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Comments Due by: **April 19, 2022**

SC REVENUE RULING #22-x [DRAFT- 3/29/2022]

SUBJECT: Employer Wage Withholding Requirements
(Income Tax)

EFFECTIVE DATE: Applies to all periods open under statute, except the COVID-19 temporary relief provided in SC Information Letter #20-11 and subsequent extensions expires June 30, 2022.¹ Notwithstanding this effective date, employers may cease South Carolina withholding on nonresidents for wages earned while working outside of South Carolina at any time before the temporary COVID-19 relief ends.

REFERENCES: S.C. Code Ann. Section 12-8-10 (2014)
S.C. Code Ann. Section 12-8-510 (2014)
S.C. Code Ann. Section 12-8-520 (2014)
S.C. Regulation 117-910.1

AUTHORITY: S.C. Code Ann. Section 12-4-320 (2014)
S.C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #09-3

SCOPE: The purpose of a Revenue Ruling is to provide guidance to the public. It is an advisory opinion issued to apply principles of tax law to a set of facts or general category of taxpayers. It is the Department's position until superseded or modified by a change in statute, regulation, court decision, or another Department advisory opinion.

PURPOSE

Due to unprecedented temporary closings of offices and businesses and stay at home orders issued across the United States during the Coronavirus (COVID-19) pandemic, many businesses implemented temporary work at home options for employees. The Department announced temporary relief regarding a business's establishment of nexus solely because an employee is temporarily working in a different work location due to COVID-19 from March 13, 2020 through June 30, 2022, and provided that South Carolina will not use the temporary change of an employee's work location during the COVID-19 relief period to impose a South Carolina withholding requirement under Code Section 12-8-520.

¹ SC Information Letter #20-11 was effective beginning March 13, 2020. See subsequent extended relief through March 31, 2022, published in SC Information Letters #20-24, #20-29, #21-8, #21-22, and #21-31. This advisory opinion further extends the COVID-19 relief period through June 30, 2022.

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With the relaxation of COVID-19 restrictions, the Department is ending its temporary relief provided in SC Information Letter #20-11 and subsequent extensions effective June 30, 2022. The COVID-19 pandemic, however, has brought about changes in the work environment and more employers are providing employees with greater flexibility to return to the office, work from home, or work remotely from anywhere on a permanent or flexible basis.

The purpose of this advisory opinion is to provide guidance to employers of their South Carolina withholding requirements under South Carolina Title 12, Chapter 8, for resident and nonresident employees, whether the employees are working in the employer's office/location or working partially, primarily, or wholly remote from home or other remote location.²

LAW

General Wage Withholding Requirements

Code Section 12-8-510, establishes who is subject to the withholding laws in South Carolina, and reads:

A person located, doing business, or having gross income in this State and an employer having an employee earning income within this State are subject to the withholding laws provided in this chapter.

Code Section 12-8-10 provides definitions of terms used for purposes of income tax withholding, including the terms "employee," "employer," and "nonresident," and reads, in part:

As used in this chapter unless otherwise required by the context:

* * *

(3) "Employee" includes a resident individual receiving wages, as defined in Section 12-8-520(D), for services regardless of where the services are rendered and nonresident individual receiving wages, as defined in Section 12-8-520(D), for services rendered in this State.

(4) "Employer" means the person for whom an individual performs or performed a service, of whatever nature, as the employee of the person.

(5) "Nonresident" [employee] means an individual domiciled outside this State...

* * *

² This guidance is limited to income tax wage withholding under Code Section 12-8-520. This guidance does not apply to any obligation that may apply with respect to labor and employment law other than South Carolina Title 12, "Taxation."

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Code Section 12-8-520 details the “wages” subject to withholding and amounts to be withheld.

Code Section 12-8-520(A) provides for the wage threshold upon which an employer must withhold South Carolina income tax on an employee, and reads:

(A) An employer paying wages to an employee shall withhold income tax for that employee if at the time of payment the wages are expected to equal one thousand dollars or more during the year, except as provided in (C), using the tables and rules promulgated by the department.

Code Section 12-8-520(C) addresses when “wages” of a resident employee working in another state are not subject to the withholding requirements of Title 12, Chapter 8, and reads:

(C) The following wages are not subject to the withholding requirements of this chapter:

- (1) Wages of a resident employee receiving wages in another state if:
 - (a) the wages are subject to the withholding laws of the state in which they are earned; and
 - (b) the employer is withholding income taxes on behalf of the other state.

Code Section 12-8-520(D) defines the term “wages” for purposes of the withholding requirements of Title 12, Chapter 8, and reads:

(D) For purposes of this chapter “wages” is all remuneration for services of any nature performed by an employee for an employer, including the fair market value of all remuneration paid in a medium other than cash...

Remuneration Exempt from Withholding and Regulation 117-910.1

Code Section 12-8-520(D) provides that the term “wages” does not include certain remuneration paid. Remuneration excluded from the definition of “wages,” and therefore exempt from withholding, includes amounts paid:

- (1) for agricultural services performed by an employee on a farm in connection with:
 - (a) cultivating the soil, or raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, training, and management of livestock, bees, poultry, fur-bearing animals and wildlife;
 - (b) the operation, management, conservation, improvement, or maintenance of a farm and its tools and equipment; or
 - (c) salvaging timber or clearing land of brush and other debris left by a hurricane if the major part of the service is performed on a farm.

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(2) for domestic services performed in a private residence;

(3) for personal services performed in this State by nonresident employees in connection with their regular employment outside of this State when the gross South Carolina wages are equal to or less than the personal exemption amount provided in Internal Revenue Code Section 151(d) as defined in Section 12-6-40. However, this item does not apply to employees performing construction, installation, engineering, or similar services where the situs of the job is in this State;

(4) for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of the ministry or by members of a religious order in the exercise of duties required by the order;

(5) for services performed by an individual on a boat with a crew of ten or fewer engaged in catching fish or other forms of aquatic animal life under an arrangement with the boat owner or operator in which the individual receives only a share of the boat's catch or a share of the proceeds from the sale of the catch and for services involving a multiple boat operation, with each boat's crew being ten or fewer, in which the individual receives a share of all the boats' catch or a share of the proceeds from the sale of all the boats' catch;

* * *

Regulation 117-910.1, "Determination of Withholding When Receiving Taxable Wages and Exempt Compensation," provides guidance regarding South Carolina's withholding requirement when an employee is earning from the same employer both wages subject to withholding and remuneration exempt from withholding as provided in Code Section 12-8-520(D)(1) through (11). The rule established in this Regulation is commonly referred to as the "One-Half Rule." Regulation 117-910.1 reads:

A particular employee may receive wages subject to withholding and also remuneration that is exempt from withholding. In such a case all remuneration paid during the payroll period is treated alike; that is, it is all treated as wages on which withholding is required, or it is all treated as exempt from withholding. The following rules apply:

(1) If one-half or more of any payroll period (not in excess of 31 days) is spent in earning wages subject to withholding, then withholding is required on all remuneration paid to the employee (including the "exempt" remuneration).

(2) If more than one-half of any payroll period (not in excess of 31 days) is spent in earning exempt remuneration described in Section 12-8-520, then no withholding is required on any wages paid to the employee.

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SUMMARY OF EMPLOYER SOUTH CAROLINA WAGE WITHHOLDING REQUIREMENTS

In general, an employer having an employee earning income in South Carolina is subject to South Carolina's wage withholding laws in Title 12, Chapter 8. This includes an employer located outside of South Carolina having a South Carolina resident employee or nonresident employee earning income in South Carolina (whether the employee is working in South Carolina at the direction of the employer or at his own choosing). South Carolina wage withholding does not, however, apply to an employer who pays wages to a South Carolina resident employee to work exclusively outside South Carolina, provided the employer is withholding income taxes on behalf of the other state. Code Sections 12-8-510, 12-8-10(3), and 12-8-520(C)(1).

Resident Employee Wage Withholding – General Rule. South Carolina's withholding laws apply to resident employees, regardless of where the resident employee performs the services (e.g., in South Carolina exclusively, partially, or exclusively outside South Carolina, at the employer's business premises, or at the employee's home, out-of-state vacation home, or other location, etc.), except as noted below. A "resident employee" is an individual domiciled in South Carolina. Code Section 12-8-10(3).

Special Rule for Resident Employee Working Outside South Carolina (Partially or Totally). South Carolina's withholding laws do not apply to wages of South Carolina residents working outside of South Carolina during some or all of the payroll period if: (a) the wages are subject to the withholding laws of the state in which they are earned and (b) the employer is withholding income taxes on behalf of the other state. Code Section 12-8-520(C)(1). If this provision applies, the employer is not required to withhold South Carolina income tax on the wages.

Nonresident Employee Wages. South Carolina's withholding laws also apply to nonresident employees only for services rendered in South Carolina. The wages of nonresident employees working exclusively outside of South Carolina are not subject to South Carolina withholding. A "nonresident employee" is an individual domiciled outside of South Carolina. Code Sections 12-8-10(3) and (5).

The wages of nonresident employees working partially in South Carolina and partially outside of South Carolina are subject to South Carolina withholding only to the extent the wages are for services rendered in South Carolina. **Note:** Regulation 117-910.1 (the one-half rule) does not apply. "Exempt" remuneration referenced in Code Section 12-8-520(D)(1) through (11) and Regulation 117-910.1 does not mean "wages" subject to withholding in another state when an employee is working partly within South Carolina and partly outside of South Carolina. See additional discussion and example below.

Exceptions to Wage Withholding Rules. South Carolina's wage withholding laws in Title 12, Chapter 8, do not apply to the following:

1. An employee whose wages are expected to be less than \$1,000 during the year.

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2. A nonresident employee whose wages do not exceed the federal personal exemption amount in IRC Section 151(d). However, this exception does not apply to employees performing construction, installation, engineering, or similar services where the situs of the job is in South Carolina. Code Section 12-8-520(D)(3).
3. An employee who has requested a “Waiver of Withholding Requirements,” permitted under Code Section 12-8-1040. Code Section 12-8-520(C)(2).
4. Wages earned by a resident employee working outside South Carolina (partially or totally) when (a) the wages are subject to the withholding laws of the state in which they are earned and (b) the employer is withholding income taxes on behalf of the other state. Code Section 12-8-520(C)(1).
5. Certain remuneration paid for services performed by an employee listed in Code Section 12-8-510(D)(1) – (11), except as provided in Regulation 117-910.1 (the one-half rule).
6. A military spouse who requests an exemption from South Carolina withholding under federal law. See SC Revenue Ruling #21-10, “Military Servicemember Spouse – Domicile and Taxation,” for when a military spouse may request an exemption.

EXAMPLES

Examples below illustrate the employer wage withholding requirements discussed above. The examples are not an exhaustive list of all South Carolina’s withholding requirements. With respect to the examples below, the examples assume that each employee earns over \$1,000 of South Carolina wages; a nonresident employee earns South Carolina wages over the personal exemption amount listed in the Internal Revenue Code; and an exemption from withholding has not been requested by any employee. In addition, each example assumes the employer has nexus with South Carolina, unless otherwise stated.

Example 1 – South Carolina Employer with Resident and Nonresident Employees who Work Exclusively in South Carolina

An employer with a South Carolina facility near the South Carolina/North Carolina state line hires employees who are residents of South Carolina and North Carolina. The employer is required to withhold South Carolina income tax on the wages paid to the South Carolina resident employees, whether the resident employees are working at the employer’s business premises in South Carolina, the employees’ South Carolina home, or any other location in South Carolina (e.g., employees’ South Carolina vacation home, employer’s South Carolina satellite office). In addition, the employer is required to withhold South Carolina income tax on the wages paid to North Carolina resident employees working in South Carolina.

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Example 2 – Iowa Employer with Resident Employee who Works Exclusively in South Carolina

A resident of South Carolina is an employee of an Iowa home improvement supply company. The employee works out of his home in South Carolina. South Carolina law requires an employer, including an employer located outside of South Carolina, to withhold income tax on the wages of a South Carolina resident employee working in South Carolina, regardless of the location of the work in South Carolina. Code Sections 12-8-10, 12-8-510, and 12-8-520. The employer is required to withhold South Carolina income tax on the wages earned by the South Carolina resident employee in South Carolina.

Example 3 – South Carolina Employer with Resident Employees who Work Partially in South Carolina and Partially Outside of South Carolina

Example A: South Carolina Resident Works Partially in another State that has a Withholding Requirement. A South Carolina resident employee works 70% of the payroll period at the employer's business premises in South Carolina and 30% of the payroll period in Georgia (e.g., at the employee's Georgia home or the employer's business premises in Georgia). The employer determines the wages earned in Georgia are subject to the withholding laws of Georgia and the employer withholds income taxes on behalf of Georgia. South Carolina law requires the employer to only withhold South Carolina income tax on 70% of the wages paid to the South Carolina resident since both requirements of Code Section 12-8-520(C)(1) are met.

Note: The answer would be different, and 100% of the resident employee wages would be subject to South Carolina withholding, if the employer did not withhold income tax on behalf of Georgia.

Example B: South Carolina Resident Works Partially in a State Without a Withholding Requirement. A South Carolina resident employee works 10% of the year at the employer's business premises in South Carolina and 90% of the year in Florida, a state with no individual income tax and no requirement for the employer to withhold on the employee's wages. South Carolina law requires the employer to withhold South Carolina income tax on 100% of the wages paid to the South Carolina resident (i.e., the wages earned in South Carolina and the wages earned in Florida) since both requirements of Code Section 12-8-520(C)(1) are not met.

Example 4 – Ohio Employer with Nonresident Employee who Works Partially in South Carolina and Partially Outside of South Carolina

An Ohio resident employed as a computer programmer for an Ohio corporation chooses to rent and work from a beach house in South Carolina for three months this year to enjoy the warmer winter weather. The Ohio resident works exclusively in South Carolina during these three months. South Carolina law requires an employer, including an out-of-state employer, to withhold on the wages of a nonresident employee working in South Carolina, whether the employee is working in South Carolina at the direction of the employer or at his own choosing.

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The Ohio nonresident employer is only required to withhold South Carolina income tax on the wages of the nonresident employee paid for services rendered in South Carolina during these three months. Code Sections 12-8-10(3) and (5).

Example 5 – South Carolina Employer with Nonresident Employee who Works Partially in South Carolina and Partially Outside of South Carolina

A solar power manufacturer located in South Carolina near the South Carolina/Georgia state line employs Georgia residents. A nonresident employee (e.g., Georgia resident) works 70% of the payroll period at the employer's business premises in South Carolina and 30% of the payroll period at the employee's Georgia residence. Under South Carolina law, the wages of nonresident employees working partially in South Carolina and partially outside of South Carolina are subject to South Carolina withholding only to the extent wages are for services rendered in South Carolina. Accordingly, only 70% of the nonresident employee's wages are subject to South Carolina withholding since the employee is not a resident of South Carolina and only 70% of the wages were for services rendered in South Carolina during the payroll period. Code Sections 12-8-10(3) and (5). Regulation 117-910.1, the one-half rule described above, is not applicable.

Example 6 – South Carolina Employer with Nonresident Employee who Works Exclusively Outside of South Carolina

A resident of Texas, an employee of a college located in South Carolina, is employed by the college to teach courses remotely from his home office in Texas. The employee does not physically work in South Carolina at any time. South Carolina's withholding laws do not apply to a nonresident employee who is performing services exclusively outside of South Carolina. South Carolina withholding on nonresident employees is only required to the extent wages are for services rendered in South Carolina. Code Section 12-8-10(3) defines the term "employee," in part, as a nonresident individual receiving wages for services rendered in this State. Since the nonresident professor is not rendering services in South Carolina, but from his domicile in Texas, the South Carolina employer is not required to withhold South Carolina income tax on these wages.

Example 7 – Louisiana Employer with Resident Employee who Works Exclusively in Louisiana

A resident of South Carolina is hired by a Louisiana oil company for a 12-month period to work on-site exclusively in Louisiana. The company does not have nexus with South Carolina. The employee rents an apartment in, and lives in, Louisiana, but maintains his domicile in South Carolina. Since the employer does not have nexus with South Carolina, South Carolina cannot require the employer to withhold South Carolina income tax on the wages paid to the South Carolina resident employee. Code Section 12-8-510.