

So, an Employee Wants to Work Remotely in Canada, eh?

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A number of issues can arise if an employee of a non-Canadian employer comes to Canada to work remotely. Unless the employee is seconded to a Canadian affiliate of the employer on a cost-recovery basis, the employer will be required to register with the Canada Revenue Agency (“**CRA**”). Among other things, depending on the circumstances, the employer may also have an obligation to file Canadian tax returns, pay Canadian income tax, and comply with payroll tax and/or value-added tax obligations.

The discussion herein assumes that the remote working arrangement in Canada is intentional. Where the remote working arrangement arose or continued due to Covid-19 travel restrictions, the Canada Revenue Agency (“**CRA**”) has provided for significant administrative concessions that limit a non-resident employer’s exposure.

Payroll Tax Obligations

Having an employee in Canada invariably means that the employer will have to register with the CRA for a payroll account because the employer will have payroll tax obligations and/or the account will be required in order to obtain an exemption from some or all of its payroll tax obligations.

In general, resident and non-resident employers have the same payroll tax obligations with respect to work performed in Canada by their employees, which include deductions for income tax, Canada Pension Plan (“**CPP**”) contributions, and employment insurance (“**EI**”) premiums, and any applicable provincial payroll taxes.

A non-resident employer without an establishment in Canada is generally not required to withhold CPP contributions. Further, EI premiums are not required to be withheld if premiums are payable in respect of the Canadian employment services under the employment insurance laws of the employee’s home country. Where CPP contributions and/or EI premiums must be deducted from an employee’s pay, the employer is liable for CPP contributions and EI premiums on its own account.

Non-Resident Employer Certification

Under a non-resident employer certificate regime, employers that are resident in a treaty country, and become certified by the CRA, are not required to deduct and remit Canadian income tax on remuneration paid to qualified non-resident employees. Qualifying employees must be:

- resident in a country with which Canada has a tax treaty;
- exempt from Canadian income tax on the remuneration because of that treaty; and
- either (A) not in Canada for 90 or more days in any 12-month period that includes the payment time, or (B) not in Canada for 45 or more days in the calendar year that includes the payment time.

The employer will generally have continuing reporting obligations on amounts paid to its qualifying non-resident employees. Further, the employer can be liable for withholdings to the extent that the non-resident employees were not in fact qualifying non-resident employees.

Regulation 102 Waiver

If the employer is not certified as described above or the employee is not a qualified non-resident employee, the employee can apply for an exemption via a Regulation 102 waiver if the remuneration is exempt from Canadian income tax because of a tax treaty.

Income Tax Obligations

Carrying on Business in Canada

Having an employee in Canada will raise the risk of the employer being considered to be carrying on business in Canada. Subject to a treaty exemption, a non-resident “carrying on business” in Canada is generally liable for tax in respect of profits from such business activities.

Under one test commonly used by Canadian tax courts, a non-resident would generally be found to be carrying on business in the jurisdiction where the business contract is concluded or where the center of profit-making activities is located. Further, certain activities of the employee may cause the employer to be deemed to be carrying on business in Canada. For example, such activities include where the employee “solicits orders or offers anything for sale in Canada...whether the contract or transaction is to be completed inside or outside Canada.”^[1]

An employer that is entitled to treaty benefits is not generally liable to Canadian income tax in respect of its business profits provided it does not carry on the subject business through a permanent establishment (“PE”) in Canada. If the employee has the authority to conclude contracts in Canada, the tax treaty may deem the employer to have a PE in Canada. Under certain treaties such as the Canada-US tax treaty, there is additional risk of a deemed PE if the employee is providing services on behalf of the employer.

A non-resident carrying on (or deemed to be carrying on) business in Canada in a year is required to file a Canadian tax return in respect of that year (even if it is exempt from tax by reason of a tax treaty).

Regulation 105 Obligations and Waiver

If the employee is providing services in Canada, the employer’s customer may be required to deduct and remit 15% of the payment for such services to the CRA unless a waiver is obtained (however, in many situations, the customer may not be aware that any part of the service is being provided from inside Canada). These withholdings are applied against the non-resident service provider’s potential Canadian income tax liabilities for the year.

Employers may be eligible to apply for a waiver to eliminate or reduce the withholding. Treaty-based waivers are available to treaty residents that do not have an PE in Canada. Income and expense waivers are available to allow a payer to withhold tax at a reduced rate based on the employer’s anticipated net income on the services rendered.

Indirect Value-Added Taxes

Value-added taxes (GST/HST) apply on the supply of goods and services in Canada, to the extent that the supplies are not “exempt” or “zero-rated”. A non-resident is required to register for and comply with the GST/HST regime if it makes taxable supplies in Canada in the course of a business carried on in Canada.

[1] *Income Tax Act* (Canada), RSC 1985, c 1 (5th Supp), s. 253(b).

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances.

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