

New York's Proposed Telework Tax Policy: State Won't Shift Gears

by Nicole Belson Goluboff

Nicole Belson Goluboff, a lawyer in New York is the author of The Law of Telecommuting (ALI-ABA 2001, with 2004 Supplement), Telecommuting for Lawyers (ABA 1998), and numerous other publications concerning telework. She is also a member of the Advisory Board of The Telework Coalition. The author thanks Professor Edward A. Zelinsky for his comments on an earlier draft of this article.

Recently, I reported that the Telecommuter Tax Fairness Act¹ — the proposed federal legislation that would prohibit New York and other states from applying the “convenience of the employer” rule² — is gaining momentum.³ The list of members of Congress sponsoring the bill is growing. (Indeed, since my last report, U.S. Rep. Robert R. Simmons, R-Conn., has added his name.) The tax community, a host of pro-telework groups, and the general public are calling for Congress to eliminate the double taxation that threatens telecommuters nationwide because of the convenience rule.⁴

Perhaps to forestall congressional action, New York State's Department of Taxation and Finance has prepared draft revisions to its application of the “convenience of the employer” rule.⁵ However, the proposed revisions would make no significant change in the impact the convenience rule has on interstate telework. Indeed, the proposal demonstrates that New York has no serious plan to relent in its punitive treatment of nonresidents who tele-

commute for New York employers. Rather than obviating the Telecommuter Tax Fairness Act, New York's draft revisions further underscore the need for it.

I. Current Application of New York's Rule

A. How the Necessity Test Works

Under the convenience of the employer rule as New York currently applies it, a nonresident who telecommutes some or most of the time to his New York employer may allocate the income he earns at home to his home state only if the telework arrangement is an employer “necessity.”⁶ If telework is merely beneficial to the employer, the telecommuter must allocate the income earned at home to New York and pay New York taxes on it.⁷ Because the telecommuter's home state may also tax the income he earns at home, the telecommuter may be double taxed on that income.

B. Why the Necessity Test Fails

1. Too Hard to Satisfy

As I have previously argued,⁸ New York's test for determining whether telework is necessary is nearly impossible to satisfy. According to New York, telework is necessary only if the nature of the work the

⁶20 NYCRR section 132.18(a).

⁷New York State Department of Taxation and Finance, Taxpayer Services Division, Technical Services Bureau, TSB-A-96(10)I (Dec. 26, 1996)(*Annitto*), available at http://www.tax.state.ny.us/pdf/advisory_opinions/income/a96_10i.pdf (“Work performed at an out-of-state home which could have been performed at the employer's New York office, if accommodations were available, is work performed for the employee's convenience and not for the employer's necessity. The fact that the employer also benefits from the arrangement does not establish its necessity.”).

⁸See, e.g., *supra*, note 3; Goluboff, Nicole Belson, “Put the Telecommuter Tax Fairness Act In the Passing Lane,” *State Tax Notes*, Nov. 1, 2004, p. 319, 2004 STT 211-2, or *Doc 2004-19727*.

¹S. 1097; H.R. 2558.

²See 20 NYCRR section 132.18(a). See also 61 Pa. Code section 109.8; Neb. Admin. Code section 316-22-003.01C(1).

³Goluboff, Nicole Belson, “The Telecommuter Tax Fairness Act Is Gaining Traction,” *State Tax Notes*, Apr. 3, 2006, p. 37, 2006 STT 63-2, or *Doc 2006-5309*.

⁴*Id.*

⁵New York State Department of Taxation and Finance, Office of Tax Policy Analysis, Technical Services Division, TSB-M-05(X)I, undated draft (hereinafter “Draft Revisions”).

nonresident does at home is such that it could not possibly be done in New York.⁹ However, a key reason telework has become so prevalent¹⁰ is that technology can now help us do anywhere the work we could previously do only in the office. Because nonresident telecommuters often perform precisely the same tasks on telework days that they perform on office-based days, few will be able to prove that telework is an employer “necessity.”

2. An Irrelevant Standard

Further, as I have also argued, whether telework is necessary for the employer or merely beneficial is irrelevant to the question of which state is the source of the telecommuter’s income.¹¹ The necessity test reflects New York’s presumption that telecommuting is merely a mask for tax avoidance — that telecommuters are not truly working when they are at home or are not being compensated for the work they do there.

That presumption, however, is inconsistent with the realities of the modern workplace. An analysis of whether remote work is “necessary” makes no sense in an age when employees are routinely expected — by their employers, customers, and clients — to be reachable outside the office via cellphones, Blackberries, and other portable tools.

II. New York’s Proposed Revision

A. In General

New York’s proposed revision to its application of the convenience rule is the following:

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.¹²

That is, a nonresident who telecommutes to a New York employer would be able to treat a day worked at home as an out-of-state day — and allocate the income earned on that day to the home state — if (1) the day is a “normal work day,” and (2) the home office is a “bona fide employer office.”

⁹See, e.g., *Matter of Kakar*, DTA No. 820440 (Feb. 16, 2006)(For the *Matter of Kakar*, see *Doc 2006-3721* or *2006 STT 41-23*.)

¹⁰See, *supra* note 3 (“In 2005 approximately 10 million Americans telecommuted to their employers at least on a part-time basis.”) (citation omitted).

¹¹*Id.*

¹²Draft Revisions, p. 2.

While New York’s proposal seems to offer nonresident telecommuters a new test to use when assessing whether they can allocate their non-New York income outside New York, applying this test is not meaningfully different from applying the convenience rule under New York’s current scheme.

B. Normal Work Day

Under New York’s proposed revisions, a “normal work day” means “any day that the taxpayer performed the usual duties of his or her job.” And, “For this purpose, responding to occasional phone calls or emails, reading professional journals or being *available* if needed does not constitute *performing the usual duties* of his or her job.”¹³

1. No Evidence of a More Reasonable Test

Under the proposed revisions, the taxpayer in *Zelinsky v. Tax Appeals Tribunal of New York*¹⁴ — the case that spawned interest in congressional intervention — would almost certainly not be able to prove that the days he worked at home were normal work days. As has been previously reported,¹⁵ Edward A. Zelinsky was (and still is) a professor at the Benjamin N. Cardozo School of Law in New York. During the two tax years at issue, on some days he commuted to New York to teach classes and meet with students. On other days, he worked from home, grading student work and conducting legal scholarship.

Under the convenience of the employer rule, New York required Zelinsky to treat the days he worked at home as if they were days worked in New York and pay New York taxes on the income he earned on those days. Because Connecticut also taxed the income he earned at home, he was double taxed on that income.

Zelinsky challenged New York’s application of the convenience rule to him in the New York courts, arguing that it violated his rights under the Commerce and Due Process clauses of the U.S. Constitution. The court of appeals rejected those claims.

In concluding that there was no Commerce Clause violation, the court found that New York’s tax on Zelinsky’s Connecticut income was fairly apportioned “because the entirety of [his] salary is derived from New York sources.”¹⁶ According to the court, the job for which Cardozo paid him was the

¹³*Id.* (emphasis in original).

¹⁴*Zelinsky v. Tax Appeals Tribunal of New York*, 1 N.Y.3d 85 (2003), *cert. denied*, 541 U.S. 1009 (2004). For the court of appeals decision in *Zelinsky*, see *Doc 2003-25309* or *2003 STT 228-10*.

¹⁵See, e.g., 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*.

¹⁶*Supra* note 14.

teaching he did in New York, not his scholarship. Specifically, the court said:

As a law professor, the taxpayer is primarily engaged in the business of teaching. It is for this that Cardozo hired him and for this that he is paid. . . . From the perspective of his employer, as long as he performs his teaching responsibilities as scheduled, it matters not when or where he performs his *ancillary functions*.¹⁷

Note that New York's view that the professor's scholarship is merely an "ancillary function" is not one his employer shares. On its Web site, Cardozo makes clear that teaching and scholarship are equally important aspects of the job of its faculty: "Professors at Cardozo are . . . committed to the *twin goals* of teaching and scholarship."¹⁸

Because New York regards as "ancillary" and uncompensated the very scholarship that Cardozo considers essential, it is hard to imagine that the state would treat a day during which a teacher does research at home as a normal work day. New York's draft revisions obviate lengthy speculation. According to the state, "reading professional journals" — a fundamental component of scholarship — "does not constitute *performing the usual duties*" of one's job.¹⁹

2. No Better Justification for a Strict Test

By identifying specific tasks that do not constitute "performing the usual duties" of a job, New York apparently seeks to address a concern the New York Court of Appeals discussed in *Zelinsky* — that, in the absence of the convenience rule, nonresident commuters might try to manipulate New York's tax system. Specifically, these commuters might spend "an hour working at home every Saturday and Sunday and then [claim] that 2/7 of their work days were non-New York days and that 2/7 of their income was thus non-New York income."²⁰

That concern was — and remains — misplaced. First, it is highly unlikely that large numbers of traditional commuters — people who, every week, Monday through Friday, travel to their New York offices — will be inspired to redefine themselves as telecommuters for the purpose of defrauding New York simply because they do some professional reading at home on the weekend.

¹⁷*Supra* note 14.

¹⁸http://www.cardozo.yu.edu/faculty_staff/fulltime.asp (emphasis added). See also Goluboff, Nicole Belson, "Perspective: New York's Convenience-of-Employer Doctrine Cries Out for Congress to Stop State Taxation of Interstate Telecommuting," *BNA Tax Management Multistate Tax Report*, vol. 11, no. 6 (June 25, 2004).

¹⁹Draft Revisions, p. 2.

²⁰*Supra* note 14.

Second, claiming as a "work day" a weekend day that includes some work is not necessarily a subterfuge. When employees actually do perform an hour of work on Saturday and Sunday, the work could easily be work their employers pay them to do. Suppose a nonresident who works primarily outside the state unexpectedly comes to her employer's New York site one day. She stays only an hour or two and performs the very same tasks that other employees perform at home on the weekend. New York would surely count the day as a New York work day.²¹ If the tasks performed would qualify as work when performed in New York, there is no sound reason to treat them differently when they are performed at home, in another state.

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In sum, New York's proposed definition of a "normal work day" inspires no confidence that the state has either relaxed the convenience rule or conceived a more defensible justification for it.

C. 'Bona Fide Employer Office'

Like New York's proposed definition of a "normal work day," the requirement that the telecommuter's home office be a "bona fide employer office" would perpetuate the double tax risk many interstate telecommuters currently face.

New York's draft revisions set forth a variety of factors employees should use "to assist them in determining if their home office constitutes a bona fide employer office."²² The factors "are divided into three categories: the primary factor, secondary factors, and other factors. In order for an office to be considered a bona fide employer office," according to New York, "the office must . . . either [satisfy] the

²¹See State of New York, Department of Taxation and Finance, *Income/Franchise Tax — District Office Audit Manual, Withholding Tax Field Audit Guidelines*, Apr. 5, 2005, p. 25 ("Employers are not required to withhold on nonresident employees who are assigned to a primary work location outside of New York State and work in New York State 14 or fewer days in a calendar year. For the purposes of counting the days worked in New York State for the 14-day guidance, *any part of a day spent performing services in New York counts as a full day*. . . . [T]his guidance does not relieve employees from their responsibility to file personal income tax returns with New York State.") (emphasis added).

²²Draft Revisions, p. 2.

primary factor, **or** [satisfy] at least 4 of the secondary factors **and** 3 of the other factors.”²³

1. The Primary Factor

The primary factor is that the “home office contains or is near specialized facilities.” Thus, according to New York, if “the employee’s duties require the use of special facilities that cannot be made available” in the New York office, “but those facilities are available at or near the employee’s home, then the home office will meet this factor.”²⁴

As an example, the proposed revisions provide that the office will satisfy the primary factor “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.”²⁵

That factor is effectively a reaffirmation of the holding in the 1979 case *Matter of Fass*.²⁶ In *Fass*, the taxpayer, a New Jersey resident with New York employers, was the editor and publisher of several magazines addressing “a wide variety of special areas, including sports cars, motorcycles, firearms, home improvements, dogs and horses.”²⁷ His duties included testing new products in those areas and reporting on them in the magazines. To perform those duties, he required access to a variety of “specialized facilities,” including, for example, “a garage to store automobiles and motorcycles for testing and evaluation.” These facilities were established at his “farm and residence in New Jersey.”²⁸

Applying the same necessity test New York uses today (that is, that “an employee’s out-of-State services are not performed for an employer’s necessity where the services could have been performed at his employer’s office”), the court held that the taxpayer did qualify “for an allocation of his income.”²⁹ Although the specialized facilities he used could have been “set up somewhere in New York State,” the court ruled that “the work [he] performed at the New Jersey locations concededly could not have been performed at his employers’ New York City office.”³⁰

New York’s position under the proposed revisions is, essentially: If a telecommuter’s circumstances are as extraordinary as those described in *Fass* and, therefore, manage to satisfy the strict requirements

of the current test, they will satisfy the requirements of New York’s amended test. So far, New York offers nothing new.

2. The Secondary Factors

There are six secondary factors,³¹ of which (as noted above) a telecommuter who is not relying on the primary factor must prove at least four. While that scheme is intended to appear more flexible than the current one, in fact, like the primary factor, it is simply a restatement of the old, troubled rule: Telecommuters must still prove that telework is not merely beneficial to the employer, but necessary.

For example, the proof required by factor 1 — that the employer makes the home office a condition of employment — is proof that telework is necessary. The same is true of factor 2: If the employer has a bona fide business purpose for establishing an office in the precise location where the nonresident employee lives, telework is necessary. Indeed, New York’s example of a situation that would satisfy factor 2 is one in which “the employee is an engineer working on several projects in his or her home state and *it is necessary* that the employee have an office near these projects in order to meet project deadlines.”³²

Further, under the proposed revisions, necessity remains unreasonably difficult to prove. For example, not many telecommuters will be able to prove that the home office is an employer requirement. Although there are instances in which employers have conditioned employment (or continued employment) on an employee’s use of a home office,³³ in most cases, telework is voluntary.³⁴

³¹The six secondary factors are: (1) “The home office is a requirement or condition of employment”; (2) “The employer has a bona fide business purpose for the employee’s home office location;” (3) “The employee performs some of the core duties of his or her employment at the home office;” (4) “The employee meets or deals with clients, patients or customers on a regular and continuous basis at the home office;” (5) “The employer does not provide the employee with . . . regular work accommodations at one of its regular places of business;” and (6) The employer reimburses expenses for the home office (to a specified extent). Draft Revisions, pp. 3-4.

³²Draft Revisions, p. 3 (emphasis added).

³³See, e.g., *supra* note 9; *Matter of Gray*, DTA No. 819457 (Feb. 24, 2005). For the opinion in *Gray*, see Doc 2005-4339 or 2005 STT 44-27.

³⁴See The Telework Coalition, “Telework Benchmarking Study: Best Practices for Large-Scale Implementation in Public and Private Sector Organizations,” Executive Summary 2006 (“TelCoa Benchmarking Study”), pp. 1, 7, available at <http://www.TelCoa.org> (The study “represents information gathered from 13 organizations which collectively have more than 77,000 teleworkers and nearly 60,000 additional mobile workers. The participating organizations’ telework programs have been in place for an average of 10 years. . . . Most of the participating organizations’ telework programs are voluntary.”).

²³*Id.* at 2-3 (bold in original).

²⁴*Id.* at 3.

²⁵*Id.*

²⁶*Matter of Fass*, 68 A.D.2d 977 (App. Div. 3d Dept. 1979), *aff’d*, 50 N.Y.2d 932 (1980).

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

Also, whether telework is a condition of employment may not always be clear. The proposed revisions do provide that the home office will satisfy this factor “if a written employment contract states the employee must work from home to perform specific duties for the employer.”³⁵ However, suppose an employee’s contract has no such provision and the employer suddenly directs all staff to work from home because a terror threat or natural disaster renders the central office inaccessible or unusable for a time. Or suppose a bird flu outbreak occurs and — as President Bush’s new flu plan³⁶ encourages organizations instruct employees to work from home to help stem the spread of the disease. In those such situations, will New York regard a “home office” as a “condition of employment”?

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Other circumstances may be ambiguous, as well. Suppose, for example, that an employer requires a nonresident employee to perform some specific tasks at home and the rest in the New York office. If the home office is within commuting distance of the New York site, it might meet the test. The employee might do at home only the work the employer requires him to do at home, and he might perform in the New York office the work the employer requires him to do in New York.

However, what if the nonresident telecommuter relocates to a state that is not within commuting distance of the New York office? In that case, the employee may telecommute more often than before. If the employee performs all the work at his new home that he previously did at home — but also does some work at home that he previously did in the New York office — is the home office still a condition of employment? Is it a condition of employment for purposes of some work days but not others, depending on the nature of the work done? The complexity involved in determining whether a day’s earnings are allocable outside New York could be dizzying.

Proving factor 2 — that the “employer has a bona fide business purpose for the employee’s home office location” — would also be difficult. The reasons employers typically implement telework programs include telework’s capacity to:

- reduce real estate costs;
- enhance the results of recruitment efforts;

- improve retention rates; and
- facilitate business continuity in case of an emergency or other disruption.³⁷

Other reasons employers may turn to telework include its capacity to lessen the impact of high fuel costs³⁸ and to accommodate disabled workers entitled to the protections of the Americans with Disabilities Act, the Rehabilitation Act, or comparable state laws.³⁹

While those advantages compel managers to authorize telework, it is simply the fact that the employee is working at home — not the precise location of the home — that provides the business benefit. Thus, few telecommuters would be able to prove factor 2.

The third factor — that the “employee performs some of the core duties of his or her employment at the home office” — could also be hard to prove for the same reason that proving a normal work day would be hard: New York may have a significantly more restrictive view than employers and employees of which duties are “core duties.”⁴⁰

Ironically, however, factor 5 may be the clearest evidence that New York’s proposed revisions reflect a greater change in public relations strategy than in tax policy. Under the convenience rule as New York currently applies it, New York has refused to consider telework necessary when, to save on rent, the employer denied the employee continued use of a private office and required the employee to work

³⁷See TelCoa Benchmarking Study, pp. 1, 4. See also Kelley, Joanne, “Companies ramping up telework due to strike,” *Rocky Mountain News*, Apr. 5, 2006 (“Rocky Mountain News”) (reporting on heightened use of telework during transit strike in Denver area).

³⁸See *Rocky Mountain News* (The telework program coordinator for the Denver Regional Council of Governments “said companies flooded her office with calls last year when gasoline prices rose quickly.”).

³⁹See Lee, Christopher, and Josh White, “Employee \$300,000, Commerce \$0,” *The Washington Post*, Aug. 11, 2005, p. A21 (reporting that a U.S. Commerce Department employee prevailed in litigation against the department when the department terminated the telework arrangement it had previously authorized as an accommodation under the Rehabilitation Act).

⁴⁰That the “normal work day” test and the “core duties” test would pose similar problems is evident from the similar language New York uses to describe each test. As discussed above, in defining a normal work day, New York states that “reading professional journals . . . does not constitute performing the usual duties of [one’s] job” and, therefore, does not establish that the day at home is a normal work day. Draft Revisions, p. 2. Similarly, to illustrate the meaning of “core duties,” New York describes a stockbroker who works from home. According to New York, if the broker “merely reads business publications on the weekend, this would not constitute performing the core duties at the home office.” Draft Revisions, p. 3.

³⁵Draft Revisions, p. 3.

³⁶Homeland Security Council, “National Strategy for Pandemic Influenza Implementation Plan,” May 2, 2006, available at <http://www.whitehouse.gov>.

from home.⁴¹ Factor 5 purports to put an end to that unreasonable policy. However, the language New York uses to describe that factor belies that New York has any plan to abandon its current approach.

New York explains factor 5 as follows:

If the employer does not provide the employee with designated office space or other regular work accommodations at one of its regular places of business, then the home office will meet this factor. For example, an employer wishes to reduce the size of the office space maintained in New York to decrease rental expenses and, therefore, no longer provides designated office space or other regular work accommodations for one of its employees. Instead, the employer allows the employee to work from the employee's home. If the employee must come to the office, the employee must use the 'visitors' cubicle that is also used by the other employees of the company. In this instance, the home office will meet this factor.⁴²

New York strains to appear as if it has relaxed the necessity test by describing the situation as one in which the employer "allows," rather than requires, the employee to work from home. That formulation is a smoke screen: If the employer evicts the employee from her private office, limits access to the central site to only those days the employee "must" come in, and provides only limited work space on those days, remote work is not "allowed." It is required.

New York's reluctance to call that arrangement what it is — mandatory telework — suggests that the state would also be loath to concede that the employer has denied the employee "regular work accommodations." The expression "regular work accommodations" is, conveniently, vague: While a telecommuter might be able to satisfy factor 5 by proving that she was relegated to a visitors' "cubicle" on her office-based days, how would New York view the situation if the employer converted the private office she previously occupied into a "visitors' office" and instructed her to work there on her New York days?⁴³ The state might well hold that she had the use of "regular work accommodations" when she came to New York and, therefore, that her home office failed to meet this factor.

⁴¹*Supra* note 7.

⁴²Draft Revisions, p. 4.

⁴³That was the situation in *Matter of Gray*, *supra* note 33 (Company "management advised [Gray] that he would have to vacate his office in New York. [His] former office . . . would henceforth be available to managing directors [like himself] assigned to [company] offices throughout the United States when they came to New York.").

3. Other Factors

The "other factors" also blare the strong bias against home-based work that underlies New York's adamant retention of the necessity test.

Many of those "other factors" require telecommuters to prove that their home offices look just like traditional offices. The office trappings that might render a home office more tolerable to New York include, for example:

- a sign at the home office location indicating that it is a place of business of the employer;
- inclusion of the home office address and phone number on the business letterhead or business cards of the employer;
- a separate telephone line and a listing for the home office maintained by the employer;
- employer business records stored at the telecommuter's home office; and
- advertising for the employer that shows the telecommuter's home office as one of the employer's places of business.⁴⁴

As with the primary and secondary factors, these "other factors" may be hard for most telecommuters to prove. For example, few employees will post a sign indicating that the home office is a place of business of the employer. In some communities, zoning rules may even prohibit it.⁴⁵

Similarly, proof that an employee's home office address and phone number are listed on the employer's stationery may be impossible to provide. Some private companies and some government agencies have extensive telework programs with hundreds — or thousands — of telecommuters.⁴⁶ Identifying every nonresident telecommuter's home office on the stationery of such an organization may be wholly impractical. Requiring such proof reflects New York's anachronistic perception that telework is rare.

⁴⁴Draft Revisions, pp. 4-5.

⁴⁵*Cf.* "Common Code Violations," <http://www.talgov.com> (Under the Land Development Code of Tallahassee, Fla., a "home occupation is a permissible use in all districts. . . . No signs . . . or other evidence of the home occupation shall be visible from outside the dwelling unit.").

⁴⁶*See, e.g.,* Langberg, Mike, "Telecommuting offers hope for region choking on traffic," *The Seattle Times*, Feb. 27, 2006, ("Half [of Sun Microsystems] 31,000 employees worldwide participate in a program called iWork. They work at home at company-owned drop-in centers.") *See also* "Enterprisewide Telework Program Succeeds at TIGTA," *The Teleworker*, April 2006, available at <http://www.teleworkexchange.com> (reporting that, of the 845 employees who work for the U.S. Treasury Inspector General for Tax Administration, "750 telework at least part-time"); Pulliam, Daniel, "Patent office launching massive telework program," *GOVEX-EC.com*, Dec. 16, 2005 (describing a telework program designed for the patent division of the U.S. Patent and Trademark Office for which "[a]ll of the agency's 4,000-plus patent examiners will be eligible").

As has been previously observed,⁴⁷ some of the “other factors” and “secondary factors” draw on the criteria necessary to qualify for the home office deduction under federal law.⁴⁸ Indeed, one factor is precisely that the “employee is entitled to and actually claims a deduction for home office expenses for federal income tax purposes.”⁴⁹ That factor also evinces New York’s intent to restrict significantly the number of telecommuters who will be able to satisfy the convenience rule.

Under the Internal Revenue Code, an employee will qualify for the home office deduction only if the employee’s business use of the home is “for the convenience of his employer.”⁵⁰ If the business use of the home is not for the convenience of the employer — if “the use of the home office is merely appropriate and helpful” — the employee cannot take the deduction.⁵¹ Thus, if the employer authorizes but does not require telework, the employee may not be entitled to take the deduction.

An IRS example of how the agency treats this deduction demonstrates that a telecommuter like Prof. Zelinsky would not be entitled to take it and, therefore, would not satisfy the home office deduction factor in the proposed convenience rule revisions.

The example describes a teacher: “The school provides her with a small office where she can work

on her lesson plans, grade papers and tests, and meet with parents and students. The school does not require her to work at home. [She] prefers to use the office she has set up in her home. . . .”⁵² According to the IRS, because the employer provides the teacher “with an office and does not require her to work at home, . . . she does not meet the convenience-of-the-employer test and cannot claim”⁵³ the home office deduction.

Employees in the 21st century often do their jobs precisely as Prof. Zelinsky does, working in the central office when necessary and at home when that is where they can get the job done most effectively and efficiently. By incorporating in its proposed revisions to the convenience rule factors that telecommuters like Zelinsky could not satisfy, New York manifests that its agenda remains what it has long been: To tax the income employees earn — and may be taxed on — in other states. That is the agenda that compelled members of Congress to introduce the Telecommuter Tax Fairness Act, and the need for federal redress is as powerful as ever.

III. Conclusion

New York’s proposed revision to how it applies the convenience of the employer rule is a circuitous detour to the continued double taxation of interstate telecommuters. It simply renders even more complex a tax policy that was rife with administrative difficulties from the outset. The complicated array of factors, which few telecommuters could prove, demonstrates that, contrary to the recent proclamation of New York’s commissioner of taxation and finance, it is *not* possible to “keep the convenience-of-employer rule while still recognizing the reality of telecommuting.”⁵⁴

New York’s refusal to abandon the necessity test altogether — its refusal to acknowledge that the test is wholly incompatible with an information-based, global economy — dooms the state’s apparent effort to avoid congressional intervention. Because New York will not erase the convenience rule, Congress must. ☆

⁴⁷*Supra* note 15.

⁴⁸*Cf.* Draft Revisions, “Secondary Factor” 4, p. 4 (“If an important part of the employee’s duties include physically meeting with clients, patients or customers in the normal course of the employer’s trade or business, and those meetings are performed on a regular and continuous basis at the home office, then the home office will meet this factor”) *with* IRS Publication 587, p. 2 (Taxpayers may “qualify to claim expenses for business use of [their] home” if they “use part of [the] home . . . [e]xclusively and regularly as a place where [they] meet or deal with patients, clients, or customers in the normal course of [their] trade or business). *Cf. also* Draft Revisions, “Other Factor” p. 4 (“The employee uses a specific area of the home exclusively to conduct the business of the employer that is separate from the living area. You will not meet this factor if the area is used for both business and personal purposes”) *with* IRS Publication 587, p. 3 (Taxpayers will “not meet the requirements of the exclusive use test if [they] use the area in question both for business and for personal purposes”).

⁴⁹Draft Revisions, “Other Factor” 10, p. 5.

⁵⁰26 U.S.C. section 280A(c)(1).

⁵¹IRS Publication 587, p. 3.

⁵²*Id.* at 5.

⁵³*Id.*

⁵⁴“New York State Considering Changes in Rule Upheld in ‘Huckaby’ Case, Official Says,” *BNA Daily Report for Executives*, State Taxes, Jan. 20, 2006, p. H-5.