

Controversy Brewing Over Massachusetts Taxation of Nonresidents

The Massachusetts Department of Revenue (the “DOR”) promulgated on July 21, 2020 an [emergency regulation](#) (the “Regulation”) to address income-sourcing concerns during the COVID-19 pandemic. Pursuant to the Regulation, the DOR will continue to treat as Massachusetts-source income any compensation paid to a nonresident who currently performs services out of state due to the pandemic but, immediately prior to the pandemic, performed such services in Massachusetts. Accordingly, such income will be subject to Massachusetts personal income tax and personal income tax withholding. The Regulation is scheduled to remain in effect until the earlier of December 31, 2020 or 90 days after the Governor terminates the state of emergency. The DOR held a public hearing on the Regulation on August 27, 2020, as announced in a [notice](#). This procedural step was necessary to extend the effectiveness of the Regulation beyond three months, pursuant to [MASS. GEN. LAWS ch. 30A, § 2](#).

Some neighboring New England states have expressed opposition to the Massachusetts Regulation. For instance, state officials from New Hampshire—which does not impose a personal income tax on its residents—have publicly contemplated a legal challenge to the Regulation. On August 21, 2020, the New Hampshire [Governor](#), [Attorney General](#), and [Commissioner of Business and Economic Affairs](#) sent letters to Massachusetts Governor Charlie Baker outlining the state’s position with respect to the Regulation. The [Attorney General](#)’s letter put forth several arguments challenging the legality of the Regulation, including that the Regulation exceeds statutory authority, that it is unclear and overbroad, that it may violate the U.S. Constitution’s Due Process and Commerce Clauses, and that it infringes upon New Hampshire’s sovereign interests.

Two bills have been proposed in Congress to address uniformly the taxation of workers telecommuting across state lines, with one bill supporting Massachusetts’ stance and the other bill supporting New Hampshire’s stance. A first proposed bill, the [Remote and Mobile Worker Relief Act of 2020](#), supports Massachusetts’ emergency regulation: This bill would temporarily (in 2020 only) permit states to tax the wages of nonresidents who telecommute, if their primary work location is within the taxing state. A second proposed bill, the [Multi-State Worker Tax Fairness Act of 2020](#) (introduced by a Connecticut representative, and co-sponsored by representatives from Connecticut and New Hampshire), supports New Hampshire’s stance: This bill would allow a state to tax nonresidents only on compensation earned when such individuals are physically present working in that state.

We expect other states will closely watch the dispute between Massachusetts and New Hampshire. While some neighboring New England states may follow New Hampshire’s lead in protesting the Massachusetts Regulation, other states—including some outside of the region—may take positions similar to Massachusetts’ as they attempt to retain taxing jurisdiction over their pre-COVID-19 tax base. For example, Rhode Island has announced a position similar to Massachusetts’. The state enacted an [emergency regulation](#), effective until November 18, 2020, providing that income of nonresidents who are temporarily working outside of the state due to the pandemic will continue to be treated as Rhode Island-source income. For previous coverage of state taxation of telecommuting employees, see [Key Tax Considerations for Cos. With Remote Employees](#).