Ohio Remote-Work Tax Bills Would Unduly Burden Employers

Related Attorneys

David A. Froling

Jeffrey Allen Miller

Related Services

State and Local Taxation

Taxation

AUTHORED ARTICLE | 9.8.2020

Tax Law360

Dave Froling and Jeffrey Miller, attorneys in the Vorys Columbus office and members of the state and local tax group, authored an article for *Tax Law360* titled "Ohio Remote-Work Tax Bills Would Unduly Burden Employers." The full text of the article is included below with permission from *Law360*.

Ohio Remote-Work Tax Bills Would Unduly Burden Employers

Last March, shortly after Gov. Mike DeWine ordered all nonessential employees to work from home, the Ohio General Assembly wisely enacted H.B. 197 in order to prevent an administrative nightmare for employers.

Ohio is a unique state in that it has over 600 cities that impose a local income tax and a corresponding employer withholding tax. Each city is free to set its income tax rate. Any employer that has employees working in a city must withhold the city's income tax from the employee's wages, with certain exceptions that are not applicable here.

H.B. 197

Absent H.B. 197, the order may have required employers to withhold and remit withholding tax to each employee's city of residence. Section 29 of H.B. 197, however, assigned the employee's wages to the city of the employee's principal place of work instead of the employee's city of residence, thus negating the need for the employer to withhold and remit withholding tax to each employee's city of residence.

Not long after the General Assembly enacted H.B. 197 various cities and employees began to view H.B. 197 in a different light. Cities where employees resided wanted the tax revenue associated with the employee's wages. Employees living in a city that had a lower income tax rate than the city of the employee's principal place of work wanted a refund of the withholding tax that their employer remitted to the employee's principal place of work.

Some employees did not want to wait for tax filing time to get their refund from their principal place of work city. Not surprisingly, litigation has ensued.[1]

S.B. 352 and H.B. 754

On Aug. 11, Ohio state Sen. Kristina Roegner introduced S.B. 352 to repeal Section 29.

The bill, in its present form, does not offer any remedy to employers. It will adversely impact private and public employers equally, and for-profit and not-for-profit employers equally. And it will adversely impact large, medium and small employers as the additional administrative burden is one of scale. On Aug. 31, Rep. Kris Jordan introduced H.B. 754 as a companion bill to S.B. 352.

On Sept. 1, S.B. 352 was assigned to the Senate's Local Government, Public Safety and Veterans Affairs Committee. The House has yet to assign H.B. 754 to a committee.

Repealing Section 29, without taking into account the administrative burden that it creates for all employers, is not a viable solution. S.B. 352 and H.B. 754, as written, do not effectively consider the collective interests of employers, employees and Ohio municipalities. These bills just shift the burden entirely to employers. These bills undo precisely what H.B. 197 solved.

Addressing Tax Compliance Issues Caused by COVID-19

That said, it is a challenging, if not perhaps an insurmountable, task to craft legislation that addresses the tax compliance issues that COVID-19 presents without imposing unduly burdensome administrative requirements on employers, employees or cities. Undoubtedly, one or more of these parties will have increased administrative requirements going forward.

Adding to the complexity of finding a practical resolution is that the General Assembly must understand its constitutional authority relative to the cities' home rule powers as conferred by the Ohio Constitution.

On one hand, the Ohio Constitution confers upon home rule cities all powers of local self-government, which includes the power to levy taxes.[2] On the other hand, the Ohio Constitution confers upon the Ohio General Assembly the power to limit home rule municipalities' power to levy taxes.[3]

The Ohio Constitution also allows cities to adopt ordinances related to police powers provided such ordinances are not in conflict with general laws.[4] The General Assembly's powers of limitation however do not confer upon the General Assembly the ability to expand a city's taxing power beyond what the Ohio Constitution confers.[5]

Further adding to the complexity is that the General Assembly must understand the difference between what an employer withholding tax represents as compared to an income tax imposed on employees.

> *A tax constitutes a taking of property. Imposition of the tax by the city on its residents is a taking from them. Imposition of a duty on the taxpayer's employer to act as a collection agent for the city does not constitute a taking from the employer. It is a regulation enacted pursuant to the city's police power ... The police power includes the power to enact laws designed to promote the health,*

> *morals, peace and welfare of the community ... An entity is subject to a legitimate exercise of a municipality's police power when it does business within that municipality ... A requirement that a business withhold tax payments from the wages of its employees who owe the tax is a reasonable exercise of the police power.[6]*

In *City of Springfield v. All American Food Specialists Inc.*, a state court of appeals held the city of Springfield could not require a business doing business in Springfield to withhold Springfield income taxes from the wages of employees who were residents of Springfield but were working for the business at locations outside Springfield. The court held the reach of the city's police power stops at its territorial boundaries.[7]

The governor's order was an exercise of the governor's police power. H.B. 197 was an act of limitation by the General Assembly to limit the employee's city of residence from requiring the employer to withhold city of residence income tax.

In effect, H.B. 197 said employers are not doing business in a city if the employers' only connection to the city is an employee who is temporarily working from home because of the governor's order. H.B. 197 did not speak to whether the employee's wages are subject to tax in the employee's principal place of work or the employee's city of residence.

Of course, Springfield suggests H.B. 197 may be unlawful because the ruling indicates employers should not withhold income taxes for the principal place of work when the employee is not physically working there.

To be sure, the Ohio Supreme Court's decisions in *Hillenmeyer v. Cleveland Board of Review*[8] and *Saturday v. Cleveland Board of Review*[9] strongly suggest that the nonresident does not have to pay income tax to the principal place of work city when the employee is not physically present working in the principal place of work city.

Possible Solutions

Seemingly there are three possible solutions that will get strong consideration going forward.

1. Do not enact S.B. 352 and H.B. 754.

Do not amend H.B. 197. In the short run this is a possible solution, notwithstanding Springfield. That said, there are three issues that need to be considered.

First, H.B. 197 has a shelf life — 30 days after the conclusion of the governor's order. Presently, it is hard to say when the governor will rescind his order. Second, this solution does not address the employee's desire to not be overwithheld each pay period. Third, this solution does not account for the fact that after the governor rescinds his order, there will be some employees who continue to work from home full-time or several days a week.

In this regard, the question as to whether an employer is doing business in a city just because the employer has an employee working from home in that city is not free of doubt. This analysis is very much a facts-and-circumstances test.

2. Allow employers to remit all local withholding to the Ohio Department of Taxation and require the department to remit the funds to each city.

This occurs now as to the school district income tax. Ohio law also allows businesses to elect to file all local net profits tax returns with the department. That said, various Ohio cities have challenged the lawfulness of the department administering the city net profits tax in City of Athens v. Testa.[10]

Oral argument was held on May 13 and we anticipate the court will issue its decision by Dec. 31. The merits of this solution likely hinge on the court's decision.

3. Repeal H.B. 197, but require employees to make estimated income tax payments to their city of residence in lieu of requiring employers to withhold city of residence income tax.

This option harmonizes the law, but undoubtedly causes compliance concerns for cities. This option also likely causes cash flow concerns for cities since individuals make estimated income tax payments quarterly while employers remit withholding taxes monthly. Further, many employees may not want to have this obligation, especially if the employee works from home part-time.

Other Considerations

If S.B. 353 and H.B. 754 are not modified, their effective dates also need to be considered. Many employers, and particularly large employers, will need significant lead time to work with their software providers and payroll service providers to recode each employee to effectively withhold to the employee's city of residence if the employee will work full-time from home, or part-time from home and part-time from their principal place of work.

Similarly not to be overlooked is that S.B. 352 and H.B. 754 create net profits tax issues for employers. These two bills, as written, create the question as to whether the employer must file a net profits tax return with each city because the employer now has a payroll factor in the city where the employee lives.

Further, the employer may have a sales factor, as well, depending on the nature of the work the employee is performing from home. An employer's audit concerns are obvious and not to be taken lightly.

As set forth above, these issues could be resolved by the General Assembly enacting legislation that declares an employer is not doing business in an employee's city of residence for net profits tax purposes if the employer's only connection to that city is an employee residing and working there.

In our view, significant time and consideration should be given to S.B. 352 and H.B. 754. These bills, in their present form, do not adequately address the current and future local tax issues associated with COVID-19.

--

[1] See, T*he Buckeye Institute, Et Al. v. City of Columbus*, Case No. 20CV-4301, pending, Franklin County Ct. of Comm. Pleas.

[2] See, Ohio Const. Art. 18, Section 7.

[3] See, Ohio Const. Art. 18, Section 13.

[4] See, Ohio Const. Art. 18, Section 3.

[5] See, *Gesler v. City of Worthington*, 138 Ohio St.3d 76 at ¶22 (2013) ("...[t]he General Assembly cannot command Worthington to impose a tax on Schedule C income when Worthington has chosen not to tax that income, because such a requirement is not an act of limitation.").

[6] *City of Springfield v. All American Food Specialists, Inc.*, 85 Ohio App.3d 464, 466-467, 2nd Appel. Distr. Ohio Ct. of App. (Mar. 26, 1993). See also, Baral v. United States, 528 U.S. 431, 436-43 (2000) ("Withholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax.").

[7] See, Springfield at pg. 469.

[8] *Hillenmeyer v. Cleveland Board of Review*, 144 Ohio St.3d 165 (2015).

[9] *Saturday v. Cleveland Board of Review*, 142 Ohio St.3d 528 (2015).

[10] See, *City of Athens v. Testa*, Ohio Case No. 2019-0696.