

# DOUBLE TAXATION ON THE RISE: ADDRESSING DOUBLE STATE INCOME TAX FOR REMOTE WORKERS

---

Matthew Behboud

## I. INTRODUCTION

Imagine that Ashley started her dream job in New York a couple of years ago. Excited to begin her new journey in her life, Ashley left her home state of California for New York. Fast-forward to March 2020, the world is ravaged by the deadly COVID-19 pandemic. As a measure to combat the spread of COVID-19, the State of New York orders Ashley's employer to shut down its physical office. Fortunately, Ashley's occupation allowed her to work remotely. Ashley moves back to California but continues to work remotely for her New York employer. Unfortunately, California will tax Ashley for the days she worked in California, and New York will tax her for the exact same days under its "Convenience of the Employer Rule" (Convenience Rule).<sup>1</sup>

States should only impose income tax on employees who are physically present in that state. The crux of Ashley's potential double taxation lies with New York's Convenience Rule.<sup>2</sup> Individuals are often subject to state income tax on income generated while physically residing in that state.<sup>3</sup> Several states, however, have a Convenience Rule that requires employers to

---

1. See N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (West 2022); N.Y. STATE DEP'T OF TAX'N AND FIN., TSB-M-06(5)I, NEW YORK TAX TREATMENT OF NONRESIDENTS AND PART-YEAR RESIDENTS APPLICATION OF THE CONVENIENCE OF THE EMPLOYER TEST TO TELECOMMUTERS AND OTHERS (2006), [https://www.tax.ny.gov/pdf/memos/income/m06\\_5i.pdf](https://www.tax.ny.gov/pdf/memos/income/m06_5i.pdf) [<https://perma.cc/Z8DF-ZKMD>] [hereinafter N.Y. STATE DEP'T OF TAX'N AND FIN.].

2. See N.Y. STATE DEP'T OF TAX'N AND FIN., *supra* note 1.

3. See Michelle Singletary, *Your 2020 Taxes Could Be a Hot Mess, and the Coronavirus is Why*, THE WASH. POST. (Sept. 1, 2020, 6:01 PM), <https://www.washingtonpost.com/business/2020/09/01/taxes-coronavirus-impact/> [<https://perma.cc/YWD5-U26B>].

withhold tax from nonresident employees who work from another state based on the employee's convenience, as opposed to the employer's necessity.<sup>4</sup>

At first glance, it may appear that Ashley is not required to pay New York's income tax for the income she earned while working in California because she relocated out of necessity; however, courts have applied the "necessity" requirement very narrowly.<sup>5</sup> To avoid New York's income tax, Ashley's employer must take affirmative steps to ensure Ashley's home office is a "bona fide employer office."<sup>6</sup>

California will nonetheless grant Ashley a tax credit to offset the taxes she paid to New York.<sup>7</sup> However, states like California must choose between issuing a tax credit and incurring a financial loss (because the state will continue to pay for public services despite not collecting taxes from some of its residents) or not issuing the credit and subjecting those residents to double taxation.<sup>8</sup> Unlike California, other states do not grant a tax credit.<sup>9</sup> Based on their specific income tax laws, a handful of states should not be able to harm other states or their residents.

This Note compares the New York Convenience Rule to nonresident income tax rules in other states and proposes that Congress pass legislation to repeal the Convenience Rule. Part II explains the general purpose of income tax, the history of New York's Convenience Rule, the source-based income rule in California, the changing nature of the workforce post-COVID-19, and highlights pending legislation that may prevent the double taxation of remote workers. Part III illustrates the harmful effects of the Convenience Rule on employees, employers, and various states. Part IV suggests possible legislation to ensure that remote workers do not suffer from double taxation in the post-COVID market. Part V concludes by outlining the advantages of eliminating the Convenience Rule and allowing states to tax only those employees who earn income while physically present in that state.

---

4. See Sarah O'Brien, *Still Working Remotely? Your 2021 Taxes May Be More Complicated Than Your 2020 Return*, (Jul. 18, 2021, 9:54 AM), <https://www.cnbc.com/2021/07/18/still-working-remotely-your-2021-taxes-may-be-more-complicated-.html> [https://perma.cc/VNU5-8F7G].

5. See Paul R. Comeau et al., *New York's Revised Convenience Rule Provides Some Clarity and Continued Controversy*, Aug. 2006 J. OF MULTISTATE TAX'N & INCENTIVES 18, 20.

6. See *id.* at 22-23.

7. State of Cal. Franchise Tax Bd., *Other State Tax Credit: Credit Code 187* (Jan. 4, 2023), <https://www.ftb.ca.gov/file/personal/credits/other-state-taxcredit.html> [https://perma.cc/92UW-CTS3].

8. See Motion For Leave to File Bill of Complaint at 28-29, *New Hampshire v. Massachusetts* (2020) No. 22O154.

9. See Vt. Stat. Ann. tit. 32, § 5825 (West 2017).

## II. THE DEVELOPMENT AND APPLICATION OF THE CONVENIENCE RULE

### A. *Purpose and Methodology of State Income Tax*

Employers must deduct and withhold income tax from wages paid to employees in accordance with state income tax legislation.<sup>10</sup> Citizens agree to contribute a portion of their earned income to their state in exchange for the protection and public services provided by the state.<sup>11</sup> Typically, states impose an income tax on residents who earn income while working in that state.<sup>12</sup> Nonresident employees are normally taxed only on income earned while physically present in the state.<sup>13</sup> In other words, if a State A resident works for an employer in State B, the State B employer may only withhold taxes on income earned while the State A resident is present in State B.<sup>14</sup> Therefore, State B may not withhold any income earned by the State A resident in another state.<sup>15</sup>

In addition, several states have reciprocal agreements whereby residents who work for a neighboring state are only required to pay income tax in their state of residence or vice versa.<sup>16</sup> For instance, Virginia and the District of Columbia have a reciprocal agreement wherein the District of Columbia does not levy an income tax on Virginia residents who work in the District of Columbia.<sup>17</sup>

Some states have no income tax.<sup>18</sup> Additionally, several states expand the general taxation method by imposing an income tax on nonresidents who

---

10. 26 U.S.C. § 3402.

11. Julia Kagan, *What Is Income Tax and How Are Different Types Calculated*, INVESTOPEDIA (Feb. 27, 2023) <https://www.investopedia.com/terms/i/incometax.asp> [<https://perma.cc/EEJ4-HYX2>].

12. Ariele R. Doolittle, *Remote Workers Beware: Potential Double Taxation Under the Convenience Rule*, N. Y. STATE SOC'Y OF CERTIFIED PUB. ACCT. (Nov. 1, 2020), <http://www.nysscpa.org/news/publications/the-tax-stringer/stringer-article-for-authors/remote-workers-beware-potential-double-taxation-under-the-convenience-rule> [<https://perma.cc/NU54-EHH7>].

13. See Mark Klein et al., *Tax Implications of COVID-19 Telecommuting and Beyond*, CPA JOURNAL (July 2021), <https://www.cpajournal.com/2021/07/16/tax-implications-of-covid-19-telecommuting-and-beyond/> [<https://perma.cc/B86Q-XQPC>]; see also Singletary, *supra* note 3.

14. See Klein et al., *supra* note 13; see also Singletary, *supra* note 3.

15. See Klein et al., *supra* note 13; see also Singletary, *supra* note 3.

16. See Jared Walczak, *Teleworking Employees Face Double Taxation Due to Aggressive "Convenience Rule" Policies in Seven States*, TAX FOUND. (Aug. 13, 2020), <https://taxfoundation.org/remote-work-from-home-teleworking/> [<https://perma.cc/4NA5-9LNR>]; see also O'Brien, *supra* note 4.

17. Walczak, *supra* note 16; see also O'Brien, *supra* note 4 (explaining that Maryland has a reciprocal agreement with the District of Columbia where Maryland will not impose an income tax on its residents who work in the District of Columbia).

18. See *supra* note 17 and accompanying text.

work out-of-state for an employer or business located in one of the states that have no income tax if the nonresidents' work performed out-of-state is deemed to be for the employee's "convenience," as opposed to the employer's "necessity."<sup>19</sup> This is known as the Convenience of the Employer Rule.<sup>20</sup> Connecticut, New Jersey, New York, Nebraska, Delaware, and Pennsylvania are among these states.<sup>21</sup> For example, where nonresidents work outside New York, the New York employer must pay income tax on days worked in another state if the employee's "convenience" rather than the employer's "necessity" is the basis for working from another state.<sup>22</sup> To escape this income tax, employees must demonstrate that working from another state is a "necessity" for their employers.<sup>23</sup>

Double taxation occurs when an income tax is imposed in both the state where the employer conducts business and the state where the employee works. Some states have a reciprocal agreement to avoid this problem where employees, for example, will work and live in Virginia, but their employer is in North Carolina.<sup>24</sup> Furthermore, if the residents of Virginia work from home for an employer located in North Carolina, the employees will only pay income taxes in Virginia under the reciprocal agreement between the two states.<sup>25</sup> Other states issue a tax credit, in part or whole, for nonresidents taxed by Convenience Rule states.<sup>26</sup> The same, however, is not true for residents of Vermont who work for an employer in New York.<sup>27</sup> Vermont only provides tax credits for its residents working physically in New York.<sup>28</sup>

---

19. See *supra* note 17 and accompanying text; see also Michael Cohn, *Remote Work Brings Tax Issues for Employees and Employers*, ACCOUNTING TODAY (Aug. 30, 2021, 4:03 PM), <https://www.accountingtoday.com/news/employers-and-employees-hit-by-tax-issues-from-remote-work-out-of-state> [<https://perma.cc/Y8C7-YT8A>]; Ark. Code Ann. §§ 26-51-202, 26-51-435, ARK. Dep't of Fin. & Admin. Legal Op. No. 20200203; 30 DEL. Code. § 1124(b)(1)(b); 316 NEB. Admin. Code § 22-003.01C(1); N.Y. Tax Law § 601(e)(1), 631(a)(1), 631(b)(1)(B), 20 N.Y. Comp. R. & Regs. § 132.18(a); 72 PA. Stat. § 7308, 61 PA. Ad- min. Code § 109.8; CONN. Gen. Stat. § 12-711(b)(2)(C).

20. See Cohn, *supra* note 19.

21. See Amicus Curiae Brief for States of N.J., Conn., Haw., and Iowa at 5, *State of N.H. v. Commonwealth of Mass.*, No. 220154 (U.S., Oct. 23, 2020) (mentioning Ark. Code Ann. §§ 26-51-202, 26-51-435, ARK. Dep't of Fin. & Admin. Legal Op. No. 20200203; 30 DEL. Code. § 1124(b)(1)(b); 316 NEB. Admin. Code § 22-003.01C(1); N.Y. Tax Law § 601(e)(1), 631(a)(1), 631(b)(1)(B), 20 N.Y. Comp. R. & Regs. § 132.18(a); 72 PA. Stat. § 7308, 61 PA. Ad- min. Code § 109.8; CONN. Gen. Stat. § 12-711(b)(2)(C)).

22. See *supra* note 21 and accompanying text.

23. Comeau et al., *supra* note 5, at 20.

24. Walczak, *supra* note 16; see also O'Brien, *supra* note 4 (explaining how an employee who lives in Maryland but works in the District of Columbia only pays income tax in Maryland).

25. Walczak, *supra* note 16.

26. See *id.*; see also Doolittle, *supra* note 12.

27. Walczak, *supra* note 16.

28. See Vt. Stat. Ann. tit. 32, § 5825, *supra* note 9.

If, however, an employee works remotely from Vermont for a New York employer, Vermont considers that income as earned within Vermont and thus imposes an income tax on the employee's income, and New York will deem that income as days worked in New York under the state's Convenience Rule.<sup>29</sup>

### B. *The History of New York's Convenience Rule*

According to New York's Convenience Rule, nonresidents who work outside the state for their own convenience rather than their employer's necessity,<sup>30</sup> are required to pay income tax. When applying the Convenience Rule, the "convenience" requirement has been interpreted broadly, while the "necessity" requirement has been interpreted narrowly.<sup>31</sup> Prior to May 15, 2006, to meet the "necessity" requirement under the Convenience Rule, nonresidents were required to show that their occupation could not be performed within New York.<sup>32</sup> For example, in an advisory opinion by the New York State Department of Taxation and Finance (Department), Mark F. Annitto challenged New York State's requirement that he pay income tax on income earned while working in Connecticut because his employer closed down his New York office to save on office rental costs.<sup>33</sup> While Annitto did receive a computer and a dedicated phone line from his employer, the Department nevertheless declared Annitto's relocation as motivated by his own "convenience" as defined by the Convenience Rule and, thus, required him to pay New York income tax.<sup>34</sup> Additionally, the state's highest court held in *Zelinsky v. New York Tax Appeal Tribunal* that a law professor who worked half the week in New York and half from his home in Connecticut had to pay New York's income tax on all of his earned income because his work from home was "inextricably intertwined" and therefore considered a typical New York work day.<sup>35</sup>

The Department revised New York's Convenience Rule in a Technical Services Bureau Memorandum published on May 15, 2006.<sup>36</sup> The revised

---

29. *See id.*

30. *See* N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2022); N.Y. STATE DEP'T OF TAX'N AND FIN., *supra* note 1.

31. *See* Comeau et al., *supra* note 5, at 20.

32. N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (West 2022).

33. N.Y. STATE DEP'T OF TA'N AND FIN., TSB-A-96(10)I, *Advisory Opinion, Petition No. I951222B* (Dec. 26, 1996), [https://www.tax.ny.gov/pdf/advisory\\_opinions/income/a96\\_10i.pdf](https://www.tax.ny.gov/pdf/advisory_opinions/income/a96_10i.pdf) [<https://perma.cc/C82X-MW57>].

34. *See id.*

35. *Zelinsky v. Tax Appeals Tribunal of State*, 801 N.E. 2d 840, at 846 (N.Y. App. Ct. 2003).

36. N.Y. STATE DEP'T OF TAX'N AND FIN., *supra* note 1.

Convenience Rule extended the “necessity” requirement to include nonresidents who spend a “normal work day” from an out-of-state home office only if it is considered a “bona fide employer office.”<sup>37</sup> If a nonresident works from a home office that qualifies as a “bona fide employer office,” the nonresident will not be required to pay New York’s tax on income earned while working from that office.<sup>38</sup> According to the memorandum, a “normal work day” under the Convenience Rule is one in which an employee performs their usual tasks from their home office.<sup>39</sup> A “normal work day” does not include simply being “available” or responding to occasional phone calls or emails.<sup>40</sup> Employees’ days spent working from home offices will be counted as non-workdays if they do not meet the “normal work day” requirement.<sup>41</sup>

Nonresidents must also show that their home office qualifies as a “bona fide employer office” in addition to conducting a “normal work day” in order to avoid paying New York’s income tax.<sup>42</sup> To qualify as a “bona fide employer office,” nonresidents must demonstrate that their home office meets the specified requirements.<sup>43</sup> The requirements are divided into three categories: (1) the primary factor; (2) the secondary factors; and (3) the “other factors.”<sup>44</sup> Nonresidents must either meet the primary factor or at least four of the six secondary factors and three of the ten “other factors” for their home office to qualify as a “bona fide employer office.”<sup>45</sup>

The primary factor requires the nonresidents’ out-of-state home office to “contain or be near specialized facilities.”<sup>46</sup> This primary factor is, therefore, somewhat limited. The secondary factors include whether (1) the home office is a requirement or condition of employment, (2) the employer

---

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 3 (“If the employee’s duties require the use of special facilities that cannot be made available at the employer’s place of business, but those facilities are available at or near the employee’s home, then the home office will meet this factor. For example, if the employee’s duties require the use of a test track to test new cars, and a test track is not available at the employer’s offices in New York City, but is available near the employee’s home, then the home office will meet this factor. In the alternative, if the employee’s duties require the use of specialized scientific equipment that is set up at the employee’s home (or at a facility near the employee’s home) but could physically be set up at the employer’s place of business located in New York, then the home office would not meet this factor.”).

has a “bona fide business purpose” for the nonresident’s home office,<sup>47</sup> (3) the nonresident employee performs some of the main duties of their employment from their home office, (4) the nonresident employee meets regularly and continuously with their patients, clients, or customers from their home office, (5) the employer does not provide their employees with the necessary accommodations to work in the regular office, and (6) the employer reimburses the nonresident’s home office expenses.<sup>48</sup> The “other factors” include whether (1) the nonresident employee and the employer have a separate phone line; (2) the nonresident employee’s home office phone number and address are listed on the employer’s business cards or letterhead; (3) nonresident employee works from a designated area of their home; (4) the nonresident employee keeps an inventory of the products sold by their employer, and whether the employer sells the products at wholesale or retail; (5) the nonresident employee retains their employer’s business records in their home office; (6) the nonresident employee’s home office has their employer’s business sign on it; (7) the nonresident employee’s home office is listed as one of the employer’s business locations in advertisements; (8) the business insurance policy covers the nonresident employee’s home office; (9) the nonresident employee can claim a deduction for their home office expenses for federal income tax purposes; and (10) the nonresident employee is an “officer of the company.”<sup>49</sup> Thus, a specific narrow test is needed to meet the “necessity” requirement.

### C. California’s Income Tax Rule

Unlike New York and other states that enforce the Convenience Rule, California imposes a source-based income rule.<sup>50</sup> Under this rule, California residents and nonresidents are taxed on income earned from work conducted while physically in the state.<sup>51</sup> However, California does not impose an

---

47. *See id.* (providing an example of an engineer working from his or her home state on several projects requiring him or her to have an office near these projects).

48. *Id.* at 3-4; *see also* Comeau et al., *supra* note 5, at 24 (explaining this factor is satisfied if “(1) the employer (a) reimburses the employee for substantially all of the expenses related to the home office, or (b) pays the employee a fair rental value for the home office space used, and (2) the employer furnishes or reimburses the employee for substantially all of the supplies and equipment used by the employee”).

49. N.Y. STATE DEP’T OF TAX’N AND FIN., *supra* note 1.

50. CAL. FRANCHISE TAX BD., 2018 GUIDELINES FOR DETERMINING RESIDENT STATUS 3 (FTB Pub. 1031), [https://www.ftb.ca.gov/forms/2018/18\\_1031.pdf](https://www.ftb.ca.gov/forms/2018/18_1031.pdf) [<https://perma.cc/C86Y-KFX2>].

51. *See id.*; *see also* Chris Manes, *Nonresidents Working Remotely for California Businesses: Taking “The Sting” Out of California Income Taxes*, CALIFORNIA RESIDENCY TAX PLANNING (MANES LAW) (June 21, 2021), <https://www.palmspringstaxandtrustlawyers.com/nonresidents->

income tax on a nonresident who works for a California company from another state.<sup>52</sup> Therefore, unlike states that apply the Convenience Rule, a nonresident who never sets foot in California but works remotely for a California-based business will not be subjected to California's state income tax.<sup>53</sup>

In addition, California does grant a tax credit for income earned from another state while working remotely from California.<sup>54</sup> Because California taxes any income produced within the state, a resident or nonresident who works remotely from California for a company based in a Convenience Rule state, such as New York, may be required to pay both the state income tax of California and the Convenience Rule state.<sup>55</sup> To avoid the issue of double taxation, California issues a tax credit to offset the taxes paid to other states.<sup>56</sup>

#### D. *The Convenience Rule in the COVID-19 Era*

Teleworking or working remotely is not a new phenomenon or recent trend.<sup>57</sup> For a variety of reasons, employees have been working remotely for years. The number of remote workers has drastically increased since the COVID-19 pandemic.<sup>58</sup> A Stanford Institute for Economic Policy Research study estimates that in June 2020, approximately forty-two percent of the workforce telecommuted.<sup>59</sup> Moreover, about thirty percent of those remote workers worked from a different state than before the pandemic.<sup>60</sup> In addition, a recent survey found that between fourteen to twenty-three million workers intend to relocate as a result of the ability to telecommute.<sup>61</sup>

Under the Convenience Rule, New York treats teleworkers as working remotely out of their own "convenience" rather than their employers'

---

working-remotely-for-california-businesses/ [https://perma.cc/3HHJ-D6XK]; Raquel Lazar-Paley, *What is California Source Income?*, MOSKOWITZ LLP (Oct. 24, 2019), <https://moskowitzllp.com/what-is-california-source-income/> [https://perma.cc/DNC5-3LAF].

52. See Lazar-Paley, *supra* note 51.

53. Manes, *supra* note 51.

54. State of Cal. Franchise Tax. Bd., *supra* note 7.

55. See CAL. FRANCHISE TAX BD., *supra* note 50; Manes, *supra* note 51; Lazar-Paley, *supra* note 51.

56. State of Cal. Franchise Tax. Bd., *supra* note 7.

57. O'Brien, *supra* note 4.

58. *Id.*

59. *Id.*

60. *Id.* ("[A]ccording to a survey done by the Harris Poll on behalf of the American Institute of CPAs.").

61. See *Economist Report: Remote Workers on the Move*, UPWORK, <https://www.upwork.com/press/releases/economist-report-remote-workers-on-the-move> [https://perma.cc/Q5N3-KLCY].



“necessity.”<sup>62</sup> The only recognized exception for teleworkers in New York is if their duties cannot be physically performed in New York.<sup>63</sup> Even during the COVID-19 pandemic, New York, and other Convenience Rule states, continued to adhere to this narrow exception.<sup>64</sup>

Undoubtedly, the pandemic has raised confusion regarding the applicability of the Convenience Rule.<sup>65</sup> For instance, would it be regarded as out of their “convenience” or the employer’s “necessity” under the definition of the Convenience Rule if an employee’s company shut down as a result of the epidemic, forcing them to work from home or even from another state?<sup>66</sup> This intricate question led to New Hampshire filing suit against Massachusetts in the United States Supreme Court.<sup>67</sup> The issue arose when Massachusetts ordered all businesses to close their physical offices due to the pandemic and associated safety concerns.<sup>68</sup> Furthermore, Massachusetts announced that it would keep taxing any nonresident working for any state business from another state, provided that the employee had worked in Massachusetts before the pandemic and only relocated due to the state’s business closure order.<sup>69</sup> Nevertheless, many employees relocated and worked from out of state.<sup>70</sup> Many of them began working from New Hampshire for their Massachusetts-based employers.<sup>71</sup> New Hampshire filed suit against Massachusetts, arguing that because New Hampshire does not impose an income tax on its residents, Massachusetts is infringing on New Hampshire’s sovereignty by taxing its citizen who earned income while working remotely from New Hampshire.<sup>72</sup>

New Jersey filed a brief in support of New Hampshire’s complaint to the United States Supreme Court, arguing that the Convenience Rule harms both

---

62. Nicole Belson Goluboff, *The “Convenience of the Employer” Rule and the Telecommuter Tax Fairness Act*, 20 PRAC. TAX LAW. 55, 56 (2005).

63. *See id.*

64. *See Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax*, N.Y. STATE (Feb. 14, 2023), <https://www.tax.ny.gov/pit/file/nonresidentfaqs.htm#telecommuting> [<https://perma.cc/XY8V-ECB8>].

65. Walczak, *supra* note 16, at 3; *see also* Klein et al., *supra* note 13.

66. Klein et al., *supra* note 13.

67. *See id.*; *see also* Motion For Leave to File Bill of Complaint, *supra* note 8; *No. 220154, New Hampshire v. Massachusetts*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/docket/docketfiles/html/public/22o154.html> [<https://perma.cc/T7WV-PHZE>]; U.S. CONST. art. III, § 2, cl.1.

68. Klein et al., *supra* note 13; *see also* Motion For Leave to File Bill of Complaint, *supra* note 8, at 10.

69. Klein et al., *supra* note 13.

70. *See id.*

71. *See id.*

72. *Id.*

states that tax their inhabitants and states that do not, such as New Hampshire.<sup>73</sup> Additionally, residents of states who work remotely for a business located in one of the Convenience Rule states may be subject to both the income tax of the Convenience Rule state and the residents' home state where they live and work.<sup>74</sup> Moreover, New Jersey argued that even if the states offered a full or partial tax credit in these circumstances, the states would lose billions in revenue as a result.<sup>75</sup> Additionally, despite providing a tax credit to its residents who are working for a Convenience Rule state, the residents' home state still provides public services such as education, healthcare, and even police protection.<sup>76</sup> As a result, states must decide whether to provide their residents with a tax credit or suffer significant financial loss.<sup>77</sup> Although the Supreme Court denied New Hampshire's petition to hear the case,<sup>78</sup> this disagreement led New York to reaffirm its Convenience Rule. The state reiterated that nonresidents who work remotely for a New York-based business from another state due to the pandemic or otherwise will continue to be subject to New York income tax unless their employers establish a "bona fide employer office" for their employees.<sup>79</sup>

#### *E. Remedial Federal Legislation?*

Congress can regulate a state's income tax on nonresidents under the Commerce Clause of the United States Constitution.<sup>80</sup> The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States."<sup>81</sup> Legislation to regulate states' ability to impose income tax on nonresidents has been introduced in Congress; however, there has been no further action.<sup>82</sup> The Multi-State Worker Tax Fairness Act (Act),<sup>83</sup> first

---

73. See Amicus Curiae Brief States of New Jersey, Connecticut, Hawaii, & Iowa in Support of Plaintiff at 2-3, 6-7, *New Hampshire v. Massachusetts*, No. 22O154 (2020).

74. See *id.* at 6-7 ("[R]esidents who work from home could be required to pay taxes on the same income to two States—despite never leaving their Home State.").

75. See *id.* at 2-3.

76. See *id.* at 8.

77. *Id.* at 2, 7-8.

78. See No. 22O154, *New Hampshire v. Massachusetts*, *supra* note 67.

79. See *Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax*, *supra* note 64.

80. U.S. CONST. art. I, § 8, cl. 3; see also Joel Michael, *Constitutional Restrictions on Taxation of Nonresidents*, HOUSE RSCH. (Sept. 2018), <https://www.house.leg.state.mn.us/hrd/pubs/ss/clssnonr.pdf> [<https://perma.cc/47B2-MGM5>].

81. U.S. CONST. art. I, § 8, cl. 3.

82. See Multi-State Worker Tax Fairness Act of 2016, S. 2813, 114th Cong. (2016); Multi-State Worker Tax Fairness Act of 2020, H.R. 7968, 116th Cong. (2020); American Workers, Families, and Employers Assistance Act, S. 4318, 116th Cong. (2020).

83. See S. 2813.

introduced in 2016, has been reintroduced in the House of Representatives in 2020.<sup>84</sup> The Act would prohibit the taxation of nonresidents and effectively nullify the Convenience Rule by requiring states to only tax those who earn income while physically working within that state.<sup>85</sup> Furthermore, the Act would prohibit states from treating work performed by employees in other states as “nonworking time” unless their employer classifies that time as such.<sup>86</sup>

The Health Economic Assistance, Liability Protection and Schools Act, which includes the American Workers, Families and Employers Assistance Act, was also recently introduced by certain senators.<sup>87</sup> Under this bill, remote workers would be temporarily allowed to pay taxes only on income earned in their state of residency or in any other state where they have worked for at least ninety days in 2020 or will do so for at least thirty days in 2021-2024.<sup>88</sup>

### III. THE HARMFUL EFFECTS OF THE CONVENIENCE RULE ON EMPLOYERS, CONVENIENCE AND NON-CONVENIENCE RULE STATES

The Convenience Rule harms employees in several ways. First, as discussed above, the Convenience Rule opens the door to possible double taxation on nonresident employees.<sup>89</sup> The fact that the main solution to avoid double taxation lies with the employer’s affirmative steps in creating a “bona fide employer office” puts nonresident employees at risk of double taxation.<sup>90</sup> Remote workers are also more susceptible to potential double taxation because states must decide whether to issue a tax credit for these employees or suffer significant financial losses.<sup>91</sup> Second, as explained in *Zelinsky v. New York Tax Appeal Tribunal*,<sup>92</sup> New York will likely impose its income tax on the full income earned by an employee who works several days in New York and several days in another state, which would likely cause

---

84. See H.R. 7968.

85. See H.R. 7968 § 2(a).

86. *Id.*

87. See S. 4318.

88. See S. 4318 §§ 403(a)(1), 403(c).

89. See Doolittle, *supra* note 12; O’Brien, *supra* note 4; Klein et al., *supra* note 13; Walczak, *supra* note 16, at 2.

90. Comeau et al., *supra* note 5; see also Walczak, *supra* note 16, at 3-4; N.Y. STATE DEP’T OF TAX’N AND FIN., *supra* note 1.

91. See Amicus Curiae Brief for States of New Jersey, Connecticut, Hawaii, & Iowa in Support of Plaintiff, *supra* note 73, at 2, 7-8.

92. See *Zelinsky v. Tax Appeals Tribunal of State*, 801 N.E. 2d 840, at 846 (N.Y. App. Ct. 2003).

employees to be reluctant to enter New York altogether.<sup>93</sup> This is because New York will likely tax their full income if they fail the Convenience Rule test, causing employees to remain in their home state.<sup>94</sup> This way, they can save on other expenses associated with commuting, such as gas.<sup>95</sup> However, nonresident employees may be taxed under New York's Convenience Rule despite never benefiting from the state's public services that they pay for as part of their income tax.

The Convenience Rule also harms employers. First, employers must ascertain whether any of their employees work from another state. If an employee works remotely from another state, the employer is required to create a "bona fide employer office" or withhold income tax.<sup>96</sup> This would cost the employer time and expenses in complying with this requirement. Second, due to the obligation of employers to establish a "bona fide employer office" for their nonresident employees who telework, employers may hesitate to hire out-of-state employees altogether, which may lead to the potential loss of great talent.<sup>97</sup> Finally, the Convenience Rule causes great difficulty to employers seeking to avoid double taxation of their employees when implementing telework temporarily and in case of an emergency.<sup>98</sup>

States applying the Convenience Rule are also suffering. As discussed above, many nonresident employees may avoid stepping foot in the state because of the taxes imposed on nonresidents working in that state.<sup>99</sup> The Convenience Rule may also deter employers from hiring out-of-state employees due to the hardships associated with managing nonresident employees in a Convenience Rule state.<sup>100</sup> All of this results in employees and businesses wanting to avoid such a state, which could be costly to the state. The challenges the Convenience Rule presents may cause businesses that would otherwise open in such a state to reconsider their decision, which would directly impact the state's economy.

Finally, the Convenience Rule also harms states that do not follow it. Non-Convenience Rule states are forced to choose whether to provide a full tax credit for their citizens who work for a Convenience Rule state, as discussed in New Jersey's Amicus Curiae Brief to the United States Supreme

---

93. See Goluboff, *supra* note 62, at 57-58.

94. See *id.* at 56-58.

95. *Id.*

96. N.Y. STATE DEP'T OF TAX'N AND FIN., *supra* note 1, at 2.

97. See Goluboff, *supra* note 62, at 58.

98. *Id.*

99. See Walczak, *supra* note 16.

100. See Goluboff, *supra* note 62, at 58.

Court.<sup>101</sup> If they issue the tax credit, the state will likely suffer a financial loss because they will continue to pay for public services and social programs for an employee who pays reduced income taxes to that state. If they do not issue the tax credit, their residents who work for a Convenience Rule state may be subjected to double taxation.<sup>102</sup> In either case, the non-Convenience Rule states are harmfully affected by a handful of states that impose taxes on nonresident employees under their Convenience Rule.

#### IV. THE MODERN WORKPLACE ENVIRONMENT REQUIRES A NEW AND FAIR TAX SOLUTION FOR ALL STATES AND NONRESIDENTS

The COVID-19 pandemic has highlighted the significance of technological advancements and creative solutions for the workforce while businesses across the nation closed their physical doors due to safety concerns. Although telework is not a new concept, the pandemic has increased its prevalence. Because many employees throughout the country began working remotely for the first time, and many relocated to their home state, states must change their income tax policies, especially considering that many businesses have announced that they will allow their employees to work remotely on a permanent basis.<sup>103</sup> Thus, many employees in the new workforce may never step foot in the state that taxes their income if their business is incorporated in a Convenience Rule state. Therefore, those employees will not benefit from the public services that their taxes assist in funding, defeating the main purpose of income tax.<sup>104</sup> This problem is likely going to worsen. Due to the feasibility of remote work, many more businesses may elect to close their physical offices. This raises the question of whether the state where the business is incorporated will still tax nonresidents. If not, this will incentivize businesses to become fully remote, thus rendering the Convenience Rule obsolete.

Congress must outlaw the Convenience Rule under its Commerce Clause power. To do so and guarantee an equitable tax structure across all states in the new marketplace, Congress should pass the Multi-State Worker Tax Fairness Act<sup>105</sup> with some modifications. The Act would prohibit states

---

101. See Amicus Curiae Brief States of New Jersey, Connecticut, Hawaii, & Iowa in Support of Plaintiff at 2-3, 6-7, *New Hampshire v. Massachusetts*, No. 22O154 (2020).

102. *Id.* at 2.

103. Emily Courtney, *30 Companies Switching to Long-Term Remote Work*, MONEY TALKS NEWS, (Mar. 31, 2022), <https://www.moneytalksnews.com/slideshows/23-companies-switching-to-long-term-remote-work/> [<https://perma.cc/7LKK-3UVE>]; *Remote Workers on the Move*, *supra* note 61.

104. See Kagan, *supra* note 11.

105. See Multi-State Worker Tax Fairness Act of 2020, H.R. 7968, 116th Cong. (2020).

from taxing nonresidents who telework from another state out of their own convenience or otherwise fail the Convenience Rule test.<sup>106</sup> Therefore, in order for a state to tax employees, they must be physically present in that state when they earn their income.<sup>107</sup> Finally, the Act clarifies that a state cannot label time spent by employees performing tasks in other states as “nonworking time” unless the employer deems that time as such.<sup>108</sup> The Act should also allow nonresidents to travel during regular business hours and perform certain tasks from another state without being taxed by that state if they intend to stay there for a short period of time, say under thirty days. For example, suppose an employee who works from California for a New York employer decides to travel to Nevada for two weeks, and the employee will continue to work normal workdays during the two weeks. In that case, Nevada should not be allowed to impose an income tax on that employee for the two weeks of work performed there.

To simplify the matter, Congress can adopt the provision in the Health Economic Assistance, Liability Protection and Schools Act, which included the American Workers, Families, and Employers Assistance Act,<sup>109</sup> that would temporarily allow remote workers only to be taxed on income earned in their state of residency, or in any state where they have worked for ninety days in 2020 or will work for over thirty days in 2021-2024, and make that provision permanent. This would allow workers to telework without being subject to double taxation or hardship.

Finally, to ensure transparency and fairness in the amount to be taxed, Congress should include a provision requiring all businesses to report nonresidents’ earned income to the state from which they work remotely, so that the state can impose an income tax. For instance, if employees telework from Vermont for a New York employer, the New York employer must report the amount earned by the employee to the state of Vermont. With the provisions mentioned above, Congress will eliminate double taxation of remote workers and will finally end the Convenience Rule.

## V. CONCLUSION

For the reasons stated above, Congress should pass legislation to abolish the Convenience Rule and address the ever-growing potential for double taxation of remote workers. The Convenience Rule of New York and other

---

106. *See id.*

107. *Id.*

108. *Id.*

109. *See* American Workers, Families, and Employers Assistance Act, S. 4318, 116th Cong. (2020).

states has opened the door to potential double taxation and many other hardships.<sup>110</sup> The decision to work remotely for any reason should not subject an individual to the possibility of double taxation, nor should the test for exemption from New York's income tax be dependent on the employer's necessity. The Convenience Rule causes employees, employers, and states significant hardships.<sup>111</sup> Thus, Congress should act quickly and adopt the above-described proposals to put an end to double taxation hardships.

The above proposals would: (1) allow teleworkers to finally benefit from the taxes they pay by taking advantage of the state's public services; (2) free employers of any added requirements, such as establishing a "bona fide employer office"<sup>112</sup> or determining whether to withhold nonresidents' income taxes; (3) eliminate the need for non-Convenience Rule states to determine whether or not to issue a tax credit;<sup>113</sup> and (4) alleviate the concerns of workers or entrepreneurs who might take a job or start a business in a Convenience Rule state.<sup>114</sup> As a result, all workers in the new workforce, including remote workers, would be taxed fairly without being subject to double taxation or undue burdens.

---

110. Doolittle, *supra* note 12; *see also* O'Brien, *supra* note 4; Singletary, *supra* note 3; Walczak, *supra* note 16.

111. *See* Goluboff, *supra* note 62, at 58; *see also* Walczak, *supra* note 16; N.Y. STATE DEP'T OF TAX'N AND FIN., *supra* note 1.

112. *See* N.Y. STATE DEP'T OF TAX'N AND FIN., *supra* note 1; *see also* Comeau, *supra* note 5.

113. *See* Amicus Curiae Brief States of New Jersey, Connecticut, Hawaii, & Iowa in Support of Plaintiff, *New Hampshire v. Massachusetts*, No. 22O154 (2020).

114. *See* Goluboff, *supra* note 62, at 58.