

MANUFACTURING INFORMATION MEMO

APRIL 1, 2025

Employment of Out-of-State Telecommuters by Manufacturers in New York State

For manufacturers located in New York State, the employment of out-of-state telecommuters can greatly expand the available talent pool. That said, there are a number of issues that need to be addressed when considering this type of employment arrangement.

Registration as both an In-State and Out-of-State Employer

Generally, wages paid by a New York employer to an out-of-state telecommuter are subject to taxation, withholding and reporting in the jurisdiction where the telecommuter actually renders services, regardless of the location of the employer, the service recipient or the source of payment. Moreover, benefits such as unemployment insurance, workers' compensation, disability insurance, paid family leave and the like, need to be provided under the laws of the jurisdiction where the telecommuter's services are performed. Therefore, a New York employer may need to register as an out-of-state employer with certain states and withhold and report various taxes to those states, accordingly.

However, in addition to the withholding obligations, if any, in the state where the telecommuter actually renders services, a New York employer may have an obligation to withhold New York State income taxes as well. The New York State Department of Taxation and Finance (the Department) has taken the position that, in the case of a taxpayer whose assigned or primary office is located in New York State, all normal work days spent at the taxpayer's out-of-state home office for their own convenience, rather than for the employer's necessity, will be considered work days in New York State, subject to New York State income tax withholding. On the other hand, if the taxpayer works at their out-of-state home office out of necessity for the employer, and the office is considered a "bona fide employer office" (as described below), those work days will not be subject to New York State income tax withholding. In other words, the Department treats all of the wages of a New York State nonresident telecommuter that are paid by an employer situated in New York State as income allocated to New York State, unless by necessity (and not mere convenience) the nonresident's work must be performed from the worker's out-of-state home office.

To be considered a bona fide employer office, the home office must meet certain factors of a test developed by the Department. The test comprises either: (1) the primary factor, or (2) at least four of six secondary factors and three of ten other factors. The primary factor addresses the employee's proximity to certain specialized equipment or facilities. The secondary and other factors contemplate a myriad of facts and circumstances related to the purpose and function of the home office to discern whether the office functions as a bona fide employer office.

Some relevant secondary factors include:

- whether the home office is a requirement or condition of employment;
- whether the employee performs some of the core duties of his or her employment at the home office; and
- whether the employee meets or deals with clients, patients or customers on a regular and continuous basis at the home office.

Some relevant other factors include:

- whether the employee uses a specific area of the home exclusively to conduct the business of the employer that is separate from the living area (the home office will not meet this factor if the area is used for both business and personal purposes);
- whether the employer's business is selling products at wholesale or retail and the employee keeps an inventory of the products or product samples in the home office for use in the employer's business;
- whether advertising for the employer shows the employee's home office as one of the employer's places of business; and
- whether the home office is covered by business insurance policy or by a business rider to the employee's homeowner insurance policy.

Registration to Conduct Business Out-of-State

Many states require out-of-state corporations and limited liability companies (LLCs) to register to conduct business in their state for a variety of reasons, including having an employee present in the state for a period of time beyond conducting an isolated transaction.

Failure to register to conduct business in a state may carry certain consequences, including preventing an entity from bringing a lawsuit in that state; however, such entities are typically permitted to defend themselves in lawsuits brought against them. In addition, states typically assess penalties against out-of-state entities that transact business without qualifying or registering. Further, some states may impose penalties individually on the officers and directors of non-compliant out-of-state entities.

Registration is a generally a straightforward process involving the appointment of an in-state agent to accept service of process and the payment of a nominal registration and annual filing fee.

Business Registration, Corporate Income Tax and Sales Tax

Among other things, employer registration to conduct business in a state may create a "Nexus" (i.e., a taxable presence) in that state for income tax purposes. This may require the filing of corporate income tax returns or partnership tax returns, which may allow for the "apportionment" of income away from New York State. Shareholders and members of pass-through entities such as S-corporations and LLCs may be obligated to file individual in-state tax returns as well. Moreover, registration for sales tax may be required for any transactions beyond a certain annual dollar threshold or number of sales transactions.

What Should Manufacturers Do Now?

New York State manufacturers should conduct a review of the states where their out-of-state telecommuters actually perform services and determine whether the manufacturer is complying with each state's laws and rules and treating all such employees appropriately.

Bond, Schoeneck & King, PLLC has helped many New York State-based clients address their out-of-state registration, withholding and reporting obligations. If you have any questions or concerns related to the foregoing, please contact [Frank C. Mayer](#), chair of Bond's [tax law practice](#), [Jessica M. Blanchette](#), [Emily Ahlqvist](#) or the attorney at the firm with whom you are regularly in contact.

