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REGULATION

830 CMR 62.5A.3: Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic (EMERGENCY REGULATION)

DATE:

12/08/2020

ORGANIZATION:

[Massachusetts Department of Revenue \(/orgs/massachusetts-department-of-revenue\)](/orgs/massachusetts-department-of-revenue)

REGULATORY AUTHORITY:

[Massachusetts General Laws \(https://malegislature.gov/Laws/GeneralLaws\)](https://malegislature.gov/Laws/GeneralLaws)

OFFICIAL VERSION:

[Published by the Massachusetts Register \(https://www.sec.state.ma.us/spr/massreg.htm\)](https://www.sec.state.ma.us/spr/massreg.htm)

EMERGENCY REGULATION

830 CMR: DEPARTMENT OF REVENUE

830 CMR 62:00: INCOME TAX

830 CMR 62:00 is amended by adding the following section:

830 CMR 62.5A.3: *Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic*

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(1) Scope of Regulation; Background; Outline of Topics; Effective Dates

(a) *Scope of Regulation.* 830 CMR 62.5A.3 sets forth the sourcing rules that apply to income earned by a non-resident employee who telecommutes on behalf of an in-state business from a location outside the state due to the COVID-19 pandemic.

(b) *Background.* In response to the COVID-19 pandemic, Massachusetts and other states have declared states of emergency and issued temporary social-distancing measures and other restrictions. Many businesses and employees have adopted telecommuting arrangements in response to the pandemic.

For Massachusetts personal income tax purposes, Massachusetts residents are generally taxed on all of their income from whatever sources derived. M.G.L. c. 62, § 2. Non-residents are taxed on items of gross income from sources within the Commonwealth, including income derived from or connected with any trade or business, including any employment, in Massachusetts. M.G.L. c. 62, § 5A(a). Wage income paid to an individual that is subject to the Massachusetts personal income tax generally must be withheld upon for each payroll period by his or her employer. M.G.L. c. 62B, § 2. 830 CMR 62.5A.3 sets forth general rules applicable to non-resident employees who are telecommuting on behalf of an in-state business from a location outside the state due to the COVID-19 pandemic, and explains the parallel treatment that will be accorded to resident employees with income tax liabilities in other states that have adopted similar sourcing rules.

(c) *Outline of Topics.* 830 CMR 62.5A.3 is organized as follows:

1. Scope of Regulation; Background; Outline of Topics; Effective Dates
2. Definitions
3. Massachusetts Source Income for Non-Residents Telecommuting due to Pandemic-Related Circumstances
4. Sourcing Rules in Other States

(d) *Effective Dates.* 830 CMR 62.5A.3 applies to the sourcing of wage income attributable to employee services performed commencing March 10, 2020 through 90 days after the date on which the Governor of the Commonwealth gives notice that the Massachusetts COVID-19 state of emergency is no longer in effect.

(2) Definitions

Unless the context requires otherwise, for the purposes of 830 CMR 62.5A.3, the following definitions apply:

Massachusetts COVID-19 State of Emergency. The state of emergency in the Commonwealth of Massachusetts proclaimed in the Governor's Declaration of a State of Emergency to Respond to COVID-19, issued March 10, 2020.

Non-Resident. Any natural person who is not a Massachusetts resident.

Pandemic-Related Circumstances, generally include the following situations; (a) a government order issued in response to the COVID-19 pandemic, (b) a remote work policy adopted by an employer in compliance with federal or state government guidance or public health recommendations relating to the COVID-19 pandemic, (c) the worker's compliance with quarantine, isolation directions relating to a COVID-19 diagnosis or suspected diagnosis, or advice of a physician relating to COVID-19 exposure, or (d) any other work arrangement in which an employee who performed services at a location in Massachusetts prior to the Massachusetts COVID-19 state of emergency performs such services for the employer from a location outside Massachusetts during a period in which 830 CMR 62.5A.3 is in effect.

Resident. Any natural person domiciled in Massachusetts or any natural person who is not domiciled in Massachusetts but who maintains a permanent place of abode in Massachusetts and spends in the aggregate more than 183 days of the tax year in Massachusetts, including days spent partially in and partially out of Massachusetts.

(3) Massachusetts Source Income for Non-Residents Telecommuting due to Pandemic-Related Circumstances

(a) *In General.* 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. Pursuant to this rule, all compensation received for 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 is performing services from a location outside Massachusetts due to a Pandemic-Related Circumstance will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62, § 5A and personal income tax withholding pursuant to M.G.L. c. 62B, § 2.

(b) *Apportionment Based on Days Spent Working in Massachusetts.* Consistent with the rule set forth in 830 CMR 62.5A.3(3)(a), a non-resident employee who, prior to the Massachusetts COVID-19 state of emergency, determined Massachusetts source income by apportioning based on days spent working in Massachusetts in accordance with 830 CMR 62.5A.1(5)(a), must continue to do so based on (1) the percentage of the employee's work days spent in Massachusetts during the period January 1 through February 29, 2020 as determined under 830 CMR 62.5A.1(5)(a), or (2) if the employee worked for the same employer in 2019, the apportionment percentage properly used to determine the portion of employee wages constituting Massachusetts source income on the employee's 2019 return. For example, if a non-resident employee is working from home full-time due to a pandemic-related circumstance but during the period January 1 through February 29, 2020 the

employee worked five days a week, two of those days from an office in Boston and three of those days from home, 40% of the employee's wages would continue to be Massachusetts source income.

(4) Sourcing Rules in Other States

Other states have adopted or may adopt sourcing rules similar to the rule in 830 CMR 62.5A.3(3). A resident employee who, immediately prior to the Massachusetts COVID-19 state of emergency was an employee engaged in performing services from a location outside of Massachusetts, and who began performing such services in Massachusetts due to a Pandemic-Related Circumstance, will be eligible for a credit for income taxes paid to the state where the employee was previously providing services, to the extent provided 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.

Regulatory Authority:

830 CMR 62.5A.3: M.G.L. c. 14, § 6(l); M.G.L. c. 62C, § 3

Emergency Regulation Promulgated: December 8, 2020