830 CMR 62B.00: WITHHOLDING AND ESTIMATED TAXES

Section

62B.2.1: Withholding of Taxes on Wages and Other Payments
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62B.2.1: Withholding of Taxes on Wages and Other Payments

(1) Statement of Purpose, Effective Date, Outline of Topics.

(a) Statement of Purpose. 830 CMR 62B.2.1 explains the requirements of employers and other persons to withhold the Massachusetts income tax on wages and payments, as required by M.G.L. c. 62B, §§ 1 through 12.

(b) Effective Date. All sections of 830 CMR 62B.2.1 except 830 CMR 62B.2.1(6) are effective as of November 18, 2005. 830 CMR 62B.2.1(6) is effective for taxable years beginning on or after January 1, 2006.

(c) Outline of Topics. 830 CMR 62B.2.1 is organized as follows:

1. Statement of Purpose
2. Definitions
3. Income Subject to Withholding
4. Employers and Other Persons Required to Withhold; Amount to Withhold
5. Employer and Employee Reporting Obligations
6. Registration and Reporting Obligations of Payers of Compensation to Performers or Performing Entities; Reporting Obligation of Performing Entity
7. Returns and Payments
8. Methods of Calculation
9. Multiple Withholding
10. Pensions, Annuities, and other Retirement Arrangements
11. Fringe Benefits
12. Interest and Penalties
13. Credit Against Taxes

(2) Definitions. For purposes of 830 CMR 62B.2.1, the following terms shall have the following meanings, unless the context requires otherwise:

Code. The Internal Revenue Code of the United States in effect for the applicable year.

Commissioner. The Commissioner of the Massachusetts Department of Revenue, or the Commissioner's duly authorized representative.

Employer. The same meaning as defined in the Internal Revenue Code § 3401(d).

Employee. The same meaning as defined in the Internal Revenue Code § 3401(c), except full-time students engaged in seasonal, temporary or part-time employment whose estimated annual income does not exceed $2,000.

Performance. An event in which a performer or performing entity receives compensation for personal services performed in, derived from, or connected with sources within Massachusetts by competing, demonstrating, exhibiting, entertaining or educating an audience, making a public appearance, or endorsing merchandise.

Performer. A performer may be:

(a) an athlete such as a wrestler, boxer, golfer, tennis player, sports team member or other athlete who is paid for competing, demonstrating, making a public appearance, or endorsing merchandise, as well as a person paid to further an athlete's performance or an athletic event, performing services such as owner or leader of a performing entity; agent or manager of a performing entity or performer; referee, coach, or trainer; member of a production crew; or

(b) a paid entertainer or speaker, such as an actor, singer, musician, dancer, circus performer, comedian, celebrity, public speaker or lecturer, as well as any person paid to further an entertainer's or speaker's performance such as owner or leader of a performing entity; agent or manager of a performing entity or performer; or writer, director, coach, designer, or member of a sound, light, stage or production crew.

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Performing Entity. A corporation, partnership, limited partnership, limited liability company, corporate trust or other entity that employs, engages, or comprises one or more performers.

Promoter. A person, association, corporation, partnership, limited partnership, limited liability company, corporate trust or other entity that organizes, produces, or sponsors a performance.

Quarter-monthly Period. The first seven days of a calendar month, the eighth through the 15th day of a calendar month, the 16th through the 22nd day of a calendar month, or the 23rd through the last day of a calendar month.

Seasonal Employer. An employer that is required to deduct and withhold Massachusetts income tax and that regularly has no withholding tax liability in the same one or more calendar months each year.

Taxpayer. Any person or entity subject to the tax imposed by M.G.L. c. 62 or M.G.L. c. 62B, including individuals, trustees and other fiduciaries, estates and corporate trusts, and employers or other entities required to withhold tax.

Transacting Business within the Commonwealth. Having or maintaining within this state, directly or indirectly, an office, distribution house, sales house, warehouse, or other place of business, or otherwise operating or engaging in business within this state by or through any agent or other representative under the authority of the employer.

Wages. For withholding purposes only, wages as defined in Code § 3401(a), periodic payments and nonperiodic distributions as defined in Code § 3405 and subject to federal withholding, and contributions paid by the employer on behalf of the employee pursuant to M.G.L. c. 32, § 22(10) or pursuant to M.G.L. c. 32, § 65D(i) and not otherwise included as wages.

(3) Income Subject to Withholding.

(a) Income Subject to Withholding. Employers and other withholders are required to withhold an amount from wages or payments that is substantially equivalent to the tax amount reasonably anticipated to be due, according to the calculation methods or tables, as applicable, provided by the Commissioner. Generally, income is subject to Massachusetts income tax withholding if:

1. it is taxable under the Massachusetts personal income tax law; and
2. it falls into one of the following categories:
   a. wages for federal withholding purposes under Code § 3401(a);
   b. periodic payments and nonperiodic distributions as defined in Code § 3405 and subject to federal withholding;
   c. employer pension contributions by governmental units and free public libraries as provided in M.G.L. c. 32, § 22(10) and payments by governmental units for retirement pay of judges appointed on or after January 2, 1975, as provided in M.G.L. c. 32, § 65D(i); or
   d. payments made as compensation in any form for performances by performers, including payments to individuals as independent contractors and payments to performing entities.

(b) Remuneration Excluded from Withholding. Certain types of income are excluded from the federal definition of wages under Code § 3401(a) and accordingly are not subject to withholding in Massachusetts. Code § 3401(a) excludes from withholding remuneration paid:

1. for certain armed forces service during active combat zone service;
2. for certain agricultural labor if the worker is paid in a medium other than cash or the employee earns less than $150 annually and other conditions are met;
3. for domestic service in a private home;
4. for certain service not in the course of the employer's trade or business;
5. for services by a United States citizen or resident for a foreign government or an international organization as defined in Code § 7701(a)(18);
6. for certain services performed by certain non-resident alien individuals;
7. (intentionally omitted because omitted from Code § 3401(a));

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8. for certain services performed by United States citizens living abroad;
9. for certain services performed by a minister or religious leader;
10. for certain services performed by a newspaper delivery person under the age of 18;
11. for certain services not in the course of the employer's trade or business paid in a medium other than cash;
12. to, or on behalf of, an employee or an employee's beneficiary:
    a. from or to a trust described in Code § 401(a);
    b. under or to a Code § 403(a) annuity plan;
    c. for a payment described in Code § 402(h)(1) and (2) if it is reasonable to believe that the employee will be entitled to an exclusion;
    d. under an arrangement to which Code § 408(p) applies;
    e. under or to an eligible deferred compensation plan under Code § 457(b) (for distributions after December 31, 2001);
13. pursuant to certain service performed under the Peace Corps Act;
14. in the form of group-term life insurance on the life of an employee;
15. to or on behalf of an employee for certain moving expenses that are reasonably expected to be deductible under Code § 217;
16. as tips if the employee receives tips in a medium other than cash or receives less than $20 in tips in a calendar month in the course of employment with one employer;
17. for certain service on a fishing boat described in Code § 3121(b)(20);
18. for payments or benefits to an employee that are reasonably expected to be excluded from income under Code § 127 (educational assistance programs) or Code § 129 (dependent care assistance programs) or Code § 134(b)(4) (dependent care assistance programs as a qualified military benefit);
19. for benefits that are reasonably expected to be excluded from income under:
    a. Code § 74(c) (certain employee achievement awards);
    b. Code § 117 (qualified scholarships);
    c. Code § 132 (certain fringe benefits);
20. for medical care reimbursement paid under a self-insured medical reimbursement plan as defined in Code § 105(h)(6);
21. for certain contributions to or for the benefit of an employee under a medical savings account as defined in Code § 106(b).
22. any payment to or for the benefit of an employee if the employee could exclude the payment from income under Code § 106(d) (contributions to health savings accounts).

(c) Differences between Withholding Requirement and Taxability. A determination of the requirement to withhold is not the same as a determination of taxability. Differences between withholding requirements and taxability occur for two reasons. First, income may be taxable in Massachusetts but not subject to withholding, either because it is excluded from the definition of wages for withholding purposes, or because of differences between federal and state taxable income. Second, Massachusetts withholding law is based on the current Code, while taxation of income is generally based on the Code as of a certain date. Because of these differences between withholding requirements and taxability, employers may meet their withholding obligations yet employees may still be required to pay estimated taxes or agree to additional withholding in order to avoid the imposition of underpayment penalties. 830 CMR 62B.2.1 addresses only withholding requirements.

(4) Employers and Other Persons Required to Withhold; Amount to Withhold.

(a) Employers and their Agents.

1. Employers. Employers that maintain an office or transact business within Massachusetts and that make payment of wages taxable to a resident or nonresident individual shall deduct and withhold a tax from such wages for each payroll period. Employers not maintaining an office or transacting business within Massachusetts may, as a convenience to employees, withhold Massachusetts income taxes for employees who reside in Massachusetts and who request that their employer withhold Massachusetts taxes. Employers that withhold as a convenience to employees must meet all reporting, return, and payment obligations established under 830 CMR 62B.2.1.

2. Agents of Employers. If the person for whom the individual performs the services does not have control of the payment of the wages for such services, the term "employer" means the person having control of the payment of such wages. The federal approval of an agent under Code § 3504 is effective for Massachusetts income tax withholding purposes. All provisions of 830 CMR 62B.2.1 that are applicable to an employer shall be applicable to a fiduciary, agent, or other person having control of the payment of wages subject to withholding.

3. Amount Withheld. An employer shall withhold amounts determined according to the calculation methods or tables, as applicable, provided by the Commissioner. Amounts withheld shall be substantially equivalent to the tax imposed by M.G.L. c. 62.

(b) Payers of Gambling or Sports Wagering Winnings. Payers of gambling winnings or sports wagering winnings are required to withhold 5% on winnings, with the exception of winnings from horse and dog racing, if:

1. the winnings are subject to tax under M.G.L. c. 62; and
2. either:
   a. the winnings are subject to withholding under Code §§ 3402(q) and 3406; or
   b. for lottery winnings, the winnings are $600 or greater (for tax periods beginning on or after January 1, 2005).

Code § 3402(q) generally requires withholding if the proceeds of the wagering transaction are greater than $5,000 and at least 300 times as large as the amount wagered. Code § 3402(q) requires withholding on state-conducted lotteries, sweepstakes, wagering pools, pari-mutuel pools, jai alai, lotteries, and proceeds from a wager, but does not require withholding on winnings from a slot machine, keno, and bingo.

(c) Payers of Unemployment Compensation. If the recipient of an unemployment compensation payment, as defined in Code § 85(b), has elected withholding of federal income tax on such payment, then the payment shall be treated as if it were payment of wages by an employer to an employee. The payer of such benefits shall withhold the amount set forth in M.G.L. c. 151A, § 29E, and shall follow the applicable employer withholding schedule.

(d) Trustees of Retirement Funds. If an individual recipient of a periodic or nonperiodic payment as defined in Code § 3405 has elected federal income tax withholding on such income, the payer shall withhold the amount of Massachusetts income tax withholding substantially equivalent to the amount reasonably anticipated to be due.

(e) Trustees of Pooled Income Funds and Charitable Remainder Annuity Trusts or Unitrusts. Resident trustees of pooled income funds and resident trustees of charitable remainder annuity trusts or unitrusts who make payment to resident beneficiaries are required to withhold taxes, or pay estimated taxes, under M.G.L. c. 62, §§ 11A and 11B at the applicable tax rates.

(f) Withholding Agents Paying Compensation to Performers or Performing Entities.

1. A person or entity that pays performers or performing entities compensation for one or more performances shall withhold. Compensation may not be paid to a performer or a performing entity unless the required tax has been withheld. Any person or entity that transfers funds ultimately payable in part or in full to a performer or performing entity may be held responsible for withholding and subject to the penalty and interest provisions described in 830 CMR 62B.2.1(12). If there is more than one contract for the same date and venue with a performer or performing entity, there may be a different withholding agent for each contract. The withholding agent shall be:
   a. The Massachusetts venue or, if the venue is not a party to the contract with the performer or the performing entity, the lessee of the venue; or
   b. If the venue or lessee of the venue is not a party to the contract with the performer or performing entity, the promoter; or
   c. If there is no promoter, or if the promoter is not a party to the contract with the performer or performing entity, the payroll service provider making payments to performers, or the vendor selling merchandise for which a performer or performing entity will receive a percentage of the sales price; or
   d. Notwithstanding the requirements of 830 CMR 62B.2.1(4)(f)1.a, b, and c, any person or entity the Commissioner designates who pays a performer or performing entity compensation for one or more performances.

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2. A withholding agent must withhold tax at the rate imposed on Part B taxable income under M.G.L. c. 62, § 4(b) multiplied by the gross payment to the performer or the performing entity, unless the performer or performing entity requests in advance of the performance that withholding be reduced or waived, and the Commissioner grants the request. For purposes of 830 CMR 62B.2.1(4)(f), a gross payment is the sum of all payments made by one payer to the same performer or performing entity for performances during the calendar year. If the withholding agent's gross payment to an individual performer exceeds the taxable income threshold referenced in M.G.L. c. 62, § 4(d), then the tax rate applicable to the portion of such payments exceeding the taxable income threshold shall be the applicable rate under M.G.L. c. 62, § 4(b) plus an additional 4%.

3. Withholding pursuant to 830 CMR 62B.2.1(4)(f) is not required if the payer reasonably anticipates that gross payment will not exceed the threshold established by the Commissioner. The Commissioner may direct a withholding agent to withhold notwithstanding the established threshold.

4. A payer that is exempt from federal taxation under Code § 501(c)(3) is not required to withhold taxes from persons who are not employees, unless the aggregate amount paid for a particular performance exceeds $10,000.

(5) Employer and Employee Reporting Obligations.

(a) Withholding Exemption Certificate.

1. Obligation to Furnish. Withholding exemption certificates shall be in the form prescribed by the Commissioner. Every employee shall furnish his or her employer with a signed withholding exemption certificate setting forth the number of exemptions the employee claims pursuant to M.G.L. c. 62, § 3(B)(b). Withholding exemption certificates shall take effect as of the beginning of the first payroll period ending, or as of the time of the first payment of wages made without regard to payroll period, on or after the date on which such certificate is furnished. Each certificate continues in effect with respect to the employer to whom it was submitted until another certificate takes effect.

2. Changes in Number of Exemptions. If a withholding exemption certificate is furnished to take the place of an existing certificate, the employer has the option to continue the old certificate in force with respect to all wages paid on or before the first status determination date which occurs at least 30 days after the date on which the new certificate is furnished. For the purpose of 830 CMR 62B.2.1(5) the term "status determination date" means January 1st and July 1st of each year. If changes occur in the number of dependency exemptions to which an employee is entitled, the employee shall furnish the employer with an accurate exemption certificate within ten days if the change occurs during the calendar year, or before the beginning of the next calendar year if the change is reasonably expected to occur at the beginning of the next calendar year.

3. Commissioner may Determine Correct Number of Exemptions. If the Commissioner finds that an employee has no reasonable basis for the number of dependency exemptions the employee has claimed, the Commissioner shall determine the proper number of dependency exemptions and shall notify the employer. Upon such notification, the employer shall use the number of dependency exemptions determined by the Commissioner with respect to wages paid to that employee.

4. Penalties. There is a $500 penalty for an employee's false statement on a withholding exemption certificate that results in a decrease in the amount deducted and withheld. In addition, a person who willfully supplies false or fraudulent information, or who willfully fails to supply information that would require an increase in the tax to be withheld shall be guilty of a misdemeanor and subject to a fine of up to $1,000 or imprisonment for up to one year, or both.

(b) Estimate Quarterly Wages. The employer may:

1. estimate the wages that will be paid to any employee in any quarter of the calendar year;

2. determine the amount to be deducted and withheld upon each payment of wages to the employee during that quarter as if the average of the estimated wages constituted the actual wages paid; and

3. deduct and withhold upon any payment of wages to the employee during that quarter the amount necessary to adjust the amount actually deducted and withheld to the amount that would be required to be deducted and withheld during the quarter if the payroll period of the employee were quarterly.

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(c) Miscellaneous Payroll Periods. If wages are paid with respect to a period that is not a payroll period, the amount to be deducted and withheld shall be for a miscellaneous payroll period containing a number of days, including Sundays and holidays, equal to the number of days in the period with respect to which the wages are paid. If wages are paid by an employer without regard to any payroll period, the amount to be deducted and withheld shall be for a miscellaneous payroll period containing the number of days, including Sundays and holidays, that have elapsed since the date of the last payment of wages by the employer during the calendar year, or the date of commencement of employment with the employer during the year, or January 1st of the year, whichever is later.

(d) Furnish Wage or Payment Statement by January 31st. Every employer and other withholding entity that deducts and withholds a tax from an employee or payee shall furnish a written statement in duplicate to each employee or payee in respect of the wages or other payments paid to that employee or payee during the calendar year. The written statement must show the name of the employer or payer, the name of the employee or payee and his or her social security number, if any, the total amount of wages or payments subject to taxation under M.G.L. c. 62, and the total amount deducted and withheld as tax. This statement shall be made on or before January 31st of the succeeding year, or, if employment is terminated before the close of the calendar year, within 30 days from the day on which the last payment of wages is made. The Commissioner may grant reasonable extensions of time, not exceeding 60 days, to furnish this statement.

(6) Registration and Reporting Obligations of designated Withholding Agents of Performers or Performing Entities; Reporting Obligation of Performing Entity.

(a) A withholding agent pursuant to 830 CMR 62B.2.1(4)(f)1. shall:

1. register electronically for Massachusetts withholding on compensation paid to performers or performing entities;
2. deduct and withhold Massachusetts income tax on payments to or for performers or performing entities as if such payments were wages paid by an employer to an employee, withholding an amount as determined under 830 CMR 62B.2.1(4)(f)2. from each payment to a performer or performing entity;
3. report and pay the amount of taxes withheld during a quarter-monthly period within three days after the close of the quarter-monthly period, using electronic media for all reports and making all payments as ACH debit transactions;
4. file an electronic return on or before the last day of the month following the close of the calendar quarter even if no tax was withheld during the calendar quarter;
5. show on federal Form 1099-MISC, federal Form 1099-NEC, federal Form 1042-S if the performer or performing entity is a foreign person, or other applicable federal form used to report payments made to the performer or performing entity the amount of Massachusetts income tax deducted and withheld, even if such form is not required under federal law. The person treated as an employer must furnish a federal Form 1099-MISC, federal Form 1099-NEC, or other applicable federal form to each person treated as an employee on or before the last day of January on the next succeeding calendar year, unless the person treated as an employee is a foreign person, in which case the person treated as an employer must furnish a federal Form 1042-S to each foreign person treated as an employee on or before March 15th of the next succeeding calendar year; and
6. keep complete records, showing the name and social security number or federal tax identification number of the performer or performing entity, the gross amount paid to the performer or performing entity, the amount of Massachusetts income tax withheld, and the date(s) and location(s) of the performance(s), as well as copies of all issued forms 1099-MISC, 1099-NEC, 1042-S, and any other applicable form forms used to report payments made to a performer or performing entity.

(b) Performing Entity; Member or Participant of Performing Entity. A performing entity must determine how much of the aggregate income and Massachusetts income tax withholding reported by the withholding agent on federal Form 1099-MISC, federal Form 1099-NEC, federal Form 1042-S, or other applicable federal form used to report payments made to the performer or performing entity is attributable to each member or participant and furnish to each member or participant a withholding allocation form showing the member or participant's attributed withholding amount. If the recipient of a withholding allocation form is not an individual, the recipient must furnish to each of its members or participants an additional withholding allocation form showing how its withholding amount is attributed to each of its members or participants. This process is repeated until the recipient of a withholding allocation form is an individual. Each entity shall keep copies of withholding allocation forms it has issued. Each individual recipient of a withholding allocation form shall file a copy of the form with his or her Massachusetts income tax return, and may claim a credit for the withheld amount shown on the withholding allocation form.

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(7) Returns and Payments.

(a) Withholding Schedules.

1. Payroll Withholding.

a. Withholding Categories. For withholding tax purposes, employers shall be divided into the following categories:

i. Type 1: Every employer required to deduct and withhold taxes under M.G.L. c. 62B, § 2 that can reasonably expect that total taxes withheld will not exceed $100 for the calendar year.

ii. Type 2: Every employer required to deduct and withhold taxes under M.G.L. c. 62B, § 2 that can reasonably expect that total taxes withheld will exceed $100 but not $1,200 for the calendar year.

iii. Type 3: Every employer required to deduct and withhold taxes under M.G.L. c. 62B, § 2 that can reasonably expect that total taxes withheld will exceed $1,200 but not $25,000 for the calendar year.

iv. Type 4: Every employer required to deduct and withhold taxes under M.G.L. c. 62B, § 2 that can reasonably expect that total taxes withheld will exceed $25,000 for the calendar year.

b. Employers: General.

i. Type 1: Employers. Every Type 1 employer shall file a return and pay over to the Commissioner the taxes withheld during the calendar year on or before the last day of January following the close of the calendar year.

ii. Type 2: Employers. Every Type 2 employer shall file a return and pay over to the Commissioner the taxes withheld for each calendar quarter on or before the last day of the month following the close of the calendar quarter.

iii. Type 3: Employers. Every Type 3 employer shall file a return and pay over to the Commissioner the taxes withheld for each calendar month on or before the 15th day of the following calendar month, except that for the months of March, June, September and December, the return shall be filed and the taxes withheld shall be paid on or before the last day of the following calendar month.

iv. Type 4: Employers. Every Type 4 employer shall pay over to the Commissioner the cumulative amount of taxes withheld and not previously paid over, when this cumulative amount is $500 or more at the end of any quarter-monthly period. Such payment shall be made within three business days after the close of the quarter-monthly period. Type 4 employers shall also file a return on or before the last day of the month following the close of each calendar quarter accompanied by any unpaid withheld taxes.

c. Employers: Seasonal. A seasonal employer may be permitted by the Department to file withholding tax returns for only those calendar months in which it is required to deduct and withhold Massachusetts income tax. Permission is granted to file as a seasonal employer when a business has indicated to the Department, either on Form TA-1 Application for Original Registration, or on Form TA-2 Application for Additional Registration, that taxes are withheld only during certain months of the year. Permission to file as a seasonal employer shall take effect immediately and remain in effect as long as the employer remains a seasonal employer.

2. Annual Withholding from Nonpayroll Payments.

a. Payers That may Report Annually. With the exception of payers of gambling winnings, payers of nonpayroll payments that withhold Massachusetts income taxes, and that report annually on Federal Form 945 for purposes of federal income tax withholding, may report withheld Massachusetts income taxes annually. An annual report is required from each payer registered to withhold, whether or not the payer withheld Massachusetts taxes during the calendar year. Withheld amounts that may be reported annually include, for example, certain annuities as described in Code § 3402(o)(1)(B) and pensions, annuities, IRAs, and certain other deferred income subject to withholding under Code § 3405. Annual returns filed under 830 CMR 62B.2.1(6)2. are due on or before the last day of January following the close of the calendar year. A reconciliation of deposits made and amounts withheld throughout the year shall accompany the annual filing. No withholding is required on nonpayroll payments that do not exceed the lesser of $10 per payee or $100 to all Massachusetts payees during one tax year.

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b. Payment Requirements for Annual Reporters. Annually reported nonpayroll withheld taxes should be paid, accompanied by a Massachusetts tax deposit coupon, as follows:

i. if the payer of nonpayroll payments can reasonably expect that the total taxes withheld will not exceed $100 for the calendar year, payment shall accompany the annual return;

ii. if the payer of nonpayroll payments can reasonably expect that the total taxes withheld will exceed $100 but not $1,200 for the calendar year, payment shall be made no later than the last day of the month following the close of a calendar quarter for the amount withheld during the calendar quarter;

iii. if the payer of nonpayroll payments can reasonably expect that the total taxes withheld will exceed $1,200 but not $25,000 for the calendar year, payment shall be made no later than the 15th day of the calendar month for the amount withheld during the previous calendar month; or

iv. if the payer of nonpayroll payments can reasonably expect that the total taxes withheld will exceed $25,000 for the calendar year, payment shall be made no later than three business days after the close of the quarter monthly period when the cumulative amount of taxes withheld and not previously paid over is $500 or more at the end of any quarter-monthly period.

3. Gambling Winnings. Gambling winnings withheld under Code § 3402(q) and reported annually for purposes of federal income tax must be treated as if they were wages paid by an employer to an employee and withheld according to the applicable employer withholding schedule.

(b) Form of Payment. The Commissioner may, in his discretion, provide that any taxes deducted and withheld under M.G.L. c. 62B, § 2 be paid over to a depository designated by him.

(8) Methods of Calculation. The amount of tax due may be calculated according to the calculation methods or tables, as applicable, provided by the Commissioner. Alternatively, employers may use accounting machines to calculate the proper amount to be deducted and withheld from wages, provided that such calculation produces substantially the tax required by such calculation methods or tables. In determining the amount to be deducted and withheld, wages may, at the election of the employer, be computed to the nearest dollar.

(9) Multiple Withholding.

(a) Two or More Employers.

1. If an employee works for two or more separate employers during the same or overlapping payroll periods, the employee is entitled to claim exemptions and deductions upon only one withholding exemption and deduction certificate. No exemptions or deductions may be claimed on certificates furnished to other employers.

2. If an employee works concurrently for two or more joint or related employers, the amount of tax required to be withheld on each wage payment to the employee, whether the wages are paid separately by each employer or paid in a lump sum by all of the employers, may be determined upon the aggregate amount of payments in the same manner as if that amount had been paid by one employer.

3. If a payment of wages is made to an employee by an employer through an agent, fiduciary, or other person who also has the control, receipt, custody, or disposal of, or pays the wages payable by another employer to the employee, the amount of tax required to be withheld on each wage payment made through such agent, fiduciary, or person, whether the wages are paid separately on behalf of each employer or paid in a lump sum on behalf of all of the employers, may be determined upon the aggregate amount of payments in the same manner as if that amount had been paid by one employer.

4. Under 830 CMR 62B.2.1(9)(a)(2), and 62B.2.1(9)(a)(3), each employer shall be liable for the return and payment of a pro rata portion of the tax so determined, in the ratio which the amount contributed or paid by the particular employer bears to the aggregate of such wages.

(b) Multiple Withholding. If for any payroll period an employer is required to deduct and withhold from the wages paid to a resident of Massachusetts the income taxes of other states, the District of Columbia, any territory or dependency of the United States (excluding the United States itself) or Canada or its provinces levied upon such wages, the employer shall deduct and withhold under the provisions of M.G.L. c. 62B, § 2 for that payroll period the Massachusetts withholding amount, less the amount required to be deducted and withheld on account of those wages under the laws, rules or regulations of other states, the District of Columbia, territory or dependency of the United States (excluding the United States itself) or Canada or its provinces.

(c) Additional Withholding.

1. In addition to the tax required to be deducted and withheld in accordance with the provisions of M.G.L. c. 62B, § 2, the employer and employee may agree that an additional amount shall be withheld from the employee's wages. The agreement shall be in writing and shall be in the form prescribed by the employer. The agreement shall be effective for a period mutually agreed upon by the employer and employee. Unless the agreement provides for an earlier termination, either the employer or the employee, by furnishing a written notice to the other, may terminate the agreement effective with respect to the first payment of wages made on or after the first "status determination date" (January 1st and July 1st of each year) which occurs at least 30 days after the date on which the notice is furnished.

2. The amount deducted and withheld pursuant to an agreement between the employer and employee shall be treated as tax required to be deducted and withheld under M.G.L. c. 62B, § 2. All provisions of law and regulations applicable with respect to the tax required to be deducted and withheld under M.G.L. c. 62B, § 2 shall apply with respect to any amount deducted and withheld pursuant to the agreement.

(10) Pensions, Annuities, and other Retirement Arrangements. In general, income is subject to Massachusetts income tax withholding if it is taxable under Massachusetts personal income tax law and it constitutes wages for federal withholding purposes. With certain statutory exceptions, withholding is required only if both conditions apply. The tax advantage conferred upon many retirement plans is that income recognition of contributions and plan earnings is deferred to the time distributions are made from the plan. Generally, retirement plan funds are taxed once, either at the time of contribution or the time of distribution. If the Massachusetts tax treatment of contributions differs from the federal treatment, the Massachusetts tax treatment of distributions will differ correspondingly.

(a) Contributions.

1. Federal Definition of Wages. The federal definition of wages, adopted by Massachusetts under M.G.L. c. 62B, § 1, excludes contributions to certain qualified pension, profit sharing, annuity, cash or deferred arrangements, and stock bonus plans. *See* Code § 3401(a)(12) and the regulations thereunder for guidance on specific exclusions. Generally, amounts included in federal wages for withholding purposes are also included in Massachusetts wages, although certain types of retirement contributions are not taxed in Massachusetts, regardless of the federal treatment. *See* 830 CMR 62B.2.1(10)(a)2. Generally, Massachusetts withholding is not required on employer contributions to plans excluded from the federal definition of wages, although certain types of retirement contributions are statutorily included in wages for Massachusetts withholding purposes even though they may be excluded for federal purposes. *See* 830 CMR 62B.2.1(10)(a)3.

2. Contribution Amounts not Subject to Tax in Massachusetts. Withholding is not required on contributions to the following pension or retirement plans, regardless of whether such contributions are included in the federal definition of wages.

a. Wage or salary deductions contributed to the Savings Banks Employees Retirement Associations under M.G.L. c. 168, §§ 39 through 41.

b. Wage or salary deductions contributed to the Co-operative Banks Employees Retirement Association under M.G.L. c. 170, §§ 30 through 32.

c. Wage or salary deductions contributed to the Credit Union Employees Retirement Association under M.G.L. c. 171, §§ 31 through 33.

3. Contribution Amounts Included in the Massachusetts Definition of Wages but not Included in the Federal Definition of Wages. Withholding is required on contributions made on behalf of a public employee to a state or municipal retirement system established under M.G.L. c. 32, §§ 1 through 28 (including contributions to a teachers' retirement fund established under M.G.L. c. 15A, § 40), and to the Massachusetts judges' retirement fund under M.G.L. c. 32, § 65D for a judge appointed on or after January 2, 1975.

(b) Distributions. Generally, distributions under employer deferred compensation plans and Individual Retirement Accounts are included in taxable income and are subject to Massachusetts withholding if they are subject to federal withholding. There is no withholding, however, on any part of a distribution that is not expected to be includible in the recipient's taxable income. Any portion of a distribution that the recipient could exclude from income because it represents either the employee's nondeductible contributions to the plan or the annuitant's investment in the contract is not subject to withholding. The amount of the distribution that is taxable in Massachusetts will differ from the federal taxable amount if the Massachusetts treatment of contributions differs from federal treatment.

1. Periodic and Nonperiodic Distributions under Code § 3405(a) and (b) and Subject to Federal Withholding. If an individual elects federal withholding on distributions from pensions, annuities, and certain other deferred income, as provided under Code § 3405(a)(2) and (b)(2), Massachusetts withholding is required except on the portion of the distribution that represents previously taxed contributions.

2. Contributory and Military Government Pensions; Social Security. Although distributions from contributory annuity, pension, endowment or retirement funds of the United States government or the commonwealth or any political subdivision to which the employee has contributed, or any income received from the United States government as retirement pay for a retired member of the Uniformed Services of the United States, are subject to elective federal withholding, such distributions are not subject to Massachusetts withholding. Similarly, social security benefits, which are subject to voluntary federal withholding, are not subject to Massachusetts withholding. Income from federal or Massachusetts state or local government contributory or military pensions, or social security, is not taxed in Massachusetts. Massachusetts state court judges appointed on or after January 2, 1975 are participants in the contributory retirement system and their pension distributions are nontaxable. State court judges appointed before January 2, 1975 receive taxable noncontributory pensions. All or part of the pension income of certain retirees from Massachusetts state or local government service who began Massachusetts state service prior to July 1, 1939, who retired under M.G.L. c. 32, §§ 56 through 60, and who are also veterans, may be subject to tax.

3. Rollovers. A distribution constituting a federally tax-free rollover from a qualified pension, profit-sharing, stock bonus, or annuity plan, or otherwise accorded tax-free federal rollover treatment, to an eligible retirement plan, will require no withholding for Massachusetts purposes if no withholding is required for federal purposes. If assets are transferred, or "rolled over" as a tax-free transfer of money or property from one plan into another, no income will be realized at the time of the transaction for Massachusetts income tax purposes if no income is realized for federal income tax purposes. If federal withholding is required on the taxable part of an eligible rollover distribution that is not rolled over directly to another eligible plan, it is also required in Massachusetts unless such eligible rollover distributions would never be subject to Massachusetts personal income taxation independent of the facts and circumstances of a taxpayer's particular tax situation. The term "eligible rollover distribution" shall have the same meaning as under Code § 3405(c). Any withholding that is required under this subsection is subject to annual reporting and the payment schedule described in 830 CMR 62B.2.1(6)(a)2. The amount subject to withholding in Massachusetts is the entire distribution, less any previously taxed contribution.

4. Roth Individual Retirement Accounts (IRAs) and Education Savings Accounts. Distributions from Roth IRAs (Code § 408(a)) and Education Savings Accounts (Code § 530) are included in Massachusetts income and Massachusetts withholding will follow federal withholding treatment. Massachusetts follows federal rollover rules for conversions from a traditional IRA to a Roth IRA.

62B.2.1: continued

5. Guaranteed Payments by Partnership to Retiring Partner. Withholding for Massachusetts on payments characterized as guaranteed payments under Code § 736 will follow federal withholding treatment. Generally, such payments are taxable to the retiring partner but are not subject to withholding.

6. Retirement Income of Non-residents. Generally, non-residents' retirement income, as defined in 4 U.S.C. § 114, is not subject to Massachusetts withholding. Massachusetts source retirement income not covered under 4 U.S.C. § 114 is subject to withholding in Massachusetts.

7. Retirement Income to a Massachusetts Resident from another State or a Political Subdivision of another State. Withholding is not required on income to a Massachusetts resident from a contributory annuity, pension, endowment or retirement fund of any other state or political subdivision of another state, if income from a similar Massachusetts fund would not be taxed in that state or political subdivision.

(11) Fringe Benefits. Massachusetts follows the federal definition of wages for withholding on fringe benefits. Therefore, fringe benefits that are excluded from withholding for federal purposes are excluded from Massachusetts withholding as well.

(a) Exclusions under Code § 3401(a). Withholding is not required in Massachusetts to the same extent it is not required federally on the fringe benefits contained in Code § 3401(a). While 830 CMR 62B.2.1 does not reflect changes made to Code § 3401(a) after November 18, 2005, Massachusetts automatically adopts such changes. All terms are as defined in or under Code § 3401(a). As of November 18, 2005, excluded from Massachusetts withholding are federally excludable:

1. group-term life insurance on the life of an employee;
2. remuneration for moving expenses;
3. educational assistance programs;
4. dependent care assistance programs, including dependent care assistance programs as a qualified military benefit;
5. employee achievement awards;
6. qualified scholarships;
7. Code § 132 fringe benefits:
   a. no additional-cost service;
   b. qualified employee discount;
   c. working condition fringe;
   d. *de minimis* fringe;
   e. qualified transportation fringe;
   f. qualified moving expense reimbursement;
8. medical care reimbursement paid under a self-insured medical reimbursement plan;
9. contributions to or for the benefit of an employee under a medical savings account; and
10. payment to or for the benefit of an employee if the employee could exclude the payment from income under Code § 106(d) (contributions to health savings accounts).

(b) Sick Pay. Sick pay that is either:

1. attributable to contributions by the employer that were not includible in the gross income of the employee, or
2. paid by the employer, is included in the federal definition of wages and is therefore subject to withholding in Massachusetts. Employers shall also withhold Massachusetts income tax if an employee has requested that an employer withhold on sick pay that is not included in wages for federal income tax purposes under Code § 3402(o).

(c) Cafeteria Plans. Employer contributions to, and employee benefits provided under, a Code § 125 cafeteria plan are subject to Massachusetts withholding to the same extent they are subject to federal withholding.

(12) Interest and Penalties.

(a) Interest. If any amount of withholding tax is not paid to the Commissioner on or before its statutory due date, there shall be added to the tax interest at the rate of the Federal short-term rate determined under Code § 6621(b) in effect for the taxable year, plus four percentage points, compounded daily.

62B.2.1: continued

(b) Penalty for Late Filing of Return. The penalty for late filing of a withholding return is 1% of the balance due for each month or fraction of a month that the return is late, up to a maximum of 25% of the tax amount.

(c) Penalty for Late Payment of Tax. The penalty for late payment of withholding tax is ½ of 1% of the balance due for each month or fraction of a month that the payment is late, up to a maximum of 25% of the tax amount. Taxpayers required to deposit or to make payment of tax in advance of the filing of the return with respect to such payment are also subject to a penalty of 5% of the amount of the underpayment if the taxpayer fails to make such deposit or payment on or before the date prescribed therefor, unless it is shown that such failure is due to reasonable cause and not to willful neglect.

(d) Penalty for Failure to File. A taxpayer that has failed to file a return or has filed an incorrect or insufficient return, and after notification by the Commissioner refuses or neglects within 30 days after the date of such notification to file a proper return, or if a taxpayer has filed a false or fraudulent return or has filed a return with a willful attempt in any manner to defeat or evade the tax, the Commissioner may determine the tax due, according to his best information and belief, and may assess the same at not more than double the amount so determined, which additional tax shall be in addition to other penalties.

(e) Criminal Penalties. A person who fails to pay tax, make a return, keep records, or supply information as required by law or regulation is guilty of a misdemeanor and subject to a fine of up to $25,000 (or $100,000 in the case of a corporation) or imprisonment for up to one year, or both. A person who, in connection with the filing of a tax return or the payment of any tax, receives money from another person on the understanding that it is to be paid over to the commissioner to discharge, in whole or in part, the other person's tax liability and willfully fails to pay over the same to the commissioner shall be guilty of a felony and subject to a fine of up to $100,000 (or $500,000 in the case of a corporation) or imprisonment for up to three years, or both.

(f) Who is Liable. Every employer or other person required to withhold who fails to withhold or pay to the Commissioner any sums required by the withholding statutes to be withheld or paid shall be personally and individually liable therefor to the commonwealth. Any sum or sums withheld in accordance with the provisions of M.G.L. c. 62B, § 2 are deemed to be held in trust for the commonwealth. If an employer or other person required to withhold fails to withhold and thereafter the tax against which the withholding tax may be credited is paid, the withholding tax shall not be collected from the employer or other person required to withhold, but the employer or other person required to withhold will still be liable for any penalties or addition to the tax otherwise applicable to the failure to withhold. In the event an employer or other person required to withhold fails to withhold and pay over to the Commissioner any amount required to be withheld under M.G.L. c. 62B, § 2, such amount shall be assessed against such person, under the provisions of M.G.L. c. 62C, §§ 26 through 29.

(13) Credit Against Taxes. The amount deducted and withheld as tax under M.G.L. c. 62B, § 2 during any calendar year upon the wages of any employee or the payment to any payee shall be allowed as a credit to the recipient of the income against his or her income tax. If more than one taxable year begins in the calendar year, such amount shall be allowed as a credit against the tax for the last taxable year beginning in the calendar year.

62B.2.2: Pass-through Entity Withholding

(1) Statement of Purpose, Applicable Tax Years, Outline of Topics.

(a) Purpose. Pass-through entity withholding is a payment of personal income tax under M.G.L. c. 62 or corporate excise under M.G.L. c. 63 on behalf of members of a pass-through entity. The obligation to withhold is separate from the member's or pass-through entity's obligation to file a tax return. Pass-through entities must withhold as to all members unless either the pass-through entity or the member is exempt.

(b) Applicable Tax Years. Withholding is required on a member's distributive share amounts allocated on or after January 1, 2009 that are attributed to a tax year beginning on or after January 1, 2009.

(c) 830 CMR 62B.2.2 is organized as follows:

1. Statement of Purpose, Applicable Tax Years, Outline of Topics

62B.2.2: continued

2. Definitions
3. Pass-through Entities Required to Withhold; Members Subject to Withholding
4. Income Subject to Withholding; Quarterly Payment
5. Tiered Structures
6. Credit for Tax Paid; Members' Estimated Payment Obligation
7. Joint and Several Liability
8. Annual Schedule, Withholding Registration, Payment, Reporting
9. Penalties

(2) Definitions.

Commissioner, the Commissioner of Revenue.

Department, the Department of Revenue.

Distributive Share, income, gain, loss, deduction, or credit from a pass-through entity for a taxable year allocated to a member taxable under M.G.L. c. 62 or c. 63.

Investment Partnership, a partnership, including a limited liability company with any member treated as a partner under Massachusetts tax law, that meets the following three criteria:

(a) substantially all of the partnership's assets consist of investment securities, deposits at banks or other financial institutions, or office equipment and office space reasonably necessary to carry on the activities of an investment partnership;

(b) substantially all of the partnership's income is from interest, dividends and capital gains; and

(c) the partnership is not engaged in a trade or business in Massachusetts.

Massachusetts-source Income, Massachusetts gross income derived from or effectively connected with:

(a) any trade or business, including any employment, carried on by a pass-through entity in Massachusetts, whether or not the entity is actively engaged in a trade or business or employment in Massachusetts in the year in which the income is received;

(b) the participation in any lottery or wagering transaction in Massachusetts; or

(c) the ownership of any interest in real or tangible personal property located in Massachusetts.

Pass-through entities with income from sources both within Massachusetts and elsewhere must allocate and apportion the income according to 830 CMR 62.5A.1(6) to determine the amount of Massachusetts-source income.

Member, a member of a pass-through entity, including a shareholder of an S corporation; a partner in a partnership, including a limited partner in a limited partnership and a partner in a limited liability partnership; a member of a limited liability company treated as a partner under Massachusetts tax law; and a beneficiary of an estate.

Nonresident, any natural person, estate, or trust that is not a resident or domiciliary of Massachusetts; any pass-through entity without a usual place of business in Massachusetts; or any corporation that is not required to file or does not file a tax return in Massachusetts with regard to distributive share derived from a pass-through entity that is subject to the provisions of 830 CMR 62B.2.2.

Pass-through Entity, an entity whose income, loss, deductions and credits flow through to members for Massachusetts tax purposes, including a general partnership, limited partnership, limited liability partnership, or limited liability company with a member treated as a partner under Massachusetts tax law, an S corporation, an estate not taxed at the entity level, and a trust not taxed at the entity level, including a grantor-type trust.

Publicly Traded Partnership, an entity defined as a publicly traded partnership by § 7704(b) of the Internal Revenue Code that is treated as a partnership for the taxable year under the Internal Revenue Code.

62B.2.2: continued

Qualified Securities Partnership, a limited partnership that is engaged exclusively in buying, selling, dealing in or holding securities on its own behalf, and not as a broker, as described in M.G.L. c. 62, § 17(b) or 830 CMR 63.39.1(8)(b).

Tiered Structure, a pass-through entity that has a pass-through entity as a member. As between two entities, the pass-through entity that is a member is the upper-tier entity, and the entity of which it is a member is the lower-tier entity. A tiered pass-through entity arrangement may have two or more tiers; in such cases, a single entity can be both a lower-tier and an upper-tier entity.

(3) Pass-through Entities Required to Withhold; Members Subject to Withholding.

(a) General Rule. A pass-through entity that maintains an office or engages in business in Massachusetts must deduct and withhold Massachusetts tax from the member's *pro-rat*a share of the pass-through entity's Massachusetts-source income, unless:

1. the pass-through entity is exempt from this requirement under 830 CMR 62B.2.2(3)(b); or
2. the member is exempt from this requirement under 830 CMR 62B.2.2(3)(c).

(b) Exempt Pass-through Entities. The following pass-through entities are not required to participate in pass-through entity withholding:

1. An Investment Partnership or a partnership that only invests in Investment Partnerships and has no Massachusetts-source income from other sources;
2. A trust or estate that is already required to withhold on nonresident members, if it has any, under M.G.L. c. 62, § 10(g);
3. An upper-tier pass-through entity in a tiered structure that can demonstrate that a lower-tier pass-through entity has previously withheld and made estimated payments of all of the Massachusetts tax on Massachusetts-source income derived by the upper-tier pass-through entity that would otherwise be subject to withholding by the upper-tier entity. (*See* tiered structures at 830 CMR 62B.2.2(5).)
4. A Publicly Traded Partnership; and
5. An entity that is prohibited under federal or state law from withholding tax from distributions to members as otherwise required under 830 CMR 62B.2.2, such as certain for-profit entities that provide low-income housing which are funded by or through MassHousing or the United States Department of Housing and Urban Development; the exemption applies only for years in which distributions are prohibited under federal or state law. Contractual restrictions on distributions, such as loan covenants or organizational documents, do not qualify an entity for this exemption.

(c) Exempt Members. Generally, withholding is not required for members that fit into one of the categories below. For a member to be treated as exempt, the pass-through entity must: obtain, on or before the later of the last day of the fourth month of the entity's taxable year, or within thirty days of the member joining the entity, certification by the member claiming to be exempt from withholding on a form approved by the Commissioner; retain the certification according to the Commissioner's record retention rules; and produce the certification upon request. The exemption certificate remains in effect until revoked by the member. If the member's status changes during the tax year, the entity must obtain a new certification within 30 days of the date the member's status changes. If an entity does not collect the certification from its members because it does not anticipate that it will realize Massachusetts-source income, it must collect the certifications within 30 days of the date the entity could reasonably foresee that it would realize Massachusetts-source income.

1. Federally Tax-exempt. With respect to members that are exempt from federal income tax under Internal Revenue Code § 501, withholding is not required as to nonresident members' distributive shares to the extent that such income is exempt from Massachusetts tax under M.G.L. c. 62 or c. 63, as certified to the pass-through entity by the member.
2. Massachusetts Residents. Generally, withholding is not required as to a member who certifies that the member is a Massachusetts resident that is an individual, estate, or trust.
3. Corporations Otherwise Subject to Tax under M.G.L. c. 63; Pass-through Entities Doing Business in Massachusetts. Generally, withholding is not required as to members that are corporations that have income, other than their pass-through entity income, that is subject to tax under M.G.L. c. 63 and that are filing a Massachusetts corporate excise return; or as to members that are pass-through entities that must file a return pursuant to M.G.L. c. 62 in Massachusetts. Corporations and pass-through entities claiming to be exempt must certify to their filing of a Massachusetts return.

62B.2.2: continued

4. Participating M.G.L. c. 62 Nonresidents. Generally, withholding is not required as to nonresident members taxable under M.G.L. c. 62 who establish that they are compliant with Massachusetts tax laws by:

a. participating in a composite return prepared by the pass-through entity under the rules explained in 830 CMR 62.5A.1(11); or

b. filing a certification with the pass-through entity, stating that they agree to file tax returns, make quarterly estimated tax payments, and accept personal jurisdiction in Massachusetts state courts for the determination and collection of taxes, including estimated tax payments, and related interest, penalties, and fees imposed with respect to the income of the pass-through entity. Members that file this certification may nonetheless agree to have the entity withhold on their behalf at any time during the taxable year.

5. Upper-tier Pass-through Entities Comprising Only Exempt Members. Generally, withholding is not required as to upper-tier pass-through entities that certify that all of their members are exempt from withholding under 830 CMR 62B.2.2(3)(c)1. through 4.

6. Nonresident Limited Partners of Qualified Securities Partnerships. Generally, withholding is not required with respect to an individual nonresident limited partner of a Qualified Securities Partnership, to the extent the partner's distributive share from the Qualified Securities Partnership is not subject to tax in Massachusetts. Also, withholding is generally not required with respect to a corporate nonresident limited partner of a Qualified Securities Partnership to the extent the partner's distributive share from the Qualified Securities Partnership is not subject to the corporate excise in Massachusetts.

7. Other Exempt Entities. The Commissioner may identify additional exempt entities on the pass-through entity exemption certificate, which will be updated periodically.

(d) Backup Withholding. Notwithstanding the exemptions from withholding under 830 CMR 62B.2.2(3)(c), if the Commissioner notifies a pass-through entity that any resident or nonresident member has not met the member's obligation to file and pay timely, the pass-through entity must withhold and make tax payments on behalf of that member. Backup withholding, if required, shall be for a period of five tax years following the Commissioner's notification to the pass-through entity, unless the Commissioner agrees in writing to a shorter period.

(4) Income Subject to Withholding; Quarterly Payment.

(a) Amount of Tax to be Withheld. The tax withheld under 830 CMR 62B.2.2 shall be calculated based on Massachusetts taxable amounts of distributive share allocated to a member subject to withholding. The amount subject to withholding by a pass-through entity is calculated based on the entity's Massachusetts-source income.

(b) Payments of Tax Withheld. The pass-through entity must make a required annual payment on behalf of each member subject to withholding calculated by multiplying the withholding rate by the lesser of 80% of the member's distributive share for the taxable year, or 100% of the member's prior year distributive share. The pass-through entity shall make four installment payments on the required annual payment on behalf of each subject member for the taxable year. The amount of each installment shall be 25% of the required annual payment. Each installment shall be paid on or before the last day of the month following the close of the quarter of the entity's taxable year.

(c) Withholding Rate. The taxable amount of distributive share shall be multiplied by the following tax rates:

1. if the member is an individual, estate, or trust, the tax rate imposed on Part B taxable income under M.G.L. c. 62, § 4(b); or

2. if the member is a corporation, the applicable rate under M.G.L. c. 63; or

3. if a lower-tier pass-through entity is withholding directly as to the members of an upper-tier pass-through entity as permitted under 830 CMR 62B.2.2(5), the rate imposed on Part B taxable income under M.G.L. c. 62, § 4(b) for taxpayers that are taxable under M.G.L. c. 62 or the appropriate rate under M.G.L. c. 63, for taxpayers that are taxable under M.G.L. c. 63, as the case may be; or

4. if the member is a pass-through entity, the tax rate on individuals imposed on Part B taxable income under M.G.L. c. 62, § 4(b); or

5. if no exemption certificate has been filed and the entity has no information about the member, the entity should withhold at the personal income tax rate imposed on Part B taxable income under M.G.L. c. 62, § 4(b).

62B.2.2: continued

(5) Tiered Structures.

(a) Unless exempted, each pass-through entity shall withhold applicable tax, as determined under 830 CMR 62B.2.2, on behalf of its members subject to withholding, including members that are pass-through entities. To prevent multiple withholding on the same income, an upper-tier pass-through entity that recognizes distributive share income may subtract amounts withheld by a lower-tier entity from amounts required to be withheld.

(b) An upper-tier entity recognizing distributive share income that has been withheld upon must separately report to each of its members the member's proportionate distributive share of amounts withheld by the lower-tier entity. Any member of an upper-tier entity that is itself a pass-through entity must likewise report proportionate distributive share withheld to each of its members.

(c) Upon written application and with the approval of the Commissioner, a lower-tier entity may meet its withholding obligation for an upper-tier entity by directly withholding from the distributive share income of the members subject to withholding of the upper-tier entity. If approval is granted, the lower-tier entity is required to report the amounts withheld directly to the members, as well as to the upper-tier entity.

(6) Credit for Tax Paid; Members' Estimated Payment Obligation.

(a) Credit for Tax Paid. Amounts withheld and paid to the Commissioner by a pass-through entity on behalf of a member shall be considered to be the payment of the tax imposed on the member for distributive share income derived by the member from the pass-through entity for the pass-through entity's taxable year ending within or with the taxable year of the member, and shall be credited against the member's tax liability for the member's taxable year.

(b) Members' Estimated Payment Obligation. Notwithstanding this regulation, 830 CMR 62B.2.2, members shall be responsible for payment of estimated taxes on all of their income, including income from pass-through entities, under M.G.L. c. 62B, § 13 and M.G.L. c. 63B, § 2. Amounts previously withheld and paid to the Commissioner by the pass-through entity on behalf of a member, applicable to the entity's taxable year ending within or with the taxpayer's tax year, may be allowed as a credit, as of the date of receipt by the Department, on the member's estimated tax obligation.

(c) Interest and Penalties on Underpayment of Estimated Tax. Withholding by the pass-through entity may not be sufficient to satisfy members' estimated payment obligation on their pass-through entity income because of differences in timing and amount of required payments between 830 CMR 62B.2.2, and M.G.L c. 62B, § 13 or M.G.L. c. 63B, § 2, as applicable. Interest and penalties at the rates established under M.G.L. c. 62C, §§ 32 and 33 will be imposed on the amount of any underpayment as calculated under M.G.L. c. 62B, § 14(a) and (b) or M.G.L. c. 63B, § 3, as applicable.

Example (6)(c)1. Pass-through Entity and Member both use the calendar year as their taxable year. Member is a corporation. Pass-through Entity allocates Member's distributive share of $100,000 of taxable Massachusetts-source income to Member in year 1 and the same amount in year 2. For year 2, Member seeks to be within the estimated payment safe harbor by paying 100% of its prior year corporate excise. To avoid interest and penalties, Member must make an estimated payment in an amount totaling 40% x year 1 corporate excise on or before March 15th. Pass-through Entity, relying on its safe harbor of paying 100% of Member's prior year corporate excise, must withhold and pay, on behalf of Member, an amount totaling 25% x corporate excise tax rate x $100,000 on or before April 30th. Member may reduce its June 15th estimated tax payment by the amount paid by Pass-through Entity on April 30th.

Example (6)(c)2. Pass-through Entity and Member both use the calendar year as their taxable year. Member is an individual. Pass-through Entity makes its first installment payment on behalf of Member for the taxable year on April 30th. Member's first estimated payment is due April 15th. Member must make her first estimated payment on April 15th, and may take a credit on her June 15th estimated payment for the amount paid by Pass-through Entity on her behalf on April 30th.

62B.2.2: continued

Example (6)(c)3. Same facts as Example (6)(c)2, except that Pass-through Entity makes its first installment payment on behalf of Member for the taxable year on April 15th. Member's estimated payment obligation with regard to her income from Pass-Through Entity has been met.

(7) Joint and Several Liability. A pass-through entity required to withhold, shall be jointly and severally liable with each member subject to withholding for taxes, together with related interest and penalties, imposed on the member by Massachusetts with respect to the income of the pass-through entity. A pass-through entity that reasonably relies, in good faith, on an exemption certificate presented by a member pursuant to 830 CMR 62B.2.2(3)(c) shall not be liable for failure to withhold. Notwithstanding the stated exception, joint liability will exist in any instance in which the member directly or indirectly owns more than a 50% interest in the pass-through entity.

(8) Withholding Registration, Payment, Reporting. A pass-through entity that is not exempt under 830 CMR 62B.2.2(3)(b) shall withhold with respect to members, other than those that are exempt from withholding pursuant to 830 CMR 62B.2.2(3)(c), that have been allocated Massachusetts taxable amounts of distributive share during the taxable year, using electronic media and the format designated by the Commissioner. If withholding is required for any member, a pass-through entity shall:

(a) register for Massachusetts withholding on amounts paid, credited or allocated to a member;

(b) report and pay over to the Commissioner the amount of taxes withheld during each quarter of the entity's taxable year on or before the last day of the month following the close of the quarter;

(c) file an annual withholding return with the Commissioner, on or before the last day of the third month of the year following the taxable year, showing the total amount withheld for the taxable year (if no tax was withheld, report zero tax withheld) and any other information the Commissioner requires; and

(d) furnish to each member subject to pass-through entity withholding a statement of amounts withheld and paid to the Commissioner during the taxable year on the member's behalf. If the pass-through entity is treated as a partnership, this information should be included on the partner's Massachusetts information schedule. Other types of pass-through entities should use a form approved by the Commissioner.

(9) Penalties. Any pass-through entity required to withhold that fails to meet its withholding obligation shall be subject to all applicable penalties for failure to adequately withhold under M.G.L. c. 62B and M.G.L. c. 62C. A pass-through entity that has not properly allocated distributive share to its members, as required for partnerships and entities treated as partnerships under M.G.L. c. 62, § 17, as required for S corporations under M.G.L. c. 62, § 17A, or as required under other applicable authority, may be liable for additional penalties.

62B.2.3: Motion Picture Production Company Withholding

(1) Statement of Purpose, Outline of Topics.

(a) Statement of Purpose. Under M.G.L. c. 62B, § 2, the Commissioner is authorized to require persons other than employers to deduct and withhold taxes from payments other than wages in order to protect the revenue of the commonwealth. 830 CMR 62B.2.3 establishes and explains the requirements of motion picture production companies to withhold Massachusetts personal income tax on payments to independent contractors and loan-outs for services rendered in Massachusetts. For coordination with live performance performer withholding *see* 830 CMR 62B.2.3(6)(c).

(b) Outline of Topics. 830 CMR 62B.2.3 is organized as follows:

1. Statement of Purpose; Outline of Topics
2. Definitions
3. Registration and Reporting Obligations of a Production Company; Qualification for the Credit

62B.2.3: continued

4. Withholding and Reporting Requirements as Prerequisites for Credit Qualification; Loan-out Filing Requirements
5. Personal Income Credit Against Taxes; Reporting Requirements
6. Coordination With Other Withholding Requirements
7. Effective Date

(2) Definitions. For purpose of 830 CMR 62B.2.3, the following terms shall have the following meanings, unless the context requires otherwise:

Commissioner, the Commissioner of the Massachusetts Department of Revenue or the Commissioner's duly authorized representative.

Credit, the motion picture production company credit.

Independent Contractor, an individual treated as an independent contractor for federal and Massachusetts tax purposes and contracted with and retained by the production company, such as artists, crew, actors, directors and producers, for the performance of services used directly in a production. It does not include entities retained by the production company to provide tangible property or outside contractor service, such as catering, construction, trailers, equipment and transportation.

Loan-out, a personal service corporation or other entity contracted with and retained by the production company to provide individual personnel, such as artists, crew, actors, directors and producers, for the performance of services used directly in a production, but not including entities retained by the production company to provide tangible property or outside contractor service, such as catering, construction, trailers, equipment and transportation.

Motion Picture Production Company Credit, the motion picture aggregate payroll or production expense credit allowed under M.G.L. c. 62, § 6(l) or M.G.L. c. 63, § 38X.

Performer Withholding Waiver, a waiver from performer withholding requirements authorized under 830 CMR 62B.2.1, issued by the Commissioner's performer withholding unit.

Production, a motion picture as defined in M.G.L. c. 62, § 6(l) and M.G.L. c. 63, § 38X.

Production Company, a motion picture production company as defined in M.G.L. c. 62, § 6(l) and M.G.L. c. 63, § 38X.

Surtax, the personal income tax imposed by M.G.L. c. 62, § 4(d).

(3) Registration and Reporting Obligations of a Production Company; Qualification for the Credit.

(a) Registration. A production company that seeks a motion picture production company credit as to payments made to a loan-out or an independent contractor must register for motion picture production company withholding prior to filing an application for the credit.

(b) Withholding Amount. A production company must withhold at the personal income tax rate under M.G.L. c. 62, § 4(b) on any payment to a loan-out or an independent contractor for that payment to qualify for the motion picture production company credit. Where the sum of all of payments made by a production company to the same individual loan-out or independent contractor during the calendar year exceed the taxable income threshold referenced in M.G.L. c. 62, § 4(d), then the tax rate applicable to the portion of such payments exceeding the taxable income threshold shall be the applicable rate under M.G.L. c. 62, § 4(b) plus an additional 4%. A payment to a loan-out or an independent contractor can only qualify for the motion picture production company credit if, and to the extent that, such payment if made directly to the individual(s) providing services used directly in the production on behalf of the loan-out, would be Massachusetts source income to such individual.

(c) Timing of Withholding Remittance. Any production company seeking a credit as to a payment made to a loan-out or an independent contractor, must withhold and remit to the Commissioner the withholding amount required under 830 CMR 62B.2.3(3)(b) prior to the filing of an application for the credit.

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(4) Withholding and Reporting Requirements as Prerequisites for Credit Qualification; Loan-out Filing Requirements.

(a) Withholding and Reporting Requirements. A payment to a loan-out or an independent contractor will not qualify for the credit:

1. if, or to the extent that, the withholding amount required under 830 CMR 62B.2.3(3)(b) is not remitted to the Commissioner prior to the filing of an application for the credit; and
2. if the reporting requirements are not met as required under 830 CMR 62B.2.3(5).

Example 1. A production company files an application for the credit and reports as an otherwise qualifying production expense a $4,000,000 payment it made during the 2022 tax year to a loan-out for the services of the leading actor in the production. The production company has met the reporting requirements as required under 830 CMR 62B.2.3(5). Prior to filing the application for the credit, the production company had registered for production company withholding as required under 830 CMR 62B.2.3(3)(a). The withholding required under 830 CMR 62B.2.3 on the $4,000,000 payment to the loan-out for the services of the leading actor is $200,000 (5% x $4,000,000). However, the production company withheld and remitted to the Commissioner only $150,000, which is 75% of the required withholding. The production company will only be allowed to claim the credit on the portion of the payment on which it withheld and remitted to the Commissioner prior to filing its application for the credit. The $150,000 withheld by the production company is the required withholding on a payment of $3,000,000. Because this is so, the production company can only claim $3,000,000 as qualifying expenses and the credit would be equal to 25% of this amount, or $750,000. The remaining $1,000,000 of the payment to the loan-out does not constitute a qualifying expense for purposes of the credit.

Example 2. Same facts as example 1, but the production company made the payment during the 2023 tax year. For the 2023 tax year, the surtax applies to income exceeding $1,000,000. As a result, the withholding required under 830 CMR 62B.2.3 on the $4,000,000 payment is $320,000 (5% x $4,000,000 plus 4% x $3,000,000). Assume that the production company withheld $150,000, which is the required withholding on a payment of $2,111,111. As a result, the production company can only claim $2,111,111 as a qualifying expense and the credit would be equal to 25% of this amount, or $527,778. The remaining $1,888,889 of the payment to the loan-out does not constitute a qualifying expense for purposes of the credit.

(b) Loan-out Filing Requirements. Upon the completion of its tax year(s) during which the production took place, the loan-out doing business in Massachusetts must file a Massachusetts tax return and report its income and pay any accompanying tax liability.

(5) Personal Income Credit against Taxes; Reporting Requirements.

(a) Allocation of Personal Income Credit Against Taxes. The amount deducted and withheld as tax under 830 CMR 62B.2.3 during any calendar year upon the payment from a production company to a loan-out or an independent contractor shall be allowed as a credit to the individual or individuals whose services were provided in the production against his or her income tax. If the services of multiple individuals are provided by the loan-out, the amount deducted and withheld under 830 CMR 62B.2.3 shall be allocated to each individual in proportion to the Massachusetts personal income tax imposed on each individual's respective Massachusetts source income received as payment for the individual's services used directly in the production.

(b) Individual Filing Responsibility; Overpayment Applied to Estimated Tax; Refund. The individual providing services must file a Massachusetts personal income tax return attaching the allocation form provided by the production company as required under 830 CMR 62B.2.3(5), and apply the credit for the withholding tax allocated to him or her against the calculated individual income tax liability for that individual. The individual must sign the allocation form acknowledging that any overpayment of the income tax liability will, in this order, be:

1. applied to any required offsets or intercepts;
2. applied to estimated taxes for the next tax year unless all of the Massachusetts source income related to the allocated withholding tax has been reported on this, or a prior, Massachusetts personal income tax return;
3. refunded to the individual.

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(c) Reporting Requirements; Loan-out Allocation Form. The production company and the loan-out must furnish to the Commissioner as an attachment to the production company's credit application, in the manner prescribed by the Commissioner, an accounting and allocation of the withholding amounts on the payments to the loan-out and the social security number or numbers of the individual or individuals allocated the credit against taxes as allowed under 830 CMR 62B.2.3(5)(a) as well as any other information required by the Commissioner. An authorized representative of the production company, an authorized representative of the loan-out and the individual providing services to the loan-out, must sign and declare that to the best of their knowledge and belief, the information contained on the allocation form is true, correct and complete. The production company must also furnish a copy of this allocation form to the individual allocated the withholding amount as allowed under 830 CMR 62B.2.3(5)(a).

Example. Same facts as Example 1 in 830 CMR 62B.2.3(4)(a) with the following additional facts: The withholding upon the payment to the loan-out occurs during the actor's 2022 tax year. However, the actor does not receive the Massachusetts source income reported on the allocation form until the actor's 2023 tax year. The actor does not have any Massachusetts source income, income tax liability or required offsets or intercepts for his or her 2022 tax year. The actor files a Massachusetts personal income tax return for his or her 2022 tax year, attaching the allocation form and applies the $150,000 withholding amount to his or her estimated taxes for the 2023 tax year. The actor files a Massachusetts personal income tax return for the 2023 tax year, attaching the allocation form and receives a refund of any overpayment for his or her 2023 tax year, as allowed under 830 CMR 62B.2.3(5)(b).

(6) Coordination with Other Withholding Requirements.

(a) Employer Production Company Withholding. The 830 CMR 62B.2.3 withholding requirements apply to a payment made by a production company to a loan-out or an individual independent contractor. Wages and other payments made by a production company that is an employer to its employee are governed by the employer withholding requirements as explained in 830 CMR 62B.2.1. Nothing in 830 CMR 62B.2.3 limits the requirement that a production company must register and withhold Massachusetts income tax on employee wages subject to tax in Massachusetts.

(b) Loan-out Withholding. When a loan-out receives a payment from a production company on which there has been withholding under the withholding requirements of 830 CMR 62B.2.3, it does not have to further withhold under the production company withholding rules set forth in 830 CMR 62B.2.3, the employer withholding rules set forth in 830 CMR 62B.2.1 or the pass-through entity withholding rules set forth in 830 CMR 62B.2.2 as to any paid or allocated amount to an individual to the extent such payment or allocation relates to the same services previously withheld upon.

Example. Same facts as the example in 830 CMR 62B.2.3(4)(a), *e.g.*, the production company makes a $4 million payment to the loan-out, but only withholds on $3 million. The loan-out and the individual actor do not have to further withhold on the $3 million payment to the loan-out for the services of the leading actor in the production. However, any withholding obligation imposed by M.G.L. c. 62B and the regulations thereunder, on the loan-out and the individual actor, is effective for the remaining $1 million of the payment to the loan-out, as well as any related interest and penalties for failure to withhold.

(c) Performer Withholding. The performer withholding requirements and waivers explained in 830 CMR 62B.2.1 do not apply to a production that qualifies and submits an application for the motion picture production company credit as defined and allowed under M.G.L. c. 62, § 6(l)(1) or M.G.L. c. 63, § 38X. A production qualifying for the motion picture production company credit is generally defined as a film, video, digital media project or a television series. The performer withholding requirements and waivers explained in 830 CMR 62B.2.1 apply to live performances including, but not limited to, live entertainment, public appearances and athletic competitions.

830 CMR 62B.2.4: Withholding on Sales of Massachusetts Real Estate

(1) Statement of Purpose, Background; Outline of Topics.

(a) Statement of Purpose. The purpose of 830 CMR 62B.2.4 is to establish and explain the withholding requirements that apply to the proceeds of sales or Transfers of Massachusetts Real Estate. These requirements are intended to facilitate the collection of personal income tax under M.G.L. c. 62 or the corporate excise under M.G.L. c. 63, on behalf of Transferors of Massachusetts Real Estate, as authorized under M.G.L. c. 62B, § 2.

(b) Background. M.G.L. c. 62B, § 2 authorizes the Commissioner to require persons other than employers to withhold taxes from payments made by such persons to residents, nonresidents and part-year residents of the commonwealth, file withholding returns, and remit withheld amounts to the Commissioner. Pursuant to this authority, 830 CMR 62B.2.4 requires withholding on behalf of certain Transferors of Massachusetts Real Estate.

830 CMR 62B.2.4 is effective for Real Estate Closings that occur on or after November 1, 2025.

(c) Outline of Topics. The following sections are contained in 830 CMR 62B.2.4.

1. Statement of Purpose, Background, Outline of Topics
2. Definitions
3. General Rule
4. Exemption for Certain Types of Transferors
5. Other Exceptions to Withholding Requirements
6. Reporting for Like-kind Exchanges
7. Installment Sales
8. Transferor's Certification
9. Responsibilities and Requirements of Withholding Agent
10. Responsibilities and Requirements of Transferor
11. Penalties and Interest

(2) Definitions.

For the purpose of 830 CMR 62B.2.4, the following terms shall have the following meanings unless the context requires otherwise:

Closing. The date of Settlement.

Code. The Internal Revenue Code, as defined under M.G.L. c. 62 for purposes of the personal income tax or as defined under M.G.L. c. 63 for purposes of the corporate excise.

Commissioner. The Commissioner of the Department of Revenue, or the Commissioner's duly authorized representative.

Estimated Adjusted Basis. A reasonable estimate of the amount treated as basis for Massachusetts tax purposes under M.G.L. c. 62 for purposes of the personal income tax or M.G.L. c. 63 for purposes of the corporate excise. The Estimated Adjusted Basis for the purposes of 830 CMR 62B.2.4 may not necessarily equal the adjusted basis the Transferor uses to file the Transferor's Massachusetts income tax return. The Estimated Adjusted Basis shall equal the sum of the acquisition cost of the property to the Transferor, or the Transferor's share of the fair market value of the property at the date of death for inherited property, and the Transferor's costs for any major improvements to the property if such costs are known.

Estimated Net Gain. The Gross Sales Price from the Transfer, reduced by the sum of the Estimated Adjusted Basis of the property sold and the expenses that directly relate to the Settlement.

Gross Sales Price. The sum of:

(a) cash paid or to be paid, excluding interest or original issue discount as defined in Code § 1273;

(b) the fair market value of other property transferred or to be transferred; and

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(c) the outstanding amount of any liability assumed by the Transferee or to which the Real Estate is subject immediately before and after the Transfer. Gross Sales Price encompasses the entire transaction, including all payments made or to be made pursuant to an Installment Transaction.

Installment Transaction. A transaction that is subject to installment sale treatment under M.G.L. c. 62, § 63.

Maintains a Place of Business in Massachusetts. In the context of a business entity, is organized under Massachusetts law; is registered with the Secretary of State to do business in Massachusetts; or maintains a place of business in Massachusetts at which the entity carries on its business in a regular and systemic manner and which is consistently maintained, occupied and used by employees of the entity.

Pass-through Entity. An entity whose income, gains, losses, deductions, and credits flow through to members for Massachusetts tax purposes, including a partnership, an S corporation, an estate, and a trust not taxed at the entity level. An entity that is disregarded for tax purposes, such as a grantor-type trust or single-member limited liability company, or a trust that does not pass through to its beneficiaries all of the gain from the sale of Real Estate is not considered a Pass-through Entity for purposes of 830 CMR 62B.2.4.

Publicly Traded Partnership. An entity treated as a Publicly Traded Partnership under Code § 7704(b).

Real Estate. Any interest in real property located in Massachusetts and treated as an interest in real property under Code §§ 897(c)(1)(A) and 897(c)(6).

Secretary of State. Secretary of the Commonwealth of Massachusetts.

Settlement. The passage of the deed and title to Real Estate from the Transferor to the Transferee.

Transfer. The sale or conveyance of Real Estate for consideration.

Transferee. The buyer or person who takes ownership of Real Estate by sale, exchange, or any other Transfer.

Transferor. The seller or person who transfers ownership of Real Estate by sale, exchange, or any other Transfer. In the case of a Transfer by an entity that is disregarded for tax purposes, such as a trust not taxed at the entity level, including a grantor-type trust entity, the Transferor is the beneficial owner of such entity.

Transferor's Certification. A certification that a Transferor must complete and provide to the Withholding Agent for any Transfer in which the Gross Sales Price equals or exceeds the Withholding Threshold. The certification shall be provided using a form promulgated by the Commissioner.

Withholding Agent. The person responsible for closing a Real Estate transaction, including an attorney, escrow company, or title company, or any other person who receives and disburses the consideration or value for a Transfer of Real Estate.

Withholding Threshold. The Gross Sales Price at or above which a Transfer is subject to the withholding requirements under 830 CMR 62B.2.4. For purposes of 830 CMR 62B.2.4, the Withholding Threshold is $1,000,000.

62B.2.4: continued

(3) General Rule.

(a) Transfers Subject to Withholding. Except as otherwise provided in 830 CMR 62B.2.4, a Transfer is subject to withholding if the real property is located in whole or part in Massachusetts and the Gross Sales Price equals or exceeds the Withholding Threshold. The Withholding Agent is required to collect and remit withholding amounts due, if any, and submit a return to the Commissioner in accordance with the provisions in 830 CMR 62B.2.4(9). If the Transfer is otherwise subject to withholding, but all Transferors are exempt under 830 CMR 62B.2.4(4), the Withholding Agent must submit a return and, for each Transferor, a Transferor's Certification. Withholding, returns, and all Transferor's Certifications are due to the Commissioner within ten days of the Closing, except as otherwise provided in 830 CMR 62B.2.4(6). For Transfers where there is no Withholding Agent, the Transferee is required to act as the Withholding Agent.

(b) Multiple Transferors; Multiple Transferees. If a Transferor owns the Real Estate with one or more other Transferors, the withholding treatment of each Transferor is determined separately; determination of whether the Withholding Threshold has been reached shall, however, be determined based on the entire transaction. If the Real Estate is transferred to two or more joint Transferees and there is no Withholding Agent, each Transferee must act as a Withholding Agent as set forth in 830 CMR 62B.2.4(3)(a) and is subject to the obligation to withhold on that Transferee's proportionate share of the Gross Sales Price.

(c) Withholding Amount. Unless a Transferor elects to use the alternative withholding calculation set forth in 830 CMR 62B.2.4(3)(d), the amount required to be withheld shall equal the Transferor's share of the Gross Sales Price multiplied by 4%. If the Transferor's share of the Gross Sales Price exceeds the taxable income threshold referenced in M.G.L. c . 62, § 4(d) and the Transferor is subject to tax under M.G.L. c. 62, then an additional 4% shall be withheld from the portion of such Gross Sales Price exceeding the threshold.

(d) Alternative Withholding Calculation. In *lieu* of the calculation set forth in 830 CMR 62B.2.4(3)(c), a Transferor may elect to have the amount withheld equal the Transferor's Estimated Net Gain derived from the Transfer multiplied by the tax rate applicable to the Transferor. The Transferor's Estimated Net Gain is determined by subtracting the Transferor's Estimated Adjusted Basis in the Real Estate and any expenses directly related to the Settlement that are attributed to the Transferor from the Transferor's share of the Gross Sales Price. The tax rate applicable to a Transferor subject to tax under M.G.L. c. 62 shall be the personal income tax rate under M.G.L. c. 62, § 4(b), regardless of the character of the Estimated Net Gain. If the Transferor's Estimated Net Gain exceeds the taxable income threshold referenced in M.G.L. c. 62, § 4(d) and the Transferor is subject to tax under M.G.L. c. 62, then the tax rate applicable to the portion of such Estimated Net Gain exceeding the taxable income threshold shall be the applicable rate under M.G.L. c. 62, § 4(b), regardless of the character of the Estimated Net Gain, plus an additional 4%. The tax rate applicable to a Transferor subject to tax under M.G.L. c. 63 shall be the tax rate set forth in M.G.L. c. 63, § 39(a)(2).

To elect the alternative withholding calculation under 830 CMR 62B.2.4(3)(d), a Transferor must provide the Withholding Agent with a Transferor's Certification that states the Transferor's Estimated Net Gain and applicable tax rate. If the Transferor fails to provide a Transferor's Certification with the aforementioned information at or prior to Closing, then the Withholding Agent shall withhold using the calculation set forth in 830 CMR 62B.2.4(3)(c).

(e) Example . Taxpayer A and Taxpayer B are individuals who own Real Estate. Taxpayer A owns a 20% share and Taxpayer B owns an 80% share of the Real Estate. Taxpayer A and Taxpayer B sell the Real Estate for a Gross Sales Price of $1,500,000.

Taxpayer A's share of the Gross Sales Price is $300,000 and Taxpayer B's share of the Gross Sales Price is $1,200,000. Because the total Gross Sales Price exceeds the Withholding Threshold, the entire sale is subject to withholding even though Taxpayer A's share of the Gross Sales Price is less than the Withholding Threshold.

Taxpayer A fails to provide the Withholding Agent with a Transferor's Certification. The Withholding Agent must withhold $12,000 ($300,000 x .04) on behalf of Taxpayer A.

62B.2.4: continued

Taxpayer B provides the Withholding Agent with a Transferor's Certification, on which Taxpayer B elects to use the alternative withholding calculation set forth in 830 CMR 62B.2.4(3)(d), and states that its Estimated Adjusted Basis in the Real Estate is $640,000 and that it has no expenses directly related to the Settlement. Taxpayer B's Estimated Net Gain is $560,000 ($1,200,000 - $640,000). Because Taxpayer B is an individual, the applicable tax rate is the personal income tax rate under M.G.L. c. 62,§ 4(b). Additionally, because Taxpayer B's Estimated Net Gain is less than the taxable income threshold referenced in M.G.L. c. 62, § 4(d), the applicable tax rate is 5% and the additional 4% does not apply. The withholding amount for Taxpayer B is $28,000 ($560,000 x 0.05).

(4) Exemption for Certain Types of Transferors.

(a) General. Withholding on a Transfer is not required for certain types of Transferors as described below. In the case of a Transfer that includes more than one Transferor, this exemption only applies to those Transferors so described. All other Transferors are subject to withholding on the Transfer as otherwise determined in 830 CMR 62B.2.4. A Transferor claiming exemption from withholding must certify that they are exempt on the Transferor's Certification provided to the Withholding Agent at or before Closing as required under 830 CMR 62B.2.4(8). The following types of Transferors qualify for exemption:

1. A full-year Massachusetts resident, as defined in 830 CMR 62B.2.4(5)(b);
2. A Pass-through Entity;
3. A Publicly Traded Partnership;
4. An estate of a resident decedent or a resident trust as described in M.G.L. c. 62, § 10(c);
5. A corporation with a continuing Massachusetts business presence, as defined in 830 CMR 62B.2.4(4)(c)1, or a member of a combined group where one member of such group has a continuing Massachusetts business presence, as defined in 830 CMR 62B.2.4(4)(c)1, and, in either instance, the requirement set forth in 830 CMR 62B.2.4(4)(c)2 is also met;
6. An organization qualified under Code § 501 and exempt from tax in Massachusetts, unless the Transfer results in unrelated business taxable income, as defined under Code § 512, to the Transferor;
7. An insurance company that is subject to the provisions of M.G.L. c. 63, §§ 20 through 26;
8. The United States Government, the commonwealth or any political subdivision thereof, or their respective agencies;
9. The Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association, or a private mortgage insurance company;
10. Any financial institution, as defined in M.G.L. c. 63, § 1, that Maintains a Place of Business in Massachusetts; and
11. A real estate investment trust under Code §§ 856 through 859, provided that the proceeds from the trust's sale of the Real Estate are distributed to the trust's shareholders in the form of dividends derived from the sale of Real Estate.

(b) Full-year Massachusetts Resident. For the purpose of 830 CMR 62B.2.4, a person is a full-year Massachusetts resident if they:

1. Have been a resident, as defined in M.G.L. c. 62, § 1(f), from January 1st of the year in which the Real Estate Transfer occurs through the Closing, and
2. Represent that they will continue to be a resident, as defined in M.G.L. c. 62, § 1(f), after Closing.

(c) Corporation or Member of Combined Group with Continuing Massachusetts Business Presence

1. A corporation or member of a combined group with a continuing Massachusetts business presence is an entity that:
   a. filed a Massachusetts income tax return for the tax year prior to the tax year in which the Transfer occurs; and
   b. Maintains a Place of Business in Massachusetts at the time of the Transfer;
2. A corporation will only be deemed to meet the requirement for the exemption for Transfers set forth in 830 CMR 62B.2.4(4)(a)5 when it:
   a. represents that it or a member of its combined group is subject to a requirement to report the Transfer on a Massachusetts tax return for the current year, and that it or that member will so report the Transfer; and

62B.2.4: continued

b. represents that it is not selling or transferring all or substantially all of the corporation's assets situated in Massachusetts such that, under M.G.L. c. 62C, § 51, it would be required to seek a waiver or notify the Commissioner and pay the taxes due on the Transfer on or before the date of sale or Transfer.

(5) Other Exceptions to Withholding Requirements.

(a) General. Withholding may be reduced below the amount required by 830 CMR 62B.2.4(3) or not required at all if the Transferor certifies, at or before Closing, on a Transferor's Certification that withholding is reduced or not required under 830 CMR 62B.2.4(5). The Transferor's Certification must include a statement of the reason or reasons why withholding is reduced or not required.

1. Payment of Debts. If the withholding amount required by 830 CMR 62B.2.4(3) is greater than the amount by which the Gross Sales Price exceeds amounts used for the payment of debts of the Transferor, secured by a mortgage or other lien on the property being transferred that are paid at Closing, then the Withholding Agent shall withhold the amount by which the Gross Sales Price exceeds amounts used for the payment of debts of the Transferor that are paid at Closing. For purposes of 830 CMR 62B.2.4(5)(a)(1), debts do not include those incurred in contemplation of the Transfer, including a debt secured by a mortgage, deed, or trust, or other instrument on the property being sold with an effective date of not more than 90 days before the date of Transfer.

2. Foreclosure. Withholding is not required on a foreclosure sale when the Gross Sales Price does not exceed the debt secured by the property held by a mortgagee or lienholder. If the Gross Sales Price exceeds the secured debt, the amount of tax withheld pursuant to 830 CMR 62B.2.4(5)(a)(2) shall be the lesser of the surplus over the secured debt or the amount otherwise required to be withheld under 830 CMR 62B.2.4(3). When a mortgagor conveys the mortgaged property to a mortgagee in *lieu* of foreclosure and with no additional consideration, the mortgagee is not required to withhold tax. Withholding is not required by a subsequent third party bona fide purchaser on such Transfer by the mortgagee or assignee or holder of debt or other obligation if all proceeds go directly to the mortgagee or lien holder.

3. Involuntary Transfer. Withholding is not required on Transfers with respect to which gain is realized but not recognized in Massachusetts because the Massachusetts Real Estate has been compulsorily or involuntarily converted, within the meaning of Code § 1033.

4. Property Only Partly Located in Massachusetts. If the real property being transferred is located partly within and partly outside of Massachusetts, then withholding is required only on the portion of the Gross Sales Price reasonably attributable to the portion of the real property located within Massachusetts.

5. Nonrecognition Provisions. Withholding is not required with respect to certain Transfers that qualify for nonrecognition of taxable gain under M.G.L. c. 62 or M.G.L. c, 63. Withholding is not required to the extent of any gain not recognized under Massachusetts law in the following instances:

a. a Transfer of a principal residence as defined under Code § 121;

b. a Transfer between spouses or incident to a divorce, as defined under Code § 1041;

c. a Transfer that qualifies for nonrecognition under Code § 351; or

d. a Transfer that qualifies as a tax-free reorganization as defined under Code § 368.

(6) Reporting for Like-kind Exchanges.

(a) Notification to Commissioner of Amount of Deferral. Withholding is not generally required for Transfers that qualify under the provisions of Code § 1031 on the amount of any gain that is deferred for Massachusetts tax purposes. To avoid withholding on any gain that is deferred, the Transferor must provide the Withholding Agent with a statement on the Transferor's Certification acknowledging the amount of gain that has been deferred and consenting to personal jurisdiction in Massachusetts for the determination and collection of taxes and related interest, penalties, and fees that will be due when the gain is realized.

(b) Withholding Required on Gain Recognized under Code § 1031(b) Property. Withholding is required on any gain that is recognized under Code § 1031(b), as adjusted for Massachusetts tax purposes, even if the Transfer qualifies as a like-kind exchange.

62B.2.4: continued

(c) Transferor Must Qualify for the Deferral. If at the time of Closing an exchange appears to qualify as a like-kind exchange, but subsequently fails to meet the requirements of Code § 1031, the Transferor must notify the Commissioner in writing within ten days of the expiration of the statutory periods specified in Code § 1031(a)(3) and remit the applicable payment equal to the withholding amount that would have been required under 830 CMR 62B.2.4 in an estimated payment next due in accordance with the payment due dates under M.G.L. c. 62B, § 14 and M.G.L. c. 63B, § 4A or § 4B, as applicable.

(7) Installment Sales.

(a) General Rule. If the Transfer is subject to installment sale treatment under M.G.L. c. 62, § 63, the Transferor may elect to have withholding apply only to the initial payment made by the Transferee at the time of the Transfer rather than to the entire amount. This withholding election shall be made at Closing on the Transferor's Certification and shall include a statement by the Transferor consenting to personal jurisdiction in Massachusetts for the determination and collection of taxes and related interest, penalties, and fees that will be due on subsequent installment payments.

(b) Withholding Amount. If the Transferor elects to have withholding apply only to the initial payment, the withholding amount for such payment shall be the amount calculated pursuant to 830 CMR 62B.2.4(3) using the portion of the Transferor's share of the Gross Sales Price that is allocated to that payment based on the proportion the payment bears to the Transferor's share of the total Gross Sales Price.

(c) Timing of Payment. The initial withholding return and payment are due within ten days of Closing.

(d) Transition Rule. If Real Estate has been sold under the installment method prior to the date provided in 830 CMR 62B.2.4(1), withholding is not required on payments that are received after that date.

(8) Transferor's Certification. A Transferor shall execute a Transferor's Certification and provide the certification to the Withholding Agent in any case where the Gross Sales Price for a Transfer equals or exceeds the Withholding Threshold. The Transferor shall use the Transferor's Certification to provide information, as required by the Commissioner, necessary for the Withholding Agent to determine the withholding amount required under 830 CMR 62B.2.4(3)(c) or (d). The Transferor shall also use the Transferor's Certification to make representations, if any, that the Transferor is exempt from withholding or that withholding is reduced or is not required. The Withholding Agent may rely upon the information provided in the Transferor's Certification if it takes the Transferor's Certification in good faith. In the absence of evidence of bad faith, a Withholding Agent may presume that a Transferor's Certification has been executed in good faith.

(9) Responsibilities and Requirements of Withholding Agent.

(a) Filing Withholding Return and Making Withholding Payment. For each Transfer subject to withholding as set forth in 830 CMR 62B.2.4(3), the Withholding Agent must file the withholding return and any Transferor's Certifications and remit the withholding tax payment, if any, to the Commissioner within ten days of Closing. Until it is remitted, tax withheld is deemed to be held in trust for the commonwealth. Filing and payment must be done electronically. The withholding return must provide the date of the Transfer, names, addresses and identification numbers of the Transferee and Transferor, Gross Sales Price, and the amount of withholding to be remitted. If any Transferor elects to withhold using the alternative withholding calculation set forth in 830 CMR 62B.2.4(3)(d), the withholding return must also provide the Estimated Net Gain for any such Transferor.

(b) File Transferor's Certification. The Withholding Agent must file all Transferor's Certifications with the withholding return and any withholding payment. The Withholding Agent must also file any supporting documentation as the Commissioner may require. A Transferor's Certification may not be submitted after the due date of the withholding return.

(c) Provide Documentation to Transferor. If the Withholding Agent files a withholding return, the Withholding Agent must, no later than the due date for filing with the Commissioner, provide a copy of the return and the applicable Transferor's Certification to the Transferor. If the Withholding Agent remits tax on behalf of the Transferor, a receipt for such payment must also be provided to the Transferor.

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(d) Amending Returns. A Withholding Agent may submit an amended return to increase or decrease previously reported withholding, or report any other change that has no net effect on the tax shown on a return previously filed by the Withholding Agent within the time limits and other requirements provided in 830 CMR 62C.26.2, Amended Returns. An amended return cannot be filed to claim an exemption from the withholding requirements under 830 CMR 62B.2.4 if a Transferor's Certification was not filed with the Commissioner on or before the due date of the withholding return as provided under 830 CMR 62B.2.4(9)(a).

(10) Responsibilities and Requirements of Transferor.

(a) Provide Withholding Agent with Transferor's Certification. For all Transfers subject to withholding, the Transferor must provide the Withholding Agent with a Transferor's Certification signed under penalties of perjury as set forth in 830 CMR 62B.2.4(8). If the Transferor does not provide a Transferor's Certification before the return is filed, then a withholding exemption cannot be claimed. Additionally, if the Transferor does not provide a Transferor's Certification before a return is filed, then the Transferor cannot elect to withhold using the alternative withholding calculation set forth in 830 62B.2.4(3)(d).

(b) Retain Transferor's Certification. The Transferor shall retain a copy of the Transferor's Certification and shall provide this information to the Commissioner upon request.

(c) Liability. The Transferor is responsible for paying any tax due on the net gain from the Transfer of Massachusetts Real Estate. Tax due includes any applicable interest, as set forth in 830 CMR 62B.2.4(11)(b).

(d) Transferor that is an Exempt Government Entity or Agency. A Transferor that is exempt under 830 CMR 62B.2.4(4)(a)8. is not required to provide a Transferor's Certification to the Withholding Agent. Unlike with respect to other Transferors referenced in 830 CMR 62B.2.4(4)(a), if such Transferor does not provide a Transferor's Certification, the Transferor remains exempt from the withholding requirement. Also, in these cases the Withholding Agent is not required to withhold, provided that the Withholding Agent shall maintain adequate documentation verifying that the Transferor is an exempt government entity.

(11) Penalties and Interest.

(a) Penalties. A Withholding Agent that fails to meet its withholding obligation shall be subject to the penalties for failure to withhold that apply under M.G.L. c. 62B and penalties imposed under M.G.L. c. 62C. The Withholding Agent is not liable for penalties if the tax due as a result of the Transfer is paid by the original or extended due date of the Transferor's return for the taxable year in which the Transfer occurred or if the Withholding Agent fails to meet its withholding obligation because it relied in good faith on the Transferor's Certification.

(b) Interest. If any amount of withholding is not paid to the Commissioner on or before the due date of the Transferor's tax return on which the gain is reported pursuant to M.G.L. c. 62C, interest shall be assessed on the amount that should have been withheld as set forth in 830 CMR 62B.4(3)(c), or on the amount that should have been withheld as set forth in 830 CMR 62B.3(3)(d) if a Transferor's Certification with an alternative withholding calculation election was filed within ten days of Closing, at the rate established under M.G.L. c. 62C, § 32 computed from the due date of the withholding return to the date the tax is paid.

REGULATORY AUTHORITY

830 CMR 62B.00: M.G.L. c. 62B; c. 14, § 6(1) and c. 62C, § 3.

NON-TEXT PAGE