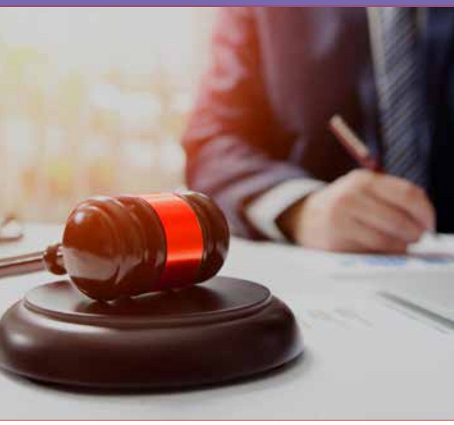

Employers May Need to Take Action to Comply With State Withholding Requirements for Employees Working in Other States Due to COVID-19

State income tax withholding for cross-border commuters has become a significant issue recently because of the national COVID-19 pandemic. As many state and local governments issued stay-at-home orders, many employees found themselves working at home for an extended period. For those employees that normally commute to work from another state, this may create new legal and tax obligations for employers and employees. Employers should consider taking action now to evaluate and comply with state tax requirements.

Background

State law generally requires employers to withhold state income tax based primarily on where an employee performs services, and secondarily where the employee resides. There are many exceptions, generally involving state reciprocity agreements, in which residents of nearby states are permitted to work in a state without incurring income tax liability. For example, Illinois residents working in Iowa are not subject to Iowa income tax, and the employer is not required to withhold Iowa income tax (and vice versa), because Iowa and Illinois have a reciprocal agreement. This is intended to reduce the number of income tax returns that an employee who lives in one state and works in another is required to file.

The 42 states that administer an earned income tax generally have well-known thresholds as to how long a nonresident can work in the state before their employer is required to withhold state income taxes. These thresholds are often expressed in terms of the number of days present in the state (e.g., 14 in New York; 30 in Illinois), or an earnings amount, or some combination. In any event, such thresholds have generally been reached, as the COVID-19 pandemic has extended from March into June.

At least 14 states have recently issued guidance on the question of income tax withholding for employees that are required to work in a state other than their normal work location due to the COVID-19 pandemic. For example, Alabama and Georgia issued rulings to the effect that they would not enforce withholding requirements if employees are temporarily working in the state due to government "work-from-home" orders.

Some announcements simply restate withholding obligations for nonresidents that normally work in the state. For example, Massachusetts issued a regulation noting that nonresidents who are telecommuting from home in a different state as a result of COVID-19 continue to be subject to Massachusetts income tax withholding. However, the regulation also provides that Massachusetts residents that normally work in another state, but are now working in-state as a result of the pandemic, does not obligate employers to withhold Massachusetts tax in addition to tax for the worked-in state.

New Jersey provided guidance stating that if employees are working from home solely as a result of COVID-19-related work-from-home orders, wage income will continue to be sourced as determined by the employer in accordance with the employer's jurisdiction. The New Jersey tax division "will not advise employers to change the current work-state setup for employees in their payroll systems who are now telecommuting or are temporarily relocated at an out-of-state employer location; however, employers must consider their unique circumstances and make that decision."

Ohio enacted Covid-19 relief legislation on March 27, 2020. It clarifies withholding obligations for municipal income taxes, stating that during the pandemic, any day an employee telecommutes from a municipality will not count toward the minimum-day count that triggers the municipality's income tax and the corresponding employer withholding requirement.

Employer and Employee Decisions Factor In

As employers and employees have become comfortable with the telecommuting arrangement, some have determined that the telecommuting arrangement could continue indefinitely. To the extent such decisions are made, they would generally be viewed to be effective at the time of such decisions. Employers may wish to contact the states involved to understand their requirements and, if necessary, register for state withholding accounts and employer identification numbers.

Lastly, to the extent that an employer establishes permanent employment in a new state, it may also be necessary to register with the applicable state agency which administers unemployment insurance.

Other State Tax Obligations

Changes to state income tax withholding may be a relatively minor part of a much larger impact for an employer. That is, the presence of an employee in a state in which an employer does not have a legal and tax presence (known as "nexus") may subject the employer to new obligations in any states in which employees are now working from home. Establishment of nexus, or legal presence in a state, may subject the employer to new state business income tax and sales tax obligations, so employers are generally careful not to inadvertently establish offices in new states. Some state announcements have addressed this question; for example, noting that the state will not seek to establish nexus for any business tax, including sales and withholding tax, solely because an employee is temporarily working from home due to the COVID-19 pandemic.

Employers facing these and related questions should consult with appropriate legal and tax professionals before proceeding.

Excerpts and links to State Tax Announcements Related to State Withholding Requirements and COVID-19 follow:

Legislative Update

AL	**https://revenue.alabama.gov/coronavirus-covid-19-updates/**	"During the federally declared period of emergency due to the coronavirus (COVID-19) pandemic, Alabama will not change withholding requirements for businesses based on an employee's temporary telework location within Alabama that is necessitated by the pandemic and related federal or state measures to control its spread. Alabama will not consider temporary changes in an employee's physical work location during periods in which temporary telework requirements are in place due to the pandemic to impose nexus or alter apportionment of income for any business."
GA	**https://dor.georgia.gov/coronavirus-tax-relief-faqs**	… The Department will not use someone's relocation, that is the direct result of temporary remote work requirements arising from and during the coronavirus pandemic, as the basis for establishing Georgia nexus or for exceeding the protections provided by P.L. 86-272 for the employer of the temporarily relocated employee. Also, if the employee is temporarily working in Georgia, wages earned during this time period would not be considered Georgia income and therefore the company is not required to withhold Georgia income tax.
IA	**http://tax.iowa.gov/iowa-illinois-reciprocal-agreement**	Iowa personal income tax and withholding requirements are not modified by the COVID-19 emergency. Nonresidents of Iowa who normally work in Iowa — but are temporarily telecommuting in another state, or who normally work outside of Iowa but are temporarily telecommuting in Iowa — may need to adjust their income apportionment or their Iowa income tax return filing requirement. Note, however, that Illinois residents working in Iowa are not subject to Iowa income tax or income tax withholding because Iowa has a reciprocal agreement with Illinois.
IL	**Info Bulletin FY 2020-29 May 2020**	If an Illinois resident employee has performed work for more than 30 working days from their home in Illinois for an out-of-state employer, the employer may be required to register with the Illinois Department of Revenue (IDOR) and withhold Illinois Income Tax from the employee. Out-of-state employers from states that have a reciprocal agreement with Illinois (Iowa, Kentucky, Michigan, Wisconsin) do not need to change the way that they currently operate.
MA	**[https://www.mass.gov/regulations/ 830-CMR-625a3-massachusetts-source-income-of-non-residents-telecommuting-due-to-covid](https://www.mass.gov/regulations/830-CMR-625a3-massachusetts-source-income-of-non-residents-telecommuting-due-to-covid)**	A resident employee suddenly working in Massachusetts due to the COVID-19 pandemic who continues to incur an income tax liability in another state due to that state's sourcing rule will be eligible for a credit for taxes paid to that other state under M.G.L. c. 62, § 6(a). In addition, the employer of such employee is not obligated to withhold Massachusetts income tax to the extent the employer remains required to withhold income tax with respect to the employee in such other state.
MD	**Tax Alert 04-14-20B**	Maryland imposes income tax and, therefore, a withholding requirement on employers, for employees domiciled in Maryland, statutory residents of Maryland, and non-residents receiving Maryland-sourced income. Income is deemed Maryland-sourced income when the income is compensation for services performed in Maryland. Residents of Virginia, Washington D.C., West Virginia and Pennsylvania who earn wages, salaries, tips and commission income for services performed in Maryland are exempt from Maryland state income tax and, therefore, withholding, because Maryland has a reciprocal agreement with these states. Delaware has not entered into a reciprocal agreement with the state of Maryland. Compensation paid to a Maryland nonresident who is teleworking in Maryland is Maryland-sourced income and, therefore, is subject to withholding. Maryland will consider the temporary nature of a business' interim workplace model and employee deployment in light of the current health emergency in making a nexus determination, whether the business correctly sourced income, and whether the business properly withheld and reported employee state withholding.

MN	[**https://www.revenue.state.mn.us/covid-19-faqs-businesses**]	Minnesota DOR announced that it will not seek to establish nexus for any business tax, including withholding tax, solely because an employee is temporarily working from home due to the COVID-19 pandemic. The DOR will not impose added individual income tax or payroll withholding tax requirements for employees who ordinarily work outside the state, but are temporarily telecommuting from a Minnesota location due to COVID-19. Minnesota residents are already taxed on income earned inside and outside the state. For nonresidents of Minnesota, the apportionment of their income may change based on the number of days they physically work in Minnesota.
MS	**https://www.dor.ms.gov/Documents/COVID%20Extensions%20Press%20Release.pdf**	During the period of national emergency, Mississippi will not change withholding requirements for businesses based on the employee's temporary telework location. Mississippi residents are taxable on their total income, regardless of where they work. However, we will not impose any new withholding requirements on the employer. Mississippi will not use any changes in the employees' temporary work locations due to the pandemic to impose nexus or alter apportionment of income for any business, while temporary telework requirements are in place.
NE	**https://revenue.nebraska.gov/businesses/frequently-asked-questions-about-income-tax-changes-due-covid-19-national-emergency**	"DOR will not require employers to change the state which was previously established in their payroll systems for income tax withholding purposes for employees who are now telecommuting or temporarily relocated to a work location within or outside Nebraska due to the COVID-19 pandemic. A change in work location is not required beginning with the date the emergency was declared, March 13, 2020, and ending on January 1, 2021, unless the emergency is extended."
NJ	Email NJ Division of Taxation **taxation.njenews@treas.nj.gov** 3/31/2020	New Jersey sourcing rules dictate that income is sourced based on where the service or employment is performed based on a day's method of allocation. However, during the temporary period of the COVID-19 pandemic, wage income will continue to be sourced as determined by the employer in accordance with the employer's jurisdiction. Would the Division advise employers in your state to not change the current work state set-up for employees in their payroll systems who are now telecommuting or are temporarily relocated at an out-of-state employer location? The Division would not require employers to make that change for this temporary situation. However, employers must consider their unique circumstances and make that decision.
OH	**Ohio H.B. 197**	SECTION 29… during the period of the emergency declared by Executive Order 2020-01D … and for thirty days after the conclusion of that period, any day on which an employee performs personal services at a location, including the employee's home, to which the employee is required to report for employment duties because of the declaration shall be deemed to be a day performing personal services at the employee's principal place of work. [Note: Relates to municipal income tax.]

PA	**https://revenue-pa.custhelp.com/app/answers/detail/a_id/3741/kw/nexus%20with%20ohio/related/1/session/**	Will a PA employer of a nonresident employee temporarily working from home due to the COVID-19 pandemic in a state that doesn't have a reciprocity agreement with Pennsylvania be required to withhold personal income tax on compensation paid for the temporary at-home work? If the employee is working from home temporarily due to the COVID-19 pandemic, the department would not consider that as a change to the sourcing of the employee's compensation. That means the employee's compensation remains PA-source, and the employer is required to withhold on the compensation.Governor Wolf Proclamation of Disaster Emergency March 6, 2020: As a result of COVID-19 causing people to temporarily work from home as a matter of safety and public health, the department will not seek to impose state unemployment tax nexus solely on the basis of this temporary activity occurring during the duration of this emergency.
RI	Emergency regulation 280-20-55-14 **https://rules.sos.ri.gov/regulations/part/280-20-55-14.**	Under the emergency regulation, Rhode Island will not require employers located outside of Rhode Island to withhold Rhode Island income taxes from the wages of employees who are Rhode Island residents temporarily working within Rhode Island solely due to COVID-19.
SC	**https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/IL20-11.pdf**	Pursuant to the COVID-19 emergency — and from the period March 13, 2020, through September 30, 2020 — the Department will not use the temporary change of an employee's work location due to COVID-19 to impose the income tax withholding requirement under SC Code §12-8-520; however, this relief does not apply to workers whose status changed from temporary to permanent assignment during this period. During the COVID-19 relief period, a South Carolina employer's income tax withholding requirement is not affected by the current shift of employees working on the employer's premises in South Carolina to teleworking from outside of South Carolina. Accordingly, the wages of nonresident employees temporarily working remotely in another state instead of their South Carolina business location continue to be subject to South Carolina withholding. Further, during the COVID-19 relief period, an out-of-state employer is not subject to South Carolina's income tax withholding requirement solely due to the shift of employees working on the employer's premises outside of South Carolina to teleworking from South Carolina. Accordingly, the wages of a South Carolina resident employee temporarily working remotely from South Carolina instead of their normal out-of-state business location are not subject to South Carolina withholding if the employer is withholding income taxes on behalf of the other state.
VT	**https://tax.vermont.gov/coronavirus**	Employers who have remote workers located in Vermont temporarily are not required to change the employee's withholding state. However, employers and their workers may wish to discuss a change to the employee's withholding state if the worker will be working remotely in Vermont for an extended period of time, even if only temporarily.

Eye on Washington

Legislative Update

ADP Compliance Resources

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