

Nonresident Withholding and Reporting Threshold Draft Legislation

[Section 1]

(A) As used in this section:

(1) “Professional athlete” means an athlete who performs services in a professional athletic event for compensation.

(2) “Professional entertainer” means a person who performs services in the professional performing arts for compensation on a per-event basis.

(3) “Public figure” means a person of prominence who performs services at discrete events, such as speeches, public appearances, or similar events, for compensation on a per-event basis.

(4) “Qualified Production employee” means a person who performs production services of any nature directly in connection with a state qualified [film, television, or other commercial video production] for compensation, provided that the compensation paid to such person are qualified expenditures under [state’s incentive program], and that such compensation is subject to withholding as a condition to treating the compensation as a qualified production expenditure.¹

(5) “Time and attendance system” means a system through which an employee is required, on a contemporaneous basis, to record the employee’s work location for every day worked outside the state where the employee’s employment duties are primarily performed and which is designed to allow the employer to allocate the employee’s compensation for income tax purposes among all states in which the employee performs employment duties for the employer.

(B)(1) Compensation, as defined under [state statute cross-reference], paid to a nonresident individual is exempt from the tax levied under [state statute cross-reference] if all of the following conditions apply:

(a) The compensation is paid for employment duties performed by the individual in this state for thirty or fewer days in the calendar year;

(b) The individual performed employment duties in more than one state during the calendar year;

(c) The compensation is not paid for employment duties performed by the individual in the individual’s capacity as a professional athlete, professional entertainer, public figure, or qualified production employee; and

(d) The nonresident individual’s state of residence: i) provides a substantially similar exclusion, or ii) does not impose an individual income tax, or iii) the individual’s income is exempt from taxation by this state under the United States Constitution or federal statute.

¹ A “production employee” exception is optional, based on whether it is needed to avoid undercutting a state’s film, television, or other commercial video production incentive program.

(2) Except as otherwise provided in this division, an employer is not required to withhold taxes under [state statute cross-reference] from compensation that is paid to an employee described in division (B)(1) of this section. If, during the calendar year, the number of days an employee spends performing employment duties in this state exceeds the thirty-day threshold described in division (B)(1)(a) of this section, an employer shall withhold and remit tax to this state for every day in that calendar year, including the first thirty days on which the employee performs employment duties in this state.

(C) The [revenue department] shall not require the payment of any penalties or interest otherwise applicable for failing to deduct and withhold income taxes as required under [state statute cross-reference] if, when determining whether withholding was required, the employer met either of the following conditions:

(1) The employer at its sole discretion maintains a time and attendance system specifically designed to allocate employee wages for income tax purposes among all taxing jurisdictions in which the employee performs employment duties for such employer, and the employer relied on data from that system.

(2) The employer does not maintain a time and attendance system, and the employer relied on either (a) its own records, maintained in the regular course of business, of the employee's location or (b) the employee's reasonable determination of the time the employee expected to spend performing employment duties in this state, provided, however, that the employer did not have actual knowledge of fraud on the part of the employee in making the determination and provided that the employer and the employee did not collude to evade taxation in making the determination.

(D) For purposes of this section, an employee shall be considered present and performing employment duties within this state for a day if the employee performs more of the employee's employment duties in this state than in any other state during that day. Any portion of the day during which the employee is in transit shall not be considered in determining the location of an employee's performance of employment duties.

[Section 2]

The enactment by this act of [state code section] applies to taxable years beginning on and after January 1, 202X.

[Section 3]

If any provision of this act, or the application of such provision to any person or circumstance, is held to be unconstitutional, then the remainder of this act, and the application of the provisions of such to any person or circumstance, shall not be affected thereby.