

GMS Flash Alert



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Australia - Displaced Employees and COVID-19 Updates

Hong Kong has extended its travel ban on incoming flights from eight countries including Australia until 21 April 2022.¹ The travel ban has been in place since 8 January 2022. This creates concerns about displaced workers and issues around residency, income sourcing, and permanent establishment.

The Australian Taxation Office (ATO) has provided guidance on the Australian tax implications for individuals that have been displaced in Australia due to the COVID-19 pandemic.

WHY THIS MATTERS

Many Hong Kong-based employees who may have come to Australia to visit extended family and friends over the Christmas and New Year period have found themselves unable to return. Some employers are now concerned about tax issues associated with allowing these employees to work remotely in Australia for a temporary period until flights resume.

Employers need to be aware of the circumstances of displaced workers who are in Australia. Regardless of which jurisdiction their employees normally work in, employers need to consider whether any Pay-As-You-Go withholding and payroll reporting obligations exist for employee time spent in Australia.

Sourcing Income

The Australian Taxation Office (ATO) published COVID-19 guidance in relation to residency and income source remains relevant in these circumstances.² (For prior coverage, see [GMS Flash Alert 2021-229](#), 3 September 2021.)

The underlying principle is that a nonresident of Australia for tax purposes is only taxable on Australian-sourced income.

- For nonresident individuals who find themselves displaced in Australia, where the remote working arrangement is for three months or less, the ATO has accepted that the income from such employment will not have an Australian source. For working arrangements longer than three months, an employee's individual facts and circumstances need to be examined to determine if the employment is connected to Australia and considered to have an Australian source.
- Where employees have chosen to stay in Australia despite being able to leave and have agreed with their foreign employer that Australia can be their usual place of employment until the employees choose to travel again, the employment income is likely to be Australian-sourced.
- If an individual is tax resident in a jurisdiction with which Australia has a double taxation agreement (currently there is no such agreement with Hong Kong SAR), then the relevant provisions under the short-term visitor exemption will need to be reviewed to determine if the employment income is exempt from taxation in Australia, or whether any "deemed source" provision may apply to treat the employment income as having an Australian source.

It is also important to remember that where employees have triggered Australian tax residence, then, regardless of the source of the employment income, they will be taxable in Australia.

Permanent Establishment

The ATO has not extended its approach to permanent establishment (PE) risk beyond 31 December 2021. Prior to 31 December 2021, the ATO indicated that it would not apply compliance resources to determine whether a PE existed in certain circumstances due to travel restrictions arising from COVID-19.

From 1 January 2022, this approach ceased to apply, and foreign employers will need to consider whether ongoing arrangements give rise to a PE in Australia. This is understandable given that some international flights have resumed. If employees have been in Australia for a significant period of time, foreign employers need to consider more broadly what the employees are doing and whether they are actually endeavoring to depart.

The ATO has updated Taxation Ruling TR 2002/5 with an addendum to formally recognise the ongoing COVID-19 pandemic as an "extraordinary circumstance" where a forced presence of employees in Australia for more than six months may be considered "temporary" for the purposes of satisfying the temporal permanence requirement for foreign entities to have a PE in Australia.³ Accordingly, this should provide foreign employers with some assurance that the Commissioner will continue to consider the impacts of the COVID-19 global pandemic and travel restrictions where relevant when determining whether a PE exists.

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Policies in Flux, Need to Monitor

With the changes in work practices globally and on-going developments as governments around the world tackle outbreaks of COVID, employers need to stay in tune with the various circumstances in which employees find themselves working in Australia in order to navigate through the associated employer obligations.

FOOTNOTES:

- 1 See, Government of Honk Kong SAR COVID-19 [website](#).
- 2 See ATO guidance, "[Residency and source of income](#)."
- 3 ATO [Taxation Ruling 2002/5A3-Addendum](#).

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