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PUBLICATION

CRA Clarifies the Province of Employment for Full-Time Remote Workers

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Effective January 1, 2024, the Canada Revenue Agency ("CRA") introduced a new administrative policy relevant to employers with full-time remote workers (the "Policy"). The Policy provides guidance in determining an employee's province of employment ("POE") for employer payroll deduction purposes.

Payroll deductions are ordinarily determined based on the province or territory where the employee reports for work (i.e. "the establishment of the employer"). The CRA administers the collection of territorial and provincial payroll taxes with the exception of the province of Quebec.

Previous CRA guidance provided that where an employee was not required to physically report for work at their employer's establishment, the employee's POE was deemed to be the one from where the employee's salary and wages were paid.

Now, under the CRA's new Policy, employers will need to perform a new analysis, which considers whether a full-time remote work agreement exists and whether the employee can reasonably be considered "attached to an establishment of the employer."

Under the Policy, employees will be considered to be reporting for work at an establishment of the employer if one of the following circumstances apply:

1. the employee physically reports for work at an establishment of the employer for any amount of time (no minimum amount of time is required); or
2. a full-time remote work agreement is in place and the employee can reasonably be considered "attached to an establishment of the employer."

Full-Time Remote Work Agreements

The CRA will consider a full-time remote work agreement to exist where the following criteria are met:

- The agreement is either temporary or permanent;
- The employer directs or allows the employee to perform their employment duties remotely on a full-time basis (i.e. 100% of the time); and
- The employment duties are performed by the employee at one or more locations that are not establishments of the employer.

Notably, the employer and employee must be able to justify that a full-time remote work agreement was made, which will depend on the specific facts and circumstances of each case.

Reasonable Attachment to an Establishment of the Employer

If a full-time remote work agreement exists, the employer must then determine if the employee can reasonably be considered "attached to an establishment of the employer." If so, the POE will be the province or territory of that establishment. To help with this assessment, the CRA has set out the following primary and secondary indicators to be considered:

- The primary indicator is whether the employee would physically report for work at the establishment of the employer to carry out their duties if it were not for the full-time remote work agreement. For employees who physically reported to an establishment of their employer immediately prior to entering into a full-time remote work agreement, that establishment is the one to which they would reasonably be considered attached, unless the employee's circumstances or the nature of their duties have since changed.

- There is also a list of secondary indicators that must be reviewed collectively, including:
- the establishment where the employee attends or would attend in-person meetings, through any type of communication;
- the establishment where the employee receives or would receive work-related material or equipment or associated instructions and assistance;
- the establishment where the employee comes or would come in-person to receive instructions from their employer regarding their duties, through any type of communication;
- the establishment that is responsible for or supervises the employee, as indicated in the contractual agreements between the employer and employee; and
- the establishment to which the employee would report to based on the nature of the duties performed by the employee.

Where an employer has more than one establishment, the Policy indicates that the employer will need to consider, based on the primary and secondary indicators, to which of their establishments the employee is most closely attached. By way of example, consider a full-time remote worker who resides in British Columbia and works for an employer with establishments (i.e. offices) in Alberta and Ontario. The worker receives their instructions from the Alberta office and would be required to attend occasional in-person meetings at the Alberta office. The worker would therefore be most closely attached to the employer's Alberta office and the POE would be Alberta and not Ontario, even if the worker is paid from the Ontario office.

In all cases, an employer's determination of an employee's POE must be supported by the facts and will not be considered reasonable where it is made for the purpose of avoiding or reducing source deductions or employer payroll contributions in another province or territory.

In situations where a non-resident employer without a permanent establishment in Canada hires a non-resident employee to temporarily provide services in Canada, there is no requirement to withhold and remit payroll deductions under the above analysis, as the employee is considered attached to the employer's location outside of Canada. However, for the employer to be relieved of their obligation, the employee must apply for and receive a waiver of withholding from the CRA pursuant to Regulation 102 of the Income Tax Act.

Implications for Employers

The POE for employees who physically report for work at an establishment of their employer will continue to be the province or territory in which that establishment is located. The CRA's new Policy impacts employees who are subject to full-time remote work agreements, in which case, employers will need to engage in the above analysis to determine if the remote worker is "attached" to an establishment of the employer.

The Policy provides greater certainty with respect to determining an accurate POE for full-time remote workers. Importantly however, the Policy only applies for the purpose of determining the POE for Canada Pension Plan (CPP), Quebec Pension Plan (QPP), Employment Insurance (EI), Quebec Parental Insurance Plan (QPIP) and income tax deductions. Accordingly, employers should note that an employee's POE for such payroll deductions may not necessarily be the same jurisdiction that applies for other important employment issues such as employment standards, occupational health and safety, workers' compensation and human rights legislation. Employers should therefore review these matters separately to ensure full legislative compliance with the appropriate jurisdiction.

In response to this Policy, employers are well-advised to assess the POE for each of their full-time remote workers as soon as possible to make any necessary payroll adjustments. In this regard, the CRA has provided an interactive guide with relevant questions to assist employers in their assessments.

For more information about these changes, or for specifically tailored advice, please reach out to a member of Blaneys' Tax Group or Labour and Employment Group.

The information contained in this article is intended to provide information and comment, in a general fashion, about recent developments in the law and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.