

# New York Makes It Official: Double Taxing of Telecommuters Will Continue

by Nicole Belson Goluboff

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On May 15 New York state issued the final version of its “revised position” concerning the application of the “convenience of the employer” rule.<sup>1</sup> The final version<sup>2</sup> is nearly identical to the draft version offered earlier this year.<sup>3</sup>

Recently, Prof. Edward A. Zelinsky argued that the draft version failed to correct the constitutional defects of the convenience rule,<sup>4</sup> and I argued that it failed to correct the practical problems with the rule.<sup>5</sup> The draft sought to create the illusion that New York had come to appreciate the need for a telework-friendly tax policy. In fact, the draft set forth a scheme that, just like the old scheme, would protect woefully few nonresident telecommuters from the risk of double taxation.

New York’s swift and virtually wholesale adoption of the draft version demonstrates the state’s resolve to continue penalizing interstate telecommuters and to ignore the fundamental ills that plague the convenience rule.

<sup>1</sup>20 NYCRR section 132.18(a).

<sup>2</sup>New York State Department of Taxation and Finance, Office of Tax Policy Analysis, Technical Services Division, TSB-M-06(5)I, May 15, 2006 (hereinafter Final Revisions).

<sup>3</sup>New York State Department of Taxation and Finance, Office of Tax Policy Analysis, Technical Services Division, TSB-M05(X)I, undated draft.

<sup>4</sup>Zelinsky, Edward A., “Employer Convenience, Telecommuting, and the Constitution: The Empire State Really Strikes Back,” *State Tax Notes*, May 8, 2006, p. 451, 2006 STT 88-1, or Doc 2006-7053.

<sup>5</sup>Goluboff, Nicole Belson, “New York’s Proposed Telework Tax Policy: State Won’t Shift Gears,” *State Tax Notes*, May 22, 2006, p. 593, 2006 STT 98-24, or Doc 2006-7896.

Congress must call New York on its ruse to appear more flexible. Congress must not accept cosmetic changes to a telework tax program that needs to be toppled entirely. The Telecommuter Tax Fairness Act<sup>6</sup> — the federal bill that would eliminate the convenience rule — is the right response to New York’s tactics, and Congress should not wait any longer before making it the law.

## The Old Policy

To recap, under the convenience of the employer rule, nonresidents who sometimes telecommute to their New York employers may owe taxes to New York, not just on the income they earn when they come to New York, but also on the income they earn at home. Because those nonresidents may also owe taxes on that income to their home states, New York subjects them to the risk of double taxation.

***Congress must not accept cosmetic changes to a telework tax program that needs to be toppled entirely.***

Under the long-standing program for applying the convenience rule that New York now claims to have revised, the state might exempt a nonresident telecommuter from taxation on his out-of-state income if the telework arrangement was an employer “necessity.” But few could prove necessity. According to New York, telework was necessary only if the nature of the telecommuter’s work was such that performing it in New York was impossible.<sup>7</sup>

## The New Policy: The Old Policy Undercover

Under New York’s allegedly new telework tax policy, telecommuters seeking to allocate the income

<sup>6</sup>S. 1097; H.R. 2558.

<sup>7</sup>*Supra* note 5 at 593-594 (citation omitted).

they earn at home to their home states are still effectively required to prove that telework is an employer necessity. Although the new necessity test is phrased differently from the old one, satisfying it is every bit as difficult — if not more so.

Under the new policy, a telecommuter may allocate income earned at home to the home state if the workday spent at home is a “normal work day” and if the taxpayer’s home office is a “bona fide employer office.”<sup>8</sup>

A normal workday is defined as “any day that the taxpayer performed the usual duties of his or her job.”<sup>9</sup> As I have previously argued, whether New York will consider particular tasks an employee’s “usual duties” is uncertain. The state and its businesses may very well disagree.<sup>10</sup>

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To prove that a home office is a “bona fide employer office,” the telecommuter must essentially demonstrate either that:

- he is one of the few who can satisfy the old necessity test;<sup>11</sup> or
- his home office meets a specified combination of factors that would tend to show telework is necessary for the employer.

Many of those factors would be impossible for most telecommuters to prove.

For example, New York might spare a telecommuter the threat of double taxation in the uncommon event that:

- The employer mandates that the employee work from home as a condition of employment;<sup>12</sup>
- The employer has a bona fide business purpose for establishing an office in the precise location where the telecommuter lives;<sup>13</sup>
- The telecommuter meets clients, patients, or customers on a regular and continuous basis at her home office;<sup>14</sup> and
- The employer pays the telecommuter rent for the home office space.<sup>15</sup>

Other conditions that few telecommuters will be able to satisfy include:

- The employer’s advertising shows the telecommuter’s home office as one of the employer’s places of business;<sup>16</sup>
- The telecommuter’s home office address and phone number are listed on the business’ letterhead or business cards;<sup>17</sup>
- The telecommuter never uses her home office for personal purposes;<sup>18</sup> and
- The telecommuter is entitled to and actually claims the federal home office deduction<sup>19</sup> (which, according to the IRS, is possible only if the employer requires the employee to work from home<sup>20</sup>).

In sum, New York’s final revisions to its telework tax policy effectively preserve the very policy New York purports to have replaced — a policy to limit significantly the number of nonresident telecommuters who can escape the risk of double taxation.

### Urgent National Priorities Threatened

New York issued its official “new” telework tax policy less than two weeks after President Bush released his pandemic flu plan.<sup>21</sup> That plan specifically encourages the use of telework to help organizations continue operating during a pandemic and to help stem the spread of disease. It incorporates the recommendation of the Department of Health and Human Services that large organizations should prepare for a potential pandemic by establishing telework policies and by enhancing communications and information technology infrastructure to support telework.<sup>22</sup>

<sup>8</sup>Final Revisions, p. 2 (“For tax years beginning on or after January 1, 2006, it is the Tax Department’s position that in the case of a taxpayer whose assigned or primary office is in New York State, any normal work day spent at the home office will be treated as a day worked outside the state if the taxpayer’s home office is a bona fide employer office. . . . Any day spent at the home office that is not a normal work day would be considered a nonworking day”).

<sup>9</sup>Final Revisions, p. 2.

<sup>10</sup>*Supra* note 5 at 594-595 (explaining that, in *Zelinsky v. Tax Appeals Tribunal of New York*, 1 N.Y.3d 85 (2003), *cert. denied*, 541 U.S. 1009 (2004), New York regarded Prof. Zelinsky’s scholarship as “ancillary” and uncompensated although Cardozo Law School, his employer, considers it essential).

<sup>11</sup>*Id.* at 596 (“New York’s position under the proposed revisions is, essentially: If a telecommuter’s circumstances are as extraordinary as those described in [*Matter of Fass*, 68 A.D.2d 977 (App. Div. 3d Dept. 1979), *aff’d*, 50 N.Y.2d 932 (1980)] and, therefore, manage to satisfy the strict requirements of the current test, they will satisfy the requirements of New York’s amended test”).

<sup>12</sup>Final Revisions, “Secondary Factor” 1, p. 3.

<sup>13</sup>Final Revisions, “Secondary Factor” 2, p. 3.

<sup>14</sup>Final Revisions, “Secondary Factor” 4, p. 4.

<sup>15</sup>Final Revisions, “Secondary Factor” 6, p. 4.

<sup>16</sup>Final Revisions, “Other Factor” 7, p. 5.

<sup>17</sup>Final Revisions, “Other Factor” 2, p. 4.

<sup>18</sup>Final Revisions, “Other Factor” 3, p. 4.

<sup>19</sup>Final Revisions, “Other Factor” 9, p. 5.

<sup>20</sup>*Supra* note 5 at 599 (citations omitted).

<sup>21</sup>Homeland Security Council, “National Strategy for Pandemic Influenza Implementation Plan,” May 2006, available at <http://www.whitehouse.gov>.

<sup>22</sup>*Id.*; <http://www.pandemicflu.gov/plan/businesschecklist.html>.

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New York's new telework tax policy also comes at a time when gas prices are alarmingly high and the U.S. Department of Energy is encouraging Americans to use telecommuting to reduce their costs.<sup>23</sup>

With the federal government calling for telework to meet the health and energy challenges we face,

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<sup>23</sup><http://www.doe.gov> ("Beating High Gas Prices").

New York's self-serving choice to dig in its heels and deliberately obstruct the country's use of telework is shameful.

Congress must remind New York that the state's hunger for nonresident revenue does not trump the nation's need to prepare for emergencies. Congress has the power to remove the burden on interstate telework that New York chooses to impose, and it must exercise that power. It is time to pass the Telecommuter Tax Fairness Act. ☆