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Massachusetts Adopts Emergency Withholding Rules for Out-of-State Telecommuters During COVID-19 Pandemic

BY ANTHONY J. DRAGGA • SEPTEMBER 24, 2020

Massachusetts has adopted emergency sourcing rules for personal income tax withholding from employees who are telecommuting due to the COVID-19 pandemic. The emergency [rules](#) treat employees who currently work remotely out of state for Massachusetts-based employers as Massachusetts residents for purposes of income tax withholding.

THE EXISTING REGULATIONS

Under M.G.L. c. 62, § 5A(a), income of a non-resident derived from a trade or business, including any employment, carried on in the Commonwealth is sourced to Massachusetts. As a general rule, state income tax withholding is required in the state in which the employee's services are performed, not the state in which the employee resides. Exceptions apply if the specific state does not impose an income tax or a reciprocal agreement exists between the state where the employee works (i.e., where the service is performed) and where the employee resides. Massachusetts does not have reciprocal agreements with any other states.

When a non-resident earns or derives income from sources both within Massachusetts and elsewhere, the taxpayer must either allocate or apportion the income to determine the amount of Massachusetts source income, apportionment provisions which account for the number of days that work is actually performed within Massachusetts. See 830 CMR 62.5A.1(5). In practice, the existing regulations provide the following guidance to illustrate how a telecommuting employee's income would be treated:

Example (5)(a)(1.2). A telecommuter works for a Massachusetts firm, mainly out of her home in Ohio. The telecommuter works a total of 240 days during the tax year, and is in Massachusetts on 60 of those days. Her salary is \$120,000 per year. Her Massachusetts source income is \$30,000, calculated as follows:

$$\text{\$120,000} \times \frac{60}{240} = \text{\$30,000}$$

THE EMERGENCY REGULATIONS

The Department of Revenue (“DOR”) promulgated emergency regulation [830 CMR 62.5A.3: Massachusetts Source Income of Non-Residents Telecommuting due to COVID-19](#) to explain the sourcing and withholding rules applicable to telecommuting employees during the COVID-19 state of emergency in Massachusetts.

Pursuant to the Emergency Regulations, for the duration of the Massachusetts COVID-19 state of emergency, *all compensation* received for personal services performed by a non-resident who, *immediately prior* to the Massachusetts COVID-19 state of emergency, was an employee engaged in performing such services in Massachusetts, and who, during the emergency, is performing such services from a location outside Massachusetts due solely to the Massachusetts COVID-19 state of emergency, will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62 and personal income tax withholding.

The Emergency Regulations governing sourcing and withholding rules applicable to telecommuting employees during the state of emergency are due to expire on October 21, 2020. Proposed Regulations, which track precisely with the Emergency Regulations, are currently out for public hearing.

As companies plan for a more permanent remote workforce, they should consider the tax implications of these decisions. Massachusetts employers are encouraged to reach out to the attorneys at Bowditch & Dewey to consider the state tax implications of remote working arrangements.