

# Clarification on changes for non-resident employees working in Canada

August 2015

As discussed in our April 2015 article [Welcome changes for non-resident employees working in Canada](#), the 2015 federal budget proposed changes to alleviate the administrative burden relating to withholding tax regulations on non-resident employees working in Canada. On July 31, 2015, the Department of Finance released draft legislation that provides more clarification and guidance on some of these changes, but still leaves other questions unanswered.

The following summarizes the issues that have been clarified by this recent release.

## Qualifying non-resident employers and employees

Clarification is provided on the changes to Regulation 102 withholding requirements for payments by qualifying non-resident employers to qualifying non-resident employees.

A qualifying non-resident employee is now more clearly defined as an employee who

- is a resident of a treaty country,
- is exempt from Canadian income tax in respect of the relevant payment because of a tax treaty, and
- either works in Canada for less than 45 days in the calendar year that includes the time of payment or is present in Canada for less than 90 days in any 12-month period that includes the time of payment.

Note that the days worked in Canada include only days during which the employee is physically present in Canada and paid by his or her employer for the time spent in Canada, which generally excludes weekends, days off and holidays. In addition, the computation of the number of days present in Canada follows the OECD commentary “days of physical presence” method and includes any day during which the employee is present in Canada, even if the employee is only present for a portion of the day.

To be considered a qualifying non-resident employer according to the proposed rules, the employer

- be resident in a country with which Canada has a tax treaty,
- where the employer is a partnership, at least 90 percent of the partnership's income for the fiscal period that includes the time of the payment must be allocated to persons that are resident in a treaty country, and
- be certified by the Minister at the time of the payment.

These changes are still proposed to apply in respect of payments made after December 31, 2015.

### Certification requirements

Clarification is also provided on the Minister's role in certification requirements in respect of qualifying non-resident employers.

The proposals provide the Minister with the authority to certify or revoke an employer's qualifying non-resident status. The Minister has the power to certify an employer as a qualifying non-resident employer for a specific period of time if the employer has applied in prescribed form with prescribed information and has met the other required conditions. The Minister may also revoke an employer's certification if the Minister is no longer satisfied that the employer still meets the required conditions.

Additional clarification concerning the certification process is still required, including application and supporting information to be filed with the Minister and what is considered a "specific period of time."

### Penalty relief

There is now a welcome exception from penalties for a qualifying non-resident employer who fails to withhold in respect of a payment to an employee that was reasonably believed to be a qualifying non-resident employee at the time of payment.

### Reporting requirement

Payments made by a non-resident employer to a non-resident employee that are withholding exempt continue to be subject to the information return reporting requirements.

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