The Nation's Leader in Payroll Education



Proposed Federal Law Challenges Convenience of the Employer Test

Laura Lough, Esq.

APA's Director of Publications



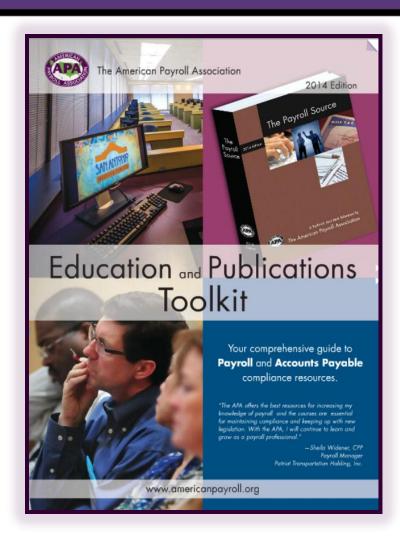






About the Speaker





Laura Lough, Esq.

- Director of Publications
- •APA staff member in New York for 17 years
- Manage Editorial Department
 - Reference books
 - •APA's Guide to State Payroll Laws
 - •APA's Guide to Local Payroll Taxes
 - Payroll Currently
 - PayState Update
 - Course materials
 - •Payroll Issues for Multi-State Employers
 - Local Income Tax Compliance
 - Conference handouts
 - Annual Congress
 - Capital Summit
 - •Fall Forum

APA Publications





APA's 2014 **Education & Publications Toolkit**



Dan Maddux Executive Director

Welcome!

The American Payroll Association is proud to present to you our 2014 Education & Publications Toolkit, Within these electronic pages you'll find APA's comprehensive educational resources for advancing your career and maintaining the compliance of your organization. Use this toolkit to create an appropriate 2014 education plan for you and your staff.

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APA's 2014 Education & Publications Toolkit

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National Payroll Week



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National Payroll Week — September 1-5, 2014

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NPW 2014 Artwork

The artwork for NPW 2014 is finally here! Download a copy of the artwork to share with the office today. Click the links below to get your copy.

NPW Survey Results

The results are in for the 2013 "Getting Paid In America" survey. Find out what America's workers determined are the most important issues concerning how they're paid.

NPW Survey Results

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importance of payroll and its
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Watch the Documentary



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Agenda



- Pay News Now
- Telecommuting
- Convenience of the Employer Test
 - Normal Workday
 - Bona Fide Employer Office
 - Primary Factor
 - Secondary and Other Factors



Agenda



- Other Considerations
 - State Tax Credits
 - NY's 14-Day Withholding Rule
- Proposed Federal Legislation
 - Physical Presence
 - Support and Opposition
- Researching Federal Legislation
- Stay Tuned

Pay News Now





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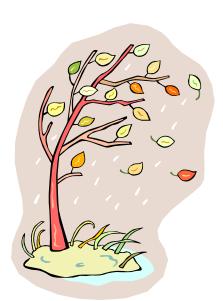
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Telecommuting



- More interest due to severe weather
 - Hurricane Sandy Oct. 2012
 - Flooding, power outages
 - Winter storms 2013-14
 - Snow, cold temps, travel issues







What is this test?

- 3 states use it: NE, NY, PA
 - > Found in state tax code and administrative rules
- Under NY application, nonresident employees of NY-based companies who telecommute and work both in and outside NY must pay NY tax on all income earned (not prorated), unless work done outside NY is for employer's necessity, not employee's convenience





- What is the problem with this test?
 - Double taxation for interstate telecommuters
 - Pay income tax to 2 states (home state and employer's state) on same income



Example



- Employee works in NY, lives in CT
 - Works 3 days/week at NY office
 - Works 2 days/week from CT home



- Double taxation for 2 days
 - NY taxes for 5 days of work a week
 - Could have worked those 2 days in NY
 - CT taxes for 2 days of work a week
 - Actually worked 2 days in CT





Guidance

- NYS Department of Taxation & Finance
 - > TSB-M-06(5)I, May 2006
 - Available at www.tax.ny.gov
- Telecommuter must prove:
 - Telecommuting days are "normal" workdays
 - Home office is a "bona fide employer office"
- Difficult to satisfy test

Normal Workday



What is a normal workday?

 Any day that the employee performed the usual duties of his or her job

- What does not count?
 - Responding to occasional phone calls or emails
 - Reading professional journals
 - Being available if needed

Bona Fide Employer Office



- Home office must satisfy either:
 - Primary factor
 - Home office contains or is near specialized facilities



- Example: Race track to test new cars
- Secondary factors (at least 4) <u>and</u> other factors (at least 3)

Secondary Factors



There are 6 secondary factors

1. Home office is a requirement or condition of employment



- 2. Employer has a business purpose for establishing an office where employee lives
- 3. Employee performs some of the core duties of his or her job at home office
- 4. Employee meets or deals with clients, patients, or customers on a regular and continuous basis at the home office

Secondary Factors



Secondary factors (continued)



- 5. Employer does not provide the employee with designated office space or other regular work accommodations at one of its regular places of business
- 6. Employer reimburses employee for substantially all of the expenses related to the home office, or pays the employee a fair rental value for the home office space used and furnishes or reimburses employee for supplies and equipment

Other Factors



There are 10 other factors

- 1. Employer maintains a separate telephone line and listing for the home office
- Employee's home office address and phone number are listed on the company's letterhead or business cards
- 3. Employee uses a specific area of his or her home separate from the living area, exclusively for work

Other Factors



Other factors (continued)

- 4. Employer's business is selling products at wholesale or retail and employee keeps an inventory of the products or product samples at home to use for work
- 5. Business records of the employer are stored at the employee's home office
- 6. Home office location has a sign indicating it is a place of business of the employer

Other Factors



Other factors (continued)

- 7. Advertising for the employer shows the employee's home office as one of the employer's places of business
- 8. Home office is covered by a business insurance policy or by a business rider to the employee's homeowner insurance policy

Other Factors



Other factors (continued)

- 9. Employee is entitled to and actually claims a deduction for home office expenses for FIT purposes
- 10. Employee is not an officer of the company



Other Considerations



State Tax Credits

- Many states tax their residents on total income, no matter where earned
- However, some states allow credit on PIT return for taxes paid to another state on earnings for services performed in that state
- New Jersey allows a credit for taxes paid to New York in this sort of situation

Other Considerations



♦ NY's 14-Day Withholding Rule



- TSB-M-12(5)I, July 2012
- Withholding not required for nonresidents assigned to a primary work location outside NY if they work in NY 14 or fewer days in a calendar year
- Days spent in NY for job-related training do not count
- Wage reporting still required

Multi-State Worker Tax Fairness Act

- H.R. 4085
 - ➤ Introduced February 25, 2014, in U.S. House of Representatives
 - Referred to House Subcommittee on Regulatory Reform, Commercial and Antitrust Law
- S. 2347
 - Introduced May 15, 2014, in U.S. Senate
 - Referred to Senate Committee on Finance

 Would prohibit states from applying the convenience of the employer test



Guess who introduced Act?

- Connecticut lawmakers
 - > H.R. 4085
 - Sponsor: Rep. James Himes (D 4th District)
 - Cosponsors: Rep. Rosa DeLauro (D 3rd District) and Rep. Elizabeth Esty (D 5th District)
 - (Missing: 1st and 2nd Districts reps, both Democrats)
 - > S. 2347
 - Sponsor: Sen. Richard Blumenthal (D)
 - Cosponsor: Sen. Christopher Murphy (D)



Why are there 2 bills?

- Companion legislation is similar or identical legislation which is introduced in the House and Senate
- House and Senate lawmakers who share similar views on legislation may introduce a companion bill in their respective chambers
- Promotes simultaneous consideration of the legislation

Similar legislation

- Introduced in every U.S. Congress since 2004
 - Called Telecommuter Tax Fairness Act in the past
- Does not target NY, but clearly aimed at NY and its aggressive enforcement



Physical Presence



- Would use physical presence test instead of convenience of the employer test
 - A state may deem a nonresident employee to be working in the state only if the employee is *physically present* in the state during that time



Physical Presence



No state may deem a nonresident employee to be working in the state on the grounds that either:



- The employee is present at or working at home for convenience
- The employee's work at home or office at home fails any convenience of the employer test or any similar test

Physical Presence



- No disqualification of time
 - A state may not deem a period of time during which a nonresident employee is physically present in another state and performing certain tasks to be:
 - Time that is not normal work time
 - Nonworking time
 - Time with respect to which no compensation is paid

Support and Opposition



- Who supports Multi-State Worker Tax Fairness Act?
 - National Taxpayers Union (advocacy group)
 - Calls convenience of the employer test a "tax nightmare"
- Who opposes Multi-State Worker Tax Fairness Act?
 - Federation of Tax Administrators
 - Says Act would preempt or supercede state tax authority and result in revenue loss

Researching Federal Legislation

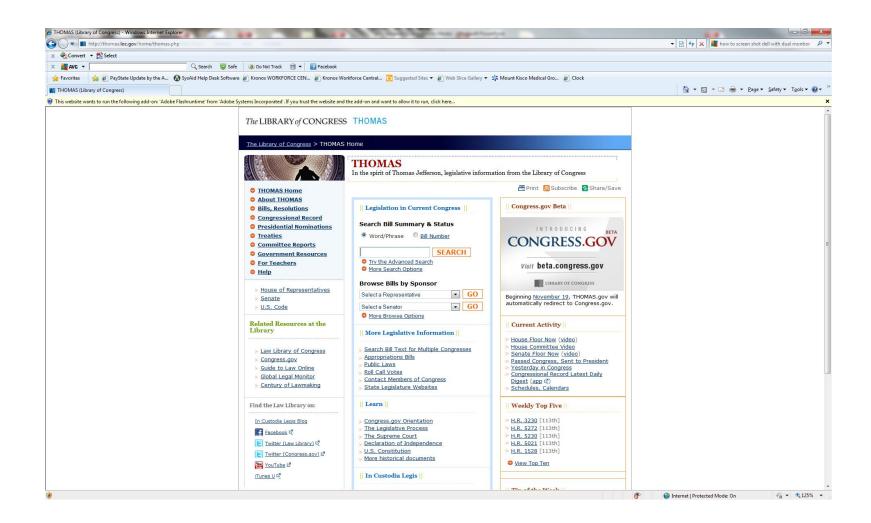


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- Available information
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Researching Federal Legislation





Stay Tuned





May 5-9, 2015 MGM Grand in Las Vegas

Stay Tuned





May 13 & 14, 2015

Contact Information







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