

# Tax Considerations for Remote Working Arrangements

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## Presenters



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- Areas of Practice:**
- Business & Corporate Transactions
  - Nonprofit & Tax-Exempt Organizations
  - Taxation



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- Areas of Practice:**
- Agriculture & Agribusiness Finance
  - Business & Corporate Transactions
  - Estate Planning, Trusts & Estates
  - Nonprofit & Tax-Exempt Organizations
  - Taxation

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## Introduction

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## Multistate Taxation

- Nexus
- Double Taxation
- Challenges
  - Due Process Clause
  - Commerce Clause

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## Remote Workers

- Home office in one state, workers remote from another state
- Workers that travel to multiple states to perform services
- Services performed completely online (e.g., remote teaching)

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## COVID Acceleration

- Work from home (WFH) increased
- Expected to continue post-COVID
- Lack of uniform legislation

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## Topic Overview

- Individual Income Tax Withholding
- Business Income Tax
- Related Issues
  - Registering To Do Business
  - Workers Compensation Insurance
  - Unemployment Insurance

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## Individual Income Tax

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## Imposition of Tax

- Nebraska taxes the entire income of every resident, irrespective of source
- Many states have a similar income tax structure

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## Double Taxation

- Some states also tax certain wages of a nonresident
- For example, California taxes the wages paid to a nonresident individual working in California

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## Withholding

- In some situations, employers may be technically required to withhold in two states
- Practical approaches

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## Convenience of the Employer

- Seven states, including Nebraska, tax individuals based on the location of their employer, regardless of where the work is performed
- If one of the two states does not provide relief, could resulting double withholding or double taxation

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*Zelinsky v. Tax Appeals Tribunal*

- Facts: New York taxed 100% of the income of a law school professor for a New York law school, but who primarily worked from Connecticut.
- Holding: The New York Court of Appeals held that the tax satisfied (a) the Commerce Clause because Connecticut provided a credit that prevented double taxation and (b) the Due Process Clause due to the professor's physical presence and employment.

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*Huckaby v. New York State Division of Tax Appeals*

- Facts: Similar facts as to *Zelinsky*.
- Holding: The Court held that 25% of the individual's time spent working in New York was significant enough to satisfy due process.

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*Writ of Certiorari to Supreme Court*

- Facts: New Hampshire filed a petition for a writ of certiorari to address the constitutionality of the Convenience Rule.
- Result: Supreme Court denied the petition.

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## Legislation

- Multi-State Worker Tax Fairness Act of 2021
  - Physical presence test would prohibit a state from taxing the income of a nonresident for any period where they are present in another state
- Remote and Mobile Worker Relief Act of 2021
  - Would prohibit any state from taxing any nonresident employee that physically worked in the taxing state for 30 days or less

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## Business Income Tax

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## Multistate Operations

- Selling products or services in multiple states
- “engaging” or “doing business” or “deriving income from sources” in the state

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## Constitutional Challenge

- Commerce Clause
  - Substantial Nexus
- Due Process Clause
  - Minimum Contacts
- P.L. 86-272
- Physical presence

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## Apportionment

- Single-sales factor
- Three-factor, sales, payroll, and property
- Weighted factor formulas
- Market based
- All or nothing

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## Relief

- State-enacted nexus thresholds based on sales or number of transactions
- Work directly with State to agree on an apportionment
- COVID-19 has caused some states to provide nexus waivers for teleworking employees

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## Related Issues

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## Registering to Do Business

- Register with Secretary of State or similar agency
- Relief in some states where Company has limited employees or sales in state

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## Workers' Compensation

- State-by-state determination and definition
- Some states have thresholds, such as a number of employees before the Company is covered

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## Unemployment Insurance

- Department of Labor has issued guidance to determine where services are performed
- Depending on State, part-time workers may be treated differently
- COVID-19 relief

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## Practical Considerations

- As a Company expands across state lines, seek analysis of considerations and obligations
- Be cognizant of state thresholds
- Work closely with HR or payroll provider

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## Questions?

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