

## Controversy Brewing Over Massachusetts Taxation of Nonresidents

The Massachusetts Department of Revenue (the “DOR”) finalized a regulation on October 21, 2020 (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 was initially scheduled to remain in effect only until December 31, 2020, but an update issued via [emergency regulation](#) on December 8, 2020 extended the Regulation’s effect through 90 days after the end of the Massachusetts COVID-19 state of emergency. The DOR will hold a public hearing on the updates in the emergency regulation on January 20, 2021. This procedural step is necessary to extend the effectiveness of the Regulation beyond three months, pursuant to [MASS. GEN. LAWS ch. 30A, § 2](#).

New Hampshire has expressed strong opposition to the Massachusetts Regulation. On October 19, 2020, New Hampshire filed a [motion for leave to file a complaint](#) with the U.S. Supreme Court, asserting that the Regulation is unconstitutional. Specifically, it requests a ruling that the Regulation violates the Due Process and Commerce Clauses by attempting to impose tax on income that is not earned within Massachusetts, which New Hampshire argues violates established jurisprudence that limits a state’s ability to tax nonresidents and activity that occurs beyond its borders. Previously, state officials from New Hampshire—which does not impose a personal income tax on its residents—had 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.

Several bills were 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. Two proposed bills, the [Remote and Mobile Worker Relief Act of 2020 and the Remote Worker Relief Act of 2020](#), support Massachusetts’ emergency regulation: These bills 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. “Primary work location” refers to the address where the employee regularly works when they are not working remotely. A third 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.

Maine has also enacted [temporary relief](#) to accommodate neighboring states' policies. For the remainder of 2020, out of state employers should continue to calculate income tax withholding on wages paid to Maine residents who suddenly telework from Maine due to COVID-19 as if the employees were still working outside of the state. This rule applies only if the employer is also required to withhold income taxes on those employees in another state that continues to assert jurisdiction (e.g. Massachusetts or Rhode Island). Similarly, the Maine Governor intends to introduce legislation providing that for tax years beginning in 2020, Maine residents will be allowed a credit for taxes paid to another state that asserts taxing jurisdiction over the income the employee earned while working remotely from Maine during COVID-19.

For previous coverage of state taxation of telecommuting employees, see [Key Tax Considerations for Cos. With Remote Employees](#).