



CONNECTICUT PLANS TO FIGHT BACK AGAINST NEW YORK'S REMOTE WORK TAX (SORT OF)

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In most cases, an employee who lives in one state (State A) but works for an employer in another state (State B) is taxed by State B only on wages earned during days he is physically working in State B. Under New York's "convenience of the employer" ("COTE") rule, however, days worked outside New York are considered New York work days if the employee's assigned or primary work location is an established office or other bona fide place of business of the employer in New York State and the days worked outside New York are for the employee's convenience rather than because of employer-imposed necessity. Application of this rule causes an employee who works remotely from his or her Connecticut home for his own convenience rather than because it is required by his New York-based employer to be treated as working in New York on these days. As a result, the employee's compensation for remote working days in Connecticut is subject to New York income tax which is often higher than the Connecticut income tax the employee would pay on this income.

New York allows non-resident remote workers to avoid the COTE rule if the employee can demonstrate that a home office is a "bona fide employer office." To do so, the employee must either show that the home office (1) contains or is near specialized facilities which cannot be made available at the employer's place of business or (2) satisfies some of the following factors: the home office is a requirement or condition of employment; the employer does not provide the employee with an office or regular workspace; the employer reimburses the employee for substantially all home office expenses; the employee has a bona fide business purpose for working from home; the employee performs some of their core duties of his or her employment at the home office; the employer maintains a separate telephone line for the home office; the employee regularly meets or deals with clients, patients or customers at home; and business records of the employer are stored at the employer's home office.

For example, the administrative law judge in a New York case determined that a nonresident employee worked outside New York by necessity because the New York employer eliminated the employee's office space, formally relocated the employee to its Virginia office (even though the employee continued to work from his Connecticut home), rescinded the employee's access to the New York building and the employee no longer communicated with New York personnel on a day-to-day basis.

Connecticut gives its residents a credit against their Connecticut income tax for the New York income tax paid under the COTE rule. This is only a small consolation to affected Connecticut residents, however, because they end up paying income tax at the New York and possible New York City tax rates (NYS top rate of 10.9%; NYC top rate of 3.876%) which are higher than the Connecticut tax rates (top rate of 6.99%). Also, although Connecticut has its own COTE rule to reduce the tax dollars lost to New York, the tax collections to both states from the COTE rule is like comparing David and Goliath. Just in the year 2022, providing the credit for New York taxes paid under this rule cost Connecticut \$1.6 billion according to the Connecticut Department of Revenue.

Taxpayers have brought several cases to court in New York, citing clauses such as the Commerce Clause and the Due Process Clause, but unfortunately, legal challenges have generally not gone the way of the taxpayer. Criticism of the COTE rule by neighboring states has grown, however, with the increased popularity of remote

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work. In an effort to combat this rule, and following New Jersey's lead, the Lamont administration recently announced a strategy to encourage Connecticut telecommuters subject to the rule to file lawsuits against New York. Under the "Challenge Incentive" introduced in Governor Lamont's fiscal year 2025 proposed budget adjustments, any Connecticut resident who successfully challenges the New York remote workers tax (i.e., New York's COTE rule) with respect to the tax years 2020-2023 will receive:

- a credit equal to 50% of the additional tax due to Connecticut following a successful challenge, and
- a waiver of penalties and interest on the additional Connecticut tax associated with a successful challenge.

The additional tax to Connecticut would be due because a successful challenger would receive a refund from New York and could no longer claim a credit for taxes paid to New York on the refunded amount. This result would require the challenger to report additional tax due to Connecticut. In all likelihood, Governor Lamont chose these specific years because, rather than suspending the application of the COTE rule during the COVID-19 pandemic, New York continued to apply this rule although nonresidents who historically worked in New York were forced to work remotely due to the stay-at-home orders enacted by New York.

According to the budget proposal, successful challenges could generate over \$200 million annually for Connecticut in future years. In addition, the overall tax burden for Connecticut residents who work remotely for New York employers would be reduced because of the tax rate differential between New York and Connecticut.

If you have any questions regarding this alert, please contact your Cummings & Lockwood private clients attorney.