TEI

Connect. Engage. Impact.

77th Annual Conference
Scottsdale, AZ

Hybrid & Remote Workforce Issues-State Employment and Payroll Tax Considerations

Monday, October 24, 2022

2:15-3:15PM

Connect. Engage. Impact.

Moderator

Linda Kim, Director, Global Head of Tax

Infinite Electronics Inc.

lkim@infiniteelectronics.com

Michael Orton, Managing Director

Experian Employer Services

Michael.orton@experian.com

Mary “Handy” Hevener, Partner

Morgan Lewis

mary.hevener@morganlewis.com

Raymond Freda, Managing Director

Andersen Tax

Raymond.Freda@andersen.com

Connect. Engage. Impact.

AGENDA

- GENERAL UPDATE
- INCOME TAX WITHHOLDING IMPLICATIONS
- CONVENIENCE RULES
- EMPLOYEE BENEFIT IMPLICATIONS

INCOME TAX WITHHOLDING IMPLICATIONS

How Remote & Hybrid Work Impacts State Income Tax Withholding

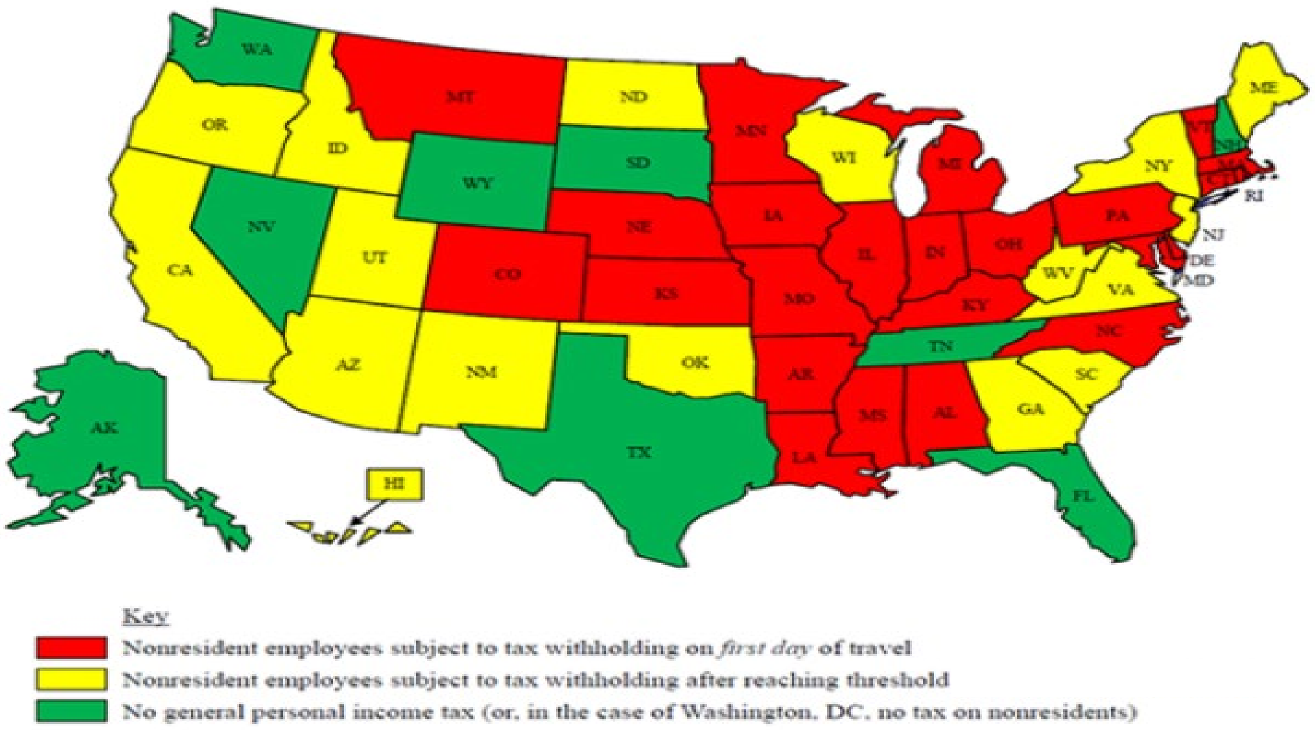
- Remote work or hybrid work increase the likelihood that an employee will perform services in more than one state. For example…
  - A hybrid employee provides services from both an office in State A and home in State B
  - A hybrid employee goes on a short business trip to a different state
  - A remote employee travels to a different states to attend internal meetings
  - A remote employee provides services while traveling for personal reasons
- Many states are actively looking for ways to increase tax revenues as a result of the COVID-19 pandemic and the pending recession.
- This issue is typically much larger than payroll tax as it has nexus, state income tax (i.e., payroll factor), and potentially international tax implications. The broader income tax and SALT departments are often heavily involved in these discussions.

General Income Tax Withholding Rules

- Resident Employees
  - Resident employees are typically subject to income tax withholding on **all wages paid**, regardless of whether the services are performed in the resident state or a nonresident state.
    - Many states offer a withholding break to residents when (1) some or all services are performed in a nonresident state and (2) the nonresident state imposes a withholding obligation. The two most common types of withholding breaks are as follows:
      - No withholding required
      - Backstop withholding only (i.e., resident state withholding > nonresident state withholding)
    - If needed, employees can partially manage double withholding risk by adjusting their state level Form W-4s
- Nonresident Employees
  - Nonresident employees are typically **only subject to income tax withholding on wages paid for services performed within a particular state**. The precise amount of withholding required is typically determined by comparing the **total number of working days in a particular state to the total number of overall working days**.

Exceptions to General Rule: De Minimis Thresholds

Nonresident Personal Income Tax Withholding



Source: Council on State Taxation

Exceptions to General Rule: Thresholds Examples

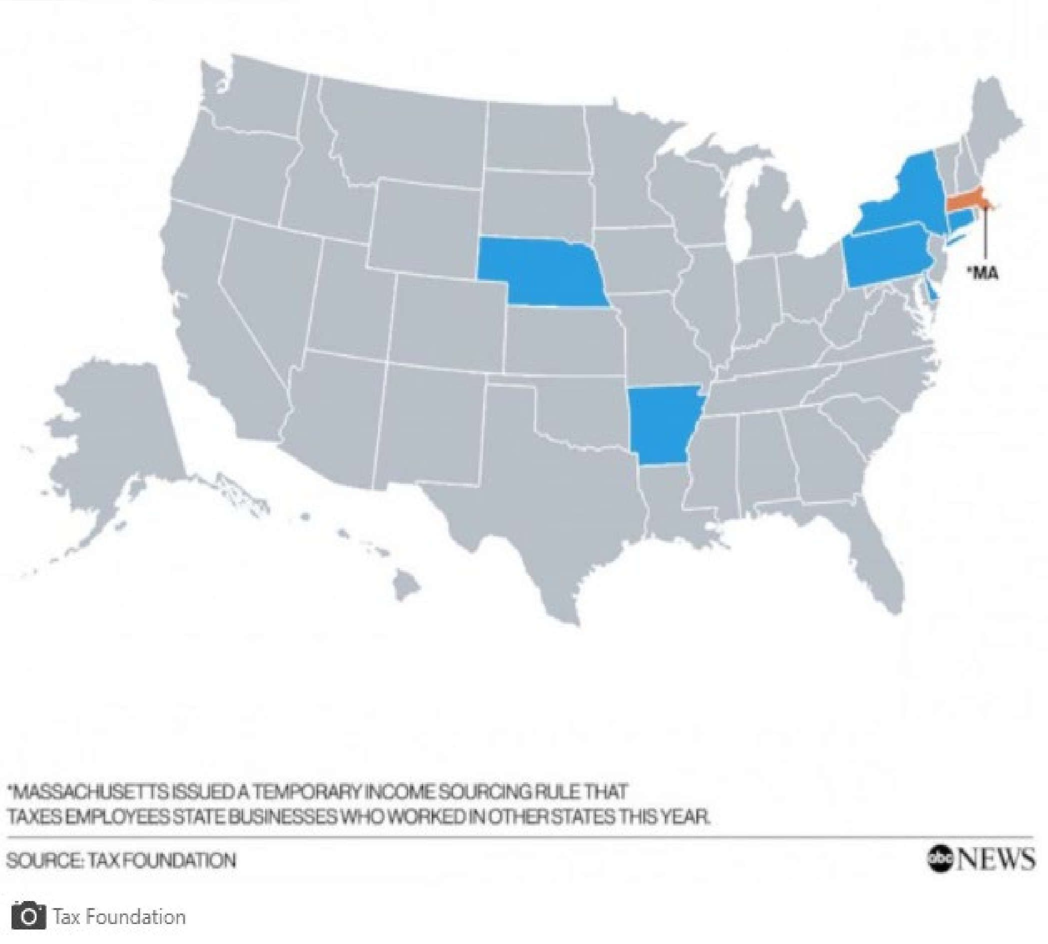
- **Day Thresholds**
  - *Arizona*: Withholding required if performing services in the state for **60 or more days** during the calendar year.
  - *Connecticut*: Withholding required if performing personal services in the state for **more than 15 days** during the tax year.
  - *New York*: Withholding is not required if (1) the employer **reasonable expects** that the employee will work in New York State for **14 days or fewer** in the calendar year and (2) the employee **DOES NOT work** in New York State for **more than 14 days** in the calendar year.
- **Income Thresholds**
  - *California*: Withholding required if **more than $1,500 of income** paid during the calendar year.
- **Mixed Thresholds**
  - *Georgia*: Withholding required if employed in the state for more than **23 calendar days** during a quarter and compensation exceeds the smaller of: **5% of the income received** for performing services in all places during the tax year; or **$5,000**.

Exceptions to General Rule: Reciprocity Agreements

- 18 states have either a formal or informal reciprocity agreement
- Reciprocity agreements typically source **all income tax withholding is sourced to the resident state** regardless of where the services are performed.
- Many states **require the employee to file a residency form** with the nonresident state in order to activate the reciprocal withholding arrangement.
- Examples
  - *Illinois*: Residents of IA, KY, MI, and WI are not subject to Illinois income tax withholding for wages earned in IL if Form IL-W-5NR, Employee's Statement of Nonresidence in Illinois, is filed with the employer
  - *Michigan*: MI employers do not withhold MI state income tax from residents of IL, IN, KY, MN, OH, and WI. MI employees must provide a declaration of nonresidence To be exempt from withholding (the Treasury Dept. does not provide a nonresidency form; the employer may develop form or obtain a letter from the employee, including his/her name, address, SSN, signature, and the date, which serves as authority not to withhold MI income tax).

Exceptions to General Rule: Convenience of the Employer

- Connecticut, Delaware, Nebraska, Massachusetts, New York, Pennsylvania (as well as Arkansas until recently), and localities in Missouri and Ohio tax wages attributable to services performed by employees outside of the state if the services could have been performed at the employer's in-state office, unless:
- The out-of-state services were performed out of the employer's "necessity" (i.e., there must be a direct business benefit in having employee work away from physical office), and not for the convenience of the employee.
- For employers with offices in "convenience" states, allowing employees to work remotely in non-convenience states can result in potential double state income tax liability.



Connect. Engage. Impact.

Inherent Challenges with Compliance

- Equity Based or Deferred Compensation (i.e., RSU, stock options, annual bonus)
  - This multistate withholding issue obviously becomes more complex when a particular type of compensation is earned over an extended period of time (i.e., compensable period).
  - First, you must determine the proper compensable period (i.e., grant to vest, grant to exercise, etc.). Next, you must determine the proper service states (i.e., where were there services performed during the compensable period). Last, you must determine the proper way to allocate the wages between the different service states.
- Tracking Employee Locations
  - Traditional data mining (i.e., travel bookings or calendars)
  - Self Reporting
  - Recent technology improvements (i.e., smartphone apps with GPS monitoring)
- SUI Four Factor Sourcing (entirely different set of rules)
- Payroll System Limitations
- Employee Notifications
- Temporary COVID-19 Nonresident Withholding Rules
- Mobile Workforce State Income Tax Simplification Act (and other proposals)

Connect. Engage. Impact.

CONVENIENCE OF THE EMPLOYER DEEP DIVE

Example: Remote 100% of the Time (Employee Has No Physical Office Assigned)

- Employer Headquartered (or Employee's Regular Office) in a Convenience State:
  - Imperative for employer to document: (1) the remote work arrangement with the employee and within the payroll system, and (2) the "necessity" for such arrangement (e.g., employee no longer allotted office space).
  - Employer should consider withholding under state laws where employee works remotely.
  - Failure to thoroughly document an employee's transition to working remotely outside the convenience state increases the risk that "convenience" states will not recognize employee remote relocations and attempt to collect unwithheld state income tax from the employer.
  - See NYS TSB-M-06(5)i
- Employer Headquartered (or Employee's Regular Office) in a Non-Convenience State:
  - Employer should withhold under state laws where employee works remotely.

Example: Hybrid Work Arrangement: Primarily Remote Work with Some In-Office Work

- Physical Office in a Convenience State:
  - When an employee's remote work state is different from the physical office state, employers should continue to withhold on 100% of wages (i.e., for both in-office and remote work) for the convenience state, and on wages attributable to working remotely for the remote-work state (once the state income threshold has been reached) – unless the employee attests that a remote-work state credit is available for convenience state taxes.
  - An exception applies if it can be established that the employee has been instructed to work part of the time remotely at the direction of the employer (i.e., for business necessity, and not for the employee's convenience).
  - Documentation substantiating the necessity of the partial remote work arrangement is key; and so is tracking the number of days an employee works in the physical office versus remotely, so that the employee can claim tax credits for income taxes paid to other states.
- Physical Office in a Non-Convenience State:
  - Employer should apportion wages based on time an employee spends working in the physical-office state and the remote-work state.
- Challenges to Convenience Statutes
  - New Hampshire v. Massachusetts
  - Morsy v. Dumas (Cleveland Ohio)

EMPLOYEE BENEFIT IMPLICATIONS

Business Expense Reimbursements

- Best practice to reimburse reasonable and necessary expenses within the course and scope of employment (in California and Illinois, in particular)
- If remote work is optional, then reimbursing home-office expenses is likewise generally discretionary, but when remote work is required or "strongly encouraged," then home-office expenses are more likely within the course and scope of employment
- Reimbursement formulas can be used, but it is recommended that:
    - Reimbursements be separately reported from employee compensation, and
    - Employees be permitted to request additional reimbursement above formula level by submitting receipts

Working Condition Fringe Benefit

- Under IRC 132(d), the “working condition” fringe benefit exclusion applies to property or services provided to employees (or independent contractors) that would have been deductible under IRC 162 or 167, if the expense had been paid directly by the employee (or contractor).
- Expenses must satisfy certain substantiation standards under the “accountable plan” rules (Treas. Reg. § 1.62-2):
  - have a business connection
  - be substantiated within a reasonable period
  - any excess must be returned within a reasonable period
- Helpfully, computers and cell phones are no longer “listed property,” and thus are tax-exempt so long as a “primary business use” is proven.

Common Work-from-Home Expenses

- Home office supplies (paper, ink cartridges, pens, notepads)
- Computer peripherals (keyboards, cables, printers, monitors)
- Office furniture (desk, chairs, lamps)*
- Business use of personal cellphone
- Home internet/Wi-Fi expenses
- Increased utility costs (electric, water, oil, gas) attributable to increased time working at home

(Examples of tax issues for specific types of requests are discussed in detail below.)

**To the extent fully depreciable in Year 1 and Year 2 due to work-from-home continuing through and beyond 2020-22*

De Minimis Fringes

The “de minimis” exclusion under IRC §132(e) is short for the Latin phrase *De minimis non curat lex* – “The law does not concern itself with trifles.”

Translated to the IRC, this “de minimis” fringe benefit exclusion generally applies to non-cash goods and services that are:

1. Provided infrequently
2. Whose value is nominal, and
3. For which the accounting would be administratively impractical.

Examples of De Minimis Fringes

Per Reg. §1.132-6(e)(1)

- Occasional typing of personal letters by a company secretary
- Occasional personal use of copying machine (provided at least 85% of machine's use for business purposes)
- Occasional cocktail parties, group meals, or picnics
- Traditional birthday or holiday gifts of property (not cash) with a low fair market value
- Occasional theater or sporting event tickets
- Coffee, doughnuts, and soft drinks
- Local telephone calls
- Flowers, fruit, books and similar property provided to employees under special circumstances (on account of illness, outstanding performance, or family crisis)

Other Examples

- Transit passes. Reg. §1.132-6(d)(1) (prior to Qualified Transit Pass Exclusion).
- Occasional supper money or taxi fare because of overtime work. Reg. §1.132-6(d)(2).
- Traditional birthday or holiday gifts of property with a low FMV. Rev. Rul. 59-58 (Christmas hams and turkeys); *but see Leschke v. Comm'r*, T.C. Memo. 2001-18 (taxing $61 gift nut baskets given to employees).
- Commuting use of an employer-provided automobile no more than one day a month. Reg. §1.132-6(e)(2).
- Charging electric cars (possibly). Info Letter 2012-008.
- $2,000 worth of spousal or dependent life insurance. Notice 89-110.

Examples of "Non-De-Minimis Fringes"

- Season tickets to sporting or theatrical events
- Commuting use of an employer-provided automobile or other vehicle more than one day a month
- Membership in a private country club or athletic facility (regardless of frequency of use)
- Employer-provided group-term life insurance on the life of the spouse or child of an employee
- Use of employer-owned or leased facilities (such as an apartment, hunting lodge, boat, etc.) for a weekend
- Cash, except as specifically provided (i.e., occasional meal money or local transportation fare)
- Gift certificates that are transferrable or allow cash-outs

Working Condition/De Minimis Overlaps: Phones & Computers

- Under 2017 tax reform (the "TCJA"), computers and related equipment provided to employees for use in their home offices were put on the same footing as cell phones, in particular, the heightened substantiation requirements applicable to listed property no longer apply.
- Accordingly, the IRS guidance issued pursuant to cell phone usage in IRS Notice 2011-72 would seem to apply to computer equipment provided to teleworkers.
- The IRS will treat the employee's use of employer-provided computers and equipment for reasons related to the employer's trade or business as a working condition fringe benefit, the value of which is excludable for payroll tax purposes provided the equipment is used **primarily** for noncompensatory business reasons.
- The employer's policy should require limited personal use and that the equipment must be returned when no longer used in providing services to the employer.

Section 139 “Disaster Assistance”

- Under IRC §139, “qualified disaster assistance payments” are not subject to Federal employment tax.
- “Qualified disaster assistance payments” include amounts paid to “reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster [that are] not otherwise compensated for by insurance or otherwise.” Requirements are therefore:
  - Qualified disaster
  - Assistance intended to cover unexpected reasonable and necessary personal, family, living, or funeral expenses
  - Expenses are attributable to the qualified disaster
  - Expenses would otherwise be out-of-pocket (not covered by insurance)
- IRC §139 is not limited to employees (or even to service providers). Instead, the exclusion can apply to anyone impacted by a qualifying disaster (except terrorists).

Section 139 Limitations

- It's important not to assume that IRC section 139 will cover all payments designed for disaster relief, because the IRS may contend that:
- Expenses are not "incurred as a result of the disaster"
- Too much was paid (i.e., payments in excess of what was "reasonable and necessary")
- Expenses were not personal in nature (and were business-related instead).
- But what if an employer's payment is to cover benefits employees cannot receive, because they are shut at home during the pandemic- e.g., food at home to replace free food at the office? Or, what if an employer pays for a private car to work, or free meals during the first few months after office reopening, to protect employees from potential exposure to COVID on public transportation? (These questions are discussed below.)

Overlaps between Sections 139 and 132(d)

- IRC §139 disaster payments do not have to be substantiated, and employees can "keep the spare change."
- This leads to some confusion, when an employer proposes to pay cash allowances – e.g., $250 per month – to cover a range of expenses. When does IRC §132 stop, and IRC §139 start?
- Employees (at least in California, which mandates reimbursement of business expenses, and Illinois, which has similar but less onerous rules) may sue, contending that, apart from the disaster relief, they had other business expenses that were not reimbursed.
- Most employee business expense reimbursements must also comply with the accountable plan rules under Reg. §1.62-2, requiring the expense to have a business connection and be substantiated within a reasonable period. Also any excess reimbursement must be returned within a reasonable period.
- Cash allowances for "occasional overtime meals" can be de minimis expenses, although the IRS has a narrow view of this exclusion.

Overlaps between Sections 139 and 132(d), cont.

Examples of common types of pandemic-related <u>"working condition" fringes</u>:

- Home-office supplies (paper, ink cartridges, postage, notepads, pens, etc.);
- Technology (keyboards, cables, printers, computer monitors) and office furniture (desks, chairs, lamps), to the extent depreciable at least in in Years 1 and 2 (but questions on whether the employee can have title to property);
- 100% of an employee's pro-rata portion of his/her cellphone bill (recognizing that many people have family plans covering multiple phones);
- 100% of an employee's home internet/wifi bill;
- Increased utility costs (electric, water, oil, gas) attributable to increased time working at home and not in the office (but would the IRS require "proof of a "home office" before allowing an IRC §132(d) exclusion?)

Overlaps Between Sections 139 and 132(d), cont.

Examples of common types of pandemic-related <u>“disaster relief” expenses</u>:

- Cleaning, health, medical supplies (Lysol, disposable masks, hand sanitizer, ergonomic furniture, to the extent personal in nature):
- Increased food costs at home (due to price increases on many items), and due to loss of access to “free food” at the office);
- commuting costs (including trips by Uber/Lyft, and parking at the office, for employees not willing to take public transportation);
- Food at the office (coupled with policies to keep employees on premises (expanding on what also should be a IRC §§ 132(e) & 119 excluded benefit instead);
- Increased utility costs (electric, water, oil, gas) attributable to increased family presence in the home; and
- Increased dependent care costs (day care, virtual learning equipment such as laptops for employees’ dependents).

More Specific Tax Issues for Pandemic-Related Benefits

- The Pandemic has raised still more tax issues for time-honored benefits, covered by various exclusions, but where the exclusions and valuation rules have been liberalized.
- The prior slides discussed specific exclusion rules, long-standing examples, and many limitations on the exclusions.
- These concluding slides discuss tax issues relating to specific types of benefits commonly covered by reimbursement requests.

Travel Expenses and Identifying the "Tax Home"

- Business travel expenses under "work from home" programs raise huge, largely unanswered, questions for employers.
- The AICPA wrote to Treasury and the IRS in August, 2022, requesting "updated guidance on working remotely."
- Morgan Lewis is preparing a 30-page list of 55 questions (and suggested answers) relating to problems in identifying the "tax home" and any "280A home office," which in turn affect the exclusion for reimbursements of overnight travel expenses, commuting, and local lodging.
- Even the IRS/ OPM guidelines pay reimbursements not clearly excludable, so guidance is certainly needed, for governments and the private sector.

Travel Expenses and Identifying the “Tax Home,” cont.

- Employees can exclude (and employers can deduct) travel expense reimbursements if the employee (1) has a “tax home” and (2) is away from the tax home long enough to reasonably require sleep or rest.
- Generally, an employee’s “tax home” is the city of his/her principal place of business, not the location of the personal residence.
- Determining which location is the principal place of business is a question of fact, based on an analysis of the following primary factors:
  - total time ordinarily spent at each business post;
  - degree of business activity at each such post;
  - whether the financial return with respect to each post is significant or insignificant; and
  - Whether employment at a particular location is known to be temporary or permanent.

Travel Expenses and Identifying the "Tax Home," cont.

- There is a general presumption, under longstanding rulings and cases, that a residence is not the "tax home."
- However, for remote workers working PRIMARILY at home for over 12 months, it is reasonable to assume that the residence COULD become the "tax home," under Code section 162(a) (as amended in 1993) and Rev. Rul. 93-86 (denying deductions where works in a "single geographic area" has extended, or is expected to extend, for over 12 months).
- This is particularly true, because the IRS has interpreted this "12-month rule" to mean that the "tax home" changes, to match the new primary place of work.
- This determination affects both overnight travel away from the tax home, and commuting between the residence and other places of work, as discussed below.

Commuting Expenses- Definition of “Commuting”

- Commuting expenses between home, vacation home, or other shelter location (“residence”) are generally personal in nature and therefore not eligible for exclusion as a working condition fringe benefit.
- The fact that an employee’s residence and regular place of business are a significant distance apart does not change this income inclusion (or deduction disallowance) for commuting expenses.
- Yet if an employee has a regular place of business outside the home, the employee may exclude and deduct daily transportation expenses incurred in going between the residence and another “temporary work location,” regardless of distance between the two. Thus, for taxpayers with “regular work locations” transportation expenses to a temporary location are deductible. (Rev. Rul. 99-7)
- And if an employee has a qualifying 280A home office, the residence is the regular/principal place of business, and therefore may deduct daily transportation expenses incurred in going between the residence and another work location, regardless of whether the work location is regular or temporary. (Rev. Rul. 99-7)
- However, if the taxpayer does not have a home office, daily transportation expenses between the residence and another regular place of business are <u>not</u> excludable from income and are not deductible.

TEI
Connect. Engage. Impact.

Commuting Expenses- Deduction Disallowance

- The deduction disallowance rules for “entertainment flights” (applicable since 2005 to both fixed and variable costs, prorated across all passenger miles or passenger hours) do not apply to “commuting flights.”
- But under a TCJA change, since 2018, commuting expenses between an employee’s residence and place of employment are not deductible, “except as necessary for ensuring the safety of the employee.” IRC 274(l).
- Reg. § 1.274-14(b) (finalized in December 2020) allow a commuting expense deduction when “unsafe conditions” as described in Reg. § 1.61-21(k)(5). are present, which exist “if a reasonable person would, under the facts and circumstances, consider it unsafe for the employee to walk to or from home, or to walk to or use public transportation at the time of day the employee must commute,” taking into account “the history of crime in the geographic area surrounding the employee's workplace or residence at the time of day the employee must commute.” (The proposed regs had simply referenced Reg. § 1.132-5(m).)

Commuting Expenses – After "Security Exclusion"

- Special tax exclusions apply for security protections (e.g., home and office security protections is entirely excluded, company cars are partially excludable (by exemptions for bulletproofing, or provision of drivers, if they have been trained in defensive driving), and there is a reduction of almost 50% in the SIFL rates for plane travel) – but only if the special security exclusion rules in Reg. §1.132-5(m) are met.

- These exclusions apply if there is a "bona fide business-oriented security concern" – meaning:

    1. specific threats – including, but not limited to, death threats – *i.e.*, may cover threats of kidnapping, serious harm to body or property, and a history of violent terrorist activity in an area; and

    2. receipt of threats either by particular employees, or by "similarly situated employees." Reg. §§ 1.132-5(m)(2)(i)(A) and (B).

- Note: A "generalized concern for an employee's security" will not trigger application of the security exclusion. Reg. § 1.132-5(m)(2)(i). The IRS has NOT indicated that COVID risks create grounds for the exclusion.
- And, even where a bona fide concern exists, either 24-hour protection or a security study by an outside firm is required, as discussed below.

Connect. Engage. Impact.

Commuting Expenses- Operation of “Security Studies”

- If the bona fide security concerns are present, the employee must EITHER provide comprehensive security protection on a 24-hour basis to the employee while at work, at home, commuting or traveling.
- This requirement can be avoided only if 24-hour protection is found unnecessary on the basis of a written security study by an independent security firm or analyst (e.g., not in-house security team) that has made an objective assessment of all the particular facts and recommended the types and locations of security that will be provided.
- All the security study recommendations must be applied on a consistent basis. *See* Reg. § 1.132-5(m)(2)(ii). Thus, new protections should not be added, and prior protections not be dropped, without adoption of a new study (unless the additions and deletions were “recommended for consideration” in the prior study).

Commuting Expenses Triggered by the Pandemic – Possible Application of IRC § 139

- Even though commuting is generally taxable (as discussed above), it may be possible to assert that, during the COVID-19 pandemic, IRC §139 might exclude the value of commutes in company-provided cars and aircraft for trips between the office and remote work locations, if such commutes by private car or company jets are provided so that executives can avoid potential exposure to COVID (if, public transportation or commercial air travel would be the alternative).
- The IRC § 139 exclusion arguably exists because offices were closed due to COVID, and there are more and more cases where executives are sheltering far from their historic regular office, in locations where public transportation is not available, or are too far for car trips (although the IRS never issued specific guidance on this issue).
- It may be safer, however, to continue to impute income (cents-per-mile in cars worth under $50,400), or the applicable SIFL rates, instead of applying a 100% exclusion.
- Note, too, on the deduction side, that commuting trips to or from shelter locations in vacation homes MIGHT be viewed as "personal entertainment flights" (instead of as "commutes" that are excluded from these deduction disallowance rules), in which case deduction disallowances might apply to the pro-rated fixed and variable costs of the aircraft.

280A Home Office

- IRC §280A(c)(1) recognizes a residence as a home office only if it is a:
  - portion of a dwelling "used exclusively on a regular basis" either as the principal place of business for any trade or business of the taxpayer (including for performing substantial administrative or management activities where there is no other fixed location where those activities occur), or
  - place where patients, clients, or customers meet or deal with the taxpayer in the normal course of the trade or business.
- For employees, the "exclusive use" must be "for the convenience of [the] employer" (i.e., for business reasons of the employer, and not for the convenience of the employee).
- Employees who work at home <u>less</u> than 50% of the time do not have 280A home offices, and so the limitations on commuter expense reimbursements apply.
- But employees who work at home <u>more</u> than 50% of the time may be able to establish a 280A home office, from which limited trips (no more than 35 trips per year) to their business office may not be subject to the limitations on commuter expense reimbursements.

280A Home Office Transportation Expenses vs. Personal Residence Transportation Expenses

- Rev. Rul. 99-7 concedes that an employee is not “commuting” when the employee has “daily transportation costs” between an IRC 280A home office maintained by the employee and other business locations – whether those business locations are visited regularly, and irrespective of how far away those business locations are from the office.
- If an employee does NOT have an IRC 280A home office, and travels on <u>day trips</u> between the home and any place that is visited “regularly” (e.g., that the employee has been visiting for more than 12 months, or intends to visit for more than 12 months), then, per this ruling, day-trip travel would not be deductible.
- But, per CCA 200026025 (May 31, 2000), the IRS said (albeit only informally) that if the visits were “no more than 35 times during each calendar year” that the location might not be deemed to be a “regular” work location. But travel one day a week is more than 35 days a year!

The Home Office

- Thus, for employees who are working at a "regular office" of the employer for as little as one day each week (and who don't have a 280A home office), the IRS likely will contend that the regular office is going to be the "tax home" – because (a) it's a regular place of business and (b) it's where the employee's earnings are coming from.
- Under that construct, not only are day trips deemed to be nondeductible commutes, but also overnight trips may not be deductible – with ONE narrow exception for "local lodging" (which does NOT cover travel or meal expenses).
- Specifically, Reg. §§ 1.162-31 and 1.262-1(b)(5) (updating the rules in Notice 2007-47), create a special limited exclusion for local and "not-lavish" lodging in the area of the worker's tax home, provided to employees or independent contractors for periods that do not exceed five days and do not occur more frequently than once per quarter, where the lodging is necessary for the individual to participate in business meetings or be available for some other bona fide business function. (In the case of employees, the employer must have required an employee to stay at the business function overnight.)

Local Lodging, for Employees Occasionally Visiting Headquarters

- For employees who are working at a “regular office” of the employer for as little as one day each week (and who don’t have any IRC §280A home office), the IRS likely will contend that the regular office is going to be the “tax home” – because (a) it’s a regular place of business and (b) it’s where the employee’s earnings are coming from.
- Under that construct, not only are day trips deemed to be nondeductible commutes, but also overnight trips may not be deductible – with **ONE narrow exception** for “local lodging” (which does NOT cover travel or meal expenses).
- Specifically, Reg. §§ 1.162-31 and 1.262-1(b)(5) (updating the rules in Notice 2007-47), create a special limited exclusion for local and “not-lavish” lodging in the area of the worker’s tax home, provided to employees or independent contractors for periods that do not exceed five days and do not occur more frequently than once per quarter, where the lodging is necessary for the individual to participate in business meetings or be available for some other bona fide business function. (In the case of employees, the employer must have required an employee to stay at the business function overnight.)

Parking

- IRC § 132(f)(1)(C) allows an employer to provide up to $280/month [the 2022 limit] in "qualified parking" to employees on a tax-free basis.
- Under a TCJA change, since 2018, employers generally cannot deduct the cost of providing "qualified parking" to employees.
- In final regulations issued in December 2020, various "qualified parking" valuation methodologies provide a few planning opportunities to minimize the employer's deduction disallowance:
  - Rural/remote facility lots are exempt if there is no commercial parking with a charge; and
  - Lots 50% open to the public are exempt (so some employers might consider eliminating employee-reserved parking, and opening up lots for a charge to the public, while parking lots & garages are underutilized by employees).

Employer-Provided Vehicles

- Many employees who are assigned employer-provided cars, or participate in car reimbursement plans, had worried during 2020 because they used the cars so little for business
- If the “fraction of business use” declined dramatically, the car’s “annual lease value” (ALV) taxable to the employee could increase by potentially thousands of dollars, but the IRS regulations prohibit switches to “cents-per-mile”.
- In Notice 2021-7, the IRS allowed a switch to “cents per mile” (57.5¢ in 2020) to measure the value of personal use of company cars valued at under $50,400, from March 31–Dec. 31, 2020, even if the car had been valued using ALV. Employers may continue to use cents per mile (56¢) in 2021 (for cars with a value under $51,100).
- Note: This Notice does NOT help on the “FAVR” car plans, which reimburse employees for use of their own cars if at least 6,250 miles are driven each year.

TEI
Connect. Engage. Impact.

Business Meals

- Business meals are generally 50% deductible, but thanks to the Consolidated Budget Appropriations Act, 2021, business meals* from a "restaurant" are 100% deductible during 2021-2022.
- Per Notice 2021-25, "restaurant" means a business that prepares and sells food or beverages to retail customers for immediate consumption, regardless of whether the food or beverages are consumed on the business's premises.
- So whether served and consumed in a restaurant, brought back to the office, or delivered individually by a meal delivery service, business meals are fully deductible through 2022. Plus at least the "M" portion of per diem payments is 100% deductible, per Notice 2021-63.
- However, meals provided at "on-premises eating facilities"- e.g., company cafeterias – are still only 50% deductible.

* Deductibility also requires that the meal is not lavish or extravagant under the circumstances, and that an employee is present at the furnishing of the meal.

Wellness Programs

- Considerable confusion arises about the tax treatment of "wellness programs" – that do not specifically either provide insurance or treat medical conditions – but which may separately be excludable as "health benefits" (e.g., for health screenings), or under IRC §127 (for education for employees) or IRC §132 (for athletic facilities **on the employer's premises)** or IRC §139 (for wellness programs at home during the Pandemic).
- Some programs do not even provide specific counseling, but instead are "referral" or "concierge" programs, that put employees in touch with doctors and clinics.
- There is also confusion about information reporting of wellness benefits, due to confusion over whether the third-party benefit-providers are (a) independent providers – covered by Rev. Ruls. 70-331 and 70-337, (allowing Form 1099-MISC reporting, but only for where payments are valued at $600 or more); (b) providing "de minimis" benefits (as explained in PLR 201117014); (c) a "statutory employer" independently required to report taxable benefits as "wages' or (d) an "agent"- that is jointly liable with the employer for W-2 reporting.
- If employers provide the benefits directly, then ILM 201622031 (4/15/2016) warns that NO EXCLUSION applies to participant prizes, including cash rewards, in kind benefits ((e.g., Fitbits, or "points") or any other "benefits that do not qualify as section 213(d) medical expenses, such as gym membership fees."

Connect. Engage. Impact.

Reimbursements for State Income Taxes on Travelers

- Some employees have even been asking for reimbursements even for items that are not "business expenses" – such as the state taxes that can be triggered either (a) when employees are required to travel for business to other states for long enough to trigger state withholding or (b) when employees are working at home (but return to the headquarters office for long enough trigger state income tax withholding).
- There is no case law we have found that acknowledges that STATE INCOME TAXES are covered under the "business expense reimbursement" rule.
- But could this be a "Section 139" excludable reimbursement- particularly for employees who have been forced to live in a different location, due to the Pandemic (including, as an example, persons who immigrated to the US from the Ukraine – which is specifically covered by a Presidential declaration of "National Emergency" (per Notice of March 2, 2022: Continuation of the National Emergency With Respect to Ukraine, 87 F.R. 12387 (March 3, 2022), so it's eligible for section 139 (as well as leave-sharing by employees, under Notice 2022-28)).

PROBLEMS FOR 2020-21: OGDEN COMPUTERS DID NOT RECOGNIZE PERMITTED DEFERRALS OF EMPLOYER & EMPLOYEE OASDI TAXES

- These penalty assessments under section 6656 have been vastly expanded, in error, through hundreds of computerized notices from the Ogden, Utah computers – which were not programmed to recognize the permitted deferral of employer- share social security taxes (or the much less popular permitted deferral of employee-share social security taxes). The IRS has been issuing penalties on employers (under 6656 and 6651)- with ever-increasing interest, and monthly additional penalties under 6651.
- Employers simply have to appeal the penalties, then wait- just as they also have been waiting, in many instances, for claimed refunds of CARES Act Employee Retention Credit, and FFCRA leave credits.
- New IR Manual Guidance was issued 9/28- IRM 5.1.15; 5.4.10; 5.9.3; 5.19.1.

SPEAKER'S BIO

Connect. Engage. Impact.

ANDERSEN

Andersen.com

EMAIL: raymond.freda@Andersen.com

PHONE: 646.213.5114

EDUCATION

- Vassar College, BA (Political Science)
- Union College Graduate Management Institute, MBA (Accounting)
- Albany Law School, JD

AFFILIATIONS

- American Bar Association State and Local Tax Section Executive Committee
- New York State Bar Association
- New York City Bar Association – State & Local Tax Committee, Chairman Emeritus
- Cornell Club – State & Local Tax Committee
- Dutchess Community College Foundation, Board of Directors
- National Collegiate Conference Association, Board of Directors
- New York State Tax Appeals Tribunal Advisory Panel

Raymond J. Freda

Managing Director – New York

Raymond Freda has over 24 years of experience in state and local tax and advising clients with respect to income/franchise, capital, gross receipts, sales and use, property, employment and other state industry specific excise taxes.

Raymond's corporate clients range from early stage to Fortune 100 companies and he provides the following services: tax compliance, tax planning and restructuring, voluntary disclosure agreement advisory services, audit defense and negotiated settlement representation. In addition, Raymond leads a dedicated tax litigation practice which represents clients at various state administrative tax adjudicatory forums. Raymond's individual tax services include residency planning (in bound/out bound), audit defense and litigation.

Raymond has extensive transactional experience including sell side tax planning and EBITDA enhancement, due diligence, state tax structuring, transfer tax analysis and remediation and post-acquisition integration and planning.

Before joining Andersen, Raymond was a tax partner in an international professional services firm and provided state and local transaction advisory services. At the outset of his career, Raymond clerked at the New York State Tax Appeals Tribunal Administrative Law Judge Unit.

Raymond currently serves as a member of the New York City Finance Commissioner's Advisory Board and the New York State Tax Appeals Tribunal Advisory Panel. He frequently speaks at the Interstate Tax Corporation State and Local Tax Seminars, the New York City Bar Association and has been a speaker at the Council on State Taxation (COST), Paul J. Hartman State Tax Institute, Tax Executives Institute (TEI), NYU Summer Institute in Taxation and New York State CPA Society events.

Connect. Engage. Impact.

Mary B "Handy" Hevener

Partner, Morgan, Lewis & Bockius LLP

Mary.Hevener@morganlewis.com

Mary B. "Handy" Hevener helps US and multinational enterprises minimize corporate payroll taxes and maximize benefits–related tax deductions. She focuses her practice on the tax and information reporting treatment of employee and independent contractor benefits outside qualified retirement plans, including stock options and other stock-based compensation; executive income deferrals; golden parachutes; and fringe benefits that range from health and life insurance, to employee loans, cars, planes, and prizes.

Handy also advises on executive benefits triggered by corporate mergers and acquisitions (M&A), and spinoffs, including golden parachute issues and stock option deduction allocations. She counsels on the design of compensation and benefit programs, as well as employment and consultant contracts. She handles corporate and payroll tax audits at both the US federal and state levels, penalty abatements, and Internal Revenue Service (IRS) ruling requests.

She also is a lead attorney in tax litigations of first impression, including the payroll taxation and deduction of employee meals and per diem payments; corporate aircraft deductions; stock option taxation; bonus accruals; Railroad Retirement taxes on stock and moving expense payments; the FICA taxation of tipped employees' compensation; and the tax treatment of payments (including termination and settlement payments) to former employees made outside qualified retirement plans.

Handy is part of a group handling audits and appeals involving payroll tax, airline excise tax, and corporate deduction issues for companies in the healthcare, railroad, airline, and technology industries where the proposed taxes and penalties, in the aggregate, total more than $3 billion. These cases affect US and overseas employees receiving stock and stock options, reimbursements for travel costs and moving expenses, tax return preparation, and meals in company cafeterias.

Listed in Chambers USA: America's Leading Lawyers for Business (2011–2018), and recognized as 2019 "Lawyer of the Year" in the practice area of Litigation and Controversy - Tax in New York City by The Best Lawyers in America, Handy is co-leader of the firm's Fringe Benefits and Payroll Tax Task Force. As such, she often works in concert with lawyers from the employee benefits and executive compensation, and tax practices.

Prior to joining Morgan Lewis, she served as an attorney-adviser for the US Treasury Department's Office of the Tax Legislative Counsel. In that role, she focused on tax issues affecting current and deferred employee benefits (including parachute payments), and tax-exempt organizations. She also worked on legislation and IRS guidance affecting alternative minimum taxes, Social Security taxes, and a variety of excise taxes.

Handy has served for 35 years as a member of the New York University's Institute on Federal Taxation's Advisory Board, and she speaks frequently before the Tax Executives Institute. As a volunteer, she served as one of the original members of the Information Reporting Program Advisory Committee to the IRS.

475 Anton Boulevard Costa
Mesa, CA 92626
www.experian.com

Michael Orton
Email: Michael.Orton@experian.com
Managing Director, Tax Consulting Services

Michael joined Experian Employer Services in 2021 to lead the Payroll Tax Consulting Practice. Prior to that, Michael served as the Employment Tax West Region Leader at EY, focusing exclusively on federal, state, and local payroll tax matters.

Michael has extensive experience in the following payroll tax service areas:
M&A compliance / optimization, payroll tax refund recovery, federal and state payroll tax audit support, federal and state payroll tax penalty abatement, payroll tax process improvement, payroll tax complex advisory, and COVID-19 payroll tax credits (i.e., ERC and FFCRA). Over the past ten years Michael has helped hundreds of clients work through complicated payroll tax issues, improve payroll tax procedures and processes, and recover over $500M of federal and state payroll tax refunds / credits.

Michael has a BS and MAcc in Accounting from Brigham Young University and a JD from Arizona State University.