

# Tax Alert

## Foreign employers

### In brief

There has been a significant change (effective from 22 December 2023) to the employment withholding tax (PAYE) responsibilities of a foreign employer who conducts business through a South African (SA) permanent establishment (PE). Such foreign employers are now required to register for and withhold PAYE.

### In detail

Paragraph 2(1) of the Fourth Schedule to the Income Tax Act has been amended by the Tax Administration Laws Amendment Act, 2023, effective from 22 December 2023.

The amendment requires that every non-resident employer who:

- conducts business through a SA PE; and
- pays or becomes liable to pay any amount by way of *remuneration* to any employee must withhold and pay over PAYE to the South African Revenue Service (SARS).

As the provision does not require that the employee in question should also be effectively connected to that SA PE, the PAYE requirement has broader application than what is apparent at first blush.

For example, a non-resident employer with a SA PE could employ a SA resident employee (who does not have any connection to the SA PE) in a foreign jurisdiction. In this instance, the non-resident employer would have a PAYE obligation in relation to the SA resident employee, notwithstanding that the employment is not exercised in SA. Similar results may arise for non-resident employees who happen to be exercising employment in SA but whose activities are not connected to the PE.

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## Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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## Practical issues

If the foreign employer who operates through a SA PE has already been registered with SARS for corporate income tax, the registration with SARS as an employer for PAYE purposes should in theory be relatively easy.

Foreign employers have, however, experienced challenges in registering as an employer with SARS in cases where:

- the CIPC registration has not been completed;
- a SARS income tax registration number has not been obtained; and
- a local bank account has not been opened.

## UIF and SDL

It is important to note that the amendment only affects a foreign employer's PAYE obligations. Their obligations in respect of the Skills Development Levies (SDL) and Unemployment Insurance Fund (UIF) obligations remain the same as before, i.e.:

- **UIF** - All employers and employees must pay UIF unless a specific exemption applies (e.g. in the private sector, where employees are employed for less than 24 hours in a month).
- **SDL** - All employers are required to pay SDL on remuneration payable to all SA-based employees unless the total remuneration is not expected to exceed R500,000 during the following 12-month period.

## Takeaway

SA PEs of foreign employers should consider the new PAYE requirements to confirm whether they should register for and withhold PAYE from employees. The practical compliance issues should also be considered.

The SA PE should also advise its foreign head office of the broad application of the new PAYE requirements, i.e. that a PAYE obligation can arise where the employer employs a SA resident in a foreign jurisdiction or where an employee of the company exercises his / her employment (independent from the SA PE) in SA. The appropriate guard rails should be put in place to avoid non-compliance.

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