

2021 SALT CPE Series

Virtual Workforce Considerations

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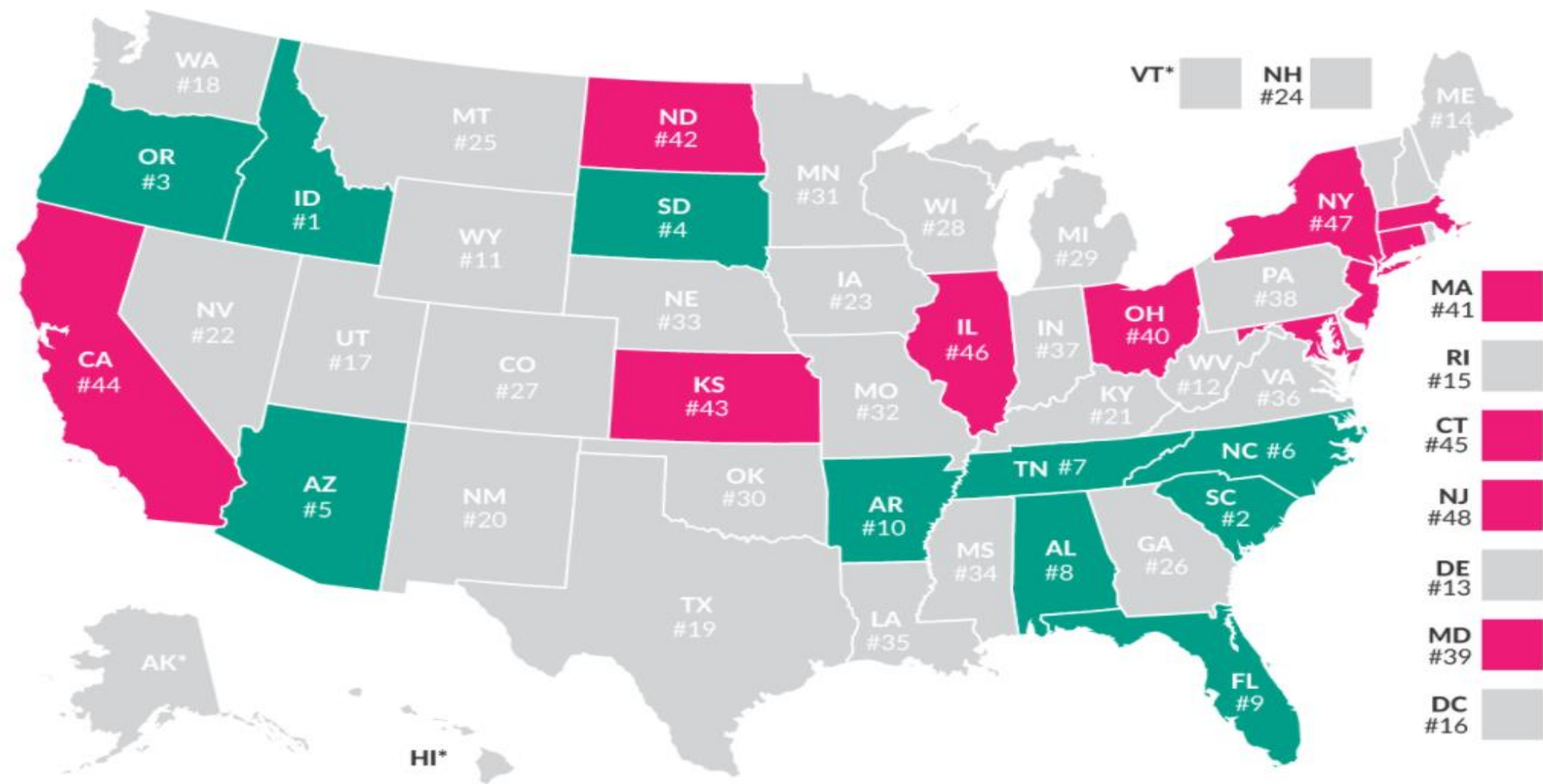
Virtual Workforce

- **Businesses expanding remote workforce arrangements**
 - › Current Employees
 - Residences, Vacation Homes/RVs, Moved
 - › New Employees
 - Never visited office
 - › Virtual internship programs
 - › Virtual board of directors' meetings



Where Did Americans Move in 2020?

State Migration Patterns, from Most Inbound to Most Outbound, 2020



Note: Rankings are determined based on the number of inbound moves as a percentage of total moves in a state. DC is included in state rankings while Vermont is excluded because of its small sample size. Alaska and Hawaii are not included in the study.

Source: United Van Lines, 2020 National Movers Study.

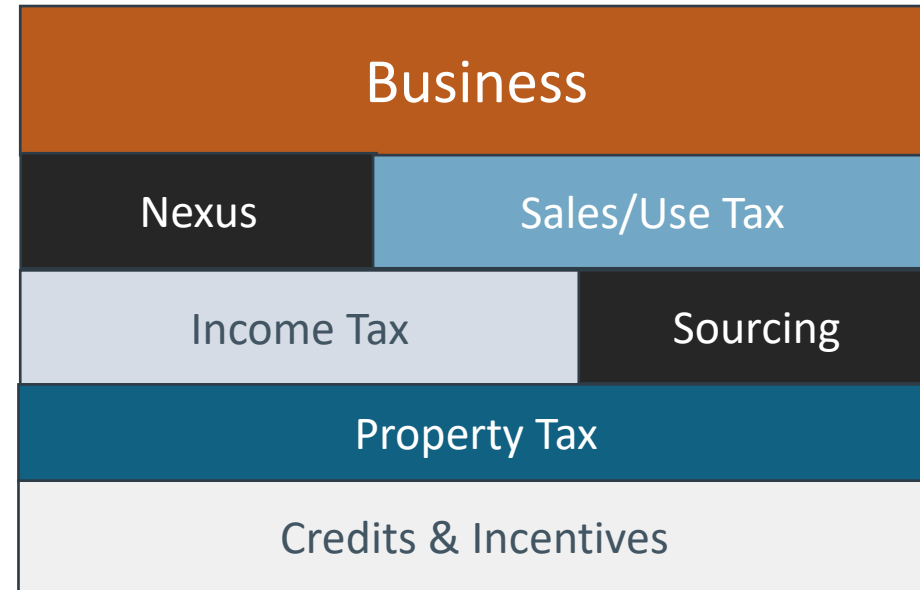
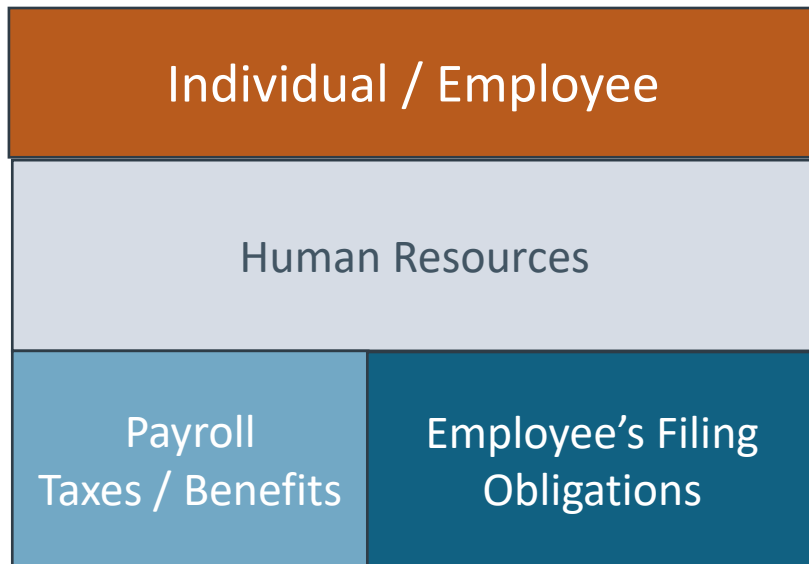
- Top 10 States for Inbound Migration
- Top 10 States for Outbound Migration

Virtual Workforce

AICPA Survey of Employees Working Remotely

- › **47%** were unaware that each state has its own tax laws related to remote working;
- › **71%** unaware that working from a different state than their employer's physical location can affect the amount of state taxes owed;
- › **54%** unaware that the number of days worked out of the state where their physical workplace is located may also affect the amount of state taxes owed.

Virtual Workforce



Virtual Workforce – Withholding tax prior to/post COVID-19

■ Location of Employee

- › State withholding based on location where employee performs services on the company's behalf.

■ Location of Employer

- › “Convenience of the Employer” Rule

- Withhold at place where employee required to work.
- When an employee chooses to work at another location (e.g., teleworker) may result in withholding in multiple jurisdictions.

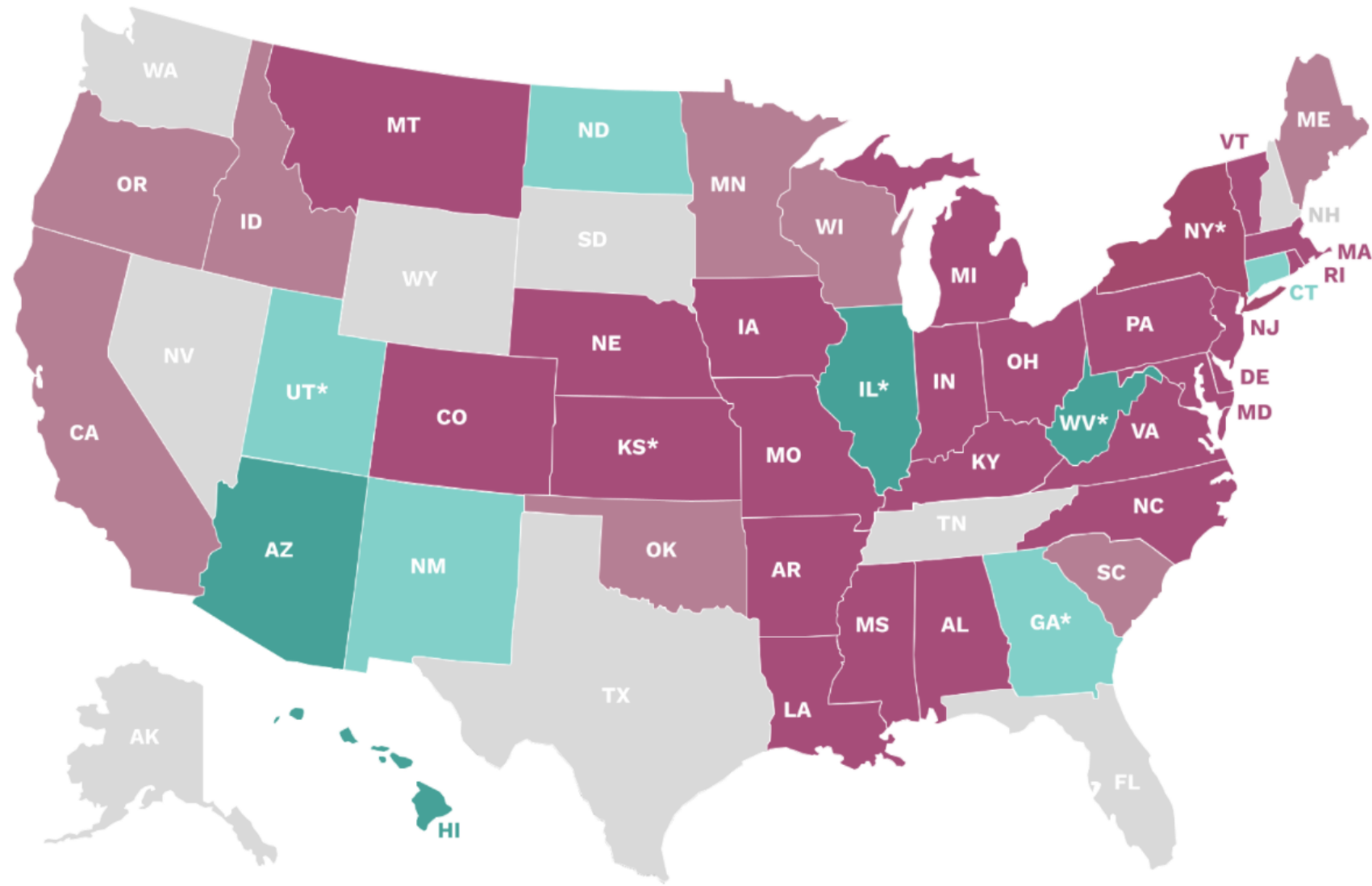
Arkansas, Connecticut,
Delaware, Nebraska,
New York & Pennsylvania*

■ **Common Exceptions**

- › De Minimis – When employee \$ wages or # days below defined threshold
- › Reciprocity – Withhold at employee's state of residency when interstate agreement exists

Which states are the most friendly to mobile workers and their employers?

- **Very Friendly.** State allows employees to work within the state for 30 or more days before employer is subject to withholding (AZ, HI, IL, WV).
- **Moderately Friendly.** State allows employees to work in the state between 15 and 29 days before employer subject to withholding (CT, GA*, NM, ND), or has other accommodating provisions (UT*).
- **Unfriendly.** State only allows employees to work in the state between 2 and 14 days before employer is subject to withholding (ME), or has a wage-based threshold (CA, ID, MN, OK, OR, WI).
- **Very Unfriendly.** State requires employer withholding on first day an employee works within the state (24 states), or requires an individual to file on first day even if employer isn't required to withhold on first day (NY).
- **Not applicable.** No state income tax.



Notes: Data as of May 2021. In **Georgia**, employer must withhold if the employee is in the state for more than 23 days in a calendar year, or if \$5,000 or more or 5% or more of total income is attributable to Georgia. In **Illinois**, the 30-day threshold applies for tax years beginning after December 31, 2020 (this is the result of legislation enacted in 2019). **West Virginia** lawmakers enacted HB 2026 in 2021, imposing a 30-day threshold. This takes effect on June 28, 2021. In **Utah**, employer must withhold if the employer (not the employee) does business in the state for more than 60 days in a calendar year.

<https://www.mobileworkforcecoalition.org>

Virtual Workforce during COVID-19

- “Business as usual”

- › Many states have issued guidance that employers should continue to withhold based upon the employee’s regular work location. (CO, ID, IL, NE, NY, OH, UT, VA)

Resident State	Regular Work State	Withholding State
Pennsylvania	Ohio	PA – State Reciprocity OH City – No Reciprocity
Vermont	New York	Both NY & VT – but VT offers credit for <u>income earned</u> in another state
Vermont	New York, but Vermont <u>during COVID</u>	Both NY & VT – but Vermont may <u>NOT</u> offer credit
New Jersey	New York, but New Jersey <u>during COVID</u>	Both , but NJ issued guidance will provide residents a credit during COVID

COVID-19 Government Responses

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Virtual Workforce – COVID-19 Federal Responses

- **Mobile Workforce State Income Tax Simplification Act of 2021**

- › Under the proposed bill (*S. 1274*) during 2020 and 2021 compensation earned by employees performing duties in more than one state is only subject to income tax in the employee's resident state and the state where employee physically performed employment duties for more than 30 days (or 90 days due to pandemic).

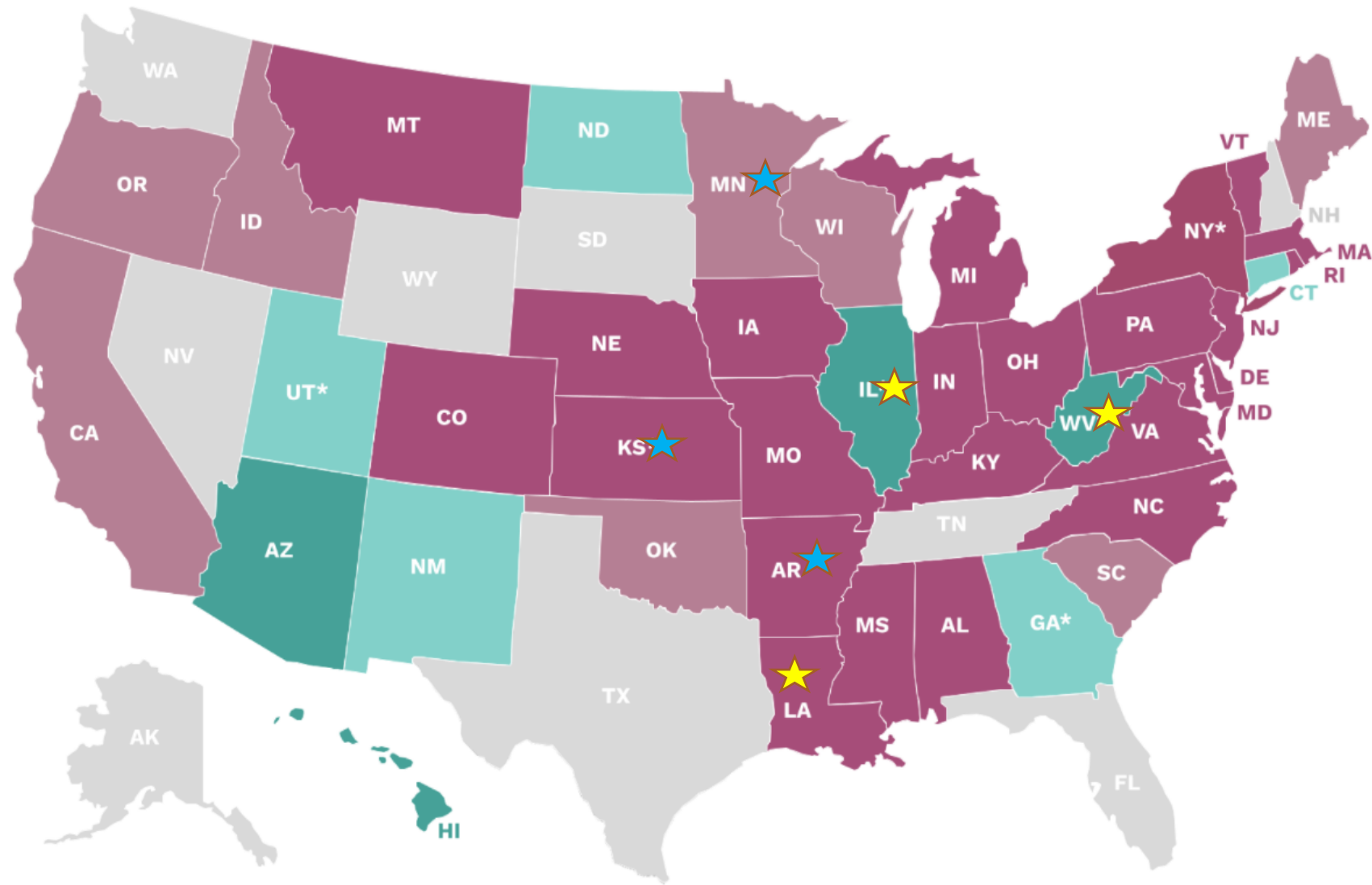
- **Multi-State Worker Tax Fairness Act**

- › Under the proposed bill (*S. 1887*) would establish a permanent rule that nonresident income tax applies only based on physical presence.

- › ***Obstacles: More Urgent Priorities & New York Senator Schumer***

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★ LA passed 25-day rule effective 2022

★ AR, KS, MN proposed increased thresholds, but did not pass.

Virtual Workforce – COVID-19 State Responses **Sunset Extension**

- **Ohio Municipal Income Tax HB 110 provisions – ZHF discussion**
 - › Background on 20-day safe harbor rule and application , pre-COVID
 - › “Status” exemption city by city, for not being required to withhold for occasionally entered city (elective, not mandatory) and not being taxed there (unless refund claim from PPW city).
 - › But R.C. 718.03 always says withhold “where earned,” and 20-day rule is a shield for taxpayer, not a sword for the City.
 - › COVID-19 legislation – G.A. uses “deemed to be a day” language.
 - › Only relevance of “day” is for 20-Day status elective safe harbor, but it caused confusion as to intent and operation.

Virtual Workforce – COVID-19 State Responses **Sunset Extension**

- **Ohio Municipal Income Tax HB 110 provisions – ZHF discussion**
 - › **Municipal Employer Withholding Provisions Extended – with the “day” issue**
 - Temporary extension of COVID-19 provisions thru December 31, 2021.
 - Allows, but does not require, employers to continue w/h at PPW (using 20-day safe harbor)
 - However, municipalities revert to 20-day safe harbor rule effective January 1, 2022.
 - “Gap period” – no tax, penalty or interest if sitused or withheld to PPW.
 - › **Employee Refund Claims**
 - Clarifies Sec. 29 (by amending it and making a new version of it- some for 2021 only). Compromise.
 - Permits employees to file 2021 refund claims with PPW cities for days employee did not work there.
 - HB 110 does not address 2020 employee refund claims. Compromise.
 - Cities may only request (1) # of Days at the PPW location, (2) no refund given by employer.

Virtual Workforce – COVID-19 State Responses

- **Ohio Municipal Income Tax - HB 110 provisions – ZHF Discussion**

- › **Business Net Profit Tax Provisions**

- Provides business net profit protection through 2021 when w/h at PPW.
- Payroll factor – earned at WFH might be nowhere payroll for numerator and denominator.
- R.C. 718.02, R.C. 718.011, Section 29; only include payroll at certain locations under .02.
- Nexus issues.

- › **Ohio Jobs Creation Tax Credit (JCTC) Provisions**

- Permits businesses that receive the JCTC to include payroll for their work-from-home employees in the credit computation. (ORC Sec. 122.17). State only, not city.

Virtual Workforce – COVID-19 Taxpayer Responses

■ ***Challenges to Temporary Ohio HB 197 Municipal Provisions – ZHF Discussion***

- › Complaints have been filed against Columbus, Cincinnati, Cleveland and Toledo challenging refund denials due to HB 197 temporary withholding provisions.
 - **Columbus Cases**
 - *Buckeye Institute v. City of Columbus* – Franklin County dismissed suit
 - 2nd Columbus case settled – Very specific fact pattern, much different than most WFH.
 - *Dr. Manal Morsy v. City of Cleveland*
 - PA resident not permitted to work in Cleveland office filed suit against City of Cleveland claiming City may not tax wages earned working outside the City.
 - *Tammy Aul Jones v. City of Massillon on March 29, 2021 (not a Covid tax year at issue)*
 - Decision clarified tax due from a non-resident employee must be measured “for work done, services performed, or rendered, or activities conducted” within the City.

Virtual Workforce – COVID-19 Taxpayer Responses

- Challenges to Temporary Ohio HB 197 Municipal Provisions – ZHF Discussion
 - › What did the GA mean by “deemed to be a day”?
 - › Are the best arguments being raised in complaints by litigants about HB 197?
 - › Exhaust administrative remedies?
 - › Aul Jones logic from the Ohio Board of Tax Appeals
 - Postal worker, with consistent route – facts stipulated to.
 - 40/60 split each day.
 - BTA cites “extraterritorial taxation” cases
 - Not a 20-Day Safe Harbor issue because not a “status” exemption sought. Paying tax on part of each day.

Virtual Workforce – COVID-19 State Response

■ *Massachusetts*

TIR 20-15 made the temporary rules effective until 90 days after the state of emergency is lifted. (Expires September 13, 2021)

- › All compensation received for services performed by a non-resident who, immediately prior to the Massachusetts COVID-19 state of emergency was an employee engaged in performing such services in Massachusetts, and who began performing services from a location outside Massachusetts due to a Pandemic-Related Circumstance, will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62 and personal income tax withholding.
- › Also provides sales tax, income and excise tax nexus protections when employee only in state temporarily due to COVID-19.
 - **MA TIR 20-10:** <https://www.mass.gov/technical-information-release/tir-20-10-revised-guidance-on-the-massachusetts-tax-implications-of>
 - **MA TIR 20-15:** <https://www.mass.gov/technical-information-release/tir-20-15-revised-guidance-on-the-massachusetts-tax-implications-of>

Virtual Workforce – COVID-19 State Response

■ *New Hampshire v. Massachusetts*

- › New Hampshire filed motion in the US Supreme Court alleging violations of the Due Process and Commerce Clauses over Massachusetts taxing nonresidents who worked in Massachusetts pre-pandemic but temporarily working remotely from their homes in New Hampshire.
 - *US Attorney General claimed only the impacted individuals have the right to file suit and further the matter not worthy of Court's time.*
 - *Massachusetts issued guidance modifying withholding provisions & sunseting*
 - *US Supreme Court denies NH's motion.*

Virtual Workforce during COVID-19

- Some states issued varying guidance (*below is sample, additional states may have also provided guidance*)

Jurisdiction	Temporary COVID Guidance	Sunset Date
Georgia South Carolina	Waived withholding on remote workers	Georgia (July 1, 2021) South Carolina (September 30, 2021)
Massachusetts Ohio Cities Kansas Nebraska	Temporary Convenience of the Employer Withholding Rule (<i>some jurisdictions mandatory and others made optional</i>)	Massachusetts Mandatory (September 13, 2021) Ohio Cities Mandatory (July 18, 2021) Optional (July 1, 2021 – December 31, 2021) Kansas Optional (2020 Only) Nebraska Optional (July 30, 2021)
Connecticut Philadelphia/Pennsylvania	Business income and sales tax nexus waivers during COVID	Connecticut (2020 Only) Philadelphia/Pennsylvania (June 30, 2021)

Virtual Workforce during COVID-19

Incentives for Remote Workers to Change Residency

■ Louisiana (SB 31)

- › Offers up to 500 “digital nomads,” a 50% income tax exemption for gross income received from remote work, provided the income is at or below \$150,000 per year. The exemption may apply for up to two years during tax years 2022 through 2025.



Illustration: Annelise Capossela/Axios

Employers Evaluating Return to Work Plans

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Virtual Workforce

■ Common Employer Questions

- › Do we plan to return to office or continue remotely?
 - Answer often varies based on employee's role/responsibilities
- › **Can my payroll team and software provider support the new plan?**
 - **How do I track employee location(s)?**
- › When is a change temporary v. permanent?
- › **What are new filing requirements and the tax impact?**
 - **Not just payroll taxes, may also create income, sales taxes, etc. filing requirements**
 - **Don't overlook local taxes**
- › How do we require employees to notify the employer when working extended periods outside resident state or change their residency?

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- **Additional State & Local Tax Considerations**

- › **State Unemployment Tax**

- SUTA only paid to one state
- 4 tests in below order to determine SUTA state
 - 1) Localization of service
 - 2) Base of operations
 - 3) Direction and control
 - 4) Residence
- Unemployment Claims by employees can create concern

- › **Workers Compensation Coverage**

- Most states allow purchasing from private insurers
- Exceptions: Ohio, North Dakota, Washington, Wyoming (monopolistic) and Texas (not required)

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■ Additional State & Local Tax Considerations

› Income Tax

- Nexus – New filing requirements or PL 86-272 impact
- Apportionment – Sourcing of property, payroll, receipts

› Sales/Use Tax

- Nexus – *Wayfair* considerations and people generally nexus-creating unless a COVID-19 waiver
- Sourcing of services
- Software, services and equipment may be “used” in new jurisdictions

› Property tax

- New personal property tax registrations and filings may be required
- Elimination or reduction of real and/or personal property tax from eliminating office footprint

› Credits and incentives previously negotiated

Virtual Workforce during COVID-19

- **Other Considerations**

- › **HR Policies** *(may require seeking legal advice)*

- Hiring

- State rules vary around employment agreements and compensation requirements
 - Communication with Tax & Payroll Departments
 - International requests

- Administrative

- Vaccination Policies
 - Employee Handbook Policies
 - State rules vary around pay frequency, paystub requirements, minimum wage, benefits

- › **IT Security**

Questions:



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Be sure to join us August 10th at 12:00 p.m. EDT for **SALT: A Legislative Update**. More information at www.cohencpa.com.