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### **New York Issues New Audit Guidelines for Employer Withholding on Compensation Paid to Nonresident Employees**

The New York Department of Taxation and Finance has recently issued revised Withholding Tax Field Audit Guidelines (“Revised Guidelines”), which establish new audit policies relating to an employer’s obligation to withhold New York income tax from wages (including certain types of deferred compensation) paid to nonresident employees who are assigned to a primary work location outside of New York but who travel to New York on business (“Nonresident Employees”). Among other provisions, the Revised Guidelines establish a “safe harbor” from withholding if a Nonresident Employee is expected to perform services in New York for no more than 14 days in a tax year. The Revised Guidelines are effective immediately and apply to all open audits.

#### **Withholding on Ordinary Wage Income**

Under the Revised Guidelines, if a Nonresident Employee performs services in New York, then the employer must withhold New York income tax on 100% of such Nonresident Employee’s wages, unless: (1) the Nonresident Employee furnishes the employer with Form IT-2104.1, Certificate of Nonresidence and Allocation of Withholding Tax; (2) the employer maintains adequate records to determine the amount of income tax to be withheld; or (3) the employer reasonably expects that the Nonresident Employee will perform services in New York in the tax year for 14 days or fewer.

For purposes of the 14 day rule, if a Nonresident Employee is expected to perform services in New York for more than 14 days in the tax year, then the employer is required to withhold on all wages that are allocable to services performed in New York. Furthermore, if such Nonresident Employee in fact works in New York for more than 14 days in the tax year, then the employer must begin withholding New York income tax on the Nonresident Employee’s wages on the fifteenth day. A reasonable number of training days spent in New York will not count toward the 14 days.

## Withholding on Deferred Compensation Income

Similar audit procedures apply to certain payments of deferred compensation, except that the 14 day rule does not apply. If deferred compensation income is attributable to services performed in New York by a Nonresident Employee, the employer will be required to withhold on 100% of such compensation, unless: (1) the Nonresident Employee furnishes the employer with Form IT-2104.1; (2) the employer has a Form IT-2104.1 on file for the Nonresident Employee for the current tax year, the Nonresident Employee is still performing services in New York, and the deferred compensation is less than \$1,000,000; (3) the Nonresident Employee is no longer employed by the employer or is no longer performing services in New York and the deferred compensation income is less than \$1,000,000, in which case the employer may withhold based on the last Form IT-2104.1 submitted by the Nonresident Employee; or (4) the employer has adequate records to determine the proper allocation of the deferred compensation income.

## Conclusion

Prior to the issuance of these Revised Guidelines, there was no stated audit policy to verify and enforce compliance with the withholding tax rules by foreign employers. The issuance of the Revised Guidelines appears to signal a new effort to enforce compliance with New York withholding tax rules by foreign employers who send Nonresident Employees to New York on business. Foreign employers with Nonresident Employees who perform services in New York should consider implementing procedures to comply with these new audit policies.

If you have questions on these guidelines or for more information, please contact Steve Crainer at (212) 218-5622 or [scrainer@seyfarth.com](mailto:scrainer@seyfarth.com) or John Napoli at (212) 218-5620 or [jnapoli@seyfarth.com](mailto:jnapoli@seyfarth.com).



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