



August 25, 2022

The Honorable Lily Batchelder
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Re: Request for Guidance in Key Areas Related to Employees Working Remotely

The American Institute of CPAs (AICPA) appreciates the efforts of the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) to address the need for guidance related to the COVID-19 pandemic. As a result of the pandemic, much of the workforce pivoted from working in an employer-provided work location (e.g., an office), to working remotely (e.g., from home). Many employees favor working from home particularly as it relates to commuting. In addition, many employers have experienced an increase in employee productivity, while many costs related to maintaining an office have been eliminated. As a result, many employers are considering permanent work arrangements involving significant increases in remote work by employees. There is no set arrangement to which employers are migrating, but rather the business needs and employer cultures are resulting in varied arrangements. For example, some employers intend to maintain offices and require employees to work from the office a limited number of days. Other employers are converting to hoteling arrangements and are only requiring a very limited number of days in the office, if any. Under many of these arrangements, both the employer and the employee view the employee’s residence as the main location at which the employee performs work.

Employers are reviving and reassessing fringe benefit programs to accommodate the new work environment. Consequently, employers are fielding questions from remote workers concerning, for example, the reimbursement of expenses for travel to an employer-provided work location when those travel days are limited, and the travel distance may have expanded. Many employees do not view themselves as commuting under the circumstances and are seeking reimbursement. In analyzing these new scenarios, and in particular, the tax home of employees, the current revenue rulings and interpretations of case law are outdated, do not reflect the current work environment, and are unclear in many instances. The lack of updated guidance has left employers and employees in the untenable position of making decisions regarding employer workplace policies while the rules regarding amounts reported as payments, to or for the benefit of employees, remain uncertain.

Notwithstanding the lack of guidance, employers are formulating workplace policies including fringe benefit policies, and taking positions both as to income inclusion and reporting and as to deductions. To provide all taxpayers applicable rules to be consistently applied, the AICPA is requesting updated guidance and offering recommendations regarding the taxation of payments

The Honorable Lily Batchelder
The Honorable Charles P. Rettig
August 25, 2022
Page 2 of 3

related to today's work arrangements. In addition, given that many employers have established policies and positions based on reasonable interpretations of existing guidance, the AICPA requests that the formulation of guidance also take into account any necessary transition relief to facilitate compliance.

Specifically, our comments and recommendations focus on the following areas:

- I. Current Tax Guidance
 1. Gross Income / Exclusions from Gross Income
 2. Away from Home
 3. Tax Home
 4. Pursuit of a Trade or Business
 5. Principal Place of Business – Daily Transportation Expenses

- II. Recommendations Related to Today's Work Arrangements
 1. Principal Place of Business
 2. Work Arrangements: Employer-Location Based, Remote, and Hybrid
 - a. Definitions of Employer Location-Based, Remote and Hybrid Work Arrangements to Define Employee's Tax Home
 - b. Facts and Circumstances Test for use in the Classification of a Remote Employee and Defining a Hybrid Employee's Tax Home
 - c. Safe Harbor for Use in Defining a Remote Worker
 - d. Employee-Employer Arrangement
 3. Pursuit of a Trade or Business
 4. Non-Travel Expenses Incurred While Working Remotely
 5. Examples

* * * * *

The AICPA is the world's largest member association representing the accounting profession, with more than 421,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please feel free to contact Tom Pevarnik, Chair, AICPA Employee Benefits Taxation Technical Resource Panel, at (202) 879-5314, or tpevarnik@deloitte.com; Kristin Esposito, AICPA Director – Tax Policy & Advocacy, at (202) 434-9241, or kristin.esposito@aicpa-cima.com; or me, at (601) 326-7119, or JanLewis@HaddoxReid.com.

The Honorable Lily Batchelder
The Honorable Charles P. Rettig
August 25, 2022
Page 3 of 3

Sincerely,



Jan Lewis, CPA
Chair, AICPA Tax Executive Committee

cc: Mr. William Paul, Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical),
Internal Revenue Service
Mr. Thomas West, Tax Legislative Counsel, Department of the Treasury
Ms. Carol Weiser, Acting Benefits Tax Counsel, Department of the Treasury
Ms. Helen Morrison, Deputy, Benefits Tax Counsel, Department of the Treasury
Mr. Andrew Holubeck, Attorney-Advisor, Office of Tax Policy, Treasury
Ms. Rachel Levy, Associate Chief Counsel, EEE, Internal Revenue Service

AMERICAN INSTITUTE OF CPAs

Request for Guidance in Key Areas Related to Employees Working Remotely

August 25, 2022

I. CURRENT TAX GUIDANCE

1. Gross Income / Exclusions from Gross Income

Gross income is defined as “all income from whatever source derived, including, but not limited to, compensation for services, including fees, commissions, fringe benefits and similar items.”¹ However, certain items are excluded from an employee’s gross income such as working condition fringes² and *de minimis* fringes. A working condition fringe is any property or service provided to an employee to the extent that, if the employee paid for the property or service, such payment would be allowable as a deduction under Internal Revenue Code (IRC) section 162³ or section 167.⁴ A *de minimis* fringe is any property or service, the value of which (after taking into account the frequency with which similar fringes are provided by the employer to its employees) is so small as to make accounting for it unreasonable and administratively impractical.⁵

For purposes of working condition and *de minimis* fringe exclusions, the term “employee” is defined as:

- Any individual who is currently employed by the employer;
- Any partner who performs services for the partnership;
- Any director of the employer; and
- Any independent contractor who performs services for the employer.⁶

Employers may provide their employees with reimbursements or allowances for expenses incurred by an employee in pursuit of the employer’s business under the accountable plan rules set forth in Treas. Reg. § 1.62-2. If such reimbursements are provided under an accountable plan, they are excluded from the employee’s income.⁷ To meet the accountable plan rules, the arrangement must meet the business connection rules, the substantiation rules, and the return of excess rules.⁸ The business connection rules require that the arrangement provide for the reimbursement or allowance

¹ Section 61(a).

² Section 132(a)(3).

³ Unless otherwise indicated, hereinafter, all section references are to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.

⁴ Reg. § 1.132-5(a)(1).

⁵ Section 132(e)(1).

⁶ Reg. § 1.132-1(b)(2).

⁷ Reg. § 1.62-2(c)(4).

⁸ Reg. § 1.62-2(c)(2)(i).

(including mileage allowances) of business expenses that are deductible by the employee under part VI (section 161 and the following) subchapter B, chapter 1 of the IRC, if they were paid directly by the employee and not reimbursed.⁹

Per section 162(a) “there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including... traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business;...”¹⁰ However, no deduction is allowed “for any expense incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer for travel in connection with travel between the employee’s residence and place of employment, except for ensuring the safety of the employee.”¹¹

To determine whether travel expenses are excluded from the gross income of an employee by meeting the working condition fringe or accountable plan requirements, the taxpayer’s tax home must be identified to determine whether the taxpayer is “away from home,” and “in the pursuit of a trade or business.”

2. Away from Home

For purposes of determining the deductibility of travel expenses under section 162(a)(2), the IRS has defined “away from home” in Rev. Rul. 73-529, Rev. Rul. 75-432, and Rev. Rul. 75-170 as follows:

- Duration long enough “as to require stop for substantial sleep or rest;”¹²
- Trip must last “substantially longer than an ordinary day’s work;”¹³
- Trip “need not be for an entire 24-hour day or throughout the hours from dusk until dawn, but it must be of such duration or nature that the taxpayer cannot reasonably be expected to complete the round trip without being released from duty, or otherwise stopping the performance of their regular duties for sufficient time to obtain substantial sleep or rest.”¹⁴

3. Tax Home

For purposes of section 162(a)(2), the IRS defined a taxpayer’s “home” as located at “(1) the taxpayer’s regular or principal (if more than one regular) place of business, or (2) if the taxpayer

⁹ Reg. § 1.62-2(d)(1).

¹⁰ Section 162(a)(2).

¹¹ Section 274(l)(1).

¹² Rev. Rul. 73-529.

¹³ Rev. Rul. 75-432.

¹⁴ Rev. Rul. 75-170.

has no regular or principal place of business, then at the taxpayer's regular place of abode in a real and substantial sense.”¹⁵

The IRS has stated that a taxpayer's tax home is not limited to a particular building or property but includes the metropolitan area or other general locality in which the taxpayer conducts a trade or business.¹⁶ However, an individual may deduct expenses of traveling between different business locations during the same business day.¹⁷

In the case of a taxpayer who has regular work at two or more work locations, the taxpayer must determine which location constitutes the principal place of business.¹⁸

The IRS has addressed the factors used to determine an individual's principal place of business when a person has more than one place of business, as follows:

- Total time ordinarily spent by the employee at each business post;
- Degree of business activity at each post; and
- Whether the financial return with respect to the business post is significant or insignificant.¹⁹

No one factor is determinative, but the third factor receives “great weight” where all services are performed as an employee.²⁰ For nonemployees, the first factor is considered the most significant.²¹

4. Pursuit of a Trade or Business

An individual that is away from home, must be away from home in the “pursuit of a trade or business” for an expense to be considered a deductible travel expense. The cases of *Commissioner v. Flowers*, 1946; *Wilbert v. Commissioner*, 2009; and *Tucker v. Commissioner*, 1976, are relevant case law when making the determination of whether an employee is in the “pursuit of a trade or business” when considering if a travel expense is deductible.

In *Commissioner v. Flowers*,²² the taxpayer, a lawyer employed by a railroad, lived in a city 250 miles from his business office in Mobile, Alabama. The taxpayer attempted to deduct expenses incurred for travel, meals and lodging when business required him to be in Mobile. The Supreme Court upheld the disallowance of these deductions and stated: “Three conditions must thus be

¹⁵ Rev. Rul. 93-86 (also supported by Rev. Rul. 75-432 and Rev. Rul. 83-82).

¹⁶ Rev. Rul. 56-49.

¹⁷ Rev. Rul. 55-109.

¹⁸ Rev. Rul. 75-432.

¹⁹ Rev. Rul. 54-147.

²⁰ *Id.*

²¹ Rev. Rul. 63-82.

²² *Commissioner v. Flowers*, 326 U.S. 465 (1946).

satisfied before a traveling expense deduction may be made under” [the predecessor of section 162(a)(2)]:

- The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling;
- The expense must be incurred while away from home; and
- The expense must be incurred in the pursuit of business.

The court made its decision to disallow the deduction for travel expenses, based on the criteria that the expense must be incurred in the pursuit of business, specifically, his employer’s business. The court concluded that the employer “gained nothing” from the taxpayer’s decision to reside in a different city and as a result the expenses were irrelevant to carrying on the railroad business. Therefore, the “pursuit of business” prerequisite to the deductibility of travel expenses was lacking. Since all three criteria listed above must be satisfied for the taxpayer to be allowed the deduction, the court noted that the failure to demonstrate that the expense was incurred in pursuit of business was sufficient, by itself, to deny the deduction.

The Court did not decide whether the taxpayer was away from “home.” The Supreme Court noted that the Tax Court had consistently defined “home” as the equivalent of the taxpayer’s place of business but did not decide the definition of “home” and specifically, whether “home” meant the taxpayer’s residence.

In *Wilbert v. Commissioner*,²³ Mr. Wilbert was employed by Northwest Airlines as a mechanic in Minneapolis from 2009 until April 2013, when he was laid off due to financial difficulties. During the time he was employed by Northwest Airlines, Mr. Wilbert and his wife lived approximately 25 miles from the airport, in Hudson, Wisconsin. Instead of accepting the layoff, Mr. Wilbert utilized “bumping rights” under Northwest’s bumping arrangement for their mechanics, which allowed him to replace a mechanic in another city with less seniority. Under the arrangement, Mr. Wilbert bumped a mechanic in Chicago, but shortly thereafter he was bumped twice, resulting in his working in Flushing, N.Y., and Anchorage, Alaska. From 2013 to 2015 while the bumping took place, Wilbert incurred approximately \$20,000 in travel expenses while he and his wife maintained their personal residence in Hudson, Wisconsin, and claimed a tax deduction for those travel expenses. They maintained that residence with the hope that his job with Northwest in Minneapolis eventually would be restored. The IRS disallowed the deduction and the Tax Court agreed, prompting Mr. Wilbert to appeal.

The Seventh Circuit Court of Appeals upheld the Tax Court’s opinion that had denied Mr. Wilbert’s deduction for living expenses as it held that they were not related to his trade or business because he had no business reason to incur duplicate living expenses. In the holding, the Seventh Circuit noted “... the statutory language, the precedents, and the considerations of administrability

²³ *Wilbert v. Commissioner*, 553 F.3d 544 (7th Cir. 2009).

that we have emphasized persuade us to reject the test of reasonableness. The “temporary versus indefinite” test is no better, so we fall back on the rule of *Flowers* and *Hantzis* that unless the taxpayer has a business rather than a personal reason to be living in two places, *he cannot deduct his traveling expenses if he decides not to move...*”

As explained in *Andrews v. Commissioner*,²⁴ “the guiding policy must be that the taxpayer is reasonably expected to locate his ‘home,’ for tax purposes, at his ‘major post of duty’ so as to minimize the amount of business travel away from home that is required; a decision to do otherwise is motivated not by business necessity but by personal considerations and should not give rise to greater business travel deductions.” If Wilbert had to travel back to Minneapolis from NY or Alaska from time to time to attend to business, the travel expense and conceivably some of his living expenses at his home (his “secondary” home, in a tax sense, since his primary home for tax purposes would be a New York or Alaska residence near his principal work), might have been deductible, just as his expenses for the office equipment that he purchased in a business other than a principal business were deductible.²⁵

In *Tucker v. Commissioner*,²⁶ the taxpayer moved to Knoxville, Tennessee in 1965 and graduated from college in 1966. He unsuccessfully sought to obtain a teaching position in Knoxville, and ultimately obtained one in Trenton, Georgia for the 1966-67 school year, during which period his family remained in Knoxville. In the next school year, he was again unsuccessful in finding employment in Knoxville and accepted employment in Murphy, North Carolina, while his family continued to reside in Knoxville. The taxpayer deducted his living expenses while in Georgia and North Carolina, and the Tax Court upheld the disallowance of these expenses, noting “by any reasonable standard, the prospects of employment in [Knoxville] must have seemed bleak, or at best, unpromising; yet, the petitioner chose to keep his family residence there for reasons of personal choice that were despite, rather than because of, the exigencies of his trade.” The court stated, “if a taxpayer chooses for personal reasons to maintain a family residence far from his personal place of employment, then his additional traveling and living expenses are incurred as a result of that personal choice and are therefore not deductible.”

In each of these cases, the fact patterns indicate that the employee traveled regularly to the employer provided work location to perform the agreed upon duties. A business purpose for the long-distance arrangements was not evident from the employer’s perspective, given the type of work that was performed (i.e., airplane mechanic, teacher).

Currently, the duties of many jobs use technology not available years ago, which allows them to be performed at an employee’s residence. In these cases, the employee’s residence is the location where most of the employee’s financial return for the employer is generated. The employee’s residence may or may not be in the geographic locale of an employer-provided office location.

²⁴ *Andrews v. Commissioner*, 931 F.2d 132 (1st Cir. 1991).

²⁵ See Bittker & Lokken, ¶ 21.1.6, p. 21-21 and *Sherman v. Commissioner*, 16 T. C. 332.

²⁶ *Tucker v. Commissioner*, 55 T.C. 783 (U.S.T.C. 1971).

5. Principal Place of Business – Daily Transportation Expenses

In general, daily transportation expenses incurred traveling between a taxpayer's residence and a work location that is not temporary are nondeductible commuting expenses.²⁷ However, such expenses are deductible under the following circumstances:

- Daily transportation expenses incurred in traveling between the taxpayer's residence and a temporary work location outside the metropolitan area where the taxpayer lives and normally works.²⁸
- A taxpayer who has one or more regular work locations away from the taxpayer's residence, may deduct daily transportation expenses incurred in traveling between the taxpayer's residence and a temporary work location in the same trade or business, regardless of the distance.²⁹
- A taxpayer whose residence is his principal place of business as defined by section 280A(c)(1)(A), may deduct daily transportation expenses incurred in traveling between the residence and another work location in the same trade or business, regardless of whether the other work location is regular or temporary and regardless of the distance.³⁰

Per Rev. Rul. 99-7, to qualify as the "principal place of business," the taxpayer's home office must meet the following criteria outlined in section 280A(c)(1):

- It must be used exclusively and on a regular basis for business purposes;
- It must be used "for the convenience of the employer" and not the employee; and
- It must be used for the administrative or management activities of any trade or business of the taxpayer if there is no other fixed location of such trade or business where the taxpayer conducts substantial administrative or management activities of such trade or business.³¹

II. RECOMMENDATIONS RELATED TO TODAY'S WORK ARRANGEMENTS

Today, many employees work entirely or primarily from a residence, rather than an employer-provided work location (i.e., an employer's office or the office of an employer's client or customer). These work arrangements, driven by an employer's business decisions, result in the employee performing services from either or both an employer-provided work location and the employee's personal residence. In many instances, existing tax guidance does not apply to today's work arrangements to determine when expenses are deductible travel expenses and when such amounts are non-deductible commuting expenses.

²⁷ Section 274(1)(1).

²⁸ Rev. Rul. 99-7.

²⁹ *Id.*

³⁰ *Id.*

³¹ Section 280A(c)(1)(C).

Employers have accommodated the new work arrangements, however, existing tax guidance no longer logically defines “tax home” or “in pursuit of a trade or business.” Until recently, an employee’s principal place of business was easily determined since employers typically required attendance at a specified location. As a result of the pandemic, the work culture has shifted in terms of the expectations regarding the physical location where employees perform their duties. Many employers are allowing or requiring remote and hybrid work arrangements with various attendance requirements at an employer-provided location. These arrangements are facilitated by technology, and while they provide personal benefit to employees, employers save office-related costs (e.g., rent, utilities, compensation costs) without losing revenues, thereby increasing profitability. In addition, these flexible work arrangements allow employers to attract a broader pool of employees as well as retain existing workers.

The following are examples of today’s work arrangements:

- Employer has no requirement for an employee to be physically present in an employer-provided work location and does not expect the employee to work from the employer-provided location, therefore no regular workspace is provided. The employee visits the employer-provided work location only sporadically and infrequently for occasional meetings and to restock business supplies;
- Employer has no requirement for an employee to be physically present in an employer-provided work location, but the employee may choose to work from the employer-provided work location any and all days if there is space available. Some employer work locations are able to accommodate all employees at the same time, while others are not;
- Employer specifies the number of days each week that an employee is required to be physically present in the employer-provided work location. The specified number of days should not be exceeded due to space constraints or other employer business reasons such as required business travel or technology limitations; and
- Employer specifies the number of days each week that an employee is required to be physically present in the employer-provided work location and allows the employee to spend additional days (including all days) in the employer-provided work location.

In each of the examples, an employee may also be expected to travel to locations other than the employee’s regular work location (e.g., another office of the employer, the office of a client or customer of the employer, a conference, or meeting site) and can do so directly from the employee’s residence.

Currently, there is minimal guidance regarding the taxation of the amounts paid to employees as reimbursement for additional costs related to performing their work duties at a chosen work location other than the employer-provided work location. Prior to the pandemic, employers provided or reimbursed employees for traditional office supplies (e.g., notepads, pens, calculators, etc.). Due to the increase in employees working remotely, it has been necessary for employers to provide additional office equipment (e.g., computers, monitors, printers, keyboards, etc.) to

employees who work from home on a regular basis. Some of the equipment is unlikely to be returned to the employer upon termination of employment. In addition, many employers either reimburse employees working from home for internet expenses and increased costs of utilities (e.g., electric, gas, water, and telephone costs) or provide employees with an allowance to cover these additional costs.

1. Principal Place of Business

Recommendation

The AICPA recommends that the IRS and Treasury revise Rev. Rul. 99-7 to eliminate the reference to the “exclusive use” requirement of section 280A(c) and reflect modern work arrangements. In addition, we recommend updating the concept of “for the convenience of employer.”

Alternatively, we recommend issuing guidance providing a safe harbor to be used in determining a principal place of business with specific criteria that would not include reference to the “exclusive use” requirement of section 280A(c).

Analysis

Revenue Ruling 99-7 provides the requirements for deductibility, under section 162(a), of daily transportation expenses incurred by a taxpayer traveling between their residence and work location. The revenue ruling also states that “section 280A(c)(1)(A) provides, in part, that a taxpayer may deduct expenses for the business use of the portion of the taxpayer’s personal residence that is exclusively used on a regular basis as the principal place of business for any trade or business of the taxpayer. (In the case of an employee, however, such expenses are deductible only if the **exclusive** and regular **use** of the portion of the residence is for the **convenience of the employer.**)” [Emphasis Added]

We suggest eliminating the exclusive use requirement in Rev. Rul. 99-7 since the tax policy for supporting a tax deduction of home office expenses is different than the exclusion of business travel expenses incurred by employees. The exclusive use of a home office test is relevant to ensure that personal home expenses are not deductible as business expenses. However, the requirement is not relevant in determining the extent to which the home is the principal place at which the employee performs his or her services and thus may be entitled to travel expenses from that location to another work location, including the employer-provided location. Moreover, the test yields arbitrary and inequitable results when applied to employees with less square footage to devote to exclusive use as a home office.

If Rev. Rul. 99-7 is modified to remove only the “exclusive use” portion of the requirement, the “convenience of employer” concept would also require modernization. Generally, any employer that adopts a policy of allowing an employee to work from home will satisfy the convenience of the employer requirement because the employer can reduce both operating expenses and employee turnover.

Many employees have been forced during the pandemic to use residential space as their primary work location. Employees often cannot afford to dedicate a portion of their residence exclusively for work. For example, an employee’s residence could be a studio apartment, thereby forcing the employee to work in an area of the studio apartment not dedicated solely to work activities. Because the principal place of business could involve dual-purpose spaces, the requirements of section 280A(c) need not be a requirement for a home to be treated as a principal place of business for purposes of allowing a deduction for transportation expenses to a second work location.

2. Work Arrangements: Employer Location-Based, Remote, and Hybrid

- a. *Definitions of Employer Location-Based, Remote and Hybrid Work Arrangements to Define an Employee’s Tax Home:*

Recommendations

The AICPA recommends that Treasury and the IRS provide guidance defining work arrangements between an employee and employer, which are reflective of today’s work environment. Specifically, we suggest defining an “employer-location based employee,” “remote employee,” and “hybrid employee” as follows:³²

- Employer location-based employee – an employee required or expected under an employer’s policy or agreement to work frequently at an employer-provided location (e.g., office building, manufacturing facility, retail store operated by the employer, or workspace provided in a facility of the employer’s customer or client).
- Remote employee – an employee not required or expected, under an employer’s policy or agreement, to work at an employer-provided location (other than infrequently) and who has a primary work location which is not employer-provided.
- Hybrid employee – an employee expected under an employer’s policy or agreement to work both at an employer-provided location and at a work location which is not employer-provided and is expected to work frequently from both locations.

In addition, we recommend that the guidance define “tax home” for each classification of employee, as follows:

- Employer-location based worker – the geographic locale of the employer-provided work location, because an employee’s presence in that locale is frequent and more than sporadic.
- Remote worker – the geographic locale that is chosen by the employee and not the geographic locale of the employer-provided work location since that worker’s presence at the geographic locale of the employer provided work location for business purposes is infrequent and sporadic. This is consistent with the fact that a remote worker provides a

³² There is an “itinerant employee” category of workers, however, itinerant workers are outside the scope of this letter.

meaningful financial return to the employer, notwithstanding the fact that that worker is present in the geographic locale of an employer-provided work location only infrequently and sporadically.

- Hybrid worker – determined based on facts and circumstances, consistent with Rev. Rul. 75-432.

Analysis

To determine the deductibility of certain travel expenses in today's work environment, it is necessary to differentiate between employees with various work arrangements. The most common modern-day work arrangements are employer-location based, remote, and hybrid.

b. Facts and Circumstances Test for use in the Classification of a Remote Employee and Defining a Hybrid Employee's Tax Home

Recommendation

We recommend that Treasury and the IRS issue guidance providing a facts and circumstances test to be used in determining whether an employee is classified as a remote employee.

We recommend that the guidance specify that the employee's classification determines an employee's tax home in the case of an employer-location based and remote employee. In the case of a hybrid employee, a facts and circumstances test would be applied to determine their tax home, as under current law. We suggest that the guidance also recognize that an individual's classification may change during the year.

Factors that could be considered in applying the facts and circumstances test for use in the determination of a hybrid employee could include, but not be limited to, the following:

- The time expected to be spent performing services at various locations;
 - Expected time should disregard the consequences of unexpected or temporary relocations due to natural disasters or personal situations; and
 - Expected time should disregard short or *de minimis* visits to the office such as to obtain office supplies.
- The portion of the duties that can only be performed on-site at an employer-provided location;
- Whether the ability to work in a hybrid arrangement has a defined business purpose (e.g., measurable cost reduction) that benefits the employer;

Analysis

Employers and employees are entering into various work arrangements. Therefore, a facts and circumstances, rather than a bright line test would be preferable for use by hybrid workers to determine their tax home, including for purposes of determining whether expenses reimbursed by the employer are taxable. The use of a facts and circumstances test to determine the tax home of a hybrid employee will allow taxpayers and the IRS to apply factors that conform to today's work arrangements.

c. Safe Harbor for Use in Defining a Remote Worker

Recommendation

The AICPA recommends that Treasury and the IRS issue guidance providing a safe harbor for use in the determination of whether an employee working in an employer-provided work location is doing so only infrequently or sporadically for purposes of defining a "remote worker." We suggest a safe harbor of 50 business days within the calendar year (an average of one day per week for a 50-week work year; 52 weeks less 10 business days of holidays), or an equivalent percentage of an employee's work schedule. Under this approach, the 50-business day safe harbor would not count time spent due to business travel to an employer-provided location (e.g., a prospective or current client or customer location, a business conference, a trade show appropriate for the employer's business).

We defer to Treasury and the IRS on whether hourly equivalents are needed for workers on an hourly schedule; we are not aware of significant numbers of hourly workers permitted to work remotely. Similarly, we defer to Treasury and the IRS for appropriate adjustments to address alternative work schedules (e.g., four 10-hour workdays).

Analysis

To provide certainty for defining a remote worker, without providing a bright line test, we suggest providing guidance stating that an employee who works less than a specified number of days of a defined period in an employer-provided location is working only infrequently and sporadically and is a remote worker. For purposes of determining an employee's tax home, it is necessary to determine whether an employee is working in an employer-provided work location on an infrequent or sporadic basis.

The recommended 50-business day per year rule as a safe harbor is equivalent to one day a work week and easily administrable. The safe harbor should also take into account substantial changes in the employee's position or work environment allowing for resetting the measurement period. For example, if a remote employee is promoted to a position and thus is anticipated or required to work in the office, the treatment of the employee as a remote employee during the earlier period should not be affected.

d. Employee-Employer Arrangement

Recommendation

The AICPA recommends that the IRS and Treasury provide guidance indicating the information that could be included in an employment arrangement between an employee and employer to describe an employer's expectation regarding an individual's presence in the geographic locale of an employer-provided work location.

Analysis

An employment arrangement between an employer and employee could include the following information:

- Which employees or classes of employees are eligible for remote or hybrid working arrangements;
- Expectations regarding performance, quality, productivity and results for employees;
- A list of the work equipment necessary for remote or hybrid employees to use or have available, including internet capabilities and cyber security requirements.

Some employment arrangements are broad-based and affect at-will employees who have no written employment agreement or contract. This should not affect the classification of the worker. Employee handbooks or general policy statements should be considered adequate.

3. Pursuit of a Trade or Business

Recommendation

The AICPA recommends that Treasury and the IRS provide guidance related to the definition of "pursuit of a trade or business" in the context of determining tax free reimbursements of deductible business expenses and working condition fringe benefits when employees work as remote or hybrid employees. In particular, when weighed against any potential loss of employee productivity (if that potential exists) or other employer costs of remote work, one or more of the following employer purposes for establishing and permitting remote work should be considered valid business purposes:

- Reducing employer occupancy costs;
- Reducing employer relocation costs for positions that can't be filled locally;
- Increasing the ability to hire the most qualified candidates for a position without geographical constraints (i.e., ability for worldwide job searches);

- Reducing employee turnover;
- Reducing compensation costs by utilizing workers in areas with a lower cost of living; and
- Enhancing an employer's green initiatives by eliminating employee commuting costs.

Analysis

The determination of whether an activity was taken in “pursuit of a trade or business” must recognize expanded business purposes that reflect the benefit that employers receive by not providing work locations for all employees. In *Flowers*, the Court noted that the employer “gained nothing” from having Mr. Flowers live elsewhere. Employers that have adopted an initiative or policy that allows or requires employees to work away from an employer-provided location have, in fact, done so for the benefit of the employers' businesses. Absent that business purpose, the employer would not allow employees to enter into such work arrangements. The determination of the principal place of business based on the facts of today's work arrangements can be made consistent with the *Flowers* decision.

4. Non-Travel Expenses Incurred While Working Remotely

Recommendations

The AICPA recommends that the IRS and Treasury provide guidance clarifying that providing reasonable business equipment and supplies to employees, needed for work outside an employer-provided work location for non-compensatory reasons, is nontaxable to the employees even if there will be a *de minimis* amount of personal use of such equipment. This rule would be similar to the rule for *de minimis* use of employer provided cell phones or reimbursement of cell phone costs.

We also recommend that the IRS and Treasury provide guidance establishing a procedure for taxpayer use in determining whether the reimbursement of additional utility, telephone, internet bandwidth and software costs (or the payment of an allowance for such costs) should be treated as taxable compensation or excluded from income, if provided under an accountable plan.

Analysis

Due to the shift from working in an employer-provided work location to working at a location chosen by the employee, it is unclear whether employer-provided office equipment is considered a transfer of property taxed under section 83 or, if the transfer is subject to a substantial risk of forfeiture, its use is considered an excludible working condition fringe benefit. There is no federal requirement for employers to reimburse employees for remote work expenses. However, several states (e.g., California and Illinois) require employers to reimburse employees for certain working-at-home expenses.

5. Examples

Recommendation

We recommend that Treasury and the IRS incorporate the following examples into guidance related to today's work arrangements.

For each example, the employer has reasonably concluded that a business purpose of the employer is served by permitting the work arrangement and annual workdays total 250 days (52 weeks times 5 days per week minus 10 holidays). In addition, all employees are United States (U.S.) citizens employed by U.S. employers.

Scenario 1 (Definition of Employee, Safe Harbor, & Facts and Circumstances Tests)

An employer requires a group of employees, comprising of 10% of its workforce, to report to the employer-provided work location daily. The classification of employees in this group is based on duties. All other employees are permitted to work from either the employer-provided work location or any other location that does not impair their ability to perform their duties.

An employee who is part of the 10% of the employer's workforce required to report to the employer-provided work location daily is an employer-based location employee incurring nondeductible commuting expenses when travelling to the employer-provided work location.

An employee who has discretion over their work location and travels to an employer-provided work location less than 51 days during the year is a remote employee under the safe harbor, incurring deductible travel or transportation expense when traveling to an employer-provided location.

An employee who has discretion over their work location and travels to the employer-provided work location more than 50 days during the year could be a remote employee depending on the facts and circumstances.

Scenario 2 (Remote Employee using the Safe Harbor Test)

An employer requires a group of employees to work at an employer-provided work location 20 days per year with all other workdays spent at a location chosen by the employee. Employee A spends an additional 60 days during the year attending a business conference and visiting current and prospective customers. The remaining 170 workdays are spent at a location chosen by Employee A.

Employee A satisfies the 50-business day safe harbor and is classified as a remote employee since only 20 days are spent in the employer-provided location. Business travel expenses, rather than commuting expenses, would be incurred when Employee A travels from the chosen work location to the employer-provided work location, the conference, and visiting current and prospective customers.

Scenario 3 (Remote Employees using the Safe Harbor Test)

Assume the same facts as Scenario 2, except that the employer requires the group of employees to work at the employer-provided work location 1 day per week (i.e., 52 days per year) unless the employees' duties require attendance at a business conference, trade show, or in customer offices. Employee B spends 1 day each week at the employer-provided work location during the 49 weeks that they are working and not on vacation. The remaining 201 days are spent at Employee B's chosen work location. Employee C spends 1 day in each of 27 weeks at the employer-provided work location with the remaining required weekly work attendance satisfied by attending a business conference, trade show, or by working in customer offices.

Employees B and C are remote employees under the safe harbor test because less than 51 days were spent at the employer-provided work location. The tax home for determining deductible travel expenses for Employees B and C is their chosen work location.

Scenario 4 (Remote Worker using Facts and Circumstances Test)

Assume the same facts as Scenario 3, except that Employee B is required to spend an additional 8 days in the employer-provided work location due to a home renovation resulting from a natural disaster. Employee B would no longer be considered a remote employee under the safe harbor rule as days in the employer-provided work location total 57. However, Employee B could be a remote employee under the facts and circumstances test as the additional time spent in the employer's office was not extensive and was caused by a personal issue beyond the control of the employee. The tax home for determining deductible travel expenses would continue to be Employee B's chosen work location.

Scenario 5 (Safe Harbor)

An employer requiring a group of employees to work at a specified employer-provided work location 2 days per week, reevaluates the policy and determines that the employees are not required to work in the employer-provided work location as frequently. The policy is changed to require attendance at the employer-provided work location only two days per month.

Prior to the change in the policy, employees in the employer-provided work location 2 days per week would be considered hybrid employees and would determine their tax home based on facts and circumstances. Beginning with the change in policy, employees only traveling to the employer-provided work location twice per month would be remote employees meeting the safe harbor test. Their tax home would be their chosen location. The travel expenses for the twice monthly trips after the policy change are non-taxable reimbursable business expenses.

Scenario 6 (Safe Harbor)

Employee D, who lives in New York City (NYC), accepted a position with an employer that is not tied to a particular geographic region. Employee D is assigned as a NYC employee and reports to employees assigned to the employer's NYC office. Employee D works almost exclusively from

his/her personal residence except for 24 business days per year which are spent attending in-person team meetings held in the NYC office. Employee D's performance is measured on billable hours derived from clients located in many different geographic regions. Employee D notifies the employer of the desire to move to Wyoming. The employer continues the employment relationship since the duties can be performed from any location and replacing the employee would be costly and disruptive. While Employee D works almost exclusively from home in Wyoming, his/her duties and chain of command remain the same. Over the course of the year, Employee D makes 10 separate business day trips to attend in-person team meetings in the NYC office. During one of the trips, Employee D takes 4 vacation days, spending time in NYC visiting family and friends.

Employee D is a remote employee whose tax home is the residence in Wyoming. For the 9 business trips which did not involve personal travel, reimbursed travel costs to NYC for the business meetings as well as meals and lodging in NYC associated with the trip, would be nontaxable. For the combined vacation and business trip, reimbursed travel costs other than the expenses directly related to the business portion of the trip (e.g., one day of business travel, including airfare) would be taxable as the trip was primarily personal.

Scenario 7 (Principal Place of Business)

Employee E is a NYC employee. The employer determines that Employee E's duties can be completed remotely except for NYC team meetings that take place 10 days during the year. Employee E attends the 10 team meetings in the NYC office. Employee E performs his duties from his personal residence in the NYC suburbs, but does not have a specific location within his residence that is used exclusively for work.

Under the safe harbor, Employee E is a remote employee whose tax home for determining nontaxable travel expenses is his personal residence. Notwithstanding that there is no exclusive area within the home, Employee E can receive tax free reimbursement for trips between Employee E's residence and the employer's NYC office.