

# Global Mobility Taxation

Breakout B  
November 8, 2021

37<sup>TH</sup> ANNUAL TEI-SJSU  
**HIGH-TECH  
TAX INSTITUTE**  
VIRTUAL CONFERENCE  
NOVEMBER 8-9, 2021

CalCPA **TEI** TAX EXECUTIVES  
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SJSU UNIVERSITY OF CALIFORNIA, SAN JOSE  
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## Global Mobility

Life Sciences Roundtable

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November 2021

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# Current state of 'global mobility'



Outbound assignments and transfers from U.S.

U.S. inbound, increasing from November 8th

Return of international business travel

Hybrid and remote working arrangements

Full and part-time employees and consultants

## The current work environment

### The context for Global Mobility

- Marked by significant fluidity – the Delta variant has stalled return-to-work strategies and consolidated remote and hybrid working
- Liberalization of U.S. and global workforce with a transformational shift away from physical work sites towards digital
- Differences in approach across industries to find a balance between the needs of the business, the importance of remote working to employees, and external pressures like the Great Resignation
- Adapting to changes in the way the business operates, contracts projects, delivers in-person

**59%**

Believe employees are more productive working at home

**91%**

Delta variant has disrupted return-to-work strategy

**58%**

Are undergoing transformation in the way the business works given the shift to hybrid and remote

**83%**

Increased the use of contingent or part-time workforce during the pandemic

# The future is hybrid...?

75%

Generally enjoyed working from home.

79%

Want flexibility on where and when they conduct work

69%

Have an improved work-life balance while working from home

55%

The ability to work remotely outside the home state or country for a short period is important

External developments encouraging international remote working, such as 'digital nomad' visas

Regular focus in the media and press – how people work is a regular area of discussion and news



## International agreements

### Bilateral Agreements

- The US has concluded approximately 70 double tax treaties. Treaties mitigate double taxation, including employment income related to periods of time (typically up to 183 days in a specified 12-month period) working in a foreign country
- Similarly, the US has concluded bilateral 'totalization' agreements covering social security contributions with 30 countries
- These agreements allow for social security contributions to be made only in the home country for a period typically up to 5 years

### US Model Tax Treaty – Art. 14(2)

- ...remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned Contracting State if:
- a) the recipient is present in the other Contracting State for a period or periods not exceeding in the aggregate 183 days for all twelve-month periods commencing or ending in the taxable year concerned;
  - b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other Contracting State; and
  - c) the remuneration is not borne by a permanent establishment that the employer has in the other Contracting State

### US Model Tax Treaty – Article 5

...the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on. // ...a person – other than an agent of independent status... -- is acting on behalf of an enterprise and has and habitually exercises in a Contracting State an authority to conclude contracts that are binding... shall be deemed to have a permanent establishment.

### Technical and Economic Cooperation

In addition to personnel covered by Art... above, all other personnel (and family members forming part of their households), except citizens and permanent residents of COUNTRY, who the Government of the United States, or any agency thereof, employs (whether by direct hire, contract or other arrangement) or finances (whether by contract, grant or otherwise with any person or entity) and who are present in COUNTRY to perform work in connection with this Agreement are exempt from:

- a) income and social security taxes levied under the laws of COUNTRY with respect to income derived from assistance programs;



# Implications for the company

*But it's employee tax, why should this be on my radar?*

- Foreign registration with tax authorities
- Foreign corporate tax filing obligations
- Payroll registration and operation
  - For the company
  - For the employee personally
- Liability to foreign social security and potential increase in employee total cost to the company
- Increased international footprint
- Administrative complexity
- Liability to taxes not withheld
- Penalty and interest exposure



## Navigating risk



- Residency for treaty
- Economic employer
- Permanent Establishment
- 'Posting' vs Hybrid

Not clear cut



- Assumption of COVID relief
- Liability tied to immigration
- Tax authority sophistication
- Proactive assessment

Uncertain environment



- Limited risk remote work
- Assignment
- Transfer
- PE / New entity
- PEO

Toolkit



# IRS Response to travel limitations caused by COVID-19

Kristen Nygren  
IRS Chief Counsel  
SBSE



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## Revenue Procedure 2020-20

- Under IRC Section 7701(b), an alien individual who meets the substantial-presence test for a calendar year is generally treated as a US resident for the year at issue.
- An alien individual may exclude certain days of presence in the United States for days that the individual had intended to leave the United States but was unable to do so because a medical condition.
- Days that an alien individual spends in the United States due to an illness that prevents the person from timely leaving, are not counted in determining the availability of treaty benefits with respect to income from dependent personal services performed in the United States.

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## Rev. Proc. 2020-20: Emergency Period

- The COVID-19 Emergency Period is a single period of up to 60 consecutive calendar days selected by an individual starting on or after February 1, 2020 and on or before April 1, 2020, when the individual is physically present in the United States.
- COVID-19 Emergency Travel Restrictions are travel disruptions or restrictions that prevent an individual from leaving the United States during the COVID-19 health emergency

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## Rev. Proc. 2020-20: Eligible Individual

- (1) was not a US resident at the close of the 2019 tax year,
- (2) is not a lawful permanent resident at any point in 2020,
- (3) is present in the United States on each day of the individual's COVID-19 Emergency Period, and
- (4) does not become a US resident in 2020 due to days of presence in the US outside of the individual's COVID-19 Emergency Period.

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## Rev Proc 2020-20 Application

- An eligible individual who planned to leave the United States during the individual's COVID-19 Emergency Period but was prevented from doing so due to COVID-19 Emergency Travel Disruptions may exclude up to 60 days during the individual's COVID-19 Emergency Period for purposes of applying the substantial-presence test.
- Form 8843, *Statement for Exempt Individuals and Individuals With a Medical Condition*, by the due date for filing Form 1040-NR.

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## Limited Relief

- Rev. Proc. 2020-20 provides limited relief of a narrowly defined 60 days in 2020 for non-residents still in the United States from being considered a resident for federal income tax purposes.
- Certain U.S. business activities conducted by a nonresident alien or foreign corporation will not be counted for up to 60 consecutive calendar days in determining whether the individual or entity is engaged in a U.S. trade or business or has a U.S. permanent establishment, but only if those activities would not have been conducted in the United States but for travel disruptions arising from the COVID-19 emergency.

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## Revenue Procedure 2020-27

- IRC Section 911(a) allows a "qualified individual" to elect to exclude from gross income the individual's foreign earned income and a housing cost amount.
- An individual is a qualified individual under IRC Section 911(d)(4) for the period in which the person was a bona fide resident of or was present in a foreign country if the individual left the country during a period for which the Treasury Secretary determines that individuals were required to leave because of war, civil unrest, or "adverse conditions".
- For 2019 and 2020, the COVID-19 emergency constitutes an adverse condition that precluded the normal conduct of business for purposes of IRC Section 911(d)(4).

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## Relief found in Rev. Proc. 2020-27

US citizens and residents satisfy the time period requirements of IRC Section 911 if:

1. They departed China, any time between December 1, 2019 and July 15, 2020 or any other foreign country between February 1, 2020 and July 15, 2020;
2. They established residency, or were physically present, in China on or before December 1, 2019 or in any other foreign country on or before February 1, 2020; and
3. They attach a statement on their tax return explaining that they expected to meet the applicable time requirements, but were prevented from doing so because of the COVID-19 emergency.

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## Waivers Published Annually

- The Treasury Secretary must declare what meets the waiver of time requirements under Section 911 for individuals electing to exclude their foreign earned income and who must leave a foreign country because of war, civil unrest or similar “adverse conditions” in that country
- The Global health emergency caused by the coronavirus (COVID-19) pandemic is “an adverse condition” according to the Treasury Secretary
- An annual revenue Procedure is published that details what countries meet this requirement.
- Rev. Proc. 2021-21 – no countries listed due to COVID-19 implications.

# State Tax Implications of Remote Work

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# State Tax Observations

- Secretary of State Registrations
- Corporate Income Tax
- Sales and Use Tax
- Payroll Tax

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## State Taxation of Workers in Multiple States: Employer Withholding

- The “employer nexus” to trigger withholding for most states is:
  - Employer office in state, or some other nexus to trigger state income tax; and
  - Payments of any wages subject to income tax in the state (or subject to contribution under the state’s unemployment compensation laws).
- Some states provide thresholds before withholding is triggered, based on days worked, dollars earned, or some combination of the two.
- Some require withholding on the first day of work (although for lower-paid workers, minimal allocated income may be less than the standard deduction and a personal exemption).

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# State Leniency During 2020, But What Happens When Pandemic Emergency Relief Is No Longer Warranted?

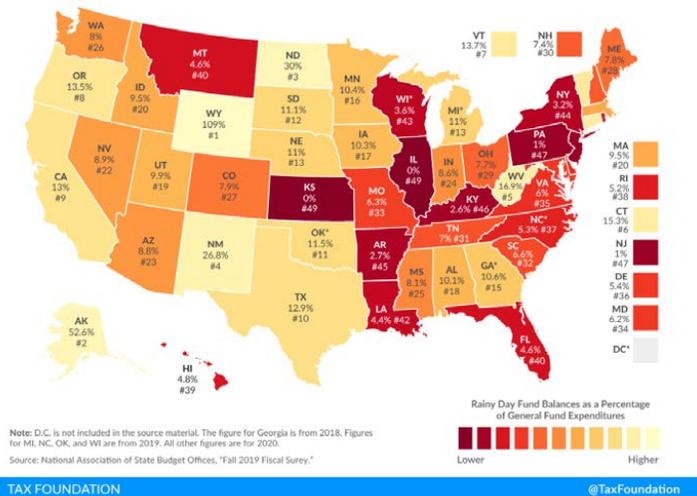
- **Cash-Strapped States**

- Significant fiscal challenges as a result of COVID-19\*

- **Prepare for Future Audits**

- Stay up to date on state guidance
- Regularly consult with advisors
- Documentation

How Healthy Is Your State's Rainy Day Fund?  
Rainy Day Fund Balances as a Percentage of General Fund Expenditures



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# Employee State Income Tax Withholding Standards, In General

- Resident Employees
  - If an employer is doing business in a state, then income tax withholding is generally required on all wages paid to resident employees regardless of the state where wages are earned.
  - States have various rules about whether (and how much) credit is allowed against resident income tax withholding for income taxes withheld in other states.
- Nonresident Employees
  - State income tax withholding applies to wages that nonresident employees earn for work they perform (or, in some states, “deemed to perform”) in the nonresident state.
  - Wages earned outside of the nonresident state are generally not subject to state income tax withholding – subject to exceptions for “convenience of the employer” states.
- Reciprocal Agreements

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## “Convenience of the Employer”

- Connecticut, Delaware, Nebraska, New York, and Pennsylvania (as well as Arkansas until recently and Massachusetts during the pandemic) 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.



\*MASSACHUSETTS ISSUED A TEMPORARY INCOME SOURCING RULE THAT TAXES EMPLOYEES STATE BUSINESSES WHO WORKED IN OTHER STATES THIS YEAR.

SOURCE: TAX FOUNDATION

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NEWS

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## Remote Work Policy Considerations

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# Importance of Setting Expectations

- Establish remote working parameters (& clarify where remote and in-office rules differ)
  - Teleworking as an accommodation or as a job requirement
  - Productivity & performance
  - Work-hour expectations
  - Break period expectations
  - Recordkeeping expectations

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# Importance of Setting Expectations

- Establish remote working parameters (& clarify where remote and in-office rules differ)
  - Protecting proprietary information
  - Absences (sick leave & vacation)
  - Home as the work-place
  - Expense reimbursement
  - Choice of law

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## Additional Best Practices

- Telecommuter training & telecommuter manager training
- Require employment contract that addresses work-from-home expectations for employees who voluntarily opt to primarily work remotely
- For employees working remotely, assume they are working from their home/residence address of record, unless employees say otherwise
- Warn that proof of remote work location may be required
- Don't give too much tax advice; instead, encourage employees to consult their own tax advisors

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## Global Mobility and Local Taxes

Eric M. Anderson  
Managing Director, ANDERSEN



# Poll Question

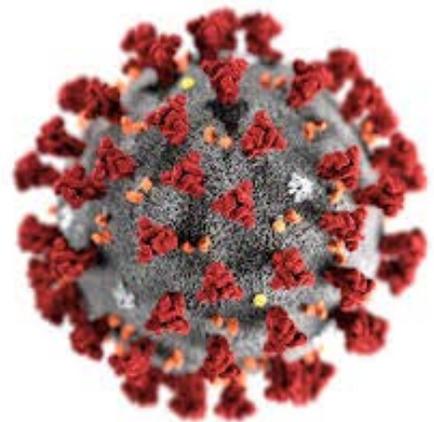
**Which of the following Global Mobility issues keeps you up at night?**

- A. Keeping up with city and local taxes
- B. Keeping up with state nexus rules
- C. Keeping up with payroll and withholding issues for mobile employees
- D. Keeping up with non-U.S. issues
- E. Just keeping up! – all the above

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## COVID-19 and State and Local Taxes

- Pandemic has had monstrous impact on State taxes, especially in major metropolitan areas
  - Residency issues: migration to Hamptons, CT, FL, NV etc.
  - Home office work: employee taxation and the “Convenience Rule”
  - And rates will likely go up
- Many local tax measures are based on where services are performed
- Flight from cities may have created an opportunity to reduce taxes



# Poll Question

**In 2022, I expect our employees will be working from home:**

- A. All the time
- B. Most of the time
- C. Some of the time
- D. Rarely

## Cities We'll Discuss Today



# New York Unincorporated Business Tax

- “Unincorporated Businesses” include: trades, professions, and certain occupations of an individual, partnership, limited liability company, fiduciary, association, estate or trust
- Tax is 4% of net income allocated to the City
- Professional and other service organizations are large taxpayers: hedge funds, private equity, law firms, accounting firms, consulting firms, advertising agencies, SaaS, and licensing companies



## NYC: Unincorporated Business Tax

- Allocation formula:  
$$\frac{\text{Services performed in NYC}}{\text{Services performed everywhere}} = \text{NYC allocation \%}$$
- An estimated *2 million* people commute into Manhattan every day (normally)
- Work performed at home in CT, NJ, Upstate, and Long Island is not work performed in NYC – no “convenience of the employer” sourcing for allocation
- The City has provided no guidance related to telecommuting employees due to COVID



# San Francisco Business Tax

- Applies to all *persons* doing business in the City - most businesses regardless of form
- Three primary components:
  - Gross receipts tax depends upon NAICS category up to 0.65%
  - Homelessness gross receipts tax up to 0.69%
  - Payroll expense tax 0.38%
- The % of payroll in SF for most businesses used to determine half or all of the taxable gross receipts



# San Francisco Business Tax

- Payroll includes all W-2 compensation of employees plus “pass-through” compensation from flow-through entities
- Payroll allocation based upon:
  - **Percentage of working hours in San Francisco**
  - **Percentage of business transacted in San Francisco**
  - **Based upon a reasonable method given facts and circumstances**
- **No prescribed method to determine hours worked in San Francisco - audits are... inconsistent**



# Los Angeles Business Tax

- Applies to all persons doing business in the City
- Tax depends upon business activity up to .45% of gross receipts for “professions and occupations” businesses
- Taxable gross receipts measured by “work performed in the City”



# Los Angeles Business Tax

- Allocation provided by City Clerk Ruling No. 15
  - Receipts “directly attributable” to services
  - Allocation based upon cost
  - Default assumption that 20% of work performed outside of Los Angeles deemed gross receipts from within the City - *rebuttable*
- Little guidance on application of these rules but City has recognized pre-COVID telecommuting workers outside of Los Angeles may reduce the percentage of taxable gross receipts



# How Can Remote Work Save \$\$?

	New York City	San Francisco	Total
Gross Receipts			200,000,000
Payroll Expenses	50,000,000	50,000,000	100,000,000
Other expenses	20,000,000	20,000,000	40,000,000
Net Income			60,000,000
Payroll %	50%	50%	
Tax			
UBT	1,200,000		
Payroll Expense		380,000	
Gross Receipts		555,650	
Total Tax	1,200,000	935,650	2,135,650
<hr/>			
Telecommuting Employees			Savings
20%	240,000	187,130	427,130
50%	600,000	467,825	1,067,825

## Other State and City Issues

- May consider impact in states and localities that apportion based upon where work performed
- Beware \$\$ grabs due to budget deficits - Philadelphia is considering temporary telecommuting employees as performing services in the City if the primary work location is in the City
- Substantiation may be the key to determining and realizing tax benefits



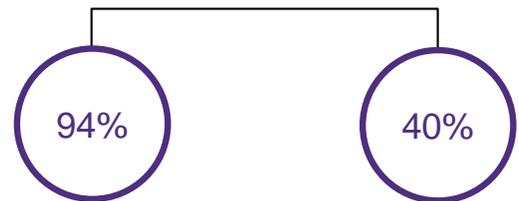
# Proof of Burden is on the Taxpayer



## The role of Tax & Finance

- 1 Enabler – identify options to support the business and mitigate attrition
- 2 Enabler – realize a form of hybrid working with tax parameters central to format
- 3 Oversight – changes in enforcement or regulations globally may necessitate policy to evolve
- 4 Oversight – leverage tools to automate risk management and

Leveraging technology for mobility



Have updated technology to meet the return-to-work strategy

HR teams have technology transformation as a strategic priority