed in a different state. Exceptions also may apply to certain types of workers, including professional athletes, entertainers, interstate transportation employees, water carriers, and airline employees.¹⁷

Delaware, Nebraska, New York, and Pennsylvania apply a “convenience of the employer” test to determine if non-residents must pay state taxes. This test says that if an employer requires an employee to work in another state (employer’s convenience), taxes are only withheld in the location where the work is performed. However, if an employee chooses to work in another location (employee’s convenience), tax withholding must usually be made in both locations. Employees may avoid double taxation if a state allows for a tax credit claim when filing personal income tax returns. Localities may not offer this same relief, especially if a telecommuting convenience rule is enacted.

Connecticut applies the employer convenience test only if the state in which the employee is working has a similar requirement.¹⁸ The Arkansas Department of Finance and Administration issued a legal opinion in 2020 that seemingly



adopts the convenience of the employer test, though the opinion was not binding.¹⁹

Most other states do not use the employer convenience test. Instead, they apply income taxes on nonresidents if the employer is physically located in the state. In the case of temporary assignments, special rules and thresholds may apply, often based on the number of days that an employee is present and working in the state (e.g., 14, 15, 30, or 60 days)²⁰ and/or an earnings threshold (e.g., \$50,000 or more gross wages). State exceptions to nonresident income taxes may include professional sports players and motion picture workers during production.

States also may have reciprocal agreements in which employees who live and work in the states subject to the agreement are only taxed in their states of residence. Employers are responsible for understanding these agreements, obtaining nonresident certificates from the employee, and to withhold and remit employment taxes on that basis. Currently, 16 states and the District of Columbia have state tax reciprocity agreements.²¹

A state may also have local tax withholding and remittance requirements. For example, in Pennsylvania, employers with physical worksites in Pennsylvania are required in some jurisdictions to withhold and remit a local Earned Income Tax and Local Services Tax on behalf of their employees working in Pennsylvania. The taxes are based on an employee's place of residence or, if an employee's municipality does not impose a local tax, the employer's location may apply. The employer's location also applies to employees who are nonresidents of Pennsylvania but work in Pennsylvania. The Pennsylvania Department of Community and Economic Development defines business worksites to include factories, warehouses, branches, offices, and residences of home-based employees.²²

Emergency Rules – COVID-19



Early in the COVID-19 pandemic, states issued temporary rules regarding employment taxes. For example, employees temporarily working in Alabama and Georgia were not subject to those states' income tax withholding

rules in 2020.²³ The Mississippi Department of Revenue announced that during the period of the COVID-19 national emergency it will not require employers to modify income tax withholding for employees that were temporarily on telework assignments within Mississippi.

New York's Department of Taxation and Finance said, "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."²⁴

While most COVID-19 tax response legislation and executive orders were in place by the spring and summer of 2020 with provisions that applied only to the 2020 tax year, by summer and fall of 2021, states were reconsidering their positions on the emergency tax measures. Connecticut declared that pandemic-related remote work was "for the convenience of the employer" and applied its tax rules accordingly. Connecticut 2021 legislation offered taxpayers income tax relief if they paid taxes in another state during 2020 because of COVID-19 remote work orders.²⁵

In response to a "stay-at-home" executive order, the California Franchise Tax Board issued guidance saying: "California will not treat an out-of-state corporation whose only connection to California is the presence of an employee who is currently teleworking in California due to Executive Order N-33-20 as being actively engaged in a transaction for the purposes of financial or pecuniary gain or profit."²⁶ The guidance remained in place until the signing of Executive Order N-07-21, when the California Franchise Tax Board issued new guidance that "an out-of-state corporation may now be considered to be 'doing business' in California, and may not be protected by Public Law 86-272, depending on the teleworking activities of the corporation's employee."²⁷ While the new guidance mitigated the company's potential corporate tax obligations in California, the state income tax withholding rules remained in effect.

The Pennsylvania Department of Revenue issued guidance that said, “[I]f an employee is working from home temporarily due to the COVID-19 pandemic, the department does not consider that as a change to the sourcing of the employee’s compensation. For non-residents who were working in Pennsylvania before the pandemic, their compensation would remain Pennsylvania sourced income for all tax purposes....” Employers with nonresident employees in states without reciprocity agreements with Pennsylvania were still required to withhold Pennsylvania taxes from employees temporarily not working in Pennsylvania because of the pandemic.

As the pandemic continued, requirements to maintain previous tax withholding and remittance raised questions. Massachusetts issued a temporary COVID-19-related employer convenience rule. Normally, nonresidents are taxed only on the income they earned while working in Massachusetts. The temporary rule required income taxes on nonresident employees of businesses based in Massachusetts if the employees were working from home outside of Massachusetts because of the pandemic. New Hampshire, which does not have an income tax, challenged Massachusetts questioning why employees working and residing in New Hampshire should pay any Massachusetts taxes. The U.S. Supreme Court denied review of the complaint because the Massachusetts rule was temporary.²⁸

Similarly, municipalities in Ohio tried to maintain their tax bases through state legislation by temporarily requiring pre-pandemic tax withholding and remittance.²⁹ Lawsuits challenged the state law. In one case, an employee who worked from home 50% of the time before the pandemic was required to continue to pay city commuter taxes in Cincinnati even though he was no longer working in the city, and the city refused the worker’s refund



request. A similar lawsuit was filed in Cleveland over income taxes by a doctor who had not worked in the city or Ohio during the pandemic.³⁰

Emergency Rules – Other Situations

States may have limited exceptions to their income tax rules in emergencies. Nonresident, short-term, service employees are often not taxed during a declared disaster period when entering a state to perform emergency work. Usually, these exceptions are very narrowly defined to emergency responders and utility workers, and for a finite period of time.



For example, in South Carolina’s law nonresident businesses operating in the state by request and to perform disaster or emergency-related work are exempt from state and local business registration and tax payments during the disaster period.³¹ The period is defined as starting within 10 days of the date the state declares the emergency and ending 60 days after the declared period ends.³²

Similarly, North Dakota offers an exemption from state and local tax filing and payment obligations to out-of-state businesses and their employees who are in the state on a temporary basis for the sole purpose of repairing or replacing critical infrastructure that is damaged or under threat of damage from a declared disaster or emergency. Critical infrastructure is defined as “real and personal natural gas, electrical, and telecommunication transmission property so vital that the incapacity or destruction of that transmission system would impact public health or safety and the economic and physical security of the state or region.”³³

TOOLS FOR PAYROLL MANAGERS AND EMPLOYERS

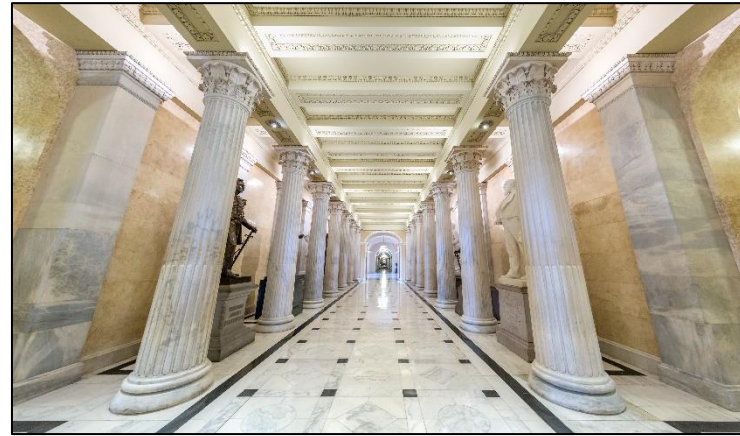
Payroll is often the last to know when employees’ work locations change. Unfortunately, employee and employer decision-makers do not always reveal work locations within regulatory deadlines or understand the cost of business nexus.

The following are recommendations for payroll managers and their employers:

- Create a list of the state and local jurisdictions in which your employer already has nexus and is registered accordingly. Employee presence may not be the reason for nexus. The list should identify the reason and the scope of applicable regulatory requirements. For example, if nexus is caused by sales taxes it may or may not be burdensome to increase nexus with employee presence.



- Identify the states and localities in which your employer does not have nexus or has limited nexus requirements, and prioritize them based on how cumbersome and costly the requirements if employee presence will trigger nexus.
- Share the lists with human resources and other decision-makers such that they understand the risks of new nexus and that payroll must be informed of employee work locations in the onboarding process and any time there is an employee location change. Explain why this is important for payroll management.
- Require employees to report their work locations — temporary, hybrid, and remote. An employee portal or other electronic system will help. Using tools such as geofencing of internet protocol locations when employees login to business systems will aid payroll in determining the working location of employees. Emphasize the importance of employees reporting their work locations by collaborating with internal decision-makers to create carrots and sticks for compliance.
- Develop systems and procedures to maintain ongoing awareness of employee work locations. At a minimum, the systems should raise flags to prompt clarifying questions of employees, such as if it becomes evident that they are in different states. These flags may include employee address changes, travel requests, and travel and expense reports. Internet service provider tracking systems can also help identify work locations.



CONSIDERATIONS FOR GOVERNMENT POLICY

Temporary Work Locations

Before the COVID-19 pandemic, federal legislation was proposed to standardize and simplify employment tax criteria for nonresident workers temporarily located in a state. The Mobile Workforce State Income Tax Simplification Act³⁴ and its many variations over the years was supported by a coalition of businesses and organizations, including APA, to move past the patchwork of confusing and difficult nonresident state income tax laws. The primary focus was on establishing a threshold number of work days before a state could impose income taxes on employees temporarily working in a state (30 days). A similar bill was introduced in 2021, called the Remote and Mobile Worker Relief Act.³⁵



In addition, the Multi-State Worker Tax Fairness Act was introduced in 2021 to limit states' ability to impose income taxes on nonresidents to the time the nonresidents are physically located in states.³⁶ The bill was a reaction to temporary COVID-19 measures requiring pre-pandemic tax withholding and remittance that were the subject of *State of New Hampshire v. Commonwealth of Massachusetts*. However, bill provisions were not narrowed to COVID-19 or emergency relief.

Instead, the physical location test would apply to any determination of state income taxes. Bill provisions do not address payroll tax issues, such as when payroll must begin accounting for income taxes, a threshold number of days before withholding is required, or exceptions.

The purpose of the proposed federal legislation — to establish clear requirements for when a state can collect income taxes from the mobile and remote workforce — still makes sense; yet the pandemic and new “work anywhere” employment market requires an enhanced approach to defining temporary presence. Temporary policy recommendations include:

- When income taxes are assessed by states on temporary nonresident workers, states should not impose the breadth of business nexus requirements on employers who otherwise do not have physical presence in the state. A simple tax registration form, available

electronically, can serve to identify the employer for purposes of employment tax withholding and remittance. This approach protects states' sovereign right to assess taxes without overburdening employers.

- States with local taxes should ensure that employees who temporarily work and live in different local jurisdictions are only taxed once. The definition of working in a temporary location should identify the circumstances when employees' local tax jurisdiction should change (e.g., number of days) and how to account for the income taxes among jurisdictions if income tax withholding is required in multiple jurisdictions during a tax period. This will prevent double taxation, especially for employees in hybrid and remote work situations.
- States should prevent localities from implementing telecommuting rules that create inconsistent requirements and the potential for double taxation situations. Instead, income tax requirements should be similar in each local jurisdiction; for example, using employees' physical presence to identify the appropriate jurisdiction.
- Emergency exemptions should be tied to the type of emergency not the type of industry, and all states should offer the exemption. Weather conditions call for utility workers and emergency responders who currently are exempt from some state and local income taxes. However, other types of workers may be needed in emergencies and should also be exempt. These include,

but are not limited to, short-term construction and debris removal employees, water and food providers, rescue crews, and medical personnel. This will encourage community support and shared resources without overburdening employers, payroll departments, and employees.

Hybrid and Remote Work Locations

The APA recognizes that state and local governments have differing views on income taxes; therefore, there will always be compliance complications for employers and payroll professionals. As the labor market evolves, the following recommendations could make administration easier.

Reciprocity Agreements

At minimum, more states should form reciprocity agreements with neighboring states. In hybrid work location models, employees are more likely to live and work in adjacent states. States should form reciprocity agreements by region in which more than two states are party to the agreement. This makes sense for hybrid work locations and for employees whose time is split among multiple locations, especially if work in those locations are not prescheduled.

Business Nexus

Similar to employers with temporary workers in a state, states should not impose full business nexus requirements on employers who, other than remote employees, do not have presence in a state. A simple tax registration form, available electronically, can serve to identify the employer for purposes of income tax withholding and remittance. The form can identify whether an employee is a temporary worker or working in a hybrid/remote environment. This will provide states with appropriate tax resources without unnecessary and burdensome administrative requirements.



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APPENDIX

Additional Business Nexus Issues

The following are other concerns for employers when making decisions on employee work locations.

Unemployment Insurance

The Federal Unemployment Tax Act (FUTA)³⁷ provides guidelines for reporting unemployment wages when an employee performs services in more than one state during a calendar year. Generally, FUTA presumes and requires stable treatment of employees and does not recognize flexible hybrid arrangements. The employer must identify a single state for reporting and can only change states if the employee makes a permanent change to another state.

The U.S. Department of Labor established a series of tests to determine the correct state. State and local income tax determinations are not subject to FUTA, thus jurisdictions for unemployment wage reporting, taxation, and allocation may be inconsistent and in direct conflict with income tax requirements.

States vary on allowing a credit for unemployment wages reported to other states. They may not allow a credit, offer a limited credit, or allow a credit with complex reporting of prior wages reported in other states.

For example, an employee resides in Texas with a permanent workplace site in Louisiana. The employee's unemployment wages were reported to Louisiana. Now, the employee is working from home in Texas and the employer is reporting unemployment wages in Texas. For the employer, this creates a situation in which the unemployment wages reported to Louisiana cannot be counted toward the unemployment wage base in Texas. Conversely wages earned in Texas are not counted toward the wage base in Louisiana.

In addition, the unemployment tax rates in each state vary. These rates can be more or less favorable to employers based on the stability of a state's unemployment trust fund and federal borrowing.

Other Considerations

Other nexus requirements that employers need to consider for hybrid and remote work situations include, but are not limited to:

- Wage and hour rules (minimum wage and worker classification).
- Government mandated benefits (public transportation, retirement plans, disability insurance, and workers compensation).
- Allocation of benefits (retirement plans, healthcare insurance, and paid sick leave).

Endnotes

¹ This report is not intended to provide a comprehensive state-by-state and local guide to business nexus and employment taxes. See *APA's Guide to State Payroll Laws*, Table 3.1, Withholding on Residents, Nonresidents, and Expatriates, and Table 13.4, COVID-19 Payroll Updates Nexus/Telecommuting; PAYSTATE UPDATE, APA's biweekly electronic newsletter covering state and local payroll compliance news (both are available at <https://bookshelf.americanpayroll.org/>) and the Multi-State Taxation and COVID-19 Hot Topic pages available on APA's website at <https://www.americanpayroll.org/compliance/compliance-overview/hot-topics>.

² Parker, Kim, Juliana Menace Horowitz, and Rachel Minkin, "How the Coronavirus Outbreak Has – and Hasn't – Changed the Way Americans Work," Pew Research Center (Dec. 9, 2020), <https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/>.

³ "State of Remote Work 2021," Owl Labs and Global Workforce Analytics, 5th Annual Ed. (Sept. 2021), <https://owllabs.com/state-of-remote-work/2021>.

⁴ Saad, Lydia and Ben Wigert, "Remote Work Persisting and Trending Permanent," Gallup News – Economy, <https://news.gallup.com/poll/355907/remote-work-persisting-trending-permanent.aspx> (Oct. 13, 2021).

⁵ Pelta, Rachel, "Many Workers Have Quit or Plan to After Employers Revoke Remote Work," FlexJobs, <https://www.flexjobs.com/blog/post/workers-quit-employers-revoke-remote-work/> (viewed Dec. 2021).

⁶ Montgomery, John, David Mayes, and Anne d'Arcy, "Employer Trends in the Remote Work World," KPMG (2021), [payroll-survey-report-1221.pdf \(kpmg.us\)](https://www.kpmg.com/au/issuesandinsights/articlespublications/2021/01/employer-trends-in-the-remote-work-world).

⁷ Pelta, Rachel, "Flexjobs Survey Finds Employees Want Remote Work Post-Pandemic," FlexJobs, <https://www.flexjobs.com/blog/post/flexjobs-survey-finds-employees-want-remote-work-post-pandemic/> (Viewed Dec. 2021).

⁸ Ozimek, Adam, "Future Workforce Report 2021: How Remote Work is Changing Businesses Forever," Upwork, <https://www.upwork.com/research/future-workforce-report> (viewed Jan. 2022); Lister, Kate, "Work-at-Home After Covid-19 – Our Forecast," Global Workplace Analytics, <https://globalworkplaceanalytics.com/work-at-home-after-covid-19-our-forecast> (viewed Dec. 2021).

⁹ Montgomery, John, David Mayes, and Anne d'Arcy, "Employer Trends in the Remote Work World," KPMG (2021), [payroll-survey-report-1221.pdf \(kpmg.us\)](https://www.kpmg.com/au/issuesandinsights/articlespublications/2021/01/employer-trends-in-the-remote-work-world).

¹⁰ U.S. Const. Amend. 14, § 1. A fundamental requirement of both the Due Process and Commerce Clauses of the U.S. Constitution is that there must be: "Some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax" (*Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 777, 112 S. Ct. 2251 (1992)).

¹¹ In *South Dakota v. Wayfair, Inc., et al.*, 138 S. Ct. 2080 (2018), the U.S. Supreme Court ruled that states can require businesses without a physical presence in a state but with more than 200 transactions or \$100,000 of in-state sales, collect and remit sales taxes on transactions in the state. This decision overturned the court's earlier decisions in *Quill v. North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess*, 386 U.S. 753 (1967).

¹² Klein, Mark, Joseph Endres, and Katherine Piazza, "Tax Implications of COVID-19 Telecommuting and Beyond," CPA Journal (Jul. 2021).

¹³ *Executive Summary: 2020 Survey of State Tax Departments*, Bloomberg Tax & Accounting. Bloomberg notes that some states provided more than one "yes" response. Washington, D.C., and New York City were treated as states in identifying the number of

jurisdictions for each nexus criteria. Nevada, Ohio, South Dakota, Washington, and Wyoming do not impose a corporate tax based on income. Colorado, Delaware, Michigan, New York, New York City, Oklahoma, and South Carolina did not participate in the nexus portion of the survey. As a result, these 12 states were not included in the data.

¹⁴ Pennsylvania has 2,500 local municipalities and 501 school districts spread across 67 counties that collect taxes based on work location, place of residence, or both. Most local jurisdictions have not addressed remote work locations. Some have tax code definitions for an employer's base of operations that may help employers determine nexus.

¹⁵ Radnor Township, Delaware County, Pennsylvania, Business Privilege and Mercantile Tax Regulations, Article II § 201 (Revised Jan. 1, 2020). Radnor offers a list of examples of what qualifies as significant business activities, including "maintaining business records or business communication via telephone, fax, mail, or electronic means." Radnor uses a "facts and circumstances" test to determine whether an at-home location in Radnor is a base of operations. Home offices that are used for the convenience of an employee, owner, or other worker do not qualify as a base of operations, with the convenience of the employee test being satisfied so long as there is another business office other than in Radnor where the same activities are performed.

¹⁶ The U.S. Supreme Court ruled in *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015), that states cannot tax the income of residents earned out of state if they impose a tax on nonresident earnings in the state.

¹⁷ See U.S. Code, Title 49 §§ 14503(a) (motor carriers), 11502 (rail carriers), 14503(b)(2) (water carriers), and 40116(f)(2) (airline employees). Professional athletes usually pay taxes in their teams' home states and in all of the states in which they played, referred to as a "jock tax." The same type of tax requirement may apply to entertainers, although employers may negotiate tax arrangements when on location in states.

¹⁸ Pinho, Rute, "Convenience of the Employer Rule," Office of Legislative Research, Connecticut General Assembly (Jan. 15, 2021), <https://www.cga.ct.gov/2021/rpt/pdf/2021-R-0008.pdf>.

¹⁹ Theis, John, Revenue Legal Counsel, State of Arkansas, Department of Finance and Administration, Legal Op. No. 20200203 (Feb. 20, 2020).

²⁰ Some states let nonresidents physically work in the state for more than 30 days without a withholding requirement, including Arizona and Hawaii, which allow up to 60 days. Other states' thresholds apply much faster, including 23 states that require tax withholding on day one.

²¹ "States With Reciprocal Agreements," Payroll Tax Knowledge Center (2020). The following states have reciprocity agreements: Arizona, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Montana, New Jersey, North Dakota, Ohio, Pennsylvania, Virginia, West Virginia, and Wisconsin.

<https://payrolltaxknowledgecenter.com/state-with-reciprocal-agreements/>.

²² "Local Income Tax Information: Frequently Asked Questions About Act 32 And Local Earned Income Tax," Pennsylvania Department Of Community And Economic Development, <https://dced.pa.gov/local-government/local-income-tax-information/>.

²³ See the Alabama Department of Revenue issued guidance that said the state "will not consider temporary changes in an employee's physical work location during periods in which temporary telework requirements are in place due to the pandemic to impose nexus or alter apportionment of income for any business,"

<https://revenue.alabama.gov/coronavirus-covid-19-updates/>. Georgia Frequently Asked Questions on the Corona Virus, "If my employees are working from home due to the Corona Virus pandemic, does that modify my company's nexus determination or the amount of my employee's Georgia wages and therefore my company's Georgia income tax withholding obligation? In response to the remote work requirements associated with the Corona Virus pandemic, the Department will not use someone's relocation, that is the direct result of temporary remote work requirements arising from and during the Corona Virus pandemic, as the basis for establishing Georgia nexus or for exceeding the protections provided by P.L. 86-272 for the employer of the temporarily relocated employee. Also, if the employee is temporarily working in Georgia, wages earned during this time period would not be considered Georgia income and therefore the company is not required to withhold Georgia income tax." The FAQ also included

limiting factors for applying the emergency tax relief.

<https://dor.georgia.gov/coronavirus-tax-relief-faqs>.

²⁴ See New York “Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax,” <https://www.tax.ny.gov/pit/file/nonresident-faqs.htm#telecommuting>.

²⁵ See Connecticut H.B. 6516, “An act mitigating adverse tax consequences resulting from employees working remotely during COVID-19, and concerning the removal of liens on the property of public assistance beneficiaries and a three-tiered grants in lieu of taxes program” (2021).

https://www.cga.ct.gov/asp/CGABillStatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB6516.

²⁶ See California COVID-19 frequently asked questions for tax relief and assistance at <https://www.ftb.ca.gov/about-ftb/newsroom/covid-19/help-with-covid-19.html#Teleworking-and-the-Stay-at-Home-order>.

²⁷ See California COVID-19 frequently asked questions for tax relief and assistance.

²⁸ *State of New Hampshire v. Commonwealth of Massachusetts*, U.S. S. Ct. Docket No. 220154 (June 28, 2021).

²⁹ Ohio H.B. 197 (effective Mar. 2020) allowed cities to collect local taxes as though people went into the office until 30 days after Gov. Mike DeWine rescinds his state of emergency declaration.

³⁰ See *Denison v. Kilgore*, Court of Common Pleas, Case No. 21 CV 00848 (Apr. 7, 2021), in which the City of Columbus agreed to reimburse the employment taxes. In *Morsy v. Dumas*, Court of Common Pleas, Case No. 21 CV 946057, the Buckeye Institute filed a new lawsuit on behalf of Manal Morsy—a Pennsylvania resident—asking for the court to declare unconstitutional an Ohio law that allows the city of Cleveland, Ohio, to tax her income even though she does not live in Cleveland—or even the State of Ohio—and has not worked in Cleveland for more than a year.

³¹ S.C. Code § 12-2-110(A)(2).

³² S.C. Code § 12-2-110(A)(6).

³³ See N.D. Century Code 37-17.5, Disaster or Emergency Remediation Work.

³⁴ The latest version of the Mobile Workforce State Income Tax Simplification Act was introduced by Rep. Gregory Steube (R-Fla.) on January 21, 2021 (H.R. 429).

³⁵ Sen. John Thune (R-S.D.) and Sen. Sherrod Brown (D-Ohio) introduced the Remote and Mobile Worker Relief Act in the Senate on April 21, 2021 (S. 1274).

³⁶ Sen. Richard Blumenthal (D-Conn.) introduced the Multi-State Worker Tax Fairness Act on May 27, 2021 (S. 1887).

³⁷ 26 U.S. Code §§ 3301-3311.