

## RECENT DEVELOPMENT IN NEW YORK LAW

### ***HUCKABY V. NEW YORK STATE DIVISION OF TAX APPEALS: IN UPHOLDING THE CURRENT TAX TREATMENT OF TELECOMMUTERS, THE COURT OF APPEALS DEMONSTRATES THE NEED FOR LEGISLATIVE ACTION***

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#### INTRODUCTION

Telecommuting is a growing trend of increasing importance in modern society. Telecommuting occurs when an employee is paid by his or her employer for work done at a location other than the employer's office and, as a result, the employee's total commuting time is reduced.<sup>1</sup> The concept of telecommuting began in the 1980s with the increased commonality of laptop computers and the Internet.<sup>2</sup> Over the past decade, the number

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<sup>1</sup> See Matthew Mariani, *Telecommuters*, OCCUPATIONAL OUTLOOK Q., Fall 2000, at 11. People who are self-employed and employees who take home work without receiving additional pay are not considered telecommuters. See *id.* Telecommuting is a "business strategy" employed by companies to promote flexible work environments by utilizing technology and communications to allow employees to work from remote locations. AT&T, *Teleworking Related Quotes*, <http://www.teleworker.com/quotes.html> (last visited Aug. 7, 2006). Examples of remote locations include home-based offices, satellite offices and neighborhood centers for telecommuters. See Mariani, *supra*, at 11. While these are the traditional outlets used by telecommuters, possibilities for remote locations are virtually endless. As Casey Green, who telecommutes from Plano, TX to Syracuse, NY, explained, "My office is wherever my laptop computer is, . . . I can work on a plane, on a train, in a cab, or in a hotel room." *Id.*

<sup>2</sup> *The Battle Heats Up Over Which States Can Tax Your Telecommuters*, PAYROLL PRAC. MONTHLY, May 2005, at 1 [hereinafter *Battle Heats Up*]. An alternative view of telecommuting is that it brings employment in this country full

of United States workers who telecommute has consistently increased, and this trend is only expected to continue.<sup>3</sup> It is estimated that by 2010, there will be one hundred million telecommuters.<sup>4</sup>

An important implication of telecommuting, which is of particular concern to individual state governments, is the tax treatment of income earned by an employee performing work for an employer in a state other than where that employer is located. While states differ in their tax treatment of such income, most apply a "physical presence" test, which apportions income based on the number of days a taxpayer has physically worked in each state.<sup>5</sup> New York, however, applies its "convenience of the

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circle. See Daniel Gross, *Home Again*, ATTACHÉ, Sept. 2003, at 13. In effect, telecommuting returns employment to the way it was until the beginning of the nineteenth century when people worked as farmers, blacksmiths, coppers, and tailors. It is only relatively recent in history that people are able to commute to work at all. Before the advent of cars, airplanes and mass transportation, there was no choice but to work at home or within walking distance from home. See *id.*

<sup>3</sup> In May 1997, there were over 3.6 million telecommuters. Mariani, *supra* note 1, at 15. In 2003 and 2004, the number of telecommuters was 8.8 million and 12.4 million, respectively. *N.Y. Court Orders Tennessee Telecommuter to Pay Full Tax*, TRANSPORT TOPICS, Apr. 18, 2005, at S17. See *CCH Tax Briefing: Impact Analysis of the Bush Tax Plan*, Feb. 2003, at 6, available at [http://tax.cchgroup.com/news/taxbrief\\_01-08.pdf](http://tax.cchgroup.com/news/taxbrief_01-08.pdf) ("Telecommuting is expected to boom over the next ten years as more employers realize its cost-effectiveness and attractiveness to employees."). The increased recognition of telecommuting is further evidenced by Microsoft's integration of Virtual Office software into future editions of Microsoft Office. See Microsoft.com, *Microsoft, Groove Networks to Combine Forces to Create Anytime, Anywhere Collaboration*, Mar. 10, 2005, <http://www.microsoft.com/presspass/features/2005/mar05/03-10GrooveQA.msp#top> (last visited Aug. 9, 2006).

<sup>4</sup> *CCH Washington News Bureau*, Washington Report, 2005 TAX WKLY NO. 27, July 14, 2005; Telework Facts, <http://www.telcoa.org/id33.htm> (last visited Aug. 9, 2006). Furthermore, 39 percent of U.S. workers would like to telecommute, but only 31 percent believe that their employers will let them. *Id.*

<sup>5</sup> For example, if in a given year (i.e., 250 total days worked), a taxpayer works 100 days in State A and 150 days in State B, State A would tax 40 percent of the taxpayer's income (100 days worked in State A out of 250 total days worked) and State B would tax 60 percent of the taxpayer's income (150 days worked in State B out of 250 total days worked). Instead of using physical presence, some states instead base income tax liability on the residence of the taxpayer. See Michael Gormley, *Judges Divided in Tax Ruling*, ALBANY TIMES UNION, Mar. 30, 2005, at B3. Other times, neighboring states will have reciprocal agreements where, for example, the employer's state will allow the taxpayer to have his or her resident state taxes withheld from his or her paycheck instead of the employer's state income taxes. See *Battle Heats Up*, *supra* note 2, at 9. Nine states (Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming) do not have a personal income tax at all. See Raymond J. Keating, *A Decision That's Bad for New York Business*, NEWSDAY (N.Y.), Apr. 10, 2005, at A32; Major Hancock,

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employer test,” which provides that all income earned by a nonresident working for a New York employer is taxable by New York State, unless such income was earned by work performed out of New York State for the *necessity* of the employer, rather than out of *convenience*.<sup>6</sup>

In applying this rule to an out-of-state telecommuter, the New York Court of Appeals may have put an end to the growing trend of telecommuting in New York that has been called “the wave of the future.”<sup>7</sup> Recently, in the four-to-three decision of *Huckaby v. New York State Division of Tax Appeals*,<sup>8</sup> the New York Court of Appeals held that 100 percent of the income of a nonresident employed by a New York employer who spent only 25 percent of his working time in New York State was subject to taxation by New York.<sup>9</sup>

From 1983 until July of 1991, Thomas L. Huckaby lived and worked in Nashville, Tennessee.<sup>10</sup> Huckaby was employed as a computer programmer by Multi-User Computer Solutions (“MCS”), a Tennessee employer, until 1991, when his job was terminated as a result of a reorganization.<sup>11</sup> Subsequent to this reorganization, Huckaby was hired by the National Organization of Industrial Trade Unions (“NOITU”), which was based in Jamaica, New York.<sup>12</sup> NOITU provides various administrative services to trade unions, such as health claims payment and pension programs.<sup>13</sup> At NOITU, Huckaby’s duties included

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*State Taxation of Military Retired Pay*, 1992 ARMY LAW. 37, 39 n.111 (July 1992).

<sup>6</sup> See N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2005). Nebraska, Pennsylvania and Utah have similar rules to New York. See *Battle Heats Up*, *supra* note 2, at 11.

<sup>7</sup> See *Beneficial or Critical? The Heightened Need for Telework Opportunities in the Post-9/11 World: Hearing on S.No.108-210 Before the Comm. on Govt. Reform*, 108th Cong. 132 (2004) (statement of Rep. Edward L. Schrock, Member, Comm. on Govt. Reform, noting: “[Telecommuting] is a very important topic that is going to continually be revisited, because it is clearly the wave of the future . . .”).

<sup>8</sup> 4 N.Y.3d 427, 829 N.E.2d 276, 796 N.Y.S.2d 312 (2005), *cert. denied*, 126 S. Ct. 546 (2005).

<sup>9</sup> *Id.* at 438, 829 N.E.2d at 283, 796 N.Y.S.2d at 319.

<sup>10</sup> *In re Huckaby*, DTA No. 817284, at 2 (N.Y. Tax App. Trib. May 30, 2002), available at <http://www.nysdta.org/Decisions/817284.dec.rtf>.

<sup>11</sup> *Huckaby*, 4 N.Y.3d at 430, 29 N.E.2d at 277–78, 796 N.Y.S.2d at 313–14.

<sup>12</sup> *Id.*, 29 N.E.2d at 278, 796 N.Y.S.2d at 314. Because NOITU had been a client of MCS and Huckaby had worked on matters for NOITU while employed at MCS, Huckaby’s transition from MCS to NOITU was logical and simple. See *id.*, 29 N.E.2d at 278, 796 N.Y.S.2d at 314.

<sup>13</sup> *In re Huckaby*, DTA No. 817284, at 2–3.

supporting software programs, assisting in selecting new information technology, and meeting any general programming needs of the company.<sup>14</sup> NOITU and Huckaby agreed that Huckaby's primary work location would be his home in Tennessee and he would only be required to travel to the New York office when necessary.<sup>15</sup> To facilitate this arrangement, NOITU assisted Huckaby in setting up a home office in Tennessee and reimbursed him for his monthly office expenses.<sup>16</sup> Huckaby's decision to work in Tennessee, rather than in New York, was purely for personal reasons.<sup>17</sup>

On his 1994 and 1995 tax returns, Huckaby allocated his income based on the relative percentages of time he spent working in New York and Tennessee.<sup>18</sup> On average, Huckaby allocated 75 percent of his income to Tennessee and 25 percent to New York.<sup>19</sup> The New York State Department of Taxation and Finance audited Huckaby's tax returns and allocated 100 percent of his income to New York State under the "convenience of the

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<sup>14</sup> *Huckaby*, 4 N.Y.3d at 430, 829 N.E.2d at 278, 796 N.Y.S.2d at 314.

<sup>15</sup> *Id.*, 829 N.E.2d at 278, 796 N.Y.S.2d at 314. Specifically, Huckaby was only required to travel to New York to "gather guidelines for revision of existing or creation of new computer programs, and to instruct NOITU's New York personnel in their use." *Id.* at 430-31, 829 N.E.2d at 278, 796 N.Y.S.2d at 314.

<sup>16</sup> *Huckaby*, 4 N.Y.3d at 431, 829 N.E.2d at 278, 796 N.Y.S.2d at 314. NOITU set up a long-distance data-line in Huckaby's home office to connect to NOITU's Jamaica office. *Id.*, 829 N.E.2d at 278, 796 N.Y.S.2d at 314. Huckaby also had a separate business telephone line and computer equipment. *Id.*, 829 N.E.2d at 278, 796 N.Y.S.2d at 314.

<sup>17</sup> *Id.*, 829 N.E.2d at 278, 796 N.Y.S.2d at 314. The fact that NOITU did not require Huckaby to work in Tennessee instead of the New York office has significant tax consequences in the application of the convenience of the employer test, under which the allocation of income to a state other than New York is permitted only if the employee's presence in that other state is out of the necessity of the employer. See N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2005).

<sup>18</sup> See *Huckaby*, 4 N.Y.3d at 431, 829 N.E.2d at 278, 796 N.Y.S.2d at 314.

<sup>19</sup> *Id.*, 829 N.E.2d at 278, 796 N.Y.S.2d at 314. In 1994, Huckaby worked fifty-nine days in New York and 187 days in Tennessee, which represents an income allocation of 24 percent and 76 percent, respectively. See *id.*, 829 N.E.2d at 278, 796 N.Y.S.2d at 314. In 1995, Huckaby worked sixty-two days in New York and 180 days in Tennessee, an income allocation of 26 percent and 74 percent, respectively. See *id.*, 829 N.E.2d at 278, 796 N.Y.S.2d at 314.

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employer test.”<sup>20</sup> Huckaby paid the deficiencies under protest and commenced legal action.<sup>21</sup>

On March 29, 2005, the Court of Appeals of New York, in an opinion rendered by Judge Read, applied the convenience of the employer test and upheld the taxation of 100 percent of Huckaby’s income because his work was performed out of state for “convenience” rather than the “necessity” of his employer.<sup>22</sup> The Court of Appeals determined that, under the relevant New York Tax Law, the legislature intended to tax nonresidents on all income earned while working for a New York employer.<sup>23</sup> Furthermore, the court upheld the convenience of the employer test as a valid interpretation of the New York Tax Law, despite the fact that Huckaby did not choose to live in Tennessee to evade taxes and was physically unable to commute to New York each day.<sup>24</sup>

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<sup>20</sup> *Id.*, 829 N.E.2d at 278, 796 N.Y.S.2d at 314. New York State and New York City assessed deficiencies, which, with interest, totaled \$5,851.54. *See In re Huckaby*, DTA No. 817284, at 6, available at <http://www.nysdta.org/Decisions/817284.dec.pdf>.

<sup>21</sup> *See Huckaby*, 4 N.Y.3d at 431–32, 829 N.E.2d at 278, 796 N.Y.S.2d at 314. On February 28, 2001, the State of New York Division of Tax Appeals Administrative Judge denied Huckaby’s petition, disagreeing with the deficiencies and requesting a formal hearing. *See In re Huckaby*, DTA No. 817284, at 13. On May 30, 2002, the State of New York Tax Appeals Tribunal affirmed the decision of the Division of Tax Appeals. *See In re Huckaby*, DTA No. 817284, at 2. On April 29, 2004, the Supreme Court, Appellate Division, Third Department again denied Huckaby’s petition. *See Huckaby v. N.Y. State Div. of Tax App.*, 6 A.D.3d 988, 991, 776 N.Y.S.2d 125, 129 (3d Dep’t 2004). Huckaby then appealed to the New York Court of Appeals. New York Court of Appeals, Court of Appeals New Filings, <http://www.courts.state.ny.us/ctapps/newcase04.htm> (last visited Aug. 8, 2006).

<sup>22</sup> *Huckaby*, 4 N.Y.3d at 430, 829 N.E.2d at 277, 796 N.Y.S.2d at 313.

<sup>23</sup> *See id.* at 435, 829 N.E.2d at 281, 796 N.Y.S.2d at 317.

<sup>24</sup> *See id.* at 434–35, 829 N.E.2d at 280–81, 796 N.Y.S.2d at 316–17. The Court of Appeals went on to uphold the convenience of the employer test against two constitutional challenges. *See id.* at 440, 829 N.E.2d at 284–85, 796 N.Y.S.2d at 320–21. Specifically, Huckaby alleged that the convenience of the employer test was unconstitutional under the Due Process and Equal Protection clauses of the Fourteenth Amendment. *Id.* at 437, 439–40, 829 N.E.2d at 282, 284, 796 N.Y.S.2d at 318, 320. Under the Due Process clause, a state has the power to tax income generated by interstate activities if: (1) a “minimal connection” exists between the state and the person, property or transaction that it seeks to tax and (2) the income taxed is “rationally related to values connected with the [taxing] state.” *Id.* at 437, 829 N.E.2d at 283, 796 N.Y.S.2d at 319 (citing *Moorman Mfg. Co. v. Blair*, 437 U.S. 267, 273 (1978)). The court concluded that these two requirements were satisfied in *Huckaby*; thus, there was no Due Process violation. *See id.* at 438–39, 829 N.E.2d at 284, 796 N.Y.S.2d at 320. In tax cases:

[T]he Equal Protection Clause is satisfied so long as there is a plausible

The dissent, authored by Judge R.S. Smith, argued that the convenience of the employer test should apply only in cases where it serves the “legitimate purpose of avoiding manipulation or fraud.”<sup>25</sup> The dissent found compelling the fact that Huckaby did not work in Tennessee to avoid New York taxes, but rather because Tennessee was simply where he had been living for almost a decade at the time he commenced his employment with NOITU.<sup>26</sup> Thus, the dissent argued that the convenience of the employer test should not apply to Huckaby and only 25 percent of his income should be taxable by New York State.<sup>27</sup> Huckaby appealed to the United States Supreme Court, which on October 31, 2005 declined to hear his case.<sup>28</sup>

The *Huckaby* decision has the potential to stifle the trend of telecommuting in New York, which, in turn, will negatively affect New York businesses. The position of this Recent Development is that, although the Court of Appeals correctly applied the New York Tax Law as it is currently written, the time has come for the New York legislature to amend its tax law to conform to the demands of the modern business environment. Part I explains the relevant New York Tax Law and why it was correctly applied in *Huckaby*. Part I posits, however, that the conflicting policy implications were not properly assessed by the Court of Appeals in the *Huckaby* decision. Part II discusses the benefits of telecommuting and ways in which the federal government has recognized its importance. Part II also illustrates the

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policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision-maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

*Id.* at 439, 829 N.E.2d at 284, 796 N.Y.S.2d at 320 (citing *Nordlinger v. Hahn*, 505 U.S. 1 (1992)). The court further concluded that New York’s distinction between those employees that work out of state for personal reasons and those that work out of state as a “necessity” is a rational means of taxing only that income attributable to New York and, thus, complies with the Equal Protection clause. *Id.* at 439–40, 829 N.E.2d at 284–85, 796 N.Y.S.2d at 320–21. This Recent Development will not address the constitutional challenges any further. The purpose of this Recent Development is to focus solely on the policy implications of the continued application of the convenience of the employer test.

<sup>25</sup> *Id.* at 441, 829 N.E.2d at 285, 796 N.Y.S.2d at 321 (R.S. Smith, J., dissenting).

<sup>26</sup> *See id.* at 443, 829 N.E.2d at 286–87, 796 N.Y.S.2d at 322–23.

<sup>27</sup> *See id.* at 445, 829 N.E.2d at 288, 796 N.Y.S.2d at 324.

<sup>28</sup> *Huckaby v. N.Y. State Div. of Tax App.*, 126 S. Ct. 546 (2005).

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detrimental implications of *Huckaby* and its tax treatment of nonresident telecommuters to New York business. Part III examines the history of the New York Tax Law to explain why a change is necessary and proposes a solution to New York's current tax treatment of telecommuters. Finally, Part III concludes with a discussion of why states, such as New York, should use their tax laws to promote, rather than inhibit, telecommuting.

## I. THE CURRENT NEW YORK TAX LAW

A. *Taxation of Nonresident Individuals*

Section 601(e)(1) of the New York Tax Law imposes a tax on all income of nonresidents "derived from sources in this state[.]"<sup>29</sup> Section 631 further addresses the taxation of nonresidents; under this provision, a nonresident's "New York source income" taxable by New York State is that attributable to a business "carried on" in the state.<sup>30</sup> Whether this section applies to telecommuters at all depends on whether "carried on" refers to the business of the employer or the work performed by the employee. If "carried on" refers to the business of the New York employer, then 100 percent of a telecommuter's income would be subject to taxation in New York, regardless of where the employee actually performs his or her work.<sup>31</sup> On the other hand, if "carried on" refers to the location of the work performed by the employee, then some type of apportionment between two states—the taxpayer's place of

<sup>29</sup> N.Y. TAX LAW § 601(e)(1) (McKinney Supp. 2006).

<sup>30</sup> N.Y. TAX LAW § 631 (McKinney Supp. 2006). In relevant part:

(a) General. The New York source income of a nonresident individual shall be the sum of the following: (1) The net amount of income, gain, loss and deduction entering into his federal adjusted gross income as defined in the laws of the United States for the taxable year, derived from or connected with New York sources . . . .

. . . .

(b) . . . .

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

. . . .

(B) a business, trade, profession or occupation *carried on* in this state . . . .

*Id.* (emphasis added); *Huckaby*, 4 N.Y.3d at 432, 829 N.E.2d at 279, 796 N.Y.S.2d at 315.

<sup>31</sup> This assumes that the employee's only income was earned for work done for that New York employer.

residence and the employer's place of business—may be necessary.

The stronger argument is the latter—that “carried on” refers to the location of the work performed by the employee. There are two reasons to support this conclusion. First, a New York Attorney General's opinion that was rendered contemporaneously with the enactment of the statute in 1919 supports this view.<sup>32</sup> The opinion discusses the issue of what is included in the meaning of “sources within the state.”<sup>33</sup> Attorney General Charles D. Newton opined the following: “[T]he work done, rather than the person paying for it, should be regarded as the ‘source’ of the income. It would follow that payments, wherever and by whomever made, for services performed outside of the State are not taxable against nonresidents . . . .”<sup>34</sup> Second, if the “carried on” language did in fact refer to the location of the employer, then the income of a nonresident employed by a New York employer would always be 100 percent taxable by New York and there would be no need to develop any apportionment scheme at all. Thus, the mere existence of the convenience of the employer test supports a reading of the statute as referring to the location of the employee. Therefore, because the “carried on” language in section 631 refers to the location of the employee, this law applies to a nonresident telecommuter.

### B. *The Convenience of the Employer Test*

The portion of a nonresident's New York “source” income under section 631 that is taxable by New York State is determined according to the convenience of the employer test; under this test, all income of a nonresident individual who works for a New York employer is taxable by New York State, unless the work done to earn such income was performed out of state for the employer's necessity, rather than convenience.<sup>35</sup> Since it was

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<sup>32</sup> 89 Op. N.Y. Att'y Gen. 301 (1919). The “carried on” language first appeared in the New York Tax Law in 1919. See *Huckaby*, 4 N.Y.3d at 432, 829 N.E.2d at 279, 796 N.Y.S.2d at 315.

<sup>33</sup> 89 Op. N.Y. Att'y Gen. at 301.

<sup>34</sup> *Id.*

<sup>35</sup> N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18 (2005). In relevant part:

(a) If a nonresident employee . . . performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed

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adopted as part of the Tax Law, the convenience of the employer test has been repeatedly upheld as a valid interpretation of section 631.<sup>36</sup>

For example, in *Phillips v. New York State Department of Taxation and Finance*,<sup>37</sup> Phillips, a resident of Pennsylvania, worked as a municipal bond salesperson for a New York City firm.<sup>38</sup> Phillips worked in the New York office about 42 percent of the time and the remainder at a home office provided by his employer in Pennsylvania.<sup>39</sup> Phillips apportioned his income between the two states.<sup>40</sup> Applying the convenience of the employer test, the court held that there should have been no apportionment; all of Phillips' income was taxable by New York because there was no evidence showing that the out-of-state work was performed for the employer's necessity.<sup>41</sup>

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within New York State bears to the total number of working days employed both within and without New York State . . . . However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.

*Id.* For a comparison of when courts will and will not find "necessity" see *Phillips v. N.Y. State Dep't of Taxation and Fin.*, 267 A.D.2d 927, 929, 700 N.Y.S.2d 566, 568 (3d Dep't 1999) (finding that the taxpayer's work at home was out of convenience rather than the necessity of the employer, even where the employer explained that the taxpayer's presence in the office was "not feasible or practical on a daily basis"). *Cf.* *Fass v. State Tax Comm'n*, 68 A.D.2d 977, 977-78, 414 N.Y.S.2d 780, 781-82 (3d Dep't 1979), *aff'd*, 50 N.Y.2d 932, 933, 409 N.E.2d 998, 998, 431 N.Y.S.2d 526, 526 (1980) (holding that work from home was out of necessity where the taxpayer's responsibilities, as an editor and publisher of several New York-based magazines, included testing, analyzing and investigating new products at an extensive testing and storage facility set up by the taxpayer at his residence in New Jersey).

<sup>36</sup> See *Speno v. Gallman*, 35 N.Y.2d 256, 259, 319 N.E.2d 180, 181-82, 360 N.Y.S.2d 855, 858 (1974) (commenting on the "longstanding judicial application" of the convenience of the employer test). For additional examples of where courts applied the convenience of the employer test to individual taxpayers, see *Zelinsky v. Tax App. Trib. of the State of N.Y.*, 1 N.Y.3d 85, 97, 801 N.E.2d 840, 849, 769 N.Y.S.2d 464, 473 (2003); *Phillips*, 267 A.D.2d at 928, 700 N.Y.S.2d at 567-68; *Kitman v. State Tax Comm'n*, 92 A.D.2d 1018, 1019, 461 N.Y.S.2d 448, 449-50 (3d Dep't 1983); *Colleary v. Tully*, 69 A.D.2d 922, 922-23, 415 N.Y.S.2d 266, 268 (3d Dep't 1979); *Fass*, 68 A.D.2d at 977-78, 414 N.Y.S.2d at 781-82; *Hayes v. State Tax Comm'n*, 61 A.D.2d 62, 63, 401 N.Y.S.2d 876, 877 (3d Dep't 1978).

<sup>37</sup> 267 A.D.2d 927, 700 N.Y.S.2d 566 (3d Dep't 1999).

<sup>38</sup> *Id.* at 927, 700 N.Y.S.2d at 567.

<sup>39</sup> See *id.* at 929, 700 N.Y.S.2d at 568. The rationale given for the employer's provision of his home office is that Phillips would then be able to perform trades at any time of the day or night. *Id.* at 927-28, 700 N.Y.S.2d at 567.

<sup>40</sup> *Id.* at 928, 700 N.Y.S.2d at 567.

<sup>41</sup> *Id.* at 928-29, 700 N.Y.S.2d at 568. This finding was notwithstanding a letter

In *Zelinsky v. Tax Appeals Tribunal of the State of New York*,<sup>42</sup> the petitioner, a Connecticut resident, was employed as a professor at a law school in New York.<sup>43</sup> Zelinsky only commuted to New York three days a week to teach classes and spent the remainder of his work time preparing exams, researching, and writing at his home in Connecticut.<sup>44</sup> He apportioned his income between the two states, but the New York Court of Appeals concluded this apportionment was improper.<sup>45</sup> The Court of Appeals upheld the Department of Taxation and Finance's application of the convenience of the employer test and determination that there was no necessity of the employer that required Zelinsky to work from home.<sup>46</sup>

In *Speno v. Gallman*,<sup>47</sup> Speno was a resident of New Jersey and the president of a New York railroad cleaning company.<sup>48</sup> Speno worked mostly outside of New York, and, therefore, only allocated income to New York for those days he spent working in the State.<sup>49</sup> In admitting that he "could live in Hong Kong and do what [he was] doing," Speno demonstrated that he was not working in New Jersey out of the necessity of his employer.<sup>50</sup> Therefore, under the convenience of the employer test, Speno's income was 100 percent taxable by New York.<sup>51</sup>

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provided by the taxpayer's employer stating that "[the taxpayer's] presence in our office is not feasible or practical on a daily basis." *Id.* at 929, 700 N.Y.S.2d at 568. The court was not persuaded as to why it was possible for the taxpayer to work from the New York office 42 percent of the time without problem and yet it still be out of the necessity of the employer for the taxpayer to spend the remainder of his time working from home in Pennsylvania. *Id.* at 929-30, 700 N.Y.S.2d at 568-69.

<sup>42</sup> 1 N.Y.3d 85, 801 N.E.2d 840, 769 N.Y.S.2d 464 (2003).

<sup>43</sup> *Id.* at 88, 801 N.E.2d at 843, 769 N.Y.S.2d at 467.

<sup>44</sup> *Id.* at 88-89, 801 N.E.2d at 843, 769 N.Y.S.2d at 467.

<sup>45</sup> *Id.* at 89, 801 N.E.2d at 843-44, 769 N.Y.S.2d at 467-68.

<sup>46</sup> *Id.* at 89, 801 N.E.2d at 844, 769 N.Y.S.2d at 468. For additional examples of where New York courts have applied the convenience of the employer test and held apportionment improper for Connecticut residents working for New York employers, see *Evans v. Tax Comm'n of the State*, 82 A.D.2d 1010, 442 N.Y.S.2d 174 (3d Dep't 1981); *Simms v. Procaccino*, 47 A.D.2d 149, 365 N.Y.S.2d 73 (3d Dep't 1975); *Page v. State Tax Comm'n*, 46 A.D.2d 341, 362 N.Y.S.2d 599 (3d Dep't 1975).

<sup>47</sup> 35 N.Y.2d 256, 319 N.E.2d 180, 360 N.Y.S.2d 855 (1974).

<sup>48</sup> *Id.* at 257, 319 N.E.2d at 180, 360 N.Y.S.2d at 856.

<sup>49</sup> See *id.* at 258, 319 N.E.2d at 181, 360 N.Y.S.2d at 856-57.

<sup>50</sup> *Id.* at 258, 319 N.E.2d at 181, 360 N.Y.S.2d at 857.

<sup>51</sup> See *id.* at 260, 319 N.E.2d at 182, 360 N.Y.S.2d at 859. For additional examples of where New York courts have applied the convenience of the employer test and held apportionment improper for New Jersey residents working for New York employers, see *Brody v. Chu*, 141 A.D.2d 907, 529 N.Y.S.2d 223 (3d Dep't 1988); *Wheeler v. State Tax Comm'n*, 72 A.D.2d 878, 421 N.Y.S.2d 942 (3d Dep't

2006] *TAX TREATMENT OF TELECOMMUTERS* 1157*C. Policy Considerations*

The convenience of the employer test averts problems that arise where an out-of-state commuter spends a few hours working at home and then tries to allocate his or her income to achieve favorable tax treatment. Since New York State residents would not be entitled to any tax benefit for work done at home, the convenience of the employer test serves to prevent nonresidents who work for a New York employer from obtaining any such benefit either.<sup>52</sup> Thus, the purpose of the convenience of the employer test is to avoid manipulation and abuses by nonresident commuters.<sup>53</sup> The crucial distinction between the cases to date and *Huckaby* is that, in prior cases, application of the convenience of the employer test to the nonresident telecommuter achieved the purpose of avoiding manipulation or fraud. In cases like *Phillips*, *Zelinsky*, and *Speno*, the nonresident taxpayers could commute daily from Pennsylvania, Connecticut, and New Jersey, respectively; therefore, as applied to these nonresidents, the convenience of the employer test prevented the manipulation of tax liability.<sup>54</sup> Unlike the taxpayers in these prior cases, however, *Huckaby* did not live in a state neighboring New York where a daily driving commute would be possible.<sup>55</sup> Because the policies behind the convenience of the employer test are not furthered as applied to telecommuters such as *Huckaby*, the principle effect of applying this test to these individuals is to discourage telecommuting to New York. The majority of the court in *Huckaby* seemingly

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1979); *Churchill v. Gallman*, 38 A.D.2d 631, 326 N.Y.S.2d 917 (3d Dep't 1971); *Morehouse v. Murphy*, 10 A.D.2d 764, 197 N.Y.S.2d 763 (3d Dep't 1960).

<sup>52</sup> *Speno v. Gallman*, 35 N.Y.2d 256, 259, 319 N.E.2d 180, 181, 360 N.Y.S.2d 855, 858 (1974).

<sup>53</sup> See *Colleary v. Tully*, 69 A.D.2d 922, 923, 415 N.Y.S.2d 266, 268 (3d Dep't 1979). Without a rule such as the convenience of the employer test, nonresidents would retain the benefits of New York employees, while affording themselves of a neighboring state's more favorable income tax treatment.

<sup>54</sup> See *Zelinsky v. Tax Appeals Trib. of the State of N.Y.*, 1 N.Y.3d 85, 88, 89, 801 N.E.2d 840, 843, 844, 769 N.Y.S.2d 464, 467, 468 (2003); *Speno v. Gallman*, 35 N.Y.2d 256-60, 319 N.E.2d 180, 180-82, 360 N.Y.S.2d 855, 856-59 (1974); *Phillips v. N.Y. State Dep't of Taxation and Fin.*, 267 A.D.2d 927, 927-28, 700 N.Y.S.2d 566, 567-68 (3d Dep't 1999).

<sup>55</sup> Nashville, Tennessee is nine hundred miles and a two-hour plane ride from Jamaica, New York. See *In re Huckaby*, DTA No. 817284, at 5, available at <http://www.nysdta.org/Decisions/817284.dec.pdf>. Needless to say, *Huckaby* and other employees like him could not afford to spend 4 hours and several hundred dollars a day commuting to and from work.

accepts this undesirable result as incident to the application of the convenience of the employer test.

## II. "A DECISION THAT'S BAD FOR NEW YORK BUSINESS"<sup>56</sup>

Rulings like *Huckaby* inevitably stunt the growth of telecommuting and will suppress business in New York. As one commentator noted, "[i]t's all about flexibility in the workplace of the future."<sup>57</sup> To remain competitive in years to come, it is vital that businesses provide their employees with the flexibility to perform their jobs in the location where they are most productive.<sup>58</sup> With so many businesses already embracing telecommuting, those that do not will be at a competitive disadvantage.<sup>59</sup> Thus, New York must encourage telecommuting through its tax laws so that resident companies can embrace telecommuting and take advantage of its many benefits. Unfortunately, the *Huckaby* decision prevents companies from taking this course. In addition, *Huckaby* contradicts many federal initiatives that encourage telecommuting and recognize its importance in today's business world.<sup>60</sup>

### A. Benefits of Telecommuting

The benefits of telecommuting are endless—for both employees and employers.<sup>61</sup> With gas prices on the rise, saving money on fuel costs is only one reason employees now, more than

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<sup>56</sup> Keating, *supra* note 5, at A32. (discussing *Huckaby v. New York State Division of Tax Appeals* as a decision that "creates another tax obstacle to doing business in New York").

<sup>57</sup> Simon Young, *Special Report: Technology, Flexible Future*, NZ MARKETING MAG., June 2, 2005, at 31 (discussing how emerging new technologies will change people's lives).

<sup>58</sup> See *infra* notes 65 & 77 and accompanying text.

<sup>59</sup> See Nicole Belson Goluboff, *Commentary: Speed Passage of the Telecommuter Tax Fairness Act: It's Time for Congress To Eliminate the Tax on Interstate Telework*, E-COM. L. & STRATEGY, Feb. 2005, available at <http://www.telcoa.org/td238.htm> (suggesting that companies not able to capitalize on the cost savings associated with telecommuting will be at a competitive disadvantage compared to those companies that successfully exploit these benefits).

<sup>60</sup> See *infra* notes 69–74 and accompanying text.

<sup>61</sup> See generally Jane Brissett, *Board Weighs Benefits of Telecommuting*, DULUTH NEWS TRIB., Apr. 26, 2004, at 1A (discussing the benefits and costs of telecommuting as found by the St. Louis County Board in Minnesota); Edward E. Potter, *Telecommuting: The Future of Work, Corporate Culture, and American Society*, 24 J. OF LAB. RES. 73, 73, 77–79 (2003) (discussing the various benefits of telecommuting to employees and employers).

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ever, prefer to work at home.<sup>62</sup> Employees also prefer to work at home to avoid threats to their own safety that accompany traveling to and working in large cities, and to reduce the stress and anxiety associated with traveling to and from work.<sup>63</sup> In addition, telecommuters find they are better able to complete their job tasks with fewer distractions when they work from home and the flexibility of telecommuting provides employees with greater enjoyment of their personal lives.<sup>64</sup> Furthermore, happier, more satisfied employees are generally more productive while they work and, therefore, produce a higher quality work product.<sup>65</sup>

In addition, telecommuting offers cost savings that can help domestic companies achieve their target net income without having to outsource labor overseas.<sup>66</sup> In particular, these cost savings include reduced overhead expenses and reduced recruitment and turnover costs.<sup>67</sup> Eliminating a daily commute not only gives telecommuters more time to perform their jobs, but cuts down on traffic, reduces air pollution, and lessens spending on fuel costs and transportation infrastructure.<sup>68</sup>

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<sup>62</sup> See Beth Cooney, *Virtual Offices: When Telecommuting Works, It's a Win/Win*, THE STAMFORD ADVOC., Sept. 1, 2006, available at <http://www.stamfordadvocate.com/features/scn-sa-telecommute1sep01,0,7042513.story?coll=stam-features-headlines> (stating gas prices as a reason for the popularity of telecommuting).

<sup>63</sup> See Mariani, *supra* note 1, at 14; Potter, *supra* note 61, at 73.

<sup>64</sup> See Mariani, *supra* note 1, at 13; Potter, *supra* note 61, at 73. A recent AT&T survey on telecommuting demonstrated the increased satisfaction of employees both with their careers and in their personal lives after they started telecommuting. See *Case Study: AT&T, TELECOMMUTE CONNECTICUT!*, <http://www.telecommutect.com/research/CSATT.asp> (last visited Oct. 7, 2006) (stating that 63 percent of telecommuters reported increased satisfaction in these two areas). This increased satisfaction may stem, at least in part, from the ability of employees who telecommute to better balance "the competing demands of work and family." See Support The Telecommuter Tax Fairness Act, <http://www.petitiononline.com/totp02/petition.html> (last visited Oct. 9, 2006) [hereinafter *Support Telecommuter Fairness Act*].

<sup>65</sup> See Goluboff, *supra* note 59 (citing "increased productivity" as a benefit to employers).

<sup>66</sup> See *Support Telecommuter Fairness Act*, *supra* note 64 (explaining that firms may have to increase their reliance on overseas workers if they are unable to exploit the benefits of telecommuting).

<sup>67</sup> See Goluboff, *supra* note 59 (discussing the bottom-line benefits to employers associated with telecommuting).

<sup>68</sup> See Goluboff, *supra* note 59 (listing the national goals that telecommuting helps to achieve); *Support Telecommuter Fairness Act*, *supra* note 64.

*B. Federal Telecommuting Initiatives*

Indeed, the federal government has recognized the importance of telecommuting. A federal law enacted on October 23, 2000, requires that federal agencies make telecommuting an option for their employees.<sup>69</sup> In addition, President Bush included tax proposals in his 2005 and 2006 Budgets that would allow individuals who telecommute to avoid the inclusion of telecommuting equipment provided by their employers, such as computers and software, in their taxable income.<sup>70</sup>

The *Huckaby* decision is also contrary to several of President Bush's public policy initiatives.<sup>71</sup> For example, in discouraging telecommuting, and thus the development of remote locations, the *Huckaby* decision undermines programs introduced by President Bush that assure the continuity of government and business operations in the event of a disaster.<sup>72</sup> In addition, President Bush has put forward his New Freedom Initiative, a program to help disabled Americans assimilate into society and integrate into the workforce.<sup>73</sup> As a result of the *Huckaby* ruling,

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<sup>69</sup> See Department of Transportation and Related Agencies Appropriations Act, Pub. L. No 106-346, § 359, 114 Stat. 1356, 1356 (2001):

Each executive agency shall establish a policy under which eligible employees of the agency may participate in telecommuting to the maximum extent possible without diminished employee performance. Not later than 6 months after the date of the enactment of this Act, the Director of the Office of Personnel Management shall provide that the requirements of this section are applied to 25 percent of the Federal workforce, and to an additional 25 percent of such workforce each year thereafter.

*Id.*; see also *Support Telecommuter Fairness Act*, *supra* note 64 (petitioning for support for legislation that eliminates any state rule that "punishes both Americans who telecommute across state lines to their employers and businesses that need to hire interstate telecommuters").

<sup>70</sup> See Tara Siegel Bernard, *Getting Personal: Telecommuter Taxes Could Get Simpler*, DOW JONES NEWSWIREs, available at <http://www.telcoa.org/id240.htm>. See generally NCTimes.com, *Federal Budget Seeks Permanent Tax Cuts*, [http://www.ncetimes.com/articles/2004/02/03/business/news/2\\_2\\_0421\\_53\\_18.prt](http://www.ncetimes.com/articles/2004/02/03/business/news/2_2_0421_53_18.prt) (last visited Aug. 9, 2006) (discussing the tax changes included in the 2005 budget, which include tax breaks for telecommuters); A Progress Report on Fulfilling America's Promise to Americans with Disabilities: The 2004 Progress Report, The White House, <http://www.whitehouse.gov/infocus/newfreedom/toc-2004.html> (last visited Aug. 8, 2006) (follow "Chapter 3: Integrating Americans with Disabilities into the Workplace" hyperlink).

<sup>71</sup> See Toni Kistner, *Fighting For Fair Telework Tax*, NETWORK WORLD, June 7, 2004, at 41.

<sup>72</sup> See Toni Kistner, *OPM Report Links Telework to Emergency Readiness*, NETWORK WORLD, June 7, 2004, at 44.

<sup>73</sup> See U.S. Dep't of Health and Human Services, *New Freedom Initiative*,

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the individuals at whom this initiative was aimed will be discouraged rather than encouraged to telecommute to New York because of the adverse tax consequences. The *Huckaby* decision is also contrary to federal laws that help rural communities expand their communities.<sup>74</sup> Many companies are located only in large metropolitan areas that are too far from rural towns for a daily commute to be possible; telecommuting facilitates the ability of residents of rural towns to work for companies located hundreds of miles away.

*C. Implications for the Future of New York Business*

The *Huckaby* decision has potentially widespread ramifications on telecommuting to New York.<sup>75</sup> Even before the *Huckaby* ruling, New York businesses faced a challenge to recruit well-qualified in-state workers.<sup>76</sup> Companies need to maintain flexibility in their operations to allow employees to live in the location where they will be most productive in performing their job.<sup>77</sup> The adverse tax consequences of the *Huckaby* ruling now limit a New York company's ability to recruit out-of-state employees as well because they will be hesitant to telecommute.

In addition, *Huckaby's* holding opens up the strong possibility for the double taxation of telecommuters.<sup>78</sup> For

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<http://www.hhs.gov/newfreedom> (last visited Aug. 9, 2006) (describing how the initiative is helping disabled Americans assimilate into the workforce).

<sup>74</sup> See Kistner, *supra* note 71, at 44. For example, the Farm Security and Rural Investment Act of 2002 aids rural communities in expanding their economies. See Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134, (2002).

<sup>75</sup> See *New York Court Puts Tax Bite on Telecommuting*, WALL ST. J., Mar. 30, 2005, at D10.

<sup>76</sup> See Keating, *supra* note 5, at A32 (reasoning that high tax burdens in New York dissuade good workers from living in the state).

<sup>77</sup> See Keith Russell, *Telecommuter Must Pay N.Y. Income Tax*, TENNESSEAN, Mar. 30, 2005, at 1E (quoting Robert Smith from the International Telework Association and Counsel: "[I]t's important for an employer to allow an employee to live in the best location for them to do the work, . . . the (*Huckaby*) ruling . . . potentially limits that flexibility." (emphasis added)).

<sup>78</sup> See Craig W. Friedrich, *Tax Based on Income from Sources within New York*, CORP. TAX'N, Sept./Oct. 2005 at 48. In his article, Friedrich also raises a number of "collateral issues" that result from the *Huckaby* ruling:

Is *Huckaby's* employer now free to treat all of his compensation as New York payroll for purposes of allocation of corporate income? Is the employer now also free of Tennessee employment taxes? Is *Huckaby* the last telecommuter to accept employee, and not independent contractor, status (with all the potential for mischief inherent in the classification issue)?

example, if a taxpayer lives in a state that uses the “physical presence” test<sup>79</sup> to apportion income and physically commutes to New York only 25 percent of the time while telecommuting 75 percent of the time, that taxpayer would be doubly taxed. That is, he or she would be taxed by both New York State and his or her home state on 75 percent of his or her income; under New York’s convenience of the employer test, the taxpayer would be taxed on 100 percent of his or her income and additionally taxed on 75 percent of that income by his or her home state through application of the physical presence test.<sup>80</sup> Thus, the potential for double taxation provides a further disincentive for nonresidents to telecommute to New York.

### III. FINDING A SOLUTION

For the health and prosperity of business in New York, it seems clear that something must be done to combat the unfavorable tax treatment that results from the application of the convenience of the employer test to nonresident telecommuters. It is time to modernize a forty-five-year-old test to conform to advancements in today’s business environment.<sup>81</sup> The Federal legislature has proposed a solution, “The Telecommuter Tax Fairness Act of 2005,”<sup>82</sup> which, if passed, would overrule *Huckaby* and remedy its ill effects on telecommuting in New York. If this federal act is not passed, New York should nevertheless adopt the physical presence test, which would enable New York businesses to reap the many benefits of telecommuting.

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*Id.*

<sup>79</sup> See *supra* note 5 and accompanying text.

<sup>80</sup> This assumes that no tax credit is given by one state for taxes paid in another.

<sup>81</sup> The convenience of the employer test was first adopted in 1960. See *Huckaby v. N.Y. State Div. of Tax App.*, 4 N.Y.3d 427, 434, 829 N.E.2d 276, 280, 796 N.Y.S.2d 312, 316 (2005)..

<sup>82</sup> See Telecommuter Tax Fairness Act of 2005, S.1097, 109th Cong. (1st Sess. 2005), <http://www.govtrack.us/data/us/bills.text/109/s/s1097.pdf>. An identical bill was also introduced in the House of Representatives. See Telecommuter Tax Fairness Act of 2005, H.R. 2558, 109th Cong. (1st Sess. 2005), <http://www.govtrack.us/data/us/bills.text/109/h/h2558.pdf>.

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The “carried on” language in section 631, which is currently applied to nonresident taxpayers, first appeared in the tax law when New York adopted an income tax in 1919.<sup>83</sup> The convenience of the employer test was developed in the regulations in 1960 to interpret section 631.<sup>84</sup> Undoubtedly, the United States and its economy were quite different in 1960 than they are today. The population of the United States increased by over one hundred million people between 1960 and 2000.<sup>85</sup> During that same time period, the percentage of people who worked in their county of residence decreased and more people now live further from their place of employment.<sup>86</sup> By 2004, it was estimated that Americans commuted an average of 24.7 minutes to work each day.<sup>87</sup>

In addition to being out of date, application of the convenience of the employer test contradicts other New York policies.<sup>88</sup> Since New York has the longest average commute time of all the states, the State government should view telecommuting as a solution to its congested roadways and crowded public transportation systems.<sup>89</sup> In discouraging telecommuting, however, the convenience of the employer test

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<sup>83</sup> See *Huckaby*, 1 N.Y.3d at 432, 829 N.E.2d at 279, 796 N.Y.S.2d at 315. The current versions of section 601 and what later became section 631, were added in 1960, but largely imitated their predecessor statutes. *Id.* at 433, 820 N.E.2d at 279, 796 N.Y.S.2d at 315.

<sup>84</sup> *Id.* at 434, 829 N.E.2d at 280, 796 N.Y.S.2d at 316.

<sup>85</sup> Specifically, the population in 1960 was 179,323,175 and in 2000 the population was 281,421,906. NANCY MCGUCKIN & NANDA SRINIVASAN, U.S. DEPT OF TRANSP., JOURNEY TO WORK TRENDS 1960–2000 (2003), <http://www.fhwa.dot.gov/ctpp/jtw/jtw1.htm#pop>.

<sup>86</sup> See *id.* In 1960, only 15 percent of the working population worked outside of their country of residence; by 2000, this percentage increased to 27 percent. *Id.*

<sup>87</sup> U.S. CENSUS BUREAU, U.S. SELECTED ECONOMIC CHARACTERISTICS: 2004 (2004), [http://factfinder.census.gov/servlet/ADPTable?\\_bm=y&-geo\\_id=01000US&-qr\\_name=ACS\\_2004\\_EST\\_G00\\_DP3&-ds\\_name=&-redoLog=false&-format=](http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2004_EST_G00_DP3&-ds_name=&-redoLog=false&-format=). New York has the highest daily commute time of all states at 30.6 minutes. U.S. CENSUS BUREAU, U.S. AND STATES: MEAN TRAVEL TIME TO WORK (2004), [http://factfinder.census.gov/servlet/GRTTable?\\_bm=y&-geo\\_id=01000US&-box\\_head\\_nbr=R0801&-ds\\_name=ACS\\_2004\\_EST\\_G00\\_-&-format=US-30](http://factfinder.census.gov/servlet/GRTTable?_bm=y&-geo_id=01000US&-box_head_nbr=R0801&-ds_name=ACS_2004_EST_G00_-&-format=US-30).

<sup>88</sup> See *Inconsistencies Surrounding New York’s Convenience of the Employer Test*, TAX ANALYSTS (2004), available at [http://taxprof.typepad.com/taxprof\\_blog/files/2005-9805-1.pdf](http://taxprof.typepad.com/taxprof_blog/files/2005-9805-1.pdf) (concluding that the convenience of the employer test squares “poorly” with other New York policies).

<sup>89</sup> See *id.*

accomplishes the opposite result. Even the majority opinion in *Huckaby* acknowledged that the convenience of the employer test may be an “unfair and unsound” policy and a “discouragement to telecommuting.”<sup>90</sup> Pointedly, the majority concluded it was simply not the place of the court to contradict the legislature’s judgment.<sup>91</sup> By refusing to go any further, the New York Court of Appeals, in effect, passed on to the legislature the duty to implement the necessary changes in the tax law, given advances of modern day business.<sup>92</sup>

*B. The “Telecommuter Tax Fairness Act”*

The Federal legislature has proposed a solution to the *Huckaby* problem that would require all states, including New York, to use a physical presence test to apportion the income of nonresidents. The “Telecommuter Tax Fairness Act of 2005” was introduced in the Senate on May 23, 2005.<sup>93</sup> In relevant part, section 127(a)(1) reads:

In applying its income tax laws to the salary of a nonresident individual, a State may only deem such nonresident individual to be present in or working in such State for any period of time if such nonresident individual is physically present in such State for such period and such State may not impose nonresident income taxes on such salary with respect to any period to time when such nonresident individual is *physically present* in another State.<sup>94</sup>

The effects of the Act are two-fold: (1) nonresident telecommuters will no longer be unfairly taxed by the employer’s state and (2) the potential for double-taxation will be eliminated. Thus, it seems apparent the Act will cure the evils of the New

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<sup>90</sup> *Huckaby v. NY. State Div. of Tax Appeals*, 4 N.Y.3d 427, 440, 829 N.E.2d 276, 284, 796 N.Y.S.2d 312, 320 (2005), *cert. denied*, 126 S. Ct. 546 (2005).

<sup>91</sup> *Id.*

<sup>92</sup> Critics of New York’s current tax treatment of telecommuters have also suggested the need for Congress to amend the tax law. *See, e.g.*, Goluboff, *supra* note 59 (suggesting the need for the legislature to take action in the title of the article: *It’s Time for Congress to Eliminate the Tax on Interstate Telework*).

<sup>93</sup> Telecommuter Tax Fairness Act of 2005, S.1097, 109th Cong. 1 (1st Sess. 2005), available at <http://thomas.loc.gov/cgi-bin/query/z?c109:s.1097>.

<sup>94</sup> Telecommuter Tax Fairness Act of 2005, S.1097, 109th Cong. (1st Sess. 2005), available at <http://thomas.loc.gov/cgi-bin/query/z?c109:s.1097:ssz> (emphasis added). The Telecommuter Tax Fairness Act was first introduced in September 2004. Goluboff, *supra* note 59. At the time this Recent Development was written, the explanation for the Act’s unsuccessful first attempt was unavailable.

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York Tax Law associated with telecommuting and the convenience of the employer test. Because of the important benefits of telecommuting and its presence in several of President Bush's public policy initiatives, the Act is expected to gain strong support.<sup>95</sup> Thus, if the New York legislature does not take the initiative in modernizing the current tax law, the "Telecommuter Tax Fairness Act" will have the same effect. A petition endorsing the Act is available on the Internet and, as of October 6, 2006, it had 456 signatories.<sup>96</sup>

*C. A Decision that's NOT Bad for New York Business*<sup>97</sup>

Initially, the effects of enacting Federal legislation like the "Telecommuter Tax Fairness Act" may appear harmful to a state's fiscal condition, as it would experience a decrease in tax revenue from the personal income of telecommuters. However, if New York were to adopt more favorable tax treatment for these telecommuters, like the physical presence test suggested by the proposed federal legislation, New York businesses would have a wider, deeper talent pool to draw from, which would include virtually any employee willing to telecommute. Furthermore, the result of a more efficient and productive work force is better for business operations; corporations would be making more money.<sup>98</sup> Thus, where New York would be losing tax revenues on the personal income tax side, it would be compensated for these losses by increased tax revenues on the corporate income tax front.

This argument is further supported by New York's current tax rates.<sup>99</sup> The corporate income tax for New York businesses in 2005 and 2006 was 7.5 percent of total net income.<sup>100</sup> The personal income tax is somewhat more complicated to calculate,

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<sup>95</sup> See Kistner, *supra* note 69, at 44.

<sup>96</sup> See Support Telecommuter Fairness Act—Signatures, [http://www.petitiononline.com/mod\\_perl/signed.cgi?totp02](http://www.petitiononline.com/mod_perl/signed.cgi?totp02) (last visited Oct. 6, 2006).

<sup>97</sup> Cf. Keating, *supra* note 5, at A32 (entitling the article *A Decision That's Bad for New York Business*).

<sup>98</sup> See Clare Huntington, *Welfare Reform and Child Care: A Proposal for State Legislation*, 6 CORNELL J.L. & PUB. POL'Y 95, 110 n.73 (Fall 1996) (noting that higher wages and business earnings can be generated by a more productive work force (citing COMMITTEE FOR ECONOMIC DEVELOPMENT, WHY CHILD CARE MATTERS PREPARING YOUNG CHILDREN FOR A MORE PRODUCTIVE AMERICA 1, 3 (1993))).

<sup>99</sup> See TAX ANALYSTS, INC., TYPES OF TAXES—NEW YORK (2006).

<sup>100</sup> *Id.*

as New York utilizes a progressive tax system, where the tax rate increases as a taxpayer's total income increases;<sup>101</sup> however, under the 2005 and 2006 tax rates, a taxpayer was not taxed more than 7.5 percent (the corporate tax rate) of his or her total income unless that income was \$500,000 or more a year.<sup>102</sup> Thus, New York could potentially raise more tax revenue by forfeiting the personal income tax revenue of telecommuters and generating more tax revenues in the form of corporate income taxes from businesses that are now more profitable because they are able to hire more qualified and more productive out-of-state employees.

#### CONCLUSION

To remain competitive in the twenty-first century, businesses must provide a corporate culture that facilitates telecommuting. Companies can only do so much to accommodate telecommuters; state-imposed tax laws inevitably play a vital role. New York's convenience of the employer test has the effect of dissuading telecommuters from working for New York employers, which is detrimental for New York business. Because the Supreme Court denied *certiorari* in *Huckaby*, the onus is on the legislature to put an end to the unfair tax treatment of telecommuters. This Recent Development aims to illustrate the important benefits of telecommuting and to demonstrate the critical need for a change in New York's current tax treatment of telecommuters, either through revisions to the New York Tax Law or adoption of the Federal "Telecommuter Tax Fairness Act."

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<sup>101</sup> See Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1361 n.84 (2000) (describing how a progressive tax system functions); TAX ANALYSTS, INC., *supra* note 99 (illustrating New York's progressive tax system).

<sup>102</sup> See TAX ANALYSTS, INC., *supra* note 99.