

### **Localization of Work Provisions**

The objective of "localization of work" provisions in state unemployment insurance laws is to cover under one state law all of the service performed by an individual for one employer, wherever it is performed. The following principles provide a guide for applying the states' statutory provisions relating to "localization of work." All of the examples provided are actual state decisions or have been taken from state manuals of interpretation or instruction.

The following language was included in the September 1950 edition of the Manual of State Employment Security Legislation and similar language now appears in all state laws:

- (1) Service that is localized within a state: The term "employment" shall include an individual's entire service, performed within, or both within and without, this state if the service is localized in this state. Service shall be deemed to be localized within a state if:
  - (A) the service is performed entirely within such state; or
  - (B) the service is performed both within and without such state but the service performed without such state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions.
- (2) Service not localized in any state: The term "employment" shall include an individual's entire service, performed within, or both within and without this state if the service is not localized in any state but some of the service is performed in this state, and;
  - (A) the individual's base of operations is in this state; or
  - (B) if there is no base of operations, the place from which such service is directed or controlled is in this state; or
  - (C) the individual's base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

The above localization of work provisions of state law are ordinarily applied in the following sequence:

- (1) Is the individual's service localized in this state or some other state?
- (2) If his/her service is not localized in any state, does he/she perform some service in the state in which his/her base of operations is located?
- (3) If the individual does not perform any service in the state in which his/her base of operations is located, does he/she perform any service in the state from which the service is directed and controlled?
- (4) If the individual does not perform any service in the state from which his/her service is directed and controlled, does the individual perform any service in the state in which he/she lives?

Thus, a state agency must first determine whether an individual's service is localized in that state. That is, it must find out whether service performed outside the state, if any, is incidental to that performed in the state. If so, service is localized in the state making the determination. If not, before going to the second test, it is necessary to find out whether the service is localized in some other state. Is the service performed in the state making the determination incidental to that performed in some other state? If so, all of the service is localized in the other state and is subject to the law of that state. It is possible, however, that part of the service is localized in one state, and part in another. In such a case, it may be desirable for the employer to elect to cover all of such individual's service in one state under the Interstate Reciprocal Coverage Arrangement.

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 the individual's base of operations state and whether any work is performed in that state. In other words, questions must be asked: Does the individual have a base of operations in this state? Is a service performed here? If the answer to either question is "no," the state must apply a second test: Is the individual's base of operations in any state where some work is performed? If it is, the law of that state covers all of the individual's service.

If the individual has no base of operations, or if no work is performed in the state in which the base of operations is located, and coverage is not determined by the second test, then it is necessary to apply the third test of "direction and control." If the individual performs no service in the state from which the service is directed and controlled and the service is, therefore, not covered by the third test in the state making the determination, or in any other state, then it is necessary to apply the fourth test. The state must determine whether the individual performs any service in the state in which he lives.

#### I. Guide for Determining the Place Where Work is Localized:

It is necessary to determine first whether the service in question is localized in any state. Service is localized in a state if it is performed entirely within the state, or, if it is performed both within and outside 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.

- A. In determining whether the service of a worker is incidental or transitory in nature, some of the factors to be considered are:
  1. Is it intended by the employer and the employee that the service be an isolated transaction or a regular part of the employee's work?
  2. Does the employee intend to return to the original state upon completion of the work in the other state, or is it the employee's intention to continue to work in the other state?
  3. Is the work performed outside the state of the same nature as, or is it different from, the tasks and duties performed within the state?

4. How does the length of service with the employer within the state compare with 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 the service is incidental or not. Service longer than 12 months would not generally be considered incidental, however, flexibility should be applied and various circumstances under which the work is performed, such as the terms of the contract of hire, whether written or oral, should be considered.

- B. Examples of services that are localized:

1. Service performed entirely in one state:

Example

A salesman employed by a New York corporation, who lives in Indiana and performs all of his work in Illinois, is covered by the Illinois law because all of his work is performed in Illinois, even though the corporation for which he works is located in New York and he lives in Indiana.

2. Service performed both in a state and outside that state:

Example

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

- a. A resident of California was hired in California to work on the Nevada job. When the work in Nevada was completed, the employee was laid off and not rehired by this employer. The employee's travel from California, where he was hired, to Nevada, was incidental to the work performed in Nevada. All work was localized in Nevada and was subject to the Nevada law.
- b. A resident of California had been a foreman on the employer's payroll for several years. The foreman was moved from a California job to the Nevada job where he worked until the completion of the job, at which time he came back to California for continued work with the same employer. Although this employee was in Nevada for 7 months, his regular work was in California, and the Nevada work was temporary in nature and incidental to the work performed in California. The

foreman's work, therefore, was localized in California, and the work performed in Nevada was subject to California law.

- c. A resident of Nevada was hired for the Nevada job only. After the end of several months of employment in Nevada, he continued working for this employer for an equal length of time on another job in California. While the employee was working in Nevada, his work was localized there and was covered by the Nevada law because that was the only job the individual was hired for, and the Nevada contract was an isolated transaction of the employer with no likelihood of future Nevada employment for the individual. Since his move to California was considered permanent,

the work in California was localized there and was subject to the California law.

#### 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, the employees' services were determined to be 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" was reiterated earlier in this document (paragraph I.A.4.) as being 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. New York and New Jersey considered the circumstances that required this move and determined that "temporary" would be considered to extend beyond a one-year period through the end of calendar year 2002. At the end of that time, employers who continued to operate in New Jersey would be considered subject to New Jersey 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, were considered to be performing services that were "localized" in New Jersey. As a result, their wages were subject to New Jersey law.

#### 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.

#### 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, and they were covered under Missouri law.

## II. Guide for Determining the Base of Operations:

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 his/her base of operations is located? The individual's base of operations should not be confused with the place from which his service is directed or controlled.

The "base of operations" is the place, or fixed center of more or less permanent nature, from which the individual starts work and to which the individual 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 exercise the individual's trade or profession at some other point or points. The base of operations may be the employee's business office, which may be located at his residence, or the contract of employment may specify a particular place at which the employee is to receive his direction and instructions. This test is applicable principally to employees, such as salesmen, who customarily travel in several states.

- A. Examples of non-localized service, where coverage is decided by the base-of-operations test:
  1. A salesman, a resident of California, sold products in California, Nevada, and Oregon for his employer whose place of business was in New York. The salesman operated

from his home where he received instructions from his employer, communications from his customers, etc. Once a year the salesman went to New York for a two-week sales meeting. His base of operations was in California, and he performed some service in California. Therefore, all of his service was covered by the California law.

2. An employee worked for a company whose home office was in Pennsylvania. He was made a regional director working out of a branch office in New York. He worked mostly in New York, but spent considerable time also in Pennsylvania and New Jersey. The individual's base-of-operations was in New York. Since he performed some service in New York and his base of operations was in New York, it is immaterial that the source of direction and control was in Pennsylvania, and all of the individual's service was covered by the New York law.
- a. The base-of-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:
    - i. Residence and mailing address of the owner.
    - ii. Location of accountant or business manager who acts as the owner's agent.
    - iii. State in which income tax returns are filed by the owner.
    - iv. State in which the owner has a traveling card from a musician's union.
    - v. 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 California, receives mail in California, carries a traveling card from a California musician's union,

and has a business agent in California. The band performs in several states, and its services are not localized in any state. All services of any employee who performs services in California as well as in other states are covered in California under the base-of-operations test. Even though the leader travels with the band, the principal base-of-operations for the leader and individual musicians remains fixed in California where the leader maintains his headquarters.

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

permanent member of the band. Under the contract of hire, the employee was to travel with the band in California and other states. Under the base-of-operations test, this employee's services are covered under California law during all periods. It is recognized that there may be a reporting period during which this employee performs services only in the State of Oregon. Also, there may be a reporting period or periods during which this employee may be performing services in several states but not in California. However, because of the period and location of employment expressed in the contract of hire, the services are considered covered in California.

3. Guide for Determining the Place From Which the Service is Directed or Controlled:

If the individual has no base-of-operations, or if he has such a base but does not perform any service in the state in which it is located, or if the base-of-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 his 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 rather than 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 which is not localized in any state, where coverage is decided by the direction and control test:

- a. A contractor whose main office is in California is regularly engaged in road construction work in California and Nevada. All operations are

under direction of a general superintendent whose office is in California. 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 control office. Employees report for work at the field offices. Time cards are sent weekly to the main office in California where the payrolls are prepared. Employees regularly perform services in both California and Nevada. It is determined that neither the localization nor the base-of-operations test applies. Because the basic authority of direction and control emanates from the central office in California, the services of the employees are covered by California law.

- b. A salesman residing in Cleveland, Ohio, works for a concern whose factory and selling office are in Chicago, Illinois. The salesman's territory is Kentucky, Arkansas, Oklahoma, Illinois, and Missouri. He does not use either the Chicago office or his home in Ohio as his base of operations. Since his work is not localized in any state and he has no base of operations, all of his service is covered by the Illinois law because his work is directed

and controlled from his employer's Chicago office and some of his service is in Illinois.

4. Guide for Determining the Place of Residence:

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 he performs no service in the state in which he has his base of operations (if he has such a base) and he performs no service in the state from which the service is directed and controlled.

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

Examples of coverage determined by state of residence:

- a. A salesman employed by an Indiana company lives in Illinois. His territory covers Iowa, Kentucky, and Illinois. The salesman's service is not localized in any state. He uses his employer's Indiana office as his base of operations, and his service is directed from that office. He performs no service in the state in which his base of operations is located, nor in the state from which his service is directed and controlled. He does

some work in Illinois, the state in which he lives. Consequently, all of his service is subject to the Illinois law.

- b. An individual who lives in California was hired as a member of a traveling circus to perform in California, Arizona, and New Mexico. The circus was directed and controlled from Florida. The employee performed in California and Arizona before quitting. Because none of the first three tests apply, and because he performed some service in the state in which he lived, all of his service is subject to the law of California.

If, after applying all of the above 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 all of the individual's service in one state, either under a provision for election of coverage or under the Interstate Reciprocal Coverage Arrangement. Under the reciprocal coverage arrangement, the service may be covered in any one of the following states: (1) a state in which some part of the individual's service is performed, (2) the state in which he lives, or (3) a state in which the employer maintains a place of business.