The New York Department of Taxation and Finance has finally provided guidance regarding telecommuting tax liability for nonresident employees working outside of New York because of the COVID-19 pandemic. In short: employees telecommuting because of COVID-19 will generally still be required to pay New York taxes on income they earn.

By way of background, for telecommuters, New York applies the “convenience of the employee/necessity of the employer” test to determine if an out-of-state telecommuting employee working for an employer with its principal place of business in New York would also be subject to New York income taxes. In applying this test, the Department of Taxation and Finance uses factors from a 2006 bulletin to determine if the employee’s telecommuting location is an established office of the employer (a “bona fide office of the employer”) – that is whether the employee’s assigned or primary work location is at an established office or other bona fide place of business of the employer inside or outside of New York State. Although an employee’s home office could meet the eligibility factors laid out in the bulletin, generally it would not qualify as a bona fide employer office outside of New York. Thus, for tax purposes, an employee working from his or her home office would be considered to be working in New York. The October 19, 2020 guidance restates the same bona fide employer office rule and offers no special rules or exceptions relating to the COVID-19 pandemic, which drove numerous New York-based employees to work outside the state (with many still continuing to do so). But because the rule remains the same, employers in this situation should expect to continue withholding New York income taxes for their telecommuting employees working outside of the state because of the pandemic. And, although the prospect of double taxation remains, in some cases employees may receive tax credit from their state of residence (for example, in New Jersey).

We also note that others states have adjusted their tax liability rules to account for the changing telecommuting landscape due to the pandemic (which we discuss more here).

We will continue to monitor tax liability guidance in New York and other states and provide updates as applicable, including whether other states challenge New York’s recent rule. Employers are encouraged to consult with employment and tax counsel before making tax decisions relating to telecommuting and COVID-19.

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