Telecommuters and Their Virtual Existence in the Unemployment World

Beverly Reyes
NOTE

TELECOMMUTERS AND THEIR VIRTUAL EXISTENCE IN THE UNEMPLOYMENT WORLD

I. INTRODUCTION

For the first time, an out-of-state telecommuter was disqualified from receiving Unemployment Insurance (UI) from the state in which the telecommuter’s former employer was located.1 Although an out-of-state telecommuter’s work is done electronically via the Internet, the New York Court of Appeals rejected the argument that a telecommuter’s work cannot be “localized in any state.”2 The justification for this holding rested on a definition of employment,3 which is codified into almost every state’s UI laws.4 By holding that physical presence determines the localization of the work performed,5 the court created a significant hurdle for out-of-state telecommuters to overcome in order to show eligibility for UI benefits. Moreover, this court’s holding, compelled by a uniformly applied definition of employment, necessitates amendments to each state’s UI laws to permit an out-of-state telecommuter to collect UI benefits from the state in which the former employer is located.

Since the inception of the Internet in the 1990s, telecommuting has risen exponentially6 because it created a win-win situation for both

2. Id. at 22.
3. Id. at 21 (quoting N.Y. Lab. Law § 511(3) (2002)). “Employment” includes services completed both inside and outside the state so long as it is not localized in any particular state. See Claim of Allen, 794 N.E.2d at 21.
5. See Claim of Allen, 794 N.E.2d at 22.
employers and employees. In 2001, there were twenty-eight million telecommuters, and according to a survey conducted by the International Telework Association & Council in 2000, approximately 19% of telecommuters have out-of-state supervisors. By advocating telecommuting, employers benefit not only through realized savings in expenditures, but also in responding to political pressure to help preserve the environment and to be more "family-friendly." For employees, telecommuting allows them to spend more time with their families and to be more independent during work time.

Information technology has progressed to the point where businesses are electronic to varying degrees, where "at one extreme . . . workplaces . . . are completely virtual." These employees, who work in virtual workplaces, are commonly known as telecommuters. In virtual workplaces, employer policies have been revamped to enable workers to complete their work electronically and

7. Employees value telecommuting because they enjoy "greater flexibility, reduced stress, and fewer distractions from work," and employers value telecommuting because it "increase[s] productivity, lower[s] real estate costs, and improve[s] recruitment." Matthew Mariani, Bureau of Labor Statistics, Telecommuters, OCCUPATIONAL OUTLOOK Q., 10, 13 (Fall 2000).
9. See JACK M. NILLES, INT'L TELEWORK ASS'N & COUNCIL, TELEWORK AMERICA 2000 RESEARCH: KEY FINDINGS (2000), available at http://www.workingfromanywhere.org/pdf/ITACTeleworkAmerica2000KeyFindings.pdf (indicating that in 2000, approximately 3,135,000, or 19% of all telecommuters, had supervisors that were not located in the same state as the telecommuter). For example, Northern Telecom Ltd., a Tennessee-based service operation, hired a Philadelphia-based man as a vice-president who supervises a staff of 1,000, including his Nashville-based secretary, from his home. Edward C. Baig, Welcome to the Officeless Office: Telecommuting May Finally Be Out of the Experimental Stage, BUS. WK., June 26, 1995, at 104, available at 1995 WL 2230210 [hereinafter Baig, Officeless Office].
10. Baig, Officeless Office, supra note 9 (reporting that Ernst & Young saved $25,000,000 in real estate costs in one year by allowing its workers to telecommute).
12. Brenda Smith, Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change, 11 COLUM. J. GENDER & L. 271, 300 (2002) (internal quotation marks omitted); see also Lenhoff & Withers, supra note 6, at 56.
13. See Baig, Saying Adios, supra note 11; Mariani, supra note 7, at 13. But see generally, Michelle A. Travis, New Perspectives on Work/Family Conflict: Telecommuting: The Escher Stairway of Work/Family Conflict, 55 ME. L. REV. 261, 270-71 (2003) (explaining that some telecommuters did not experience greater independence or an improvement in the quality of their family lives as a result of telecommuting).
15. See Mariani, supra note 7, at 10. Telecommuting has generally been defined as "the use of computer and communications technology to transport work to the worker as a substitute for physical transportation of the worker to the location of the work." Travis, supra note 13, at 268 (internal quotations marks omitted).
from outside of their employers' physical offices. Furthermore, telecommuters are more likely to communicate with co-workers and supervisors via electronic mail than interact with them in any single physical place.

The New York Court of Appeals's decision in *In re Claim of Allen* is particularly worrisome for the growing number of telecommuters. The *Claim of Allen* decision turns the telecommuting arrangement into a zero-sum game where the employer wins and the employee loses in the event of layoff or discharge. As a result, the *Claim of Allen* decision may lead to a chilling effect whereby employees, leery of the possibility of being ineligible for UI benefits, will decline to enter into telecommuting arrangements with their employers.

Despite all the vaunted advantages of telecommuter policies, telecommuting employees stand to lose the most if discharged by an employer. Ironically, the policy reasons that led to the adoption of telecommuting arrangements in the workplace are the very same reasons why UI benefits would be denied to out-of-state telecommuters. For example, the opportunity to spend more time at home or with family is a prevalent reason why employees choose to telecommute. However, when the costs of maintaining telecommuting become unjustified for the employer, the telecommuter is forced to choose between family and work.

If an out-of-state telecommuter chooses family over work, then the telecommuter faces two hurdles to eligibility for UI benefits. The first hurdle is that, in choosing family over work, it can be argued that the telecommuter voluntarily quit and became unemployed through his or her own fault. But rather than explore the viability of the voluntary quit

---


17. See *Malin & Perritt*, *supra* note 14, at 18.

18. 794 N.E.2d 18 (N.Y. 2003) (affirming the denial of the plaintiff’s claim for unemployment insurance where the plaintiff was an out-of-state telecommuter of a New York employer).


21. See, e.g., *Claim of Allen*, 794 N.E.2d at 20 (denying UI benefits to the plaintiff who chose not to return to New York once the employer chose to end the telecommuting arrangement). But see *CAL. UNEMP. INS. CODE § 1256* (West 1986 & Supp. 2003) (deeming an employee to have left with good cause if he or she quit to follow a spouse or domestic partner to a place “from which it’s impractical to commute”). Generally, most UI laws require that an employee became unemployed
argument in the foregoing scenario, this Note focuses on the second hurdle, which is that in performing the services outside the state where such services were directed or controlled by the employer, the telecommuter becomes ineligible for UI benefits in the employer’s state.22

Even the federal government recognizes that the telecommuters’ worksites are not located in their homes, but at the “office to which they report and from which assignments are made.”23 The United States Department of Labor promulgated the regulation locating telecommuters in their employers’ offices for the purpose of resolving the issue of whether the Family and Medical Leave Act (FMLA)24 includes telecommuters as workers employed within seventy-five miles of the employer’s worksite in order to bring the employer within the scope of the Act.25 Since the Department of Labor regulation only concerns administration of the FMLA, it has no binding effect on the states in the administration of their UI programs. Consequently, the New York Court of Appeals was under no obligation to consider the aforementioned regulation in Claim of Allen, and at best, the regulation could only have served as persuasive authority.

This Note proposes that work performed by out-of-state telecommuters is not localized in any state, and the first test to determine eligibility for UI benefits should be the Direction and Control test. Part II will discuss the history of UI, the requirements to be eligible for UI benefits, and the uniformity of the states’ laws providing for these benefits. Part III analyzes the recent opinions of the New York Court of Appeals in Claim of Allen, which denied UI benefits to an out-of-state

through no fault of his or her own unless the employee exhausted all reasonable efforts to rectify the situation. See, e.g., CAL. UNEMP. INS. CODE § 1256. For a discussion of the “voluntary quit exhaustion requirement,” see Deborah Maranville, Workplace Mythologies and Unemployment Insurance: Exit, Voice, and Exhausting All Reasonable Alternatives to Quitting, 31 HOFSTRA L. REV. 459, 463-67 (2002).

22. In New York, an out-of-state telecommuter, residing in Florida, was ineligible to receive UI benefits from NY, the state from which the employer directed or controlled the services, because the out-of-state telecommuter was not physically present within New York. See Claim of Allen, 794 N.E.2d at 22. A vast majority of states, forty-six and the District of Columbia to be exact, apply the same definition as New York and Claim of Allen is a harbinger of the hard times ahead for out-of-state telecommuters who apply for UI benefits when their position is effectively eliminated at the end of the telecommuting arrangement. See Note, Unemployment Compensation for Multi-State Workers, 49 COLUM. L. REV. 993, 993-94 n.3 (1949) [hereinafter Multi-State Workers]; VT. STAT. ANN. tit. 21, § 1301(6)(A)(iii) (1987).

25. See § 825.111(a)(2); see also Gabel & Mansfield, supra note 16, at 341.
telecommuter, and in Zelinsky v. Tax Appeal Tribunal,\textsuperscript{26} which ratified the multiple taxation of out-of-state commuters, and telecommuters by extension.\textsuperscript{27} Part IV discusses court decisions where personal jurisdiction was proper where non-resident defendants were only electronically present in the forum state. The purpose of this discussion is to argue that the supervising employer’s state which can hold an out-of-state telecommuter liable for damages to the employer’s property, ought to be responsible for providing UI benefits to that same out-of-state telecommuter. Finally, Part V discusses potential drawbacks and their remedies in administering UI to out-of-state telecommuters once they are initially deemed eligible to receive UI benefits.

II. BACKGROUND

In 1935, Congress passed the Social Security Act, which proposed a federal UI program in response to the states’ inability to provide public assistance to the unemployed during the Great Depression.\textsuperscript{28} UI is a temporary benefit granted to a claimant who lost his or her job involuntarily, who is able and available to work, and who has earned a minimal amount of wages (as determined by state law) in the year preceding termination of employment.\textsuperscript{29} The Act did not establish a formal UI compensation system;\textsuperscript{30} rather, Congress encouraged the states to create their own UI systems in exchange for credit to their federal tax liability if the state’s system conformed with federal guidelines.\textsuperscript{31}

The states accepted Congress’s invitation to create UI programs and designed systems where the employers contribute to the states’ UI funds.\textsuperscript{32} Under the Federal Unemployment Tax Act, the excise tax paid by an employer to a state UI fund is credited toward the employer’s tax liability.\textsuperscript{33} An employer’s tax liability depends on its experience rating.\textsuperscript{34}

\textsuperscript{26} 801 N.E.2d 840 (N.Y. 2003).
\textsuperscript{27} See id. at 848.
\textsuperscript{29} In re Claim of Allen, 794 N.E.2d 18, 21 (N.Y. 2003).
\textsuperscript{30} See Smith, supra note 12, at 309 n.160.
\textsuperscript{31} See I.R.C. § 3304 (West 2002); see also Steward Mach. Co., 301 U.S. at 592-93. Employers are also eligible to receive the credit to their federal tax liability if they contribute to a federally-approved state UI fund. See I.R.C. § 3302(a)(1) (2000).
\textsuperscript{33} See I.R.C. § 3302.
Interestingly, after the Claim of Allen decision some attorneys suggested that employers should enter into telecommuting arrangements with out-of-state employees so that terminations of telecommuting employees will not cause an increase in the employer’s experience rating and will ultimately reduce the employer’s overall tax liability in the long-run.\textsuperscript{35}

\section*{A. Definition of Employment}

While the states accepted Congress’s invitation to create UI programs, the programs’ definitions of “employment” varied.\textsuperscript{36} These various definitions led to uncertainty as to the application of UI programs across the states.\textsuperscript{37} In order to combat the growing uncertainty, the Legal Affairs Committee of the Interstate Conference of Unemployment Compensation Administrators and the Federal Bureau of Unemployment Compensation promoted a uniform definition of “employment” that was eventually adopted by forty-six states and the District of Columbia.\textsuperscript{38} The uniform definition provides, in pertinent part:

\begin{enumerate}
\item “Employment” means service, including service in interstate commerce performed for remuneration or under any contract of hire, written or oral, expressed or implied.
\item The term “employment” shall include an individual’s entire service, performed within or both within and without this State if:
\end{enumerate}

\begin{enumerate}
\item See Michael J. Album & Gershom R. Smith, \textit{Telecommuting After Allen}, 230 N.Y.L.J. 5 (2003) (both authors are attorneys employed in the New York office of Proskauer Rose LLP). Album and Smith also indicate that shifting from intra-state employees to out-of-state employees decreases an employer’s taxable wage base, which will also lead to tax savings. \textit{Id}.
\item \textit{In re Claim of Mallia}, 86 N.E.2d 577, 579 (N.Y. 1949). For examples of the varying definitions of employment, see \textit{Multi State Workers}, supra note 22, at 993-94 n.3.
\item \textit{See Claim of Mallia}, 86 N.E.2d at 580; \textit{Multi-State Workers}, supra note 22, at 993-94 n.3.
\end{enumerate}
(A) The service is localized in this State; or

(B) The service is not localized in any State but some of the service is performed in this State, and (i) the individual’s base of operation, or if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) if 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. . . .

(5) 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 services within the State, for example, is temporary or transitory in nature, or consists of isolated transactions. 39

In short, the uniform definition proposed four tests to be applied successively. 40 If the first test, which will be referred to as the Localization test, reveals a single state in which the services were performed, then the state unemployment agency need not apply the other tests. Localization of services is difficult to determine only when the claimant performed his or her job in more than one state. In these situations, the state agency must determine whether the services performed in one state can be deemed so substantial as to render the services performed in the other state(s) incidental to those performed in the first state. 41 For example, suppose that a claimant (who filed for UI benefits in Washington D.C.) commuted to Washington D.C. to work in the employer’s office everyday but was allowed to work from home in Virginia every other Friday. Under the Localization test, the claimant’s services would be localized in Washington D.C., and the services performed in Virginia would be considered incidental to the services performed in Washington D.C. Therefore, Washington D.C. would be the appropriate jurisdiction in which to claim UI benefits.

When the Localization test fails to indicate a single state in which the services were performed, then the state agency must use the second

39. *Multi-State Workers*, supra note 22, at 994 n.3 (internal quotations omitted).
40. *See id.* at 995; *see also In re Claim of Allen*, 794 N.E.2d 18, 21 (N.Y. 2003).
41. *See Multi-State Workers*, supra note 22, at 995.
test, which will be referred to as the Base of Operations test. If the Base of Operations test reveals a single state in which the claimant’s base of operations is located, then the state agency will not apply the third or fourth tests. The Base of Operations test asks where the claimant’s physical base of operation is located in order to determine a single state in which the services were performed. A physical base of operations is a fixed place to which the claimant reported during the course of employment.\footnote{See id.}

For example, suppose a claimant was employed as a commercial deliveryman and filed for UI benefits in New York after being laid off; the claimant, who resides in New Jersey, traveled between New Jersey and Pennsylvania equally in order to make deliveries. The claimant regularly went to the employer’s warehouse in New York in order to pick up deliveries, and to get his delivery truck repaired by his employer from time to time. The Localization test would fail to determine a single responsible state because the services performed outside New York are not incidental to those performed within New York. Under the Base of Operations test, New York would be the sole responsible state because the claimant regularly reported to the employer’s New York warehouse, a fixed physical location.

If the second test fails to identify a single state in which the claimant’s base of operations exists, then the state agency must apply the third test, which will be referred to as the Direction and Control test. If the Direction and Control test reveals a single state from which the employer directed and controlled the claimant, then the state agency will not apply the fourth test.\footnote{See id.}

Suppose a former office worker, who lives in Nevada, had split his time equally between remote offices located in California and Nevada, and after being laid off, he filed for UI benefits in California because his supervisor sent assignments and instructions as to which location he should report from an office in San Diego. The Localization test fails because the services performed in Nevada are not incidental to those performed at the remote office in California. The Base of Operations test also fails because the claimant spent an equal amount of time working in both Nevada and California. The Direction and Control test resolves the issue because the claimant received instructions and assignments and was generally supervised by his employer located in California.
Therefore, the claimant’s application for UI benefits in California would be proper.

However, assuming that the foregoing tests failed to reveal a single state responsible for providing the UI benefits, then the fourth test resorts to the location of the claimant’s residence. Under the fourth test, the claimant in the last hypothetical would only be eligible for UI benefits in Nevada because that is where the claimant resides.

The premise supporting the limitation of “employment” to services performed at least substantially within one state assumed that the claimant would be physically present in the state where UI benefits were requested. The uniform definition is based on the notion that only one state should be responsible for providing UI benefits to the claimant, and that state should be one where the claimant is most likely to seek and to find work. It was also generally thought that unemployment benefits would be linked to the cost of living in the area where the claimant resides.

The foregoing policy considerations favoring the claimant’s physical presence are outdated and obsolete. The fact that costs of living determine the amount of UI benefits available to a claimant ignores the fact that UI benefit awards depend, in large part, on the wages earned by the claimant during the base period. Furthermore, the Internet is a vast resource that aids job seekers in finding employment at physical and virtual workplaces anywhere in the country. Finally, focusing on the place from which the employer directs or controls the telecommuter is more efficient because employers’ tax liability will be limited to one state thereby easing the task of forecasting future tax liability.

44. See Claim of Allen, 794 N.E.2d at 22.
45. Multi-State Workers, supra note 22, at 995.
47. See Claim of Allen, 794 N.E.2d at 22.
48. See, e.g., ALA. CODE ANN. tit. 25, § 25-4-72(b) (Michie 2000 & Supp. 2003) (awarding UI benefits based on the following calculation: one twenty-fourth of the average of the wages for insured work paid to the individual during the two quarters of his or her base period in which such total wages were the highest); FLA. STAT. § 443.111(3) (West 2002) (awarding “one twenty-sixth of the total wages for insured work paid during that quarter of the base period”); N.Y. LAB. LAW § 590(5) (2002) (awarding “one twenty-sixth of the remuneration paid during the highest calendar quarter of the base period”).
49. A few examples of job search engines that have nationwide listings include http://www.monster.com; http://www.careerbuilder.com; and http://hotjobs.yahoo.com.
B. The Requirement of Involuntary Unemployment

Once a claimant shows that the employment occurred substantially in the state where benefits are claimed, it must be proven that one became unemployed through no fault of one’s own. For the most part, this means that a UI claimant may not quit the job and expect to receive UI benefits unless there is good cause therefore. Even when good cause can be demonstrated, the claimant must also show that all reasonable alternatives to quitting were exhausted.\(^{50}\) This is a common ground on which employers contest the claimant’s eligibility for UI;\(^{51}\) failure to rebut the employer’s objection renders the claimant ineligible for UI benefits.

The requirement to exhaust all reasonable alternatives before quitting for good cause is in place to lessen what economists call moral hazard on the part of employees.\(^{52}\) The moral hazard problem occurs where employees do not take care to preserve their job rights or to search for a new job because they know UI will cushion their lack of income after termination.\(^{53}\) Some courts think that an employee’s failure to exhaust all reasonable alternatives is evidence that good cause was not present or that the employee was a “malcontent.”\(^{54}\)

Arguably, even if an out-of-state telecommuter can establish that the services were performed, and therefore localized, in the employer’s state, the telecommuter still has the burden of showing that he or she did not voluntarily terminate the employment relationship. This would be particularly difficult to do if the employer offered a position to the telecommuter in the employer’s office, as in Claim of Allen,\(^{55}\) once the decision was made to end the telecommuting arrangement. Even if one concedes that the telecommuter voluntarily ended the employment relationship, the telecommuter could still be eligible for UI benefits through the satisfaction of an exhaustion requirement included in a state UI program. However, as previously stated, the involuntary

\(^{50}\) See, e.g., CAL. UNEMP. INS. CODE § 1256 (West 1986 & Supp. 2003); N.Y. LAB. LAW § 593(1) (2002); WASH. ADMIN. CODE § 192-16-009(1)(c) (1977); see also Maranville, supra note 21, at 460.

\(^{51}\) See Maranville, supra note 21, at 460.

\(^{52}\) See Schwab, supra note 34, at 38.

\(^{53}\) See id.


\(^{55}\) See In re Claim of Allen, 794 N.E.2d 18, 20 (N.Y. 2003). In fact, the employer in Claim of Allen objected to the claimant’s application for UI benefits in Florida on the grounds that the claimant chose to become unemployed. See id.
unemployment question is moot if the out-of-state telecommuter cannot overcome a physical presence hurdle to the localization test.

III. VIRTUAL PRESENCE FOR TAXATION AND UI BENEFIT PURPOSES

The problem of proving that the telecommuter was employed and present in the employer’s state still remains, and arguments to adopt the Direction and Control test as the primary test in such a determination can be found in the difference with which presence is treated for taxation purposes. In New York, at least, there is some incongruity as to how the law treats the presence of out-of-state commuters, and telecommuters by extension, for taxation and UI benefit purposes. With regard to applications for UI benefits, New York places the out-of-state telecommuter’s services in the state where the telecommuter is physically present. Yet for income tax calculations, New York apportions work performed at home by the out-of-state employee to the New York source if the work is performed at home by reason of convenience to the employee rather than by the necessity of the employer. Consequently, an out-of-state telecommuter would still be liable for non-resident income taxes owed to the New York-based employer for the income earned from working at home because the work would be allocated to the employer’s state, but would be ineligible to receive UI benefits from New York once the employment relationship is terminated because the same taxable work is performed in the state where the telecommuter is physically present. Just as Professor Bernard Jacob and Professor Edward Zelinsky have observed with multiple taxation of out-of-state telecommuters, the problems caused by denial of UI benefits to out-of-state telecommuters will become prevalent as the number of telecommuters increases. As a result, the difference with which New York treats out-of-state telecommuters for taxation and UI benefit purposes will only grow more apparent and pervasive over time.

A. The In re Claim of Allen Cases

In 1996, Maxine Allen began working for Reuters as a development technical specialist in New York. In 1997, when Allen moved to

---

56. N.Y. LAB. LAW § 511(3) (2002); Claim of Allen, 794 N.E.2d at 21.
58. See Bernard E. Jacob, An Extended Presence, Interstate Style: First Notes on a Theme from Saenz, 30 HOFSTRA L. REV. 1133, 1178 (2002).
Florida for family reasons, Reuters provided her with a laptop, hardware, and software in order to continue her work with Reuters through a telephone connection to the Internet.\textsuperscript{61} Reuters and Allen were in constant contact, with Reuters giving assignments and generally supervising her work via electronic mail.\textsuperscript{62}

Allen had to be available for work between 8:00 a.m. and 5:00 p.m.\textsuperscript{63} Every weekday, she logged onto her employer's computer servers in New York through a connection to the Internet.\textsuperscript{64} As a telecommuter, Allen was able to complete the exact same duties for which she was responsible in New York; to wit, "monitor the performance of her employer's financial systems, troubleshoot, and recommend system changes and enhancements."\textsuperscript{65} Throughout the duration of their telecommuting arrangement, Allen visited Reuter's New York office only once for a period of two weeks.\textsuperscript{66}

Reuters and Allen maintained their telecommuting arrangement until March 1999 when Reuters informed Allen that it was terminating the arrangement due to its high maintenance costs.\textsuperscript{67} Reuters offered Allen a position in its New York office, but Allen chose to stay in Florida with her family instead; at which point, Allen's employment with Reuters came to an end.\textsuperscript{68}

After her application for UI benefits was rejected in Florida, Allen applied to receive UI benefits from New York, the state from which Reuters supervised Allen's work.\textsuperscript{69} Allen's New York UI application was rejected by a Commissioner of Labor, and the decision was affirmed by the Unemployment Insurance Appeal Board.\textsuperscript{70} The Agency's denial of benefits was grounded on the fact that Allen's services were not localized in New York during the base period.\textsuperscript{71}

\textsuperscript{60.} See id. at 19.
\textsuperscript{61.} See id.
\textsuperscript{62.} See id. Allen had to request permission to arrive early or leave late, send electronic mail containing the weekly status reports to her employer, and respond to employer directives via telephone or electronic mail. See id. at 20.
\textsuperscript{63.} See id. at 19.
\textsuperscript{64.} See id.
\textsuperscript{65.} Id.
\textsuperscript{66.} See id. at 20.
\textsuperscript{67.} See id.
\textsuperscript{68.} See id.
\textsuperscript{69.} See id.
\textsuperscript{70.} See id.
\textsuperscript{71.} See id. In New York, the base period of employment is the last four completed calendar quarters that end the week immediately before a claim is filed. N.Y. LAB. LAW § 520 (2002).
The central issue before the New York Court of Appeals was whether a telecommuter’s services performed over the Internet may be deemed as localized within the state where the employer supervises or controls the telecommuter’s services. The court of appeals held that physical presence within the state is the “most practicable indicium of localization for the interstate telecommuter who inhabits today’s ‘virtual’ workplace linked by Internet connections and data exchanges.”

In reaching its decision, the court of appeals rejected Allen’s argument that her services were realized on her employer’s mainframe in New York despite the fact that she initiated the process in Florida. Rather than examining the realities of the twenty-first century workplace, it relied on a policy memorandum issued by the national Social Security Board in 1937, a time when the Internet, much less telecommuting, was utterly inconceivable. Instead, the New York court found persuasive support for its reliance on physical presence in Minnesota’s interpretation of the national Social Security board’s uniform definition, which was originally proposed in 1937.

In light of the outdated notions embodied by the 1937 definition, the Department of Labor view regarding telecommuters is certainly of more value as persuasive precedent than a memorandum issued by the national Social Security Board in 1937. The New York court’s decision and Minnesota’s interpretation, which rely on the 1937 memo, fly in the face of the Department of Labor’s view that the telecommuter’s workplace is located at the place to which the telecommuter reports and from which the employer supervises the telecommuter. This

72. See Claim of Allen, 794 N.E.2d at 19.
73. Id. at 22.
74. See id.
75. See id.
76. See id. at 22 n.2. Minnesota’s interpretation of the uniform definition of “employment” makes physical presence the test that determines where a telecommuter’s services are localized. See Minnesota WorkForce Center, Multistate Employment and Unemployment Tax, available at http://www.uimn.org/tax/pamph/multistate.htm (last visited Jan. 10, 2005) [hereinafter Minn. WorkForce Center]. The Minnesota Workforce Center views the localization of telecommuter work as follows:

Regular services include services performed in an office located in the home of the employee if they are an integral part of the employee’s regular services, and the employer: (a) does not provide other facilities; or (b) allows the services to be performed in the employee’s home as part of a telecommuting arrangement.

Id.
Department of Labor view, promulgated in a regulation for the administration of the FMLA, while not binding on New York, is more persuasive than the 1937 memo because the Department of Labor promulgated the regulation while contemplating the Internet and the telecommuting possibilities that the Internet generates.\footnote{See § 825.111(a)(2).}

As the next section will reveal, the New York Court of Appeals, in a tax case, was able to reach an opposite conclusion from that reached in Claim of Allen. In applying a tax regulation that examines whether work performed at home, and outside of New York, is allocable to New York sources, the determinative test is the Convenience of the Employer test which offends neither the Due Process Clause (of the Fourteenth Amendment) nor the Commerce Clause.\footnote{See Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 849 (N.Y. 2003). This inapposite conclusion was reached by distinguishing Claim of Allen on the grounds that Claim of Allen involved neither taxation nor Commerce Clause issues. See id. at 846 n.6.}

\section*{B. In re Zelinsky v. Tax Appeal Tribunal: Taxation of an Out-of-State Telecommuter's Income}

The petitioner, Zelinsky, taught classes and held office hours three days a week at Cardozo School of Law in New York City and performed his other teaching duties from his home in Connecticut two days a week\footnote{See id. at 843. In his appellate brief, Zelinsky characterized his at-home work arrangement as a telecommuting arrangement. See id. at 846 n.6.} between 1994 and 1995.\footnote{Id. at 844.} When it came time to file his income tax returns, Zelinsky filed two separate returns: one for New York (for the time he spent teaching in New York) and one for Connecticut (for the time he spent working from home).\footnote{See id. at 846 n.6.} Shortly thereafter, New York's Department of Taxation and Finance sent notices of deficiency to Zelinsky, who contested the notices, and after exhausting his administrative remedies, this appeal followed.\footnote{See id.} Zelinsky argued that New York's taxation of the income he earned while working in Connecticut offended both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.\footnote{See id.}
However, New York's Appellate Division and its Court of Appeals held that the out-of-state commuter's income may be taxed by both the employer's state and the commuter's state without offending the Due Process or the Commerce Clauses. The New York court upheld the Convenience of the Employer test and concluded that all of the income earned while petitioner worked in Connecticut was attributable to New York sources and was therefore subject to taxation by New York. The Convenience of the Employer test turns on whether the work performed outside the state was required to be done outside the state, and if not, then the work is treated as if it were performed within New York and is deemed to be income whose source is in New York.

The heart of Zelinsky's appeal was that the Convenience of the Employer test violates the requirement that a tax on an interstate transaction be fairly apportioned. The purposes of fair apportionment are twofold: first, to guarantee that each state only taxes its fair share of the transaction; and second, to prevent a taxpayer from being unfairly burdened with multiple taxes. Bearing these purposes in mind, a tax is fairly apportioned when each state levying the tax does not cause the total tax owed to result in a multiple taxation and when a state only taxes the portion of the income that is attributable to activities conducted within that state. In essence, Zelinsky argued that New York failed to tax only that income which was attributable to the services he provided in New York, and, in fact, that New York erred in taxing his income that was earned while he worked in Connecticut.

The court of appeals began its analysis by questioning whether the Convenience of the Employer test satisfied the fair apportionment requirement and was therefore constitutional. The reason why the Convenience of the Employer test became law was to ensure that commuters did not fraudulently reduce their income tax liability by

86. See id. at 849.
88. See Zelinsky, 801 N.E.2d at 844.
89. See id. at 844-45.
90. See id. at 844.
91. See id. at 845 (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).
93. See Zelinsky, 801 N.E.2d at 845 (quoting Tenn. Gas Pipeline Co. v. Urbach, 750 N.E.2d 52, 58 (N.Y. 2001)).
94. See Zelinsky, 801 N.E.2d at 845.
95. See id. (quoting Goldberg, 488 U.S. at 262).
96. See Zelinsky, 801 N.E.2d at 845.
97. See id. at 845-46.
claiming a full day’s work performed at home when in fact only an hour
or two of work had been done.98 Furthermore, when an out-of-state
commuter takes work home, this act is not considered interstate
commerce;99 for tax purposes, the work was performed in the state
where the commuter’s office is located.100 Consequently, the
Convenience of the Employer test does not violate the Commerce Clause
because it neither burdens interstate commerce nor discriminates
between in-state taxpayers and out-of-state taxpayers.101

Another justification for the New York tax was that Cardozo
School of Law, located in New York, paid the entirety of Zelinsky’s
salary regardless of where the services were performed.102 Zelinsky
earned his salary solely because of the teaching opportunity afforded
by his New York-based employer.103 The court of appeals emphasized that
New York “provides a host of tangible and intangible protections,”104
and Zelinsky’s choice to perform some of his work outside New York
did not refute that reality.105 With regard to the Due Process Clause, the
New York tax levied on Zelinsky was appropriate because “some
definite link, some minimum connection” between New York and
Zelinsky was established.106 The necessary link or connection required
to make the tax proper is a fiscal relationship between the benefits

98. See id. at 846 (using the example that an out-of-state commuter who works one hour per
day on the weekends may claim a full day’s work in order to reduce total taxable income to five-
sevenths of the income actually earned). The court also opined that if the Convenience of the
Employer test were not used, then the tax system would be even more vulnerable to fraud due to
underreported wages and the impossibility of disproving that a full day’s work had been done. See
id. at 846 n.4.
99. See id. at 846.
100. See id. Since the work performed at home is “inextricably intertwined” with the business
conducted at the employer’s office and is conducted at home solely for the telecommuter’s
convenience, the work performed is attributable to a New York source. Id.; see also Speno v.
Gallman, 319 N.E.2d 180, 181 (N.Y. 1974) (explaining that when services are performed out-of-
state by the employee, for the employee’s convenience rather than by necessity of the employer, the
earnings from these services are subject to New York taxes). But cf. Claim of Allen, 794 N.E.2d 18,
22 (N.Y. 2003) (holding that a telecommuter’s work is not performed within the state which is the
source of the telecommuter’s income).
101. See Zelinsky, 801 N.E.2d at 847 (citing Speno, 319 N.E.2d at 181-82). The Convenience
of the Employer test ensures that New York residents who take their work home are not at a tax
disadvantage relative to non-New York residents who take their work home. See Zelinsky, 801
N.E.2d at 847.
102. See id. at 847-48.
103. See id. at 848.
104. Id.
105. See id.
106. Id. at 849 (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 306 (1992)).
provided by New York and the tax imposed.\textsuperscript{107} Zelinsky’s employment at Cardozo was enough to establish the minimum connection or contact with New York that was necessary to justify his New York tax liability for the work he completed in Connecticut.\textsuperscript{108}

Due Process is not violated by imposing tax liability on an out-of-state telecommuter because the employment relationship is the purposeful availment that justifies a finding of minimum contacts between the out-of-state employee and the taxing state.\textsuperscript{109} Due Process, with regard to taxation issues, merely requires a fiscal relationship between the person taxed and the benefits and protections afforded by the taxing state.\textsuperscript{110} For taxation purposes, there is a fiscal relationship between an out-of-state telecommuter and the taxing state because the state “provide[s] . . . [a] host of tangible and intangible benefits flowing directly and indirectly” from the taxing state to the out-of-state telecommuter.\textsuperscript{111}

Under the reasoning in \textit{Zelinsky}, Maxine Allen, the petitioner from \textit{Claim of Allen}, would be liable for New York state income taxes\textsuperscript{112} because imposing said taxes would not offend the Due Process Clause or the Commerce Clause. In its Commerce Clause analysis, the court reasoned that the choice to work at home, even if the employee lives outside the employer’s state, does not transform the employment relationship into an interstate transaction.\textsuperscript{113} The court also rejected a dormant Commerce Clause argument because it concluded that imposing income tax liability neither unfairly burdens interstate commerce nor inhibits the flow of goods in interstate marketplaces.\textsuperscript{114} Moreover, in-state telecommuters do not get a tax advantage because they choose to work from home some days, and as a result, out-of-state telecommuters are not at liberty to enjoy lower tax liability.\textsuperscript{115}

\textsuperscript{107} See \textit{Zelinsky}, 801 N.E.2d at 849 (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)).
\textsuperscript{108} See \textit{Zelinsky}, 801 N.E.2d at 849.
\textsuperscript{109} See id. at 849.
\textsuperscript{110} See id.
\textsuperscript{111} Id.
\textsuperscript{112} Fortunately, Ms. Allen would not be burdened with multiple taxation problems since Florida does not levy personal income taxes on its individual residents. See Fl. Stat. Ann. § 220.03(aa) (excluding individuals from the definition of taxpayer); see also Fla. Department of Revenue, \textit{Florida Tax Information for New Residents}, available at http://www.state.fl.us/dor/taxes/new.html (last visited Jan. 10, 2005).
\textsuperscript{113} See \textit{Zelinsky}, 801 N.E.2d at 847.
\textsuperscript{114} See id.
\textsuperscript{115} See id.
Under the Convenience of the Employer test, Allen’s income would be treated as New York sourced income that is subject to New York taxes. Under the lens of the Convenience of the Employer test, the telecommuting arrangement resulted from Allen’s need to be in Florida with her family and not from Reuters’s need to have the work completed there; in short, the arrangement was convenient for both the employer and the employee.116

C. Scrutiny of Claim of Allen and Zelinsky Under a Dormant Commerce Clause Theory

But does the court’s decision in Claim of Allen, ratifying the successive application of the localization tests to out-of-state telecommuters, violate the Commerce Clause under a dormant Commerce Clause theory even when imposing income tax liability on the telecommuter is not discriminatory on its face? Yes!117 Under the dormant Commerce Clause theory, a state is prohibited from acting in a manner that unfairly burdens or discriminates against out-of-state actors relative to those located within the state.118 Just as in West Lynn Creamery, New York imposes an income tax on all New York-sourced income regardless of whether the income was earned by New York residents or non-New York residents while working at home.119 Assuming arguendo that granting New York-disbursed UI benefits to New York telecommuters is a rebate that becomes effective upon involuntary termination, then such a rebate could violate the Commerce Clause.120 If one assumed that UI benefits are paid out of general trust account121 funded by withholding taxes from New York-situated

116. The anecdotal evidence suggests that the employer and the employee are experimenting with alternative work arrangements; there is no suggestion that an employee would be terminated for refusal to enter into a telecommuting arrangement with the employer. See supra notes 9-11.
117. See W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194 (1994) (holding that the combination of a facially nondiscriminatory tax with a subsidy to in-state residents is unconstitutional); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521-22 (1935) (invalidating a New York pricing order that set a minimum price on milk regardless of whether the milk was produced in or out of New York because the measure acted as a tariff to protect in-state interests).
118. See W. Lynn Creamery, 512 U.S. at 192.
119. Compare id. at 195-96, with Zelinsky, 801 N.E.2d at 849.
120. See W. Lynn Creamery, 512 U.S. at 197. The facially non-discriminatory income tax could be seen as an unconstitutional rebate if UI benefits are disbursed from a general fund consisting of income taxes paid by individual employees and withholding taxes paid by employers. Cf. id.
121. See N.Y. LAB. LAW § 550 (2002).
employers, then in-state telecommuters are benefiting from the taxes paid by their employers while out-of-state telecommuters are not receiving the same benefit.

Essentially, out-of-state telecommuters are left out in the cold while New York residents benefit from the withholding taxes paid by the out-of-state telecommuters’ employers and also from the income tax paid to New York (as mandated by the Convenience of the Employer test). This result is untenable under a dormant Commerce Clause analysis. One way to remedy this result is to bring the result from Claim of Allen in line with Zelinsky by allowing UI boards to apply the Direction and Control test to telecommuters before the Localization or the Base of Operations tests. If the Direction and Control test becomes the primary test for both in-state and out-of-state telecommuters, then the measure would be applied non-discriminatorily because both types of telecommuters would be eligible for UI benefits from the employer’s state.

The imposition of tax liability on an out-of-state telecommuter and the denial of UI benefit eligibility following the same telecommuter’s termination are incongruous results that appear to penalize an employee simply for leaving the employer’s state. Such differential treatment between in-state telecommuters and out-of-state telecommuters could be seen as discriminatory behavior to those situated outside the employer’s state. Such discriminatory behavior violates the Commerce Clause on a dormant commerce clause theory that a state cannot administer its laws in such a manner that the effect would be to cause other states to retaliate in response. In order to avoid the appearance of discriminating against out-of-state telecommuters, state UI laws should be amended to allow for the use of Direction and Control as the primary test to localize services in the employer’s state.

IV. VIRTUAL PRESENCE FOR PERSONAL JURISDICTION PURPOSES

Presumably, a telecommuter could be sued in the supervising employer’s state if, through negligence or other malfeasance, the telecommuter causes damage to the employer. Furthermore, if a telecommuter could be deemed to be present in the supervising employer’s state for the purposes of personal jurisdiction for adjudication of the claim, then the telecommuter’s opportunity for benefits from the state should be as likely as the opportunity for a

122. See N.Y. LAB. LAW §§ 570, 581-b (2002). Any employer with employees from out-of-state can elect to have withholding taxes attributed to the employer’s or the employee's state. See N.Y. LAB. LAW § 561 (2002).
finding of liability by the state's courts. The virtual presence-personal jurisdiction cases discussed herein should guide state legislatures and UI agencies in reaching the conclusion that out-of-state telecommuters are present in their employers' states. After reaching such a conclusion, the next natural step would be to adopt the Direction and Control test as the primary indicator that an out-of-state telecommuter's employment services were performed in the employer's state.

Although courts have not established a bright line test to determine jurisdiction over a virtual workplace, courts have been forced to determine whether they have personal jurisdiction over parties with an electronic relationship. Courts have applied the minimum contacts standard to other online relationships, which has led to two divergent theories of Internet jurisdiction: virtual presence and single-point presence jurisdiction.

A. Virtual Presence

Under the virtual presence approach, a person puts information on the Internet and is deemed to be present wherever the information is available. For the telecommuter sending information to the supervising employer, presence for purposes of personal jurisdiction would tend to be wherever the supervising employer's computer or server is physically present.

In *Inset Systems, Inc. v. Instruction Set, Inc.*, plaintiff Inset Systems, a Connecticut corporation, registered “INSET” as a federal trademark, while defendant Instruction Set, a Massachusetts corporation, began to advertise its products on the Internet by using the domain address “INSET.COM” and the telephone number “1-800-US-INSET.” Inset Systems sued Instruction Set for trademark infringement in federal court. In response, Instruction Set moved to dismiss for lack of personal jurisdiction and argued that it lacked sufficient minimum contacts with Connecticut to satisfy due process.

---

124. *See id.*
127. *See id.* at 163.
128. *See id.* at 162.
129. *See id.*
The Inset Systems court accepted Inset Systems's argument that Instruction Set had minimum contacts with Connecticut by virtue of its continuous solicitation of customers from Connecticut via Internet advertising. The nature of Internet advertising is that it is constantly available to those with access to the Internet, unlike periodic radio and television commercials. In so reasoning, the court opined that, by advertising on the Internet, Instruction Sets aimed its advertisements not only at Connecticut customers but at anyone with Internet access. Consequently, Instruction Set should have reasonably anticipated being haled into court in Connecticut and any other jurisdiction whose residents may access Instruction Set's website. The court's holding recognized that due process requires minimum contacts so that a corporate defendant could reasonably anticipate being haled into court in the forum state.

Inset Systems's reasoning requires the conclusion that a telecommuter is virtually present where the supervising employer accesses the telecommuter's work. A telecommuter is in daily contact with the supervising employer by logging onto the employer's computer mainframe to perform his or her work. The telecommuter's activities are directed at the employer who is supervising, assigning, or otherwise controlling her work. For example, in Claim of Allen, the claimant was in constant contact with her employer over the Internet receiving work assignments and being supervised via electronic mail.

B. Single Point Presence

Despite its more complicated approach to determining jurisdiction, single point presence analysis of telecommuters' employment activities shows sufficient minimum contacts for telecommuters to reasonably anticipate being haled into court in the forum state. Telecommuters'

130. See id. at 164.
131. See id. at 165.
132. See id.
133. See id.
134. See id. at 164 (citing Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).
135. See In re Claim of Allen, 794 N.E.2d 18, 19 (N.Y. 2003). The claimant had been required to be available for work on the employer's mainframe between the hours of 8:00 a.m. and 5:00 p.m. See id.
employment activities could be deemed purposeful availment of the benefits and protections provided by the forum state's laws. Courts use a "sliding scale" to analyze whether the Internet interactions satisfy minimum contacts and are more likely to have personal jurisdiction where the defendant "purposefully availed himself of the jurisdiction by 'deliberately and repeatedly' transmitting information into the forum state." Courts are least likely to find they have personal jurisdiction over a defendant "whose website simply contains information... because such websites are not interactive."

1. CompuServe, Inc. v. Patterson

In CompuServe, defendant Richard Patterson, a Texas resident, had entered into a Shareware Registration Agreement with plaintiff CompuServe, an Ohio corporation, to post his company's shareware on CompuServe's website and computer system. The court took special note of the fact that Patterson's acceptance of the terms of the Shareware Registration Agreement was initiated on Patterson's computer in Texas but was ultimately transmitted to CompuServe's computer servers in Ohio. During the course of their three-year business relationship, Patterson transmitted shareware files to CompuServe's servers and advertised his shareware on CompuServe's system. Eventually, CompuServe began providing its users with a program that Patterson claimed was very similar to his own shareware; Patterson complained to CompuServe that it was infringing his common law trademarks.

The ensuing friction led CompuServe to file suit against Patterson in United States District Court in Ohio for declaratory judgment stating that CompuServe neither infringed Patterson's common law trademarks nor engaged in unfair or deceptive trade practices. Patterson moved to dismiss for lack of personal jurisdiction which the district court

---

nature and quality of the contact between the defendant and the forum state); see also Gabel & Mansfield, supra note 16, at 311.
140. 89 F.3d 1257 (6th Cir. 1996).
141. Id. at 1260.
142. Id. at 1260-61.
143. Id. at 1261.
144. Id.
145. Id.
granted. On appeal, the Sixth Circuit reversed the dismissal because the court acknowledged that physical presence within the forum state is not necessary to exercise personal jurisdiction over the defendant.\footnote{147}{See id. at 1264 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).}

The CompuServe court reasoned that Patterson purposefully availed himself of the benefits and protections of Ohio law through his interactions with CompuServe.\footnote{148}{See CompuServe, Inc., 89 F.3d at 1264.} The fact that Patterson had transmitted files to CompuServe for three years and had intended to continue the relationship indicates the "ongoing nature" of CompuServe and Patterson’s relationship.\footnote{149}{Id. at 1265.} Because Patterson had put his software on CompuServe’s system and advertised on CompuServe’s website, Patterson had purposefully engaged in business in Ohio.\footnote{150}{937 F. Supp. 295 (S.D.N.Y. 1996).}

2. Bensusan Restaurant Corp. v. King\footnote{151}{Id. at 297.}

In Bensusan, plaintiff Bensusan Restaurant Corporation sued defendant Richard King for trademark infringement in a United States District Court in New York.\footnote{152}{Id. at 298, 301.} Bensusan runs the The Blue Note jazz club in New York city, and King does business as The Blue Note in Missouri; King started a website advertising his jazz club on the Internet.\footnote{153}{Id. at 299, 301.} King moved to dismiss for lack of personal jurisdiction and argued that merely having an informational website is not sufficient to establish minimum contacts in New York.\footnote{154}{Id. at 297.}

The district court granted King’s motion to dismiss because the website did not require any sustained interaction between King and any New York residents.\footnote{155}{Id. at 298, 301.} King’s website merely contained general information about upcoming events and ticket information.\footnote{156}{Id. at 299, 301.} In fact, King had never done anything to solicit customers from New York, and other than his website, he had never been present New York.\footnote{157}{See id. at 301.} Unlike the defendant in CompuServe, King had no contact with New York, much less sustained contact; therefore, the court reached an opposite

---

\footnote{146}{Id.}
\footnote{147}{See id. at 1264 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).}
\footnote{148}{See CompuServe, Inc., 89 F.3d at 1264.}
\footnote{149}{Id. at 1265.}
\footnote{150}{See id.}
\footnote{151}{937 F. Supp. 295 (S.D.N.Y. 1996).}
\footnote{152}{Id. at 297.}
\footnote{153}{Id.}
\footnote{154}{See id. at 298, 301.}
\footnote{155}{Id. at 299, 301.}
\footnote{156}{Id. at 297.}
\footnote{157}{See id. at 301.}
conclusion from *CompuServe* due to the lack of sustained contact and presence in the forum state.  

3. Zippo Manufacturing Corp. v. Zippo Dot Com  

In *Zippo*, Zippo Manufacturing, a Pennsylvania corporation that makes lighters, had a registered trademark for its name, Zippo. Zippo Manufacturing sued Zippo Dot Com ("Dot Com"), a California corporation that operates an internet news service, for trademark dilution and infringement because Dot Com had gotten the exclusive rights to use "zippo.com," "zippo.net," and "zipponews.com." In response, Dot Com moved to dismiss for lack of personal jurisdiction because its offices, employees, and computer servers were located in California; Dot Com's contacts with Pennsylvania took place solely over the Internet with its 3,000 Pennsylvania customers.

After reviewing the purposeful availment and minimum contacts tests, the *Zippo* court held that the exercise of personal jurisdiction depends on the nature, quality, and quantity of interactions over the Internet between the defendant and residents of the forum state. At one end of the sliding scale, personal jurisdiction is appropriate where the defendant interacts with a resident of another state such that maintenance of the relationship requires "knowing and repeated transmission[s] of computer files over the Internet." At the other end of the scale, exercising personal jurisdiction is inappropriate where a defendant erects an informational website and the out-of-state visitor to the website does not interact with the defendant to conduct business or otherwise maintain a relationship. When encountering cases that fall in the middle of the sliding scale, the court must scrutinize the "level of interactivity and commercial nature of the exchange of information that occurs on the Web site." Ultimately, the court held that Dot Com

158. *Id.*  
160. See *id.* at 1121.  
161. *Id.*  
162. *Id.*  
163. See *id.* at 1121.  
164. *Id.*  
165. See *id.* at 1124.  
166. See *id.* (citing *CompuServe*, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)).  
168. An example is where the defendant and the out-of-state visitor to the website merely exchange information. See *Zippo Mfg. Co.*, 952 F. Supp. at 1124.  
169. *Id.* (citing Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1338 (E.D. Mo. 1996)).
purposely availed itself of Pennsylvania law by conducting business with Pennsylvania residents over the Internet.\textsuperscript{170}

Both the virtual presence and single presence approaches require the finding that a telecommuter’s presence is sufficient to justify personal jurisdiction in the supervising employer’s state. Therefore, if a telecommuter may be found liable for damages in the supervising employer’s state, then, fairness and public policy should require that a telecommuter is eligible to receive UI benefits from the supervising employer’s state upon discharge.

In light of the New York Court of Appeals’s willingness to locate Zelinsky’s services in New York and other jurisdictions’ virtual presence analyses, UI boards in the future should not hesitate to locate an out-of-state telecommuter’s services in the employer’s state. In fact, the New York Court of Appeals in \textit{Zelinsky} recognized that the necessary minimum contact between New York and petitioner, who claimed to be a telecommuter, existed by virtue of the employment relationship between Cardozo Law School and Zelinsky.\textsuperscript{171} Zelinsky’s decision to continue his employment relationship with Cardozo constituted his purposeful availment of the benefits and protections provided by New York.\textsuperscript{172} State agencies that successively apply the localization tests contained in the uniform definition of employment cause the inapposite result of locating the out-of-state telecommuter’s work outside the employer’s state when that same state would claim income taxes from and exert personal jurisdiction over the telecommuter because of the work performed for the employer in that same state. The Direction and Control test should be applied as the primary test to telecommuters if only to create symmetrical results with regard to UI benefit approval, income tax liability, and exercises of personal jurisdiction.

\textsuperscript{172} \textit{See id.}
V. CONTINUED ELIGIBILITY FOR UI BENEFITS

Once a claimant demonstrates eligibility to receive UI benefits, the claimant must continue to be eligible for the benefits by showing that he or she is ready, willing, and able to work. Every state requires a UI recipient to show that reasonable efforts have been made to find a suitable new position.\(^{173}\) Depending on the state, a suitable new position means either: being available for work, available for suitable work, or “[a]vailable for . . . [w]ork in [the claimant’s] usual occupation or for which [claimant is] reasonably fitted by prior training or experience.”\(^{174}\) If a claimant rejects an offer for a suitable new position, then the UI recipient is no longer eligible to collect UI benefits. States monitor their UI recipients’ continued availability for work by requiring the recipients to register with a local state unemployment office and to regularly report for work at the unemployment office; at such time, the recipient must indicate what search efforts have been made to find a new suitable position.\(^{175}\)

State UI programs are most vulnerable to fraudulent claims, and the resulting overpayments, after the initial determination of eligibility for UI benefits is made; billions of dollars in overpayments were made because UI claimants did not report or underreported their income when they try to show continued eligibility for UI benefits. In 2001, the General Accounting Office determined that $2.4 billion of the $30 billion paid out in UI benefits in the United States were overpayments.\(^{176}\) Of that $2.4 billion, $560 million was attributable to fraud or abuse.\(^{177}\)

\(^{173}\) See, e.g., CAL. UNEMP. INS. CODE § 1253(c), (e) (West 1986 & Supp. 2003) (requiring UI recipients to be able to and be available for work and to search for suitable work); N.Y. LAB. LAW § 593(2) (2002) (disqualifying a recipient for refusing a job offer that is a reasonable fit in training and experience for the recipient, unless the job offer pays considerably lower wages than those paid for a similar job in the same region); OHIO REV. CODE ANN. § 4141.29(A)(4)(a) (Anderson 2001) (requiring recipients to be able and be available for suitable work); see also U.S. DEP’T OF LABOR, STATE LAW PROVISIONS CONCERNING NONMONETARY ELIGIBILITY 4.18 t.400 available at http://www.ows.doleta.gov/unemploy/pdf/2001ch400.pdf (last visited Jan. 13, 2005); U.S. Dep’t of Labor, Nonmonetary Eligibility, at http://www.ows.doleta.gov/unemploy/pdf/nonmonetary.htm.

\(^{174}\) See U.S. DEP’T OF LABOR, STATE LAW PROVISIONS CONCERNING NONMONETARY ELIGIBILITY 4.18 t.400.

\(^{175}\) See, e.g., CAL. UNEMP. INS. CODE § 1253(b) (West 1986); FLA. STAT. ANN. § 443.091(1)(b) (West 2002); N.Y. LAB. LAW §§ 591(4), 596(4) (2002).


\(^{177}\) Id. However, the states’ benefit payment control divisions reported an overpayment figure that totals to $650 million. See id. at 4. In addition, the Department of Labor’s overpayment figure is
Fraud occurs when claimants intentionally falsify eligibility information, file fraudulent claims, or fail to report earnings. Of the $560 million attributable to fraud, $313 million (56%) were due to unreported earnings.

Some states’ inability to verify self-reported earnings contributes to UI claimants’ fraud on the system; however, there are computerized databases that would decrease benefit overpayments due to fraud. For example, each state is required to run a “Wage/Benefit Crossmatch” that cross-references UI benefits recipients against another database that has those individuals’ wages. The only problem with the crossmatch is that it is only performed quarterly, so the time lag allows UI recipients to receive a substantial amount of overpayments.

However, the time lag problem with the crossmatch could be solved if each state used their federally-mandated state new hires directory as a cross-reference for the UI claimants’ self-reported information. The state new hire directories are updated more often than the crossmatch databases. While the crossmatch databases are only updated every calendar quarter, the state new hires directories are updated on a monthly basis (roughly) because once an employer hires an employee, that employer is required by state law to report the new hire to the state employment security department within twenty days. One of the states visited by the General Accounting Office for its 2002 study reported that its overpayments decreased by 75% after it started using the new hires database. Unfortunately, many states do not use their state new hire directories believed to be more reliable because the Labor Department’s quality assurance investigators typically spend more time investigating overpayment claims than do state benefit payment control investigators. See id. at 7.

178. See id. at 5-6.
179. See id. at 6.
180. See id. at 8-9. Some states use “automated data resources . . . [while] others rely heavily on self-reported information from claimants” to determine benefit disbursements. Id.
181. See id. at 9.
182. See id.
183. See id.
185. See, e.g., FLA. STAT. ANN. § 409.2576(4) (West 2002); 820 ILL. COMP. STAT. ANN. 405/1801.1(B) (West 1993 & Supp. 2003); Act of Dec. 23, 2003, § 1, 2003 Ohio Laws 46 (providing that state new hires data may be used to administer the unemployment compensation program), available at http://www.legislature.state.oh.us/BillText125/125_SB_92_EN_N.pdf.
186. See Nilsen Testimony, supra note 176, at 10.
directories to verify the accuracy of UI claimants' self-reported information, and as a result, these states are more susceptible to losses from fraudulent claims of continued eligibility for UI.

The state-maintained databases only report information from employers within a given UI recipient's state;187 consequently, a recipient who gets another position that requires out-of-state telecommuting could get away with fraud if the benefit-disbursing state does not try to verify the self-reported information of the UI recipient. Fortunately, there are four nationally-maintained databases that could reduce UI fraud by out-of-state telecommuters.188 First, the Department of Labor maintains a database, Interstate Crossmatch, that can help states discover unreported or under-reported wages earned in other states.189 Another national database, Interstate Inquiry, lets states check individual UI claimant's wages earned in other states.190 The National Directory of New Hires191 maintains UI, wage, and new hires information across the country, but current law prohibits states from getting the information to verify eligibility for UI.192 Finally, the Department of Labor maintains the Wage Record Interchange System (WRIS), and it makes UI wage and employment records of individuals in other states available to each state.193

VI. CONCLUSION

Telecommuting gained in popularity by leaps and bounds over the last decade, and it is an example of technology racing ahead of the law once again. Because at least one court and one state legislature have chosen to rely on the policy considerations for a uniform definition of employment proposed in 1937, millions of employees are exposed to the risk of ineligibility for UI benefits.

187. See id. at 10.
188. See id. at 10-11.
189. See id.
190. See id.
191. 42 U.S.C. § 653(i)(2) (2000) (requiring states to furnish new hires, wage, and UI compensation data to the National Directory of New Hires within two business days of when such data becomes available to the state).
192. See id. at § 653(f) (2000).
193. WRIS was created by the Workforce Investment Act of 1998 and costs about $2 million per year to administer. See 29 U.S.C.A. § 2871(f)(2) (2003); Nilsen Testimony, supra note 176, at 11 n.11.
It is time for legislatures, courts, and Unemployment Insurance Boards to abandon the perception of the 1937 workplace and catch up to the twenty-first century reality of the workplace. The policy considerations for the 1937 uniform definition no longer exist. UI benefit awards depend on the amount of wages earned by the claimant during the base period rather than on a given state’s cost of living. Furthermore, the Internet has made it possible for job seekers to widen the geographic scope of their job search beyond the community or state in which they are physically present.

As the discussion in Part III suggests, states, like New York, tax out-of-state telecommuters for work performed outside their employers’ states in violation of the Constitution. For taxation purposes, income from work performed by an out-of-state telecommuter is taxed because the employer, located in the taxing state, is the source of that income. The New York Court of Appeals ratified the tax because an employee’s decision to bring home work was not substantial enough to constitute interstate commerce, and the dormant Commerce Clause was not violated because both in-state and out-of-state telecommuters were equally liable for the tax.

However, locating an out-of-state employee’s income within the employer’s state because the opportunity to work arose in said state while placing the services outside the state for UI benefit purposes, as per the court’s decision in *Claim of Allen*, is untenable and incongruous. A telecommuting arrangement between an employer and an out-of-state employee is a sustained relationship that is substantially different from the one contemplated in *Zelinsky* where an out-of-state commuter takes work home occasionally or only in isolated instances. In fact, it is the sustained relationship characteristic of telecommuting arrangements that would justify locating an out-of-state telecommuter’s work in the office from which the employer directs and controls, or supervises and assigns work.

It is also no small coincidence that personal jurisdiction over an out-of-state telecommuter would be proper in the employer’s state if a telecommuter’s negligence or malfeasance were to damage the employer’s property in some way.

Since personal jurisdiction over the out-of-state telecommuter is proper and an out-of-state telecommuter can be taxed in the employer’s state, it is fitting and proper that the Direction and Control test should supercede the other tests to localize a telecommuter’s services for UI purposes in the employer’s state, especially in light of the fact that a state is not made more vulnerable to fraudulent claims arising from
unreported or underreported income from UI recipients. There are already crossmatch, interstate inquiry, and new hire databases in place to prevent any fraud that could be committed by an out-of-state telecommuter.

_Beverly Reyes_*

---

* J.D. Candidate, 2005, Hofstra University School of Law. Many thanks to Professor Grant Hayden for his insight and guidance during the development of this Note; to Frank Misiti and Christina Cialone for their editorial assistance; and to Richard Corbi whose knowledge of constitutional law proved to be invaluable. For their encouragement and limitless patience during this laborious Note-writing process, I owe much love and gratitude to Corey Delaney, Susann Duffy, Tali Harel, Elizabeth Henries, Heather Ohlberg, and Lauren Reaves. Last, but certainly not least, this Note is dedicated to my family with the utmost love and respect.