

New Jersey Doubles Down in Fighting New York Remote-Work Tax

By Danielle Muoio Dunn

- New York's "convenience of employer" rule faces new scrutiny
- New Jersey law creates incentives to locate offices in state

New Jersey leaders hope a law they just enacted will lead to a legal showdown with New York over its rules for taxing telecommuters. But the prospects are challenging even as remote work lifestyles flourish.

The state spends more than \$2 billion a year crediting hundreds of thousands of residents for income taxes they must pay to other states because their employer is based there—virtually all of it related to jobs located in New York. The arrangement has applied for years to people commuting across the Hudson River, but has gotten closer scrutiny from New Jersey lawmakers since the pandemic, as more people swap out daily commutes for home offices.

For the 2020 tax year, New Jersey estimated that as much as \$1.2 billion out of \$2.5 billion it credited residents was for work performed entirely at home when many offices were shuttered. Before the pandemic, that figure ranged between \$100 million and \$400 million, officials said in a court filing.

The cause of the growing pain is New York's "convenience of the employer" rule—so called because it requires residents of other states to pay income taxes to New York when they work in their home states for their own convenience, not because their employers assign them there. To keep residents from being double-taxed, New Jersey credits its residents for those taxes.

New Jersey paid out personal income tax credits of \$2.9 billion in 2021 and \$2.3 billion in 2022, according to the state Department of Treasury—state officials attributed the 2021 increase in credits to significant increases in incomes—though the data does not break down the split between commuters and teleworkers.

Tired of paying the bill for New York's policy, New Jersey just put in place a law that tries to incentivize challenges to the rule as well as shift some employer dynamics to keep salaries, and taxes, in the state to begin with.

The measure Gov. Phil Murphy (D) signed in July (A4694) encourages residents to challenge what he called “aggressive tax policies imposed on them by other states.” Those who are successful and earn a refund from New York will also receive a bonus credit equal to 50% of what they owe to New Jersey. The new law also attempts to claw back some of the revenue New Jersey loses every year by requiring New York residents with New Jersey-based employers to pay income tax to the Garden State. Another provision sets aside \$35 million in grants for companies that assign New Jersey-based employees to locations in the state.

‘Simpler Argument Now’

New Jersey state Sen. Paul Sarlo, chair of the budget and appropriations committee and co-sponsor of A4694, said the state’s position was harder to argue when commuters were “making the trek” into the city, “but the argument is a lot simpler now.”

In 2020, the state filed an amicus brief in support of New Hampshire’s suit against Massachusetts for taxing workers who were living and working in the Granite State during the pandemic. The US Supreme Court didn’t take the case, and New Jersey officials have since looked for other ways to fight New York’s taxation of remote workers. Sarlo said he thinks future cases could have a better shot, with remote work here to stay.

“Just because their paycheck’s coming out of an office in Manhattan, nobody’s there,” Sarlo said in an interview. “And this is not just people working at a home office. Sometimes it’s working out of an office that’s rented. So we think our case is a lot stronger these days.”

Still, New Jersey residents looking to take advantage of the bonus tax credit by successfully appealing their New York income tax bills face an uphill battle.

Elizabeth Pascall, a tax partner with Hodgson Russ LLP in Buffalo, N.Y., said she “can’t imagine” that a New Jersey resident’s challenge could lead to substantial changes to New York’s application or enforcement of the convenience rule.

In 2003, the New York Court of Appeals ruled against a law professor who challenged the state’s “convenience of the employer” test over income taxes he owed for work done remotely in his Connecticut home.

Zelinsky Case

Edward Zelinsky, the professor of tax law at Yeshiva University’s Cardozo School of Law who attempted to overturn New York’s convenience rule in 2003, is challenging the statute again. This time he argues that New York can’t tax his income under the convenience rule for days he worked remotely in 2020, when state public health orders prevented him from accessing his classroom. He’s also trying to overturn the precedent set from his prior case by arguing the convenience rule is unconstitutional. The case is being briefed at the New York Tax Appeals Tribunal.

"It's a big revenue boost for New York. It's been enshrined in New York law for, what, 35 years, and upheld by the courts, so I don't see New Jersey, the legislation, changing that," Pascall said in an interview.

Stephen Josey, a litigator focused on tax controversies at Kostelanetz LLP, said he doubted "New York will revisit the issue" but said it could have implications further down the line as New York's remote work tax rules face closer scrutiny in the post-pandemic work environment.

"They ruled against Zelinsky a couple of decades ago, and I don't anticipate that their findings are going to change all too much," Josey said. "But certainly, if this winds its way up through the courts, it could potentially make its way to the United States Supreme Court" and give an "opportunity for the states to basically come in and really make their case."

'A Long Shot'

That would still be a "long shot," Pascall said, noting that the Supreme Court has so far "had no interest" in diving into the issue.

The law's biggest impact is that it will help New Jersey replace some of the revenue it loses to New York issuing credits to taxpayers while sending a larger message about the "tax issues that have been brewing between New York and New Jersey," Pascall said. Murphy signed the remote worker tax credit bill the same day he announced New Jersey had filed a lawsuit against New York's congestion pricing plan for drivers entering midtown Manhattan.

"I think it's kind of limited to that as far as real economic impact," she said.

Alysse McLoughlin, a partner in Jones Walker LLP's New York office, said the law provides numerous options to challenge what has long drawn the ire of commuter hotbeds like New Jersey and Connecticut.

"This is a way to say OK, this might be a way we can change this. We'll incentivize people to change their behavior, either to challenge this, or to have employers headquarter people, base people, more in New Jersey," McLoughlin said in an interview. "So I think it's a really creative way to try to get around the issue without actually hurting their residents."

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