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California Says Who Gets Taxed During Covid Work In State

What state taxes apply if you are stuck in California or stuck in another state during the pandemic? Do you pay taxes where you are sheltering in place, even if you don't normally live there? Do you pay taxes in your usual home state, even though you are not sheltering there? Do you get stuck paying in both? Some states have come out with rules or policies, since [sheltering in place can put your tax strategy at risk](#). All states are extra hungry for revenue as a result of the pandemic. Already, [California's top 13.3% tax rate could be raised to 16.8% retroactive to 1/1/20](#). What's more, [California legislators have proposed a wealth tax](#). California Governor Gavin Newsom issued a stay at home executive order back in March, but the state's tax agency, the California Franchise Tax Board, has been quiet until a recent FAQ on [teleworking and the "stay at home" order](#). Unfortunately, it's not likely to answer most questions from individuals.

The FTB's big message is that "California will not treat an out-of-state corporation whose only connection to California is the presence of an employee who is currently teleworking in California due to Executive Order N-33-20 as being actively engaged in a transaction for the purposes of financial

or pecuniary gain or profit.” For out of state businesses hoping not to get ensnared by the sticky and persistent tentacles of California taxes, that’s welcome news.



California defines “doing business” in the state as engaging in any transaction for the purposes of financial or pecuniary gain or profit. Yes, that is awfully broad. But now—for a limited time only—a corporation whose *only* connection to California is remote workers in the state will not be considered doing business in the state and won’t have to file taxes in California. Still, the FAQ explains California’s minimum thresholds for property, payroll, or sales, which if met will mean a taxpayer is considered doing business in the state. Wages paid to employees remote working in California solely in response to the state’s stay-at-home order will not count toward the state’s payroll threshold. The presence of employees in the state teleworking due to

the state's stay-at-home order will also not be considered as exceeding the protection of PL 86-272.

As nice and unusual as it is to have some "no tax" news from the Golden State's FTB, is it likely there are going to be some future California tax fights involving all the dislocation of the pandemic? It sure seems so. Some of that will surely involve individuals who were in or out of California and end up taking tax return filing positions that the state doesn't exactly like. For example, if you are a California resident but you are sheltering out of state, the FTB may say that you are still taxed in California the entire time, even if the other state taxes you too.

Other points seem less clear, but company disputes and line-drawing seem inevitable. The FTB was clear to focus on a remote Covid worker being the **only** connection a non-California company might have. Only out of state businesses with *no previous connections* with California except an employee teleworking during the state's executive order will be safe. What if the company has a handful of employees or even 100? And what if the company had minimal *other* connections to the state? It is pretty easy to be considered to be doing business in California.

For California franchise tax purposes, corporations are required to file a tax return and are subject to the minimum franchise tax if they are doing business in California. "Doing business" means that a corporation has sufficient connections to California so that the corporation has availed itself of the benefits provided by the state that it can be fairly subject to the taxing authority of the state. For more details, check out the [doing business in California](#) list from the FTB.

What activities might result in a corporation being considered as doing business in California? In some cases, [California can assess taxes no matter where you live](#). Generally, a corporation will be considered as [doing business in California](#) if the corporation has actively engaged in any transaction for the purpose of financial or pecuniary gain or profit. The company's connections to California do not need to be extensive in order for it to be considered as doing business for California franchise tax purposes. If the minimum thresholds for sales, property and payroll attributed to California are exceeded, a corporation will be considered as doing business in California.

But doesn't federal tax law, [Public Law 86-272](#), protect out-of-state business that sell into California? Public Law (PL) 86-272 states that if an out-of-state corporation sells tangible personal property in a jurisdiction and its employees' only activity in that jurisdiction pertains to the solicitation of sales, the out-of-state corporation will not be subject to tax on the income it generates in the jurisdiction. In *Wisconsin Dept. of Revenue v. Wm. Wrigley Jr. Co.*, (1992) 505 U.S. 214, the United States Supreme Court held that even if an out-of-state corporation engaged in activities that exceeded the solicitation of sales, as long as they were *de minimis*, the out-of-state corporation will continue to not be subject to tax on the income it generates in the jurisdiction.

Will California treat an out-of-state corporation as exceeding the protections of PL 86-272 for California franchise tax purposes if it has an employee who is currently teleworking in California due to Executive Order No. 33-N-20? No, that is *de minimis* so does not take the company out of P.L. 86-272 protection.

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