

New Massachusetts Pass-Through Entity Withholding Requirements: April 30th Deadline May Apply

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Under new regulations effective January 1, 2009, any pass-through entity that maintains an office or engages in business in Massachusetts must withhold tax on a quarterly basis from each member's share of the entity's Massachusetts source income, unless either the entity itself is exempt from this requirement or the member timely certifies that it is exempt. This withholding obligation applies regardless of whether the pass-through entity actually makes any distributions to its members.

Each quarterly withholding payment is due on or before the last day of the month following the close of each quarter of the entity's taxable year. *For a calendar year pass-through entity, the deadline for the first quarterly withholding payment is April 30th.*

Pass-Through Entities

Pass-through entities include general and limited partnerships, LLCs, S corporations, and trust and estates not taxed at the entity level. Pass-through entities that are exempt from withholding include (i) investment partnerships (as defined), (ii) trusts and estates subject to withholding on nonresidents under other Massachusetts provisions, (iii) upper-tier pass-through entities that can prove that a lower-tier pass-through entity has previously withheld and made payments of all Massachusetts tax and (iv) pass-through entities that are prohibited under federal or state law from making tax payments on behalf of members. Investment partnerships are defined as partnerships or LLCs substantially all of whose assets consist of investment securities, bank deposits and office equipment, substantially all of whose income consists of interest, dividends and capital gains, and who are not engaged in a trade or business in Massachusetts. Note that private equity and venture funds that invest in other pass-through entities are deemed engaged in a trade or business and are, therefore, not exempt.

Member Certification of Exemption on Form PTE-EX

Pass-through entities that are not themselves exempt from withholding need not withhold on a member's distributive share of income if the member is exempt and provides appropriate certification to the pass-through entity on Form PTE-EX. In general, the following members may be exempt from withholding:

- Individuals, trusts or estates that are Massachusetts residents
- Nonresident individuals who agree to either (i) participate in nonresident composite returns prepared by the pass-through entity or (ii) file any required returns, make any required quarterly estimated tax payments and accept personal jurisdiction in Massachusetts
- Federally tax-exempt organizations
- Corporations otherwise subject to Massachusetts taxing jurisdiction
- Pass-through entities with a usual place of business in Massachusetts
- Pass-through entities that certify that all of their members are exempt from withholding
- Insurance companies

Exempt members must submit the Form PTE-EX to the pass-through entity on or before the last day of the fourth month of the entity's

taxable year (or within 30 days of becoming a member), and the entity is required to keep the certification on file to be produced upon request from the Massachusetts Commissioner of Revenue. *This means that for calendar year entities, Forms PTE-EX must be received by no later than April 30th.*

The Form PTE-EX generally remains in effect until revoked by the member, but a member whose reason for exemption changes, or who no longer qualifies for an exemption, must notify the entity within 30 days of such change in status. If a member does not timely provide Form PTE-EX to the pass-through entity, the entity must withhold on that member's share of the entity's Massachusetts source income.

Withholding and Reporting Obligations

A pass-through entity that is not exempt must:

- Obtain and keep certificates from members claiming exemption from withholding
- Withhold tax on a quarterly basis on any non-exempt members
- Submit an annual pass-through entity schedule (Schedule PTE), unless exempt from this filing requirement under Department of Revenue rules
- Notify each member as to amounts withheld (on Schedule 3K-1 or Schedule SK-1)

The Massachusetts Department of Revenue's Guide for Pass Through Entities Including Registration Information contains detailed information as to these new withholding and reporting requirements, including information regarding the calculation of the appropriate withholding amounts, the applicable withholding and reporting due dates and the pass-through withholding registration requirements.

Failure to Withhold

A pass-through entity that fails to withhold will be jointly and severally liable with each member that is subject to withholding for the applicable taxes, and any related interest and penalties.

The above provides only a brief overview of the new Massachusetts pass-through entity withholding rules.

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