

Tax Guidance Needed As Remote Work Grows, Panelist Says

By **Daniel Tay**

Law360 (July 8, 2021, 6:00 PM EDT) -- The growth and complexity of remote work as spurred by the coronavirus pandemic makes guidance from the federal government or state cooperation on how to tax remote work increasingly necessary, a tax panelist said Thursday.



The U.S. Supreme Court recently declined to hear a case brought by New Hampshire over Massachusetts' regulation imposing income tax on remote workers during the pandemic. (iStockPhoto/scyther5)

The issue of how states may tax people teleworking from different states has always been an important one, but finding workable solutions has become more urgent as a larger part of the workforce shifts to remote work during the pandemic, said Katie Quinn, partner at McDermott Will & Emery LLP. Speaking at a panel hosted by the Urban-Brookings Tax Policy Center, Quinn noted that the recent increase in complexity of remote working situations, such as when an employee works from multiple remote locations, only underscores the need for guidance on what states can and cannot do.

"What's becoming even more problematic is now, we don't just have people that work in a New York office and they traditionally work from home from New Jersey," Quinn said. "Now, people are saying, 'Well, I'm going to work from New Jersey, then in the winter I'm going to work from Florida ... and then maybe for a month I'll go to Europe.' It really becomes sort of a withholding mess."

The U.S. Supreme Court **recently declined to hear** a dispute between New Hampshire and Massachusetts over Massachusetts' regulation imposing income tax on remote workers during the pandemic. Supporters of the case had **said it was an opportunity** for the high court to clarify the taxation of remote workers.

Howard Gleckman, senior fellow at the center and the panel's host, noted that court observers had said the New Hampshire-Massachusetts case was "not a great case" for such a discussion as New Hampshire doesn't have an income tax, which makes it harder to prove it was harmed by Massachusetts' regulation. Quinn agreed, adding that **there are other states** — like New Jersey and Connecticut — that may have a stronger argument.

New York has a "convenience of the employer" rule, and with the changing circumstances brought on by the pandemic, New Jersey, Connecticut and other states near New York stand to lose much more

revenue than they previously did, according to Quinn.

"As the states become more aggressive and say, 'We're going to justify our own rules, and if people have to pay double tax, it is what it is,' then I think it becomes more persuasive for the [Supreme Court] to step in," Quinn said.

Beyond guidance from the judiciary, Quinn said Congress could potentially step in to "level the playing field" and provide consistency across states.

"I think there were a couple of bills that said ... if an employee is not in the state for over 30 days, then you cannot tax those employees' wages — basically, setting a standard," Quinn said. "Really, any guidance that lets the states know what they can do, so that we have a level playing field, so that individuals and employers can comply with these rules."

An alternative solution might be for states to forge their own interstate compacts; Gleckman noted that Maryland, Virginia and Washington, D.C., have a long-standing tax agreement. Quinn said such agreements were definitely possible but noted they would be more likely for states that are already on a "similar playing field." In the case of New York and New Jersey, for example, where New York stands to lose a substantial amount of revenue while New Jersey does not have many people telecommuting from New York, Quinn said she did not think such an agreement was likely.

Guidance and consistency are not just important for employers but employees as well, Quinn said.

"These are people's salaries," Quinn said. "We're no longer talking about a huge company that maybe has endless resources. We're talking about individuals, which I think makes the case for some guidance a little more compelling."

Gleckman noted that the mobility of work, intellectual property and capital in the modern economy has resulted in the issue of how to fairly tax individuals and businesses cropping up in other areas, bringing up Maryland's **contested digital advertising tax** as an example.

"We used to talk about nexus, and nexus was a warehouse or factory or a storefront, but what is it now? And how do you figure out where this income should be taxed?" Gleckman said.

A possible answer, again, is consistency across states, Quinn said.

"I do think that the states sort of have to come together and agree, we're going to source our services or we're all going to tax these items in the same manner because otherwise it does become unduly burdensome to businesses," Quinn said.

At the same time, Quinn said there may not be a "real clean answer" given that states have a fair amount of liberty when it comes to how they want to impose taxes.

"Potentially we'll need some guidance from the Supreme Court, kind of defining what unduly burdensome means," Quinn said.

--Editing by Vincent Sherry.