

Harmonizing 'Tax Home' Concepts With Evolving Remote Work Arrangements

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Reprinted from *Tax Notes State*, June 7, 2021, p. 1037

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In this article, the authors consider the tax ramifications of the increased demands for remote work and the lack of guidance from the IRS on the evolving telework landscape.

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Over a year ago, the COVID-19 pandemic effectively required that tens of millions of employees work from home instead of at their regular workplaces. In response, many workers relocated their homes, at least temporarily, while others found advantages to working from home — and employers adapted quickly.

The gradual easing of pandemic restrictions promises to create various modified or permanent remote work arrangements. Employers are rethinking their policies, including how to accommodate employee preferences while satisfying their business objectives.

Undoubtedly, it will take time for the dust to settle. In the meantime, a key concern is whether and under what circumstances an employer should require its workers to work at the employer’s physical location (EPL). The many possibilities include:

- requiring physical presence at an EPL on specific days;
- requiring attendance at an EPL for project meetings, team building, and training sessions; and
- granting employees discretion to determine where to be physically located during work hours, except for very limited circumstances.

An important issue that arises is whether an employer should reimburse employees for the associated travel costs to the EPL to ease the transition — or provide incentives for returning to traditional work locations. Below we highlight the historic federal tax rules regarding commuting and travel expenses; identify issues raised as more employers and employees transition to modified work arrangements;¹ and offer recommendations for sensible interim policies in this area.

I. Tax Law Background

A. Daily Travel

Generally, daily transportation expenses incurred by an employee between her primary residence and an EPL are personal expenses not eligible for either a deduction by an employer under section 162(a)(2) or tax-free reimbursement to an employee (unless they are excluded as qualified transportation fringe benefits), subject to exceptions. One exception is for daily transportation expenses incurred between an employee’s residence and a temporary work location outside the metropolitan area where the employee lives. Similarly, if an employee has one or more regular work locations away from her residence, the employer may deduct daily transportation expenses incurred by the employee in going between her residence and a temporary work location in the same trade or business, regardless of the distance (and such reimbursements may be tax free to the employee).²

¹ Similar tax issues raised by an employer’s provision of business equipment or furniture — or a cash allowance to cover their costs — to employees working from home as an excludable working condition fringe benefit under section 132(d) are beyond the scope of this article.

² See Rev. Rul. 99-7, 1999-1 C.B. 361.

Further, and most pertinent to remote workers, if an employee's residence is her principal place of business, within the meaning of section 280A, then the transportation costs between the home office and an EPL may be deductible by the employer and eligible for tax-free reimbursement to the employee.³

For an employee's residence to meet the requirements of section 280A, (1) the employee must have a portion of the dwelling unit that is exclusively used for business on a regular basis, (2) the residence must be the principal place of business for the employee, and (3) the employee must exclusively and regularly use the home office for the convenience of the employer. While all three requirements must be met, the second and third requirements are the ones that most often raise issues under various remote work arrangements.

1. Principal place of business.

In interpreting whether a home office is a principal place of business, the Supreme Court has noted that there is not an "objective formula that yields a clear answer in every case. The inquiry is more subtle, with the ultimate determination of the principal place of business being dependent upon the particular facts of each case."⁴ The Supreme Court primarily looked at two factors: (1) the relative importance of the activities performed at each business location, and (2) the time spent at each location.

The IRS generally has adopted this test in determining whether a residence is a taxpayer's principal place of business.⁵ Under this guidance, the IRS first applies the relative importance test; if that test yields no definitive answer, it looks at the amount of time spent at each place.

2. Convenience of the employer.

Historically, the IRS and the courts have taken a rather narrow view of the "convenience of the employer" test. Specifically, an employee must meet an onerous burden to demonstrate that the exclusive and regular use of her home office is for the convenience of her employer.

The Tax Court has noted that neither the code nor the regulations provide guidance as to when a home office is considered used for the convenience of the employer.⁶ However, that court also noted that when an employee must maintain a home office as a condition of her employment, or when the home office was necessary for the functioning of the employer's business or necessary to allow an employee to perform her duties properly, a home office may meet the requirement that it was used for the convenience of the employer.⁷ Similarly, a nonprecedential Tax Court summary opinion has suggested that if an employer doesn't maintain or provide office space for employee use, an employee's home office may be used for the convenience of the employer.⁸ On the other hand, a home office cannot be used purely as "a matter of personal convenience, comfort, or economy" of an employee. And courts have frequently noted that if an employer provides a suitable office at the EPL that is accessible to the employee, the employee's choice to use her home office rather than the EPL will not satisfy the convenience of the employer requirement.⁹

B. Overnight Travel

If an employee incurs ordinary and necessary travel expenses while away from home in the pursuit of a trade or business, those expenses may be deductible by the employer and eligible for tax-free reimbursement to the employee.¹⁰ The statutory phrase "away from home" has been interpreted by the Supreme Court to require an employee to stop for "sleep or rest," which the IRS has interpreted to mean an overnight stay.¹¹ Travel expenses related to temporary employment away from home are generally deductible under section 162(a)(2), while travel expenses to work assignments that are "permanent or indefinite" typically aren't deductible.¹²

³ See *id.*

⁴ *Commissioner v. Soliman*, 506 U.S. 168, 175 (1993).

⁵ See Rev. Rul. 94-24, 1994-1 C.B. 87; and IRS Publication 587 (2016).

⁶ See *Hamacher v. Commissioner*, 94 T.C. 348, 358 (1990).

⁷ *Id.* at 358-359.

⁸ See *Miller v. Commissioner*, T.C. Summ. Op. 2014-74 (2014).

⁹ See, e.g., *Cadwallader v. Commissioner*, 919 F.2d 1273 (1990).

¹⁰ See section 162(a)(2); and Rev. Rul. 93-86, 1993-2 C.B. 71.

¹¹ See *United States v. Correll*, 389 U.S. 299, 302-303 (1967); and Rev. Rul. 70-150, 1970-1 C.B. 106.

¹² See *Peurifoy v. Commissioner*, 358 U.S. 59 (1958); and Rev. Rul. 93-86.

1. Tax home.

For purposes of determining if she is traveling away from home, an employee's tax home (which typically includes the entire city or general area surrounding the tax home) is generally her regular or principal (if more than one regular) place of business; if the employee has no regular or principal place of business, it is the employee's regular place of abode.¹³ If the employee doesn't fall into either of these categories, the employee is considered to be an itinerant whose "home" is where the employee happens to work.¹⁴ If an employee is employed at more than one location for more than one year, the employee's tax home will typically be considered her principal place of business.¹⁵ For purposes of determining an employee's principal place of business under section 162(a)(2), the IRS considers facts similar to those under section 280A, including the total time ordinarily spent by the taxpayer at each of her business posts, the degree of business activity performed at each post, and whether the financial return at each post is significant.¹⁶ Thus, for example, an employee may be considered to be away from home while at a minor post of duty, making temporary business travel to the minor post deductible and eligible for tax-free reimbursement.

2. Indefinite or permanent work assignment.

Work assignments that last, or are anticipated to last, longer than one year are typically considered indefinite or permanent.¹⁷ Work assignments that are realistically expected to last (and do, in fact, last) for one year or less are considered temporary. There is informal guidance in the context of daily transportation expenses suggesting that work assignments that last longer than one year, but are "infrequent or sporadic," may still be considered temporary.¹⁸ The IRS stated that if an employee spends less than 35 whole or partial days at a particular worksite each calendar year, the travel to the worksite is

infrequent or sporadic and thus won't be deemed indefinite or permanent.¹⁹ However, there is no analogous guidance in the context of overnight transportation expenses.

II. Application to Remote Work

A. Daily Travel

An employee may face challenges demonstrating that (1) her home office is her principal place of business for purposes of section 280A, depending on the facts and circumstances, and (2) she is working from her home office for the convenience of the employer. Thus, it may be difficult to establish that expenses incurred by remote workers to travel to the EPL are eligible for tax-free reimbursements to the employee and are deductible by the employer.

1. Principal place of business.

A remote worker may not be able to establish that her personal residence is her principal place of business, even if she spends most of her time working from home. Although the time spent at each location is an important factor in determining an employee's principal place of business, the nature of the activities the employee is performing is especially important. Thus, any amount of time that an employee spends at the EPL, rather than a home office, may create some risk. However, if there is no fundamental difference between the activities performed by an employee at home and at the EPL, an employee could still reasonably establish her home office as her principal place of business, as long as the time spent at the EPL is minimal.

2. Convenience of the employer.

A remote worker may have a difficult time establishing that the exclusive use of her home office is for the convenience of her employer if she is regularly traveling to the EPL, where dedicated office space is available, or if the employee has discretion in determining when she works from home or works from the EPL.

¹³ See Rev. Rul. 93-86; and Rev. Rul. 56-49, 1956-1 C.B. 152.

¹⁴ *Id.*

¹⁵ See ILM 200020055.

¹⁶ See Rev. Rul. 54-147, 1954-1 C.B. 51; and ILM 200020055.

¹⁷ See Rev. Rul. 93-86.

¹⁸ See, e.g., ILM 200026025.

¹⁹ *Id.*

B. Overnight Travel

If an employee incurs ordinary and necessary travel expenses while away from home overnight in the pursuit of a trade or business, such expenses will typically be deductible by the employer and eligible for tax-free reimbursements to the employee, subject to exceptions that may uniquely apply to remote workers. Specifically, employers may have difficulty deducting travel expenses, and remote workers may have difficulty excluding some overnight travel costs from taxable income.

For example, consider an employer that allows employees to expense a night or two at a hotel near the EPL if the employees travel to the EPL for a meeting or event. The IRS may determine that the EPL is the employee's tax home, and thus travel to it is not away from home or deductible if a remote worker works regularly from both a home office outside the same city or general area as the EPL and from the EPL. Also, even if the employee can establish her tax home as her primary residence, overnight travel within the same city or area may not be deductible or eligible for tax-free reimbursement.

III. Interim Recommendations

Advances in telecommuting technology and the ongoing pandemic have dramatically increased demands for remote work from both employers and employees. But the code and IRS guidance — primarily developed decades ago and in a radically different work environment — haven't kept pace. And the pandemic has greatly accelerated the pace of changes. Thus, travel reimbursement programs under which employees work from home less than 100 percent of the time (even when primarily for the employer's convenience) — and schedules combining required time at the EPL and the employee's residence — don't fit neatly under the existing tax rules.

The IRS should recognize the challenges employers and employees face as they adapt to evolving post-pandemic work patterns, and should not impose costly tax consequences and burdens as the parties develop workable arrangements for the post-pandemic new normal. Formal or informal guidance that extends and expands the concept of "infrequent or sporadic"

to overnight transportation would provide welcome relief to employers and employees. Similarly, a shift away from the stringent enforcement of the convenience of the employer doctrine would help remove tax distortions that create incentives for in-office work in lieu of remote work.

At a minimum, an IRS policy allowing tax-free reimbursement to employees and employer deductions of travel expenses under work arrangements entered in good faith should be permitted at least through the end of 2022. Such a temporary policy — including relief from penalties — would allow employers and workers to fashion workable arrangements — and give policymakers time to evaluate what changes, if any, should be made to the long-standing rules after the transition period. ■