

City of Wilmington



MICHAEL S. PURZYCKI
Mayor

TO: Employers and Employees of Businesses within the City limits
FROM: J. Brett Taylor, Director of Finance
DATE: June 10, 2020
RE: Changes to Earned Income Tax Regulations

The following document reflects changes made to regulations for earned income, modified by the City of Wilmington Administrative Board on June 2, 2020 for the 2020 tax year and subsequent years. Changes to the regulations reflect the following:

- a) Clarifies the terms “work performed or rendered” for the purposes of determining the application of earned income tax on work performed remotely;
- b) Changes apportionment allocations on severance and other post working income to 3-year average vs last year of employment;
- c) Clarify the application of taxable income to stock options at retirement taxable in the event where vesting accelerates at retirement but is not a condition of retirement. If it’s a condition of retirement, then it’s still not taxed and treated as retirement income;
- d) Clarifies the apportionment calculation for non-resident wage earners.

The recent response to the COVID-19 pandemic has prompted businesses to socially distance employees by affording them the opportunity to work from home or a remote location outside of the City. Attached are revised regulations for your review and use for the filing of 2020 withholdings, returns and requests for refunds.

Non-resident employees who work for City-based businesses are responsible for paying earned income tax based on the portion of work performed and rendered within the City limits. The City of Wilmington interprets “performed” as work done within the physical limits of the City while services “rendered” is work performed on behalf of the City-based employer, regardless of the employee’s location inside or outside the City.

Under the COVID-19 circumstance, the City of Wilmington views employees working remotely as temporary, much like other emergencies, such as weather-related events. Therefore, earned income tax will be imposed, unless the state of Delaware is operating under an emergency order and the employer certifies that the employee did not provide or render services to the employer’s location within the City limits during the emergency order in the 2020 tax year.

This rule interpretation will apply to income beginning in the 2020 tax year, starting on January 1, 2020 and subsequent tax years until changed through the regulatory process.

Per the City of Wilmington Charter Sec. 8-407, the Director of Finance requested promulgation from the Administrative Board and is issuing these regulations for a 30-day comment period.

Parties interested in making comments may address them to:

J. Brett Taylor
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City of Wilmington
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302-993-6993

Comments must be received by midnight on July 15, 2020. If requested, a public hearing by an affected stakeholder may be held before Admin Board and City Solicitor. At midnight on the 10th day after requested hearing, these regulations will become effective. If no hearing is requested, the regulations become effective at midnight on 30th day after notice and filing with Admin Board. In emergencies, the Mayor may make regulations effective before procedure is complete, after which the process must be completed forthwith.”

Thank you.

JBT/ms

Cc: Robert M. Goff, City Solicitor

CITY OF WILMINGTON DEPARTMENT OF FINANCE

PROPOSED AMENDMENT TO EARNED INCOME TAX REGULATIONS

I. PURPOSE

The Director of Finance wishes to amend section 203 of the City of Wilmington Earned Income Regulations to allow for more efficient and equitable administration of the tax in accordance with the purposes of the statute.

II. BACKGROUND

Section 44-116 of the Wilmington City Code gives director of finance authority to prescribe, adopt, and promulgate rules and regulations relating to any matter pertaining to the administration and enforcement of the earned income tax imposed by article V of chapter 44 of the Wilmington City Code.

Section 8-407 of the Charter of the City of Wilmington empowers the Department of Finance to make reasonable regulations as may be necessary and appropriate in the exercise of its powers and the performance of its duties under this Charter or under any statute or ordinance.

Sec. 44-107 provides for the imposition of earned income tax on the following:

- Salaries, wages, commissions and other compensation earned by residents of the City;
- Salaries, wages, commissions and other compensation earned by nonresidents of the City for work done or services performed or rendered in the City;

The City of Wilmington applies earned income tax definitions for “performed and rendered” to mean those service both physically performed while in the limits of the City and/or services rendered by the employee on behalf of employer (including self-employed and limited liability companies) whose personnel location of record is established in the City, regardless of the employee’s physical location.

III. EFFECTIVE DATE

Provided all requirements of section 8-407 of the Charter of the City of Wilmington have been met by June 30, 2020, the provisions of the amended to section 203 of the Earned Income Tax Regulations will apply to earnings taxable in accordance with the taxpayer’s method of accounting on or after July 1, 2020.

III. AMENDMENT

Section 203 of the Earned Income Tax Regulations is deleted and replaced with the following:

SECTION 203 - TAXABLE EARNINGS OF NONRESIDENT EMPLOYEES BASED IN WILMINGTON

- A. Unless otherwise specified in this section, the taxable earnings of a nonresident employee based in the City shall be subject to apportionment. The taxable amount shall be the total salaries, wages, commissions, and other compensation determined under section 101 M multiplied by a fraction, rounded to the nearest one-tenth of one percent, the numerator of which is the number of days worked in the City, and the denominator of which is the number of days worked in the tax year.

The following are excluded from the apportionment computation in this subsection A:

1. Severance or termination pay, which is apportioned in accordance with subsection G.
 2. Income from the exercise of stock options when the individual is no longer employed by the employer, which is apportioned in accordance with subsection I.
 3. Income from restricted stock or similar instruments when the individual is no longer employed by the employer, which is apportioned in accordance with subsection J.
 4. Compensation subject to an alternative allocation or apportionment method for which the taxable amount is determined in accordance with subsection K.
 5. Commissions based on the volume of business transacted, which are apportioned in accordance with section 209.
 6. Salaries, wages and other compensation paid based on a mileage rate to a nonresident transportation industry employee, which are apportioned in accordance with section 210 A.
 7. Salaries, wages, commissions, and other compensation received by a nonresident insurance agent, which are apportioned in accordance with section 210 A 5.
 8. Salaries, wages, commissions, and other compensation received by a nonresident real estate brokers, which are apportioned in accordance with section 211.
- B. A separate computation of the taxable earnings of a nonresident employee based in the City is required for each employer for which the employee worked during the tax year.
- C. The following rules apply to the counting of days and half days worked:
1. A day on which an individual works four hours or more is considered a full day worked.
 2. A day on which an individual works less than four hours is considered a half day worked.
 3. A day on which an individual works four hours or more in Wilmington is considered a full day worked in the City, regardless of the total number of hours worked that day.
 4. A day on which an individual works at least two but less than four hours in Wilmington is considered a half day worked in the City, regardless of the total number of hours worked that day.
 5. A day on which an individual works less than two hours in Wilmington is not considered a day or half day worked in the City.

- D. A nonresident employee based in Wilmington must include days or half days worked at home or a remote location outside the City limits as days worked in the City, unless the employer certifies that either the employee worked remotely for the employer's convenience, or the employer required the employee to work remotely as a condition of employment.

In general, if the employee could have worked at his or her work location in Wilmington but chose to work at a remote location for his or her own convenience, the day or half day shall be regarded as a day worked in the City.

Employers who require employees to work at home or a remote location outside of the City due to but not limited to, workplace and construction work on or utility outages at the employer's premises or situations involving weather-related or government issued public emergencies, making it impossible or unsafe for the employee to report to the workplace, must certify the employee's apportionment and location.

If a public emergency has been lifted or eased and the employee elects or employer allows the employee to continue to work from home or a remote location, such days or half days worked at home will be subject to earned income tax, unless the employer certifies that the employee has permanently ceased providing services or rendering services to the employer's location within the City limits.

- E. Days or half days worked at home or a remote location and excluded from days or half days worked in the City must be identified as such on any wage tax refund claim filed with the Division of Revenue.
- F. The original, signed employer certification stating that days or half days worked at home or remote location are for the convenience of the employer or that the employer required the employee to work at home or a remote location on such days or half days must be attached to any wage tax refund claim filed with the Division of Revenue.
- G. Severance or termination pay, whether voluntary or involuntary, of a nonresident employee based in Wilmington is subject to a separate apportionment computation. Such compensation is excluded in determining taxable earnings in subsection A.
1. The taxable amount of such compensation is the amount of severance or termination pay multiplied by the average of the apportionment percentages for the three most recent full tax years the individual worked for the employer prior to the year of payment of the severance or termination pay.
 2. If the individual worked for the employer for only two full tax years, the average of the apportionment percentages for those two years shall be used in determining the taxable amount.

3. If the individual worked for the employer for only one full tax year, the apportionment percentage for that year shall be used in determining the taxable amount.
 4. If the individual did not work for the employer for a full tax year, the apportionment percentage for the last year in which the individual worked for the employer is used in determining the taxable amount.
 5. If severance or termination pay is paid over the course of more than one tax year, the apportionment percentage determined in this subsection is used for all tax years.
- H. The requirement that an employer certification be attached to a claim for an earned income tax refund is waived if the individual's only earned income for the tax year is severance or termination pay.
- I. A former nonresident employee who was based in Wilmington, whether retired or otherwise who exercises stock options is subject to tax on the income reportable as salaries, wages, commissions, and other compensation for federal income tax purposes, unless the individual is retired and the terms of the option plan do not allow the individual to exercise the options prior to retiring. Such income is apportioned as follows:
1. The taxable amount of such compensation is the amount of income from the exercise of the option multiplied by the average of the apportionment percentages for the three most recent full tax years the individual worked for the employer prior to the year of exercise.
 2. If the individual worked for the employer for only two full tax years, the average of the apportionment percentages for those two years shall be used in determining the taxable amount.
 3. If the individual worked for the employer for only one full tax year, the apportionment percentage for that year shall be used in determining the taxable amount.
 4. If the individual did not work for the employer for a full tax year, the apportionment percentage for the last year in which the individual worked for the employer is used in determining the taxable amount.
- J. A former nonresident employee who was based in Wilmington, whether retired or otherwise, who has income from the vesting or lapse of restrictions on a grant of stock, restricted stock units or any similar form of compensation is subject to City earned income tax on the amount of income reportable as salaries, wages, commissions, and other compensation for federal income tax purposes, unless the terms of the plan under which the stock, restricted stock unit or other similar instrument was granted provide that the restrictions cannot lapse or the instrument cannot vest until after the employee has retired.
- K. A plan which provides that an employee's retirement accelerates the vesting or lapse of restrictions of an equity instrument is not a plan that provides that the restrictions cannot lapse or the instrument cannot vest until after the employee has retired, and any compensation of a nonresident employee as a result of such a plan is subject to City earned income tax.

Earnings of a former nonresident employee who was based in Wilmington, whether retired or otherwise, from the vesting or lapse of restrictions on a grant of stock, restricted stock units or any similar form of compensation are apportioned as follows:

1. The taxable amount of such compensation is the amount of income from the vesting or lapse of restrictions multiplied by the average of the apportionment percentages for the three most recent full tax years the individual worked for the employer prior to the year of exercise.
 2. If the individual worked for the employer for only two full tax years, the average of the apportionment percentages for those two years shall be used in determining the taxable amount.
 3. If the individual worked for the employer for only one full tax year, the apportionment percentage for that year shall be used in determining the taxable amount.
 4. If the individual did not work for the employer for a full tax year, the apportionment percentage for the last year in which the individual worked for the employer is used in determining the taxable amount.
- L. If a nonresident taxpayer can demonstrate that the methods of determining taxable earnings in these regulations do not result in a clear reflection of income earned in the City, the taxpayer may propose an alternative apportionment or allocation method and supply any supporting documentation needed by the Department to make a determination. If the Director agrees that the taxpayer's alternative method produces a result that is equitable for both the taxpayer and the City, then such method may be used to compute taxable earnings. The Director's decision regarding such a proposal is final and not subject to any appeal. A proposal for alternative allocation or apportionment under this subsection must be submitted by April 30, of the year following the tax year for which the taxpayer seeks to use the alternative method.
- M. Payments or other benefits received under the terms of a fellowship, which are made in return for services performed are taxable as earnings under the rules set forth in this section.
- N. Compensation received in property shall be taxed at its fair market value at the time of receipt.
- O. Board and lodging shall be taxed at fair market value. However, the value accepted by State and Federal Government for payroll tax purposes may be accepted by the Director. In the case of domestics and other employees whose duties require them to live at their place of employment, board and lodging shall not be considered taxable compensation.
- P. Earnings which are deferred by a taxpayer as part of a deferred compensation plan, such as an individual retirement account and Keogh plans, profit sharing, stock options, incentive payments, bonuses, vacation pay, etc., must be taxed at time of deferral. Resident employees are subject to tax at 100%, regardless of employment base. Non-resident employees whose employment base is in the City during the year of deferral are subject to the tax at 100%. Non-resident employees whose employment base is in the City during the year of deferral but have allocated travel time

are subject to the tax on the allocation within the City. Non-resident employees whose employment base is out of the City at the time of deferral are not subject to the tax, unless they allocate time worked inside versus outside the City. Any employees that were subject to the tax at the time of deferral and have not been taxed and have elected to draw on this compensation while still employed, should be taxed using their residence and employment base at the time of receipt. Any special circumstances must be presented to the City's Earned Income Tax Division for a determination.

- Q. Guaranteed Payments to Partners. In accordance with Internal Revenue Code Section 707(c); Reg §1.707-1(c), any fixed or guaranteed payments made to partners for services or for the use of capital are generally treated as though paid to an outsider for purposes of computation of partnership gross income and business expense deductions. Thus, guaranteed payments are regarded as part of the recipient partner's distributive share of ordinary income.

J. Brett Taylor
Director of Finance
City of Wilmington, Delaware
June 1, 2020