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Senate Republican proposals would limit withholding for remote workers, nexus for employers (COVID-19)

U.S. Senate Republicans last evening released several legislative proposals that are intended to serve as components of a broader Senate legislative response to the coronavirus (COVID-19) pandemic.

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In particular, tax provisions in the “American Workers, Families and Employers Assistance Act” would adopt general limitations on withholding and taxation of employee income through 2024. The measure effectively combines provisions of the “Mobile Workforce Simplification Act” (introduced over the past several years) and COVID-related provisions contained in a measure sponsored by Senators Thune (R-SD) and Brown (D-OH) earlier this year.

Specifically, the language provides that no part of the wages earned by an employee who is a resident of a taxing jurisdiction and performs employment duties in more than one taxing jurisdiction would be subject to income in any taxing jurisdiction other than the resident state and any jurisdiction where the employee is present and performing services for more than 30 days during the calendar year in which the wages are earned. Likewise, the employee’s wages would not be subject to income tax withholding unless the employee is subject to income tax because he or she has been working in that state for more than 30 days during the calendar year. Once the 30-day threshold is met, withholding and reporting would be required on wages and other remuneration earned as of the commencement date of employment duties in the state.

An employer could rely on an employee’s annual determination of where he or she spent time performing duties absent collusion or actual knowledge by the employer of fraud by the employee. If an employer, at its sole discretion, maintains a time and attendance system that tracks where the employee performs duties on a daily basis, data from the time and attendance system would have to be used instead of the employee’s determination. Certain types of individuals—professional athletes, entertainers, and public figures paid on a per event basis—would be excluded from the definition of an employee for purposes of the 30-day threshold.

For any employee who performs employment duties in any taxing jurisdiction other than the taxing jurisdiction of the employee's residence during calendar year 2020 as a result of the COVID-19 public health emergency, the threshold would increase from 30 to 90 days.

KPMG observation

There is no guidance on what it means to be working from a different location as a result of the COVID-19 public health emergency, but, it appears that any employee working outside of his or her resident state in 2020 would be eligible for the 90-day threshold.

Terms defined

The bill sets out specific protections for employees and employers during "covered periods." The term "covered period" means, with respect to any employee "working remotely," the period beginning on the date on which such employee began working remotely and ending on the earlier of: (1) the date on which the employer allows such employee to return to his or her primary work location and not less than 90% of the employer's permanent workforce to return to such work location; or (2) December 31, 2020.

"Working remotely" in this context means the performance of duties by an employee at a location other than the primary work location of such employee at the direction of his or her employer due to conditions resulting from the public health emergency relating to COVID-19, including:

- To comply with any government order relating to COVID-19
- To prevent the spread of COVID-19, and
- Due to the employee or a member of the employee's family contracting COVID-19

During this covered period, any wages earned by an employee working remotely would be deemed to have been earned at the primary work location of the employee unless the employer maintains a time tracking system and the employer elects to treat the wages of the employee as earned at the remote performance location.

For an out-of-jurisdiction business that has employees working remotely in the jurisdiction during the covered period, the duties performed by such employee would not be sufficient to create any nexus or establish any minimum contacts or level of presence that would otherwise subject the business to any registration, taxation or other related requirements. Similarly, any duties performed by an employee in the remote jurisdiction would not be used to apportion any income or gross receipts to the jurisdiction. Rather, for apportionment purposes, the duties would be treated as if performed at the primary work location of the employee.

What's next?

The U.S. House of Representatives on May 15, 2020, passed (on a largely party-line vote) the "Health and Economic Recovery Omnibus Emergency Solutions Act" (HEROES Act). There are many significant differences between the HEROES bill and the Senate Republicans' proposals. In order for further COVID-19 response legislation to become law, the House, Senate, and White House all will ultimately have to agree to the same legislation.

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