

THE GENETELLI CONSULTING GROUP
State and Local Tax Services
431 FIFTH AVENUE
NEW YORK, NY 10016

(212) 684-4111
FACSIMILE: (212) 213-1020
EMAIL: rgetelli@genetelli.com

Subject: NYS Revises Position on Convenience of the Employer Test
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To: Our Clients and Friends

Attached for your information is New York State Technical Services Bureau Memorandum 06(5)I, dated May 15, 2006. TSB-M-06(5)I contains revisions to New York State's position regarding the application of the convenience of the employer test. By way of background, the convenience of the employer test is used in determining the allocation of wages for nonresidents or part-year residents working for a New York based employer. Per the test, work done outside New York by a nonresident is treated as work done within New York unless the employer's necessity requires the work to be done outside New York.

For tax years beginning on or after January 1, 2006, a normal work day spent at the home office of a nonresident working for a New York based employer will be treated as a day worked outside New York if the nonresident's home office is a bona fide office of the employer. A day spent at the home office by such nonresident that is not a normal work day will be considered a nonworking day.

A normal work day is defined as any day the nonresident performed the usual duties of the job. Responding to occasional phone calls or emails, reading professional journals, or being available if needed is not considered performing the usual duties of the job.

In determining whether the nonresident's home office is a bona fide office of the employer, TSB-M-06(5)I provides one primary factor, six secondary factors, and ten other factors for consideration. For the nonresident's home office to qualify as a bona fide employer office, the office must meet either the primary factor, or at least four of the secondary factors and three of the other factors.

If you have any questions regarding the within, or any other state and local tax matters, please do not hesitate to contact me.

Richard W. Genetelli
The Genetelli Consulting Group
State and Local Tax Consultants
431 Fifth Avenue, 3rd Floor
New York, NY 10016
Tel: (212) 684-4111
Fax: (212) 213-1020
<http://www.genetelli.com>