



Canada Provides Administrative Relief for Non-Resident Employees

Executive summary

The 2015 Canadian Federal Budget introduced administrative relief for certain non-resident employees working in Canada. Qualifying Employers can complete form RC473 to be certified to participate in the new program. Qualifying employees can then work in Canada for a short time without having to file a request for a waiver from Canadian payroll withholdings.

The amendments received royal assent on June 22, 2016 and will be effective for payments made after 2015 or as of the dates applied for.

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Introduction

The following is a summary of the amendments to the Canadian rules for non-resident employees.

Canadian Withholding Rules

Under Canadian tax law, every resident and non-resident employer is required to withhold and remit payroll taxes on salary, wages and other remuneration paid to employees. For non-resident employers, this requirement is limited to work done in Canada. Note that withholdings are required, even if the employee is not required to pay Canadian income tax.

Non-resident employees working in Canada can file a Regulation 102 form to apply to have their payroll withholdings reduced to \$Nil if they qualify. The form has to be filed 30 days before the employee enters Canada to work which can be cumbersome to manage. Under the new rules, qualifying employees working for qualifying employers will not have to go through this process to have withholdings reduced to \$Nil.

T4 Information Slips are required to be filed by a non-resident employer, for non-resident employees unless they are exempt under the new rules.

Qualifying Non-Resident Employee

A Qualifying Non-Resident employee:

- is resident in a country with which Canada has a tax treaty at the time of the payment;

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- is not liable to income tax under Part I of the Canadian *Income Tax Act* on the payment because of the tax treaty* under which the employee is resident; and
- either works in Canada for less than 45 days in the calendar year that includes the time of the payment, or is present in Canada for less than 90 days in any 12-month period that includes the time of the payment.

* A qualifying non-resident employer must refer to the applicable tax treaty between Canada and the non-resident employee's country of residence to determine the existence of a tax exemption and the criteria that must be met for it to apply.

Qualifying Non-Resident Employer

A Qualifying Non-Resident Employer:

- is resident in a country with which Canada has a tax treaty* at the time of payment or if the qualifying non-resident employer is a partnership, at least 90% of the partnership's income** or loss for the fiscal period at the time of payment is allocated to partners that are resident in a country with which Canada has a tax treaty.; and
- has been certified by the Minister of National Revenue.

* Canada's tax treaties can be found on the Department of Finance Canada website at www.fin.gc.ca/treaties-conventions/in_force--eng.asp.

** Where the partnership has a nil income or loss for the certification period, a deemed income amount of \$1,000,000 is used to calculate the allocation for the purpose of the 90% rule.

Becoming A Certified Employer

To become a certified employer, Form RC473 must be completed and sent to Canada Revenue Agency for approval. Canada Revenue Agency will issue a letter either approving or denying the request. The Form should be submitted 30 days prior to the non-resident employee providing service in Canada. The employer must withhold Canadian payroll tax until the approval letter is received, unless the employee has a Regulation 102 waiver.

The non-resident certification will be valid for up to two calendar years.

Documentation Obligations of a Certified Employer

A certified employer is required to maintain the documentation to:

- track and record the number of days each qualifying non-resident employee is either working in Canada, or is present in Canada, and the income attributable to these days (or any other criteria relevant to applying the treaty exemption) on a proactive basis;

- determine if the employee is resident in a country with which Canada has a tax treaty;
- evaluate and document if the qualifying non-resident employee's remuneration is expected to be exempt from tax in Canada under a tax treaty between Canada and the employee's country of residence;
- determine if the qualifying non-resident employee either works in Canada for less than 45 days in the calendar year that includes the time of the payment, or is present in Canada for less than 90 days in any 12-month period that includes the time of payment;
- obtain a Business Number and, if required to make remittances, set up an account for payroll purposes;
- complete and file a T4 Summary and Information Return for those employees who have provided employment services in Canada that are not excluded under the new rules, pursuant to subsection 200(1.1) of the *Income Tax Regulations*.;
- file the applicable Canadian income tax returns for the calendar years under certification;
- upon request, make your books and records available in Canada for inspection by the CRA for the purpose of administering the employer certification agreement and the withholding requirements in accordance with paragraph 153(1)(a) of the *Income Tax Act* (ITA) and Regulation 102.

Although qualifying non-resident employers do not have to withhold income tax on remuneration paid to qualifying non-resident employees during the period of certification, they may still have to withhold Canada Pension Plan (CPP) contributions and/or Employment Insurance (EI) premiums. However, there are exceptions:

- CPP contributions are not required if the employer does not have an establishment in Canada or if the employee has a certificate of coverage under a Social Security Agreement between Canada and the country of residence of the employer (a certificate is not required for an employee residing in the United States if they will be in Canada for less than 183 days).
- EI premiums are not required if the employee is covered under a similar program in his or her country, while working in Canada.

Note that if you are required to withhold and remit CPP contributions or EI premiums then, under the CPP/EI legislation, you will have to report the deductions on a T4 information return even if subsection 200(1.1) of the *Income Tax Regulations* does not require the information return for tax purposes.



Canada Revenue Agency Can Revoke the Certification

The Canada Revenue Agency can revoke the certification at any time if the obligations of the non-resident employer certification agreement are not met, or if the facts presented at the time of the request for certification were not correct.

Interest and Penalties

Employers, resident and non-resident, who do not withhold the required federal and provincial income tax, Canada Pension Plan and Employment Insurance premiums are subject to penalties and interest. It is important for every non-resident employer that has employees providing service in Canada to know their obligations.

Other Considerations

As a result of the broad language in the amendments, the employer is required to track not only the days the employee works or is present in Canada as part of the employment contract with that employer, but also, as applicable, the employee's employment with another employer as well as personal time spent in Canada. In practice, it may be difficult for the employer to provide the documentation that the employee meets the criteria of a Qualified Non-Resident Employee.

In addition, it may be tricky for an employer to determine if an employee is a Qualified Non-Resident Employee at the time of each payment. For example, an employee may qualify at the start of a trip, but if a trip is extended, the employee may no longer qualify either because of the number of days in Canada or the amount of remuneration paid exceeds the applicable threshold in the treaty with Canada. Note that the remuneration is based on the Canadian dollar value which could vary in the employer's home currency. Employers that do not start withholding tax when the employee is no longer a Qualified Non-Resident Employee will be subject to failure to withhold penalties.

In most cases, the withholding exemption will not qualify to secondment arrangements. Employers may second an employee to a Canadian resident entity in order to avoid the non-resident

employer from being subject to Canadian income tax. For example the non-resident employer is subject to Canadian income tax if it is doing business in Canada and not otherwise exempt.

The requirement for the employer to file all applicable Canadian income tax returns for the calendar years in which it is certified may lead to increased scrutiny by the Canada Revenue Agency of the employer's own tax compliance in Canada.

Next Steps – Employers

Regardless of whether a non-resident employer will participate in the new program, non-resident employers with employees providing services in Canada need to apply for a Canadian non-resident employer number. If the non-resident employer wants to take advantage of the new rules, the employer should apply for certification as soon as possible.

Next Steps – Employees

Employees providing services in Canada need to apply for a Canadian tax identification number (ITIN) if they are not a Qualified Non-Resident Employee or their employer is not certified.

Conclusion

The new withholdings and reporting exceptions are a welcome improvement to the cumbersome Regulation 102 waiver procedures under the Canada Revenue Agency's non-resident withholding policies. However, the administration requirements may not make the application of the new rules feasible in all situations.

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