

# Unemployment Compensation

... INFORMATION  
FOR  
EMPLOYERS

## The Problem of “Localized” and “Nonlocalized” Employment

An interpretation of the uniform definition of employment. Statements in this pamphlet are intended for general information only and are not to be construed as legal interpretations of the Law or Regulations.



**pennsylvania**

DEPARTMENT OF LABOR & INDUSTRY

*Auxiliary aids and services are available  
upon request to individuals with disabilities.  
Equal Opportunity Employer/Program*

## **“To what state must I pay my unemployment taxes?”**

That’s a frequent and often perplexing question asked by employers who have salespersons or other employees whose duties require them to spend varying periods in several states or spend all their time in a state other than that of the home office. It’s the employer’s job to find the right answer. If the employer doesn’t, and pays the wrong state, he/she could face possible interest charges and penalties and the bothersome details of refund procedures.

### **EMPLOYMENT**

Article I, Section 4(1) of the Pennsylvania Unemployment Compensation Law states in part:

- “(1) ‘Employment’ means all personal service performed for remuneration by an individual under any contract of hire, express or implied, written or oral, including service in interstate commerce and service as an officer of a corporation.
- “(2) The term ‘Employment’ shall include an individual’s entire service performed within or both within and without the Commonwealth, if -
  - (A) The service is localized within this Commonwealth,  
or
  - (B) The service is not localized in any state but some of the service is performed within this Commonwealth and
    - (a) the base for operations or place from which such service is directed or controlled is in this Commonwealth, or
    - (b) the base for operations or place for which such service is directed or controlled is not in any state in which some part of this service is performed, but the individual’s residence is in this Commonwealth . . .”

Section 4(1)(2)(C) provides: “The term ‘Employment’ shall include an individual’s services wherever performed within the United States, the Virgin Islands or Canada if - (i) such service is not covered under the unemployment compensation law of any other state, the Virgin Islands or Canada, and (ii) the place from which the service is directed or controlled is in this Commonwealth.”

The definitions of employment are fairly uniform in the unemployment compensation laws of the states; however, the administrators of the state agencies have not always uniformly interpreted these provisions, and many conflicts have arisen. In some cases dual coverage has resulted in double taxation of the employer for the same service, and in other cases some services that should have been covered have not been covered by the law of the proper state, or of any state. This confusion has resulted in a loss of benefit rights to the worker.



### **UNIFORM DEFINITION OF EMPLOYMENT**

The objective of the uniform definition of employment is to cover under one state law all the service performed for one employer by an individual, wherever it is performed. The following guidelines for applying the statutory provisions are recommended.

First, it is necessary to determine whether the service is localized in any state. Only if the service is not localized in any state is any other test necessary. If the service is not localized, it is necessary to determine in what state the individual’s base for operations is and whether the individual performs any service in that state. If the individual has no base for operations or if no service is performed in the state in which the base for operations is located, then it is necessary to look to the state from which the individual’s service is directed and controlled. It is only when coverage is not determined by any of the tests above that residence becomes a factor.

In short, it may be necessary to apply four tests to determine the state of coverage:

- Localization of service
- Base for operations
- Place of direction or control
- Residence

### **LOCALIZATION OF SERVICE TEST**

Service is localized and covered in a state if it is performed entirely within that state, or it is performed both within and without the state and the service performed outside the state is incidental to the individual's service performed within the state. Service is considered incidental, for example, if it is temporary or transitory in nature, or consists of isolated transactions.

In determining whether the service of a worker is incidental or transitory in nature, some of the factors to be considered are:

- Intention of the employer and employee as to whether the service is an isolated transaction or a regular part of the employee's work;
- Intention as to whether the employee will return to the original state upon completion of the work in another state; and
- Length of service with the employer within the state compared to the length of service outside the state.

Because of the wide variation of facts in each particular situation, no fixed length of time can be used as a yardstick in determining whether or not the service is incidental.

#### **Examples of localized service:**

1. All services performed in one state:

A salesperson for a Pennsylvania corporation who lives in Pennsylvania but performs all services in New Jersey is not subject to the Pennsylvania Law because the service is localized in New Jersey even though the corporation for which the individual performs the service is located in Pennsylvania and residence is in Pennsylvania. No other test is necessary.

2. Service performed within and without a state:

- a. A contractor had a place of business in Pennsylvania where records were maintained and equipment stored and from which the contractor directed various jobs, wherever located. All jobs had been in Pennsylvania, but the contractor obtained a contract for a single job in New Jersey which took seven months to complete. During and after the completion of work in New Jersey, the contractor continued activities in Pennsylvania.

- (1) A resident of Pennsylvania was hired in Pennsylvania to work on the New Jersey job. When the work in New Jersey was completed, the individual was laid off and not rehired by this employer. The service in

traveling from Pennsylvania to New Jersey was incidental to service in New Jersey. All service was localized in New Jersey and therefore not subject to the Pennsylvania Law. No other test is necessary.

- (2) A resident of Pennsylvania had been a foreman on the employer's payroll for several years. The individual was moved from a Pennsylvania job to the New Jersey job, where service was performed until the completion of the job, at which time the individual came back to Pennsylvania for continued work with the employer. Although this employee was in New Jersey for seven months, the regular work was in Pennsylvania, and the New Jersey service was temporary in nature and incidental to the Pennsylvania service. The service, therefore, was localized in Pennsylvania, and service in New Jersey was subject to the Pennsylvania Law. No other test is necessary.



- (3) A resident of New Jersey was hired for the New Jersey job only. After the end of several months of employment in New Jersey, the individual continued performing service for this employer for an equal length of time on another job in Pennsylvania. While the employee was working in New Jersey, service was localized there. It was not covered by the Pennsylvania Law because that was the only job the individual was hired for and the New Jersey contract was an isolated transaction of the employer, with no likelihood of future New Jersey employment for the individual. Since the move to Pennsylvania was considered permanent, service in Pennsylvania is localized there and is subject to Pennsylvania Law. No other test is necessary.

- b. A salesperson employed by a New York company lives in New Jersey. The territory covered was in the Commonwealth of Pennsylvania. Services were directed and controlled from the New York office, and occasionally the sales person returned to that office for supplies and instructions. On other occasions the individual was required to call upon customers in the state of New York. Since the regularly assigned territory was the Commonwealth of Pennsylvania, the New York service was temporary in nature and incidental to the Pennsylvania service. Service, therefore, was localized in Pennsylvania, and service in New York was subject to the Pennsylvania Law. No other test is necessary.



### Updated examples:

Guidance from the USDOL for interpreting state statutory provisions on “localization of work” was last issued in 1952. Recent historical events have now demonstrated the need to provide more current examples of employment situations that require the uniform interpretation among the States. The new examples are:

- The terrorist attack on the United States on September 11, 2001, which required employers to temporarily relocate from New York to New Jersey;
- The advent of the Internet which allows workers to perform services through telecommuting for an employer that may be located in a different state; and
- The takeover of a major airline company by another that required flight attendants to commute long distances to work.

#### 1. World Trade Center example:

Approximately 40 employers and 1,500 employees who were working in the area of the World Trade Center in New York City prior to the terrorist attack of September 11, 2001, were temporarily relocated to New Jersey. After

the relocation, it was determined that the employees' services were localized in the State of New York because their work performed in New Jersey was temporary, with the understanding that the employers intended to return to New York as soon as possible.

A recommended definition of "temporary" is approximately 12 months or less, as long as it is applied with some flexibility, taking into consideration the various circumstances under which the work is performed. Both New York and New Jersey considered the circumstances that required this move, and based on the facts, determined that "temporary" in this instance would be considered beyond the normal one-year period through the end of calendar year 2002.

After that time, those employers who continued to operate in New Jersey would be considered subject to New Jersey's UC Law, effective January 1, 2003. In addition, employees who were hired while their employer was temporarily located in New Jersey, and who performed all services for that employer in New Jersey during 2001 and 2002 would be considered as "localized" in New Jersey, with their wages being subject to New Jersey UC tax.

2. Telecommuting example:

A resident of New York was hired as a technical specialist for a financial information provider. All services were performed in New York for two years, after which the employee moved to Florida because her husband had changed jobs. Since the employer had invested time and money in training this individual, it agreed to allow her to *telecommute* from Florida.

After the relocation took place, all of her assignments and work products were communicated via the Internet. Since this employee is now performing all duties in Florida, even though the employer is located in New York, her services are localized in Florida and subject to Florida law. Therefore, all wages from the date she began telecommuting from Florida, are reportable to Florida.

3. Airline example:

A major airline that flew out of New Jersey was acquired by another airline. The flight attendants for the defunct airline, who were previously assigned to fly out of New Jersey, were reassigned to St. Louis, Missouri. This action required the flight attendants to commute by plane from New Jersey to Missouri before beginning work. They always returned to their duty station in St. Louis before the end of their shift, at which time they commuted back to New Jersey.

Because the flight attendants began work in Missouri, their work outside of Missouri was incidental (temporary or transitory in nature) to the work within Missouri, and their flight shift ended in Missouri, their work was localized in Missouri; therefore, they were covered under Missouri law.

### **"BASE FOR OPERATIONS" TEST**

If an individual's service is not localized in any state, it is necessary to apply the second test in the statute: Does the individual perform some service in the state in which the "base for operations" is located? The individual's base for operations should not be confused with their place from which service is directed or controlled. The "base for operations" is the place or fixed center, of more or less permanent nature, from which the employee starts work and to which the employee customarily returns in order to receive instructions from the employer or communications from customers or other persons or to replenish stocks and materials, to repair equipment, or to perform any other functions necessary to the exercise of

trade or profession at some other point or points. The base for operations may be the employee's business office, which may be located at the employee's residence, or the contract of employment may specify a particular place at which the employee is to receive directions and instructions.

This test is applicable principally to employees, such as salespersons, who constantly travel in several states.

**Examples of nonlocalized service, where coverage is decided by the base for operations test:**

1. A salesperson, a resident of Pennsylvania, sold products in Pennsylvania, New Jersey, and New York, for the employer, whose place of business was in Maryland. The salesperson operated from home, where the individual received instructions from the employer, communications from customers, etc. Once a year the salesperson went to Maryland for a 2-week sales meeting. The base for operations was in Pennsylvania and the individual performed some service in Pennsylvania. Therefore, all of the service was covered by the Pennsylvania Law.
2. An employee worked for a company whose home office was in Pennsylvania. The employee was made a regional director working out of a branch office in New York. This individual worked mostly in New York but spent considerable time in Pennsylvania and New Jersey. The individual's base for operations was in New York. Since some service was performed in New York and the base for operations was in New York, it is immaterial that the source of direction and control was in Pennsylvania, and all the individual's service was not subject to the Pennsylvania Unemployment Compensation Law.

The base for operations test may also be used to determine the state of coverage of service performed by traveling bands and orchestras. When the owners or executive officers remain in the state where the main office is maintained, the application of the test to an organization other than a sole proprietorship, creates no problem. In applying the test to a sole proprietorship, when the owner (usually the leader) travels with the band, factors to be considered are:

1. Residence and mailing address of the owner.
2. Location of accountant or business manager who acts as the owner's agent.
3. State in which income tax returns are filed by the owner.
4. State in which the owner has a traveling card from a musician's union.
5. State from which the band starts and to which it returns after the completion of a tour.

**Examples involving bands and orchestras:**

1. The leader, the sole proprietor of a traveling independent band, resides in Pennsylvania, receives mail in Pennsylvania, carries a traveling card from a Pennsylvania musician's union, and has a business agent in Pennsylvania.

All services of any employee who performs services in Pennsylvania as well as in other states are in employment in Pennsylvania under the base for operations test.

Even though the leader travels with the band, the principal base for operations, for the leader and individual musicians, remains fixed in Pennsylvania, where the leader maintains headquarters while in travel status.

2. The band leader in the preceding example, while in Ohio, hired a resident of Ohio as a permanent member of the

band. Under the contract of hire the employee was to travel with the band in Pennsylvania and other states. Under the base for operations test, this employee's services are in employment in Pennsylvania during all periods. It is recognized that there may be a reporting period during which this employee performs services only in the State of Ohio. Furthermore, there may be a reporting period or periods during which this employee may be performing services in several states but not as yet in Pennsylvania. However, because of the period and location of employment expressed in the contract of hire, the services are considered in employment in Pennsylvania.

### **PLACE FROM WHICH THE SERVICE IS DIRECTED OR CONTROLLED TEST**

If the individual has no base for operations, or if the individual has such a base but does not perform any service in the state in which it is located, or if the base for operations moves from state to state, it is necessary to find out whether any of the individual's service is performed in the state from which service is directed or controlled. The place from which an individual's service is directed or controlled is the place at which the basic authority exists and from which the general control emanates. It is not necessarily the place at which a manager or foreman directly supervises the performance of services under general instructions from the place of basic authority.

#### **Examples of service not localized in any state, where coverage is decided by the place of direction and control test:**

1. A contractor whose main office is in Pennsylvania is regularly engaged in road construction work in Pennsylvania and New Jersey. All operations are under the direction of a general superintendent whose office is in Pennsylvania. Work in each state is directly supervised by Field Supervisors working from field offices located in each of the two states. Each Field Supervisor has the power to hire and fire personnel; however, all requests for manpower must be cleared through the central office.

Employees report for work at the field offices. Time cards are sent weekly to the main office in Pennsylvania where the payrolls are prepared. Employees regularly perform services in both Pennsylvania and New Jersey.

It is determined that neither the localization nor the base for operations test applies. Since the basic authority of direction and control emanates from the central office in Pennsylvania, the services of the employees are in employment in Pennsylvania under the place of direction and control test.

2. A salesperson residing in Cleveland, Ohio works for a concern whose factory and main office are located in Pennsylvania, with a sales office in Maryland. The salesperson's territory is Delaware, Maryland, West Virginia, New York and Pennsylvania. The individual does not use either the Maryland office or his/her home in Ohio as a base for operations. All service is covered by the Pennsylvania Law because:

- Work is not localized in any state.
- There is no base for operations.
- Work is directed and controlled from the employer's Pennsylvania office.
- Some of the service is in Pennsylvania.

### **PLACE OF RESIDENCE TEST**

If coverage cannot be determined by any of the tests above, it is necessary to apply the test of residence. Residence is a factor in determining coverage only when the individual's service is not localized in any state and the individual performs no

service in the state in which he/she has the base for operations (if there is such a base), and no service is performed in the state from which service is directed and controlled.

If none of the other tests apply, an individual's service in its entirety is covered in the state in which the individual lives, provided that some of the service is performed in that state.

**Examples of coverage determined by state of residence:**

1. A salesperson employed by an Indiana Company lives in Pennsylvania. The territory covers Delaware, New Jersey, and Pennsylvania. Service is not localized in any state. The individual uses the employer's Indiana office as a base for operations, and service is directed from that office. The individual performs no service in the state in which the base for operations is located or in the state from which service is directed and controlled. The individual does perform service in the resident state - Pennsylvania. Consequently, all service is subject to the Pennsylvania Law.
2. An individual who lives in Pennsylvania was hired as a member of a traveling circus to perform in New Jersey, Pennsylvania, and Ohio. The circus was directed and controlled from Florida. The employee performed in Pennsylvania and Ohio before quitting. Because none of the first three tests apply, and because some service was performed in the resident state, all service is subject to the law of that state - Pennsylvania.

If, after applying all these tests to a given set of circumstances, the individual's service is found not to be subject to any one state law, under most state laws the employer may elect to cover in one state all the individual's service; either under a provision for election of coverage or under the reciprocal coverage agreement. Under the reciprocal coverage agreement the service may be covered in any one of the following:

- a state in which some part of the individual's service is performed,
- the state in which the individual has residence, or
- a state in which the employer maintains a place of business.

One additional factor must be considered after the determination of the coverage state has been made under any or all of the described tests. Is the employing entity liable as an employer under the reporting and contribution provisions of that state? If the answer is negative, the following course of action is generally followed. The coverage state is informed of the employment being given, and a waiver is requested by the employer so that an election (RC-1) may be submitted to Pennsylvania. It can readily be seen that this facilitates reporting for a Pennsylvania employer; however, there have been instances where a preference was expressed for election with the coverage state (which is the employer's prerogative).