



## **Withholding on Wages Paid to Certain Nonresidents Who Work 14 Days or Fewer in New York State**

This memorandum explains the Tax Department's existing policy concerning employer withholding on the wages paid to certain nonresident employees whose primary work location is outside of New York State and who are expected to work 14 days or fewer in New York State during the calendar year.

### **Law and background**

Section 601(e) of the Tax Law imposes a personal income tax on the New York source income of a nonresident individual. The New York source income of a nonresident individual includes wages and other compensation for services performed in New York State.

Section 671 of the Tax Law provides that every employer maintaining an office or transacting business in New York State and paying any wages subject to New York State personal income tax must deduct and withhold tax from those wages during each calendar year. The amount withheld must be substantially equivalent to the tax reasonably estimated to be due from the inclusion of the wages in the employees' New York adjusted gross income or New York source income. Accordingly, if a nonresident employee performs all services in New York State, the tax must be withheld from all wages paid to the employee. However, if a nonresident employee performs services partly in and partly outside the state, only wages for services performed inside the state are subject to withholding.

### **Allocation of wages**

If a nonresident employee performs services partly in and partly outside the state, the amount of wages allocable to New York State is that part of the total compensation that the number of days worked in New York State bears to the total number of days worked both in and out of New York State, exclusive of nonworking days. Nonworking days are normally considered to be Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay. However, to figure the earnings of traveling salespersons or other employees whose compensation depends entirely on the volume of business transacted by them, the amount allocable to New York State is that part of the compensation received that the volume of business transacted by them in New York State bears to the total volume of business transacted by them both in and out of New York State.

An employer may determine the portion of wages allocable to New York State on the basis of the preceding year, or an employee may furnish the employer with a statement on [Form IT-2104.1](#), *New York State, City of New York, and City of Yonkers Certificate of Nonresidence and Allocation of Withholding Tax*. In either case, however, the employer is

required to make the necessary adjustments during the year so that the proper amount of New York State personal income tax is withheld for the current year.

### **Withholding on wages paid to nonresidents who work 14 days or fewer in New York State (14-day rule)**

The following sections explain the Tax Department's current policy regarding employer withholding requirements on wages paid to certain nonresident employees who are assigned a primary work location outside of New York State, and who are expected to work 14 days or fewer in New York State during the calendar year.

**Note:** An employer may choose to withhold on all New York State wages paid to a nonresident employee who is assigned to a primary work location outside of New York State, even if the employee will work 14 days or fewer in New York State during the calendar year.

#### **General**

Under the 14-day rule an employer will not be penalized for failing to withhold New York State tax on wages paid to a nonresident employee who performs services both in and out of New York State if **all** of the following conditions are met:

- The employee is assigned to a primary work location outside of New York State.
- The employer reasonably expects that the employee will work in New York State for 14 days or fewer in the calendar year.
- The employee **does not** work in New York State for more than 14 days (see *Special rules* on page 3).
- The employee's compensation is not listed in *Exceptions to the 14-day rule* (see page 3).

If the employer reasonably expects that an employee will be required to work in New York State for more than 14 days in the calendar year, the 14-day rule cannot be applied, and the employer must withhold on all New York State wages paid to that employee.

When applying the 14-day rule, any part of a day spent working in New York counts as a full day. However, do not count any day spent in New York State for the **sole** purpose of job-related training, such as in-house training courses, trade association conferences or symposia, or professional development workshops, seminars, or conventions.

## **Special rules**

If a nonresident employee was not initially expected to work more than 14 days in New York State during the calendar year, but does in fact work more than 14 days in New York, the employer is required to withhold on all New York State wages paid after the 14<sup>th</sup> day.

If, during the calendar year, a nonresident employee is reassigned to a primary work location in New York State or to a different position that will result in the employee working more than 14 days in New York State, the employer is required to withhold on New York State wages paid on and after the date of the change.

## **Exceptions to the 14-day rule**

The 14-day rule does **not** apply to the following types of compensation:

- Compensation paid to nonresident traveling salespersons or other employees when the compensation depends entirely on the volume of business transacted by them.
- Compensation paid in one year that is related to services performed in a prior year. For example, deferred compensation and compensation from nonstatutory stock options.
- Compensation paid to nonresident public speakers performing services in New York State. This includes, but is not limited to, services in the form of a speech, presentation, or personal appearance.
- Compensation paid to nonresident athletes performing services in New York State. This includes, but is not limited to, wrestlers, boxers, golfers, hockey players, basketball players, football players, tennis players, baseball players, and other athletes, as well as referees, coaches, and trainers.
- Compensation paid to nonresident entertainers performing services in New York State. This includes, but is not limited to, actors, singers, musicians, dancers, circus performers, writers, directors, producers, set designers, any other person appearing on television, radio, the stage, in a night club performance or hotel show, and compensation to any person whose performance in New York State is recorded or filmed.

For information on withholding requirements, see [Publication NYS-50](#), *Employer's Guide to Unemployment Insurance, Wage Reporting, and Withholding Tax*.

## **Penalties and interest**

As previously stated, if an employer complies with the policy as described in this memo, the employer will not be assessed tax, or the penalties for the failure to withhold or for late filing, or interest on the withholding amount that would have otherwise been due.

### **Yonkers nonresident earnings tax**

Section 1340 of the Tax Law imposes tax on the wages of nonresidents of Yonkers for services performed in the city of Yonkers.

Section 1341 of the Tax Law imposes withholding tax on wages paid to Yonkers nonresident employees for services performed in the city of Yonkers.

Employers must deduct and withhold Yonkers nonresident earnings tax from wages paid to Yonkers nonresidents. However, the Tax Law also provides that if a Yonkers nonresident employee will work only a short period within Yonkers, and it is reasonably expected that the total wages for services performed in Yonkers for the tax year will not exceed \$3,000 (or \$3,000 prorated for a tax period of fewer than one year), the employer does not have to withhold or deduct any amount of Yonkers nonresident earnings tax from the employee's wages (Part 269.3 of the Procedural Regulations of the Department of Taxation and Finance).

### **Withholding on wages paid to Yonkers nonresidents who work 14 days or fewer in Yonkers**

In addition to the \$3,000 threshold described above, employers can apply the Tax Department's 14-day rule for Yonkers nonresident earnings tax purposes. In applying the 14-day rule, the same guidelines and exceptions apply for Yonkers withholding as for New York State withholding, as described in this memorandum. Substitute *Yonkers* for *New York State* where necessary in the text of this memorandum.

### **Employer reporting requirements**

Section 672 of the Tax Law authorizes the department to require employers to complete the *State wages, tips, etc.* box of federal Form W-2, *Wage and Tax Statement*, for any employee who has federal wages subject to New York State income tax withholding. If at any time during the tax year a nonresident employee performs services in New York State, the amount of wages that must be reported in the *State wages, tips, etc.* box on federal Form W-2 is the same amount of federal wages required to be reported in box 1, *Wages, tips, other compensation*. The amount is federal wages before any allocation.

Section 171-a(2) of the Tax Law authorizes the department to require employers, as defined under Article 18 of the Labor Law, to file Form NYS-45, *Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return*, each quarter. Form NYS-45 shows the name, social security number, and gross wages paid to each employee who resides in or is employed in this state, whether or not the wages of the employee are subject to withholding of tax or payments of tax.

The policy discussed in this memorandum does not relieve an employer from any wage reporting requirements or from the requirement to provide each employee with a written statement (i.e., federal Form W-2) showing the amount of wages paid to the employee.

### **Nonresident employee filing requirements**

A nonresident must file a New York State personal income tax return if he or she has any income from New York sources, and his or her New York adjusted gross income (determined as if a resident) is more than the New York State standard deduction allowed. In addition, a nonresident is required to report wages and other compensation for services performed in this state on his or her New York State personal income tax return, whether or not his or her employer withholds tax from those wages or other compensation.

The policy discussed in this memorandum does not relieve a nonresident who works 14 days or fewer in New York State from the requirement to file a New York State personal income tax return and to report his or her New York wages. A nonresident individual may also be required to make estimated income tax payments to New York State if an insufficient amount is withheld from his or her wages, and tax will be owed when his or her New York State personal income tax return is due.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.