

## How COVID-19 Could Impact State and Local Tax Laws

To the Editor:

Because of the Coronavirus Disease 2019 (COVID-19) pandemic, many people are working from home and dealing with the effects of stay-at-home orders throughout the United States. In the weeks or months ahead, workers may get back to some semblance of a new normal. If current laws and policies are kept, there may be consequences in state and local taxes that may cause confusion and potentially result in unexpected tax assessments. While states have granted extensions to file returns and pay taxes, there are other tax laws and policies in place that should be reconsidered given current conditions.

The current laws on residency, apportionment, and nexus for taxation are based upon location, where one spends time, where employees work, make sales, and earn income, and which jurisdictions can impose tax on individuals and businesses. The current restrictions on movement and activities may make some of these laws and policies unworkable.

For example, an individual is a statutory resident of New York (NY) and subject to resident income tax if they have a permanent place of abode in the state and spend more than 183 days or parts of days in the state. Days spent in interstate or international travel and days confined in a medical facility do not count. But what about days spent in NY under a stay-at-home order by the government? What about days spent in NY because someone came back to care for a sick loved one or to volunteer as a health care provider? Health care workers and volunteers from outside NY may face contentions subject to NY nonresident income tax on wages from working in NY.

In previous emergencies, legislation was enacted to exempt them; but it is not clear whether that will occur here. Some jurisdictions impose tax based upon the location of employees. The Philadelphia wage tax and the New York

Metropolitan Commuter Transportation Mobility tax apply to people working in the covered area. Telecommuters who are not allowed to work in their normal office locations could face claims for added taxes, which may come as a surprise to them and lead to legislation and litigation over the propriety of such assessments. Similarly, companies that had no nexus and were not doing business in NY but which now have employees working from home in NY or are sending employees or goods into NY for relief efforts may be contended to create nexus and subject them to claims for NY business taxes. Such nexus considerations may be raised in other states with a business income tax or a local business tax.<sup>1</sup>

But some tax departments recognizing the severity of the current situation have clarified that telecommuting alone may not create nexus for businesses. For example, New Jersey, Pennsylvania, Mississippi, Washington, D.C., and more recently, Minnesota, North Dakota, and Indiana have announced that having employees telecommuting in their jurisdictions may not change a company's status for corporate income taxes and that specific guidance as to that will be available shortly. Indiana's tax department also announced that manufacturers taking inventory and donating it to those in need of medicines, medical supplies, and other eligible items will not be contended to have triggered its use tax, which would ordinarily apply when inventory for sale is used by a manufacturer. Similar announcements may be made by other states in this crisis.

In NY, political leaders have sought volunteers in health care and other vital services from outside the state during the crisis. Those volunteers would normally be subject to NY income tax on the wages paid for their work in the

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<sup>1</sup> See Greenberg Traurig LLP alert on local taxes: Marvin A. Kirsner et al., "Gross Receipts/Business License Taxes Planning Opportunity: COVID-19 'Shelter in Place' Orders" (Mar. 30, 2020).

state and their employers would have nexus to NY for tax corporate or other tax purposes. In recognition of that, NY and other states may consider providing exemptions from such taxes; that was done after Hurricane Sandy and 9/11.

As the virus spreads, it may be New Yorkers who volunteer and need that tax relief from other states. Many other issues due to the COVID-19 pandemic are being faced and considered, most not having to do with taxation. It will be helpful for tax authorities across the nation, like regulating other areas of concern, to identify those laws and policies which may not be fair to enforce or can be more fairly applied in the current environment and suspend or change them. Congress may also step in and preempt the states and localities from overstepping fairness in this emergency.

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