

May 1, 2021 (REVISED)

Philadelphia Wage Tax Q&A applicable to COVID-19 policies

The following is in response to frequently asked questions as a result of the Department's Wage Tax policies throughout the COVID-19 pandemic.

Facts: An employer has a business location in Philadelphia. As a result of the Coronavirus pandemic and the Mayor's and Governor's Orders, the employer's non-resident employees began working remotely outside of Philadelphia. Since July 3, 2020 (the beginning of the "limited green phase" of reopening), the City's guidance for office workers is, "Remote work must continue where feasible."

In the following circumstances, to what extent is a non-resident employee's compensation treated as compensation for services performed in the City of Philadelphia and thus subject to Philadelphia Wage Tax withholding?

- 1. From March 16, 2020 through July 3, 2020 while the stay at home order was in place and until Philadelphia entered the modified green phase of reopening, an employer has a policy that no employee may work from the Philadelphia work location.**

Answer: The non-resident employees were not working in Philadelphia and their wages for that period are not subject to Wage Tax.

- 2. Notwithstanding that the City's modified green phase allowed an employer to reopen in a limited capacity, the employer kept in place a policy that no employee may work from the Philadelphia work location.**

Answer: The wages of the non-resident employees who followed the employer's policy and were not working in Philadelphia are not subject to Wage Tax.

- 3. Beginning September 1, 2020, an employer has a policy as follows: All employees are divided into the A team and the B team and alternating weeks are designated as "A weeks" and "B weeks." Under the employer's policy, the A team is required to come to the Philadelphia workplace during the A weeks and the B team is required to come to the Philadelphia workplace during the B weeks. When it is the A Team's week to be at the Philadelphia workplace, the B team is required to work remotely and when it is the B team's week to be at the Philadelphia workplace, the A team is required to work remotely.**

Answer: The wages of the non-resident employees of both A and B teams are subject to Wage Tax only for the weeks they are working at the Philadelphia workplace.

- 4. When an employer with offices in Philadelphia documents in writing its work-from-home policy with respect to non-resident employees' underlying medical conditions or childcare**

issues, would the following language be sufficient proof of a work-from-home requirement directive to its employees:

- a) *Employees with underlying medical conditions are required to work-from-home, but must first provide a doctor's note to their manager. The employer requires employees with underlying medical conditions to work from home to protect itself from liability and therefore the policy has a business purpose.*

Answer: Yes.

- b) *Employees with childcare issues may only work-from-home with their manager's approval.*

Answer: No. The wages of the non-resident employees who have COVID-19 related childcare issues that cause them to remain at home and work remotely are subject to Wage Tax. This policy does not establish a work-from-home requirement. The employee is working-from-home to care for his/her child and this accommodation benefits the employee. Childcare issues are particular to the employee and the Department considers working-from-home for childcare reasons to be for the convenience of the employee.

- 5. Due to social distancing rules, an employer has a policy that only 20% of its workforce may come to work at the Philadelphia work location on a given day, and the remaining 80% must work from home.**

Answer: The wages of the non-resident employees who are required to and do work at home are not subject to Wage Tax , except on the days they report to the Philadelphia work location.

- 6. Consistent with the City's current guidance for office workers that "remote work must continue where feasible," an employer has a policy that, as a general rule, all employees who are able to do so are required to work from home. Access is allowed only if employees prearrange to come to the Philadelphia workplace and pass a health assessment.**

Answer: The wages of the non-resident employees are subject to Wage Tax only with respect to the days that they passed the health assessment and spent the day working at the Philadelphia workplace.

- 7. An employer has a policy that, as a general rule, all employees must work from home, with the exception of certain categories of employees, such as mail room or technical support staff. If an employee within such category must work at the Philadelphia workplace to perform his or her duties, the employee must pass a health assessment, and if approved must come into the Philadelphia workplace to work. If the health assessment is not passed, the employee is not allowed to come into the office and is required to work from home.**

Answer: The wages of non-resident employees who are part of the category of employees who must work in the Philadelphia work location are subject to Wage Tax , provided they pass the health assessment. Otherwise, the wages of this category of non-resident employees are not

subject to Wage Tax to the extent they are required to work from home. The wages of the remaining non-resident employees that are not within such categories are subject to Wage Tax only on the days that they report to the Philadelphia work location.

- 8. In December 2019, a non-resident employee elected to defer 5% of her 2020 compensation. Prior to 2020, the employee worked in Philadelphia 100% of the time. Because of COVID-19, she was required to work remotely after March 16, 2020 and only worked in Philadelphia for 20% of her total 2020 workdays under the rules described in Question 7, above. What percentage of the 2020 deferred compensation is subject to Wage Tax?**

Answer: 20% of her 2020 compensation is subject to Wage Tax.

- 9. In January 2020, an employer paid bonuses to employees with respect to work the employees performed in 2019. Prior to 2020, an employee worked in Philadelphia 100% of the time. Because of COVID-19, she was required to work remotely after March 16, 2020 and only worked in Philadelphia for 20% of her total 2020 workdays under the rules described in Question 7, above. To be paid a bonus, the employee must be employed on the date the bonuses are paid. How much of the bonus paid to the non-resident Employee is subject to Wage Tax?**

Answer: 100% of the compensation is subject to Wage Tax because the compensation is attributable to the time she worked during 2019.

- 10. In December 2020, an employer pays bonuses to employees with respect to work the employees performed in 2020. Prior to 2020, an employee worked in Philadelphia 100% of the time. Because of COVID-19, she was required to work remotely after March 16, 2020 and only worked in Philadelphia for 20% of her total 2020 workdays under the rules described in Question 7, above. To be paid a bonus, the employee must be employed on the date the bonuses are paid. How much of the bonus paid to non-resident Employee is subject to Wage Tax?**

Answer: 20% of the compensation is subject to Wage Tax because the compensation is attributable to the time she worked during 2020.

- 11. In January 2021, an employer pays bonuses to employees with respect to work the employees performed in 2020. Prior to 2020, an employee worked in Philadelphia 100% of the time. Because of COVID-19, she was required to work remotely after March 16, 2020 and only worked in Philadelphia for 20% of her total 2020 workdays under the rules described in Question 7, above. To be paid a bonus, the employee must be employed on the date the bonuses are paid. How much of the bonus paid to the non-resident Employee is subject to Wage Tax?**

Answer: 20% of the compensation is subject to Wage Tax because the compensation is attributable to the time she worked during 2020.

12. a. Would the answers to Questions 9 through 11 change if the NR employee received restricted stock instead of cash bonuses?

Answer: No, if restricted stock units are issued to employees as bonus/compensation for past services and are earned by the employees prior to the grant date. The percentage of income subject to Wage Tax is equal to the percentage of days the non-resident employee worked in the city during the year or years prior to the grant date.

b. What would the Wage Tax implications be if restricted stock units are issued to employees as an incentive payment for future services?

In such cases, the percentage of income subject to Wage Tax is equal to the percentage of days the NR employee worked in the City during the period between the date of the grant of the restricted stock and the date of vesting of the restricted stock.

13. Is the same percentage used to determine the portion of restricted stock subject to Wage Tax also applicable for determining whether the portion of a dividend equivalent received on a RSU would be subject to Wage Tax?

Answer: No. The dividend equivalent is taxable when received. The percentage of income subject to Wage Tax is equal to the percentage of days a non-resident Employee worked in the City during the year the dividend equivalent is paid.

14. When an employer with offices in Philadelphia documents in writing its COVID-19 work-from-home policy, would the following language be sufficient proof of a work-from-home requirement directive to its employees:

- a. All employees are required to work from home starting March 16, 2020 and extending through the duration of the City of Philadelphia's stay-at-home order.*

Answer: Yes.

- b. All employees are generally required to work from home starting March 16, and extending through the duration of the City of Philadelphia's stay-at-home order and may work in the office as needed to perform their duties with permission from their employer or supervisors, or on a schedule approved by their employer or supervisors, and subject to passing a health assessment*

Answer: Yes, except to the extent that employees are granted permission, pass the health assessment and work at the Philadelphia work location.

- c. All employees are generally required to work from home starting March 16, 2020 and extending through the duration of the City of Philadelphia's stay-at-home order, and may choose to work in the Philadelphia office as needed to perform their duties.*

Answer: No. Because the non-resident employees have the option to work in the office located in Philadelphia, the non-resident employees' wages subject to this order are subject to Wage Tax. The non-resident employees have a choice as to where they work.

- d. *Employees are generally required to work from home but may work in the office when necessary, subject to prior approval from the employer, and other employees may work in the office subject to a limitation of no more than 20% of the normal occupancy, subject to approval of the employer.*

Answer: Yes, in part. This policy establishes a work-from-home requirement for the non-resident employees who do not work in the Philadelphia office without prior approval from their employer. The wages of the non-resident employees who work in the Philadelphia office are subject to Wage Tax only for the time they work in the office.

- e. *Beginning July 4, 2020, employees may work in the Philadelphia office, subject to all applicable federal, state, and local laws and regulations. Employees who are uncomfortable commuting to the Philadelphia office due to the ongoing pandemic may work-from-home.*

Answer: No. This policy provides non-resident employees with an option to work-from-home if they choose to do so. It does not establish a work-from-home requirement. As such, their compensation is subject to Philadelphia Wage Tax.

15. An employer operates a retail store in Philadelphia. During portions of the COVID-19 emergency, the employer has closed the store. The employer continues to pay a nonresident employee during the periods of closure. The nonresident employee is not working from home during these periods. Would the compensation paid to the nonresident employee while he/she is not working be subject to the Wage Tax?

Answer: Compensation paid to the nonresident employee is subject to the Wage Tax. It should be treated like vacation, holiday, and sabbatical leave payments when the employee is not required to perform any services while away from work. Such compensation is a benefit accrued by the virtue of employment, subject to tax based on the employee's time inside and outside the City while such employees are actively working. In this case, the nonresident employee was working entirely in Philadelphia prior to the temporary closures of the retail store during the pandemic.

Thank you to the Philadelphia Bar Association and Howard Sklaroff for help coordinating these questions.