

TITLE 316 - NEBRASKA DEPARTMENT OF REVENUE

CHAPTER 21 - PROPOSED INCOME TAX WITHHOLDING REGULATIONS

REG-21-001 REQUIREMENT TO WITHHOLD NEBRASKA INCOME TAX

001.01 The following payments to resident or nonresident individuals or businesses are subject to Nebraska income tax withholding.

001.02 Every employer paying any wages to a resident or nonresident individual must deduct and withhold for the Nebraska income tax if:

001.02A The employer is maintaining an office or transacting business in Nebraska;

001.02B The wages are taxable under the Nebraska Revenue Act; and

001.02C The wages are subject to withholding under the Internal Revenue Code (I.R.C.), as amended.

001.03 The income tax withheld for each payroll period must be an amount that will result in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due as the result of including the employee's wages in his or her adjusted gross income.

001.04 Every payor who is paying for personal services performed or to be performed substantially in Nebraska must deduct and withhold income tax if the payments are to a nonresident individual who is not subject to withholding on the payment under the I.R.C., or to a corporation, partnership, or limited liability company (LLC) described Reg-21-001.04C through 001.04C(5).

001.04A Payments made by any person maintaining an office or transacting business in Nebraska to a nonresident individual for personal services are not subject to withholding if the payments made during the year total less than \$600.

001.04B Payments made by any person who is neither maintaining an office, nor transacting business in Nebraska to a nonresident individual for personal services are not subject to income tax withholding if the payments made during the year total less than \$5,000.

001.04C Payments to business entities for personal services performed by nonresident individuals are considered to be payments for personal services that are subject to income tax withholding.

001.04C(1) When a corporation is receiving a payment for personal services performed or to be performed substantially in Nebraska when all or substantially all of the shareholders are the persons performing personal services of the same type, the payment is considered to be wages of the individuals performing the personal

services and subject to the income tax imposed on individuals by the Nebraska Revenue Act. The amount withheld is considered to be income tax withheld from the individuals.

001.04C(2) When a partnership is receiving a payment for personal services performed or to be performed substantially in Nebraska when all or substantially all of the partners are the persons performing personal services of the same type, the payment is considered to be wages of the individuals performing the personal services and subject to the income tax imposed on individuals by the Nebraska Revenue Act. The amount withheld is considered to be income tax withheld from the individuals.

001.04C(3) When a LLC is receiving a payment for personal services performed or to be performed substantially in Nebraska when all or substantially all of the members are the persons performing personal services of the same type, the payment is considered to be wages of the individuals performing the personal services and subject to the income tax imposed on individuals by the Nebraska Revenue Act. The amount withheld is considered to be income tax withheld from the individuals.

001.04C(4) When determining whether all or substantially all of the owners of a corporation, partnership, or LLC are providing personal services subject to withholding under this regulation, all or substantially all means:

001.04C(4)(i) Eighty percent or more of the voting stock of a corporation, 80% or more of the ownership of the partnership, or 80% or more of the ownership of the LLC.

001.04C(4)(ii) A shareholder, partner, or member is considered to own any share of stock, or part of the partnership or LLC that he or she owns directly and every share, or part of the partnership or LLC that he or she is considered to own under the attribution rules of either I.R.C. §§ 267, 318, or 1563(e).

001.04C(5) Personal services do not include services performed where capital furnished by the nonresident individual is a material income-producing factor. Capital is considered a material income-producing factor whenever the value of the use of the capital, or the value of the capital furnished, exceeds 50% of the amount of the payment.

001.04C(6) If more than one of the shareholders, partners, or members of the corporation, partnership, or LLC perform the personal services in Nebraska, the income tax withholding is considered to be divided between the nonresident individual owners performing the personal services in Nebraska in proportion to the ownership in the entity of each shareholder, partner, or member who performed the service in Nebraska.

001.04D Contractors making payments to any contractor or any person that is not an employee for construction services are not subject to the requirement to withhold income tax on these payments.

001.05 Every contractor who is maintaining an office or transacting business in Nebraska and making a payment or payments for construction services performed in Nebraska to any contractor or any person who is not an employee must deduct and withhold income tax equal to five percent of the payments if the recipient of the payment is not included in the Contractor Database. Payments to a contractor for construction services are not subject to withholding if:

001.05A The payments made during the year to the contractor or person total less than \$600; or

001.05B The contractor or person receiving the payment is not subject to tax on the payment because of a treaty obligation of the U.S.

(Neb. Rev. Stat. § 77-2753. October 26, 2014.)

REG-21-002 DEFINITIONS FOR INCOME TAX WITHHOLDING PURPOSES

002.01 For the purposes of Reg-21-001 through Reg-21-019:

002.01A The definitions in Reg-21-002.02 through Reg-21-002.11 apply; and

002.01B The provisions of the I.R.C. and its applicable regulations regarding deductions and withholding of federal income tax by employers apply, (including the meaning of federal terms like payroll period and withholding allowances) except as otherwise specifically provided in these regulations or where the federal rules and definitions are clearly inconsistent with and inapplicable to the provisions of the Nebraska Revenue Act.

002.02 Construction services means services performed by a contractor.

002.03 Contractor means any person engaged in the business of constructing, altering, repairing, dismantling, or demolishing buildings, roads, bridges, viaducts, sewers, water and gas mains, streets, disposal plants, water filters, tanks and towers, airports, dams, levees and canals, water wells, pipelines, transmission and power lines, and every other type of structure, project, development, or improvement within the definition of real and personal property, including constructing, repairing, or altering property to be held either for sale or rental. Contractor also includes any subcontractor engaged in the business of these activities and any person who is providing or arranging for labor for these activities, either as an employee or as an independent contractor, for any contractor or person.

002.04 Contractor Database means the online database maintained by the Department of Labor of contractors registered under the Contractor

Registration Act that provide construction services in the state.

002.05 Department means the Nebraska Department of Revenue.

002.06 Employee means any person defined as an employee under the I.R.C. and any pension recipient, contractor, corporate payee, partnership payee, or nonresident individual from whom Nebraska income tax withholding is required.

002.07 Employer means any person or organization qualifying as an employer for federal income tax withholding purposes and maintaining an office or transacting business in Nebraska.

002.07A The fact that an employer may not be subject to Nebraska income tax is not relevant to the obligation to withhold for income tax purposes.

002.07B Employer includes the state, any political subdivision of the state, the U.S., and any agency or instrumentality of the U.S.

002.07C Employer includes employee leasing companies, professional employer organizations, common paymasters, or any other organizations that provide payroll services for employees that are supervised by another organization.

002.07D For the purposes of these regulations, including filing returns and imposing penalties, employer includes any payor required to withhold under Reg-21-001.04, and any contractor required to withhold under Reg-21-001.05.

002.08 Native American Indian means any enrolled member of a recognized Native American Indian Tribe.

002.09 Payroll record means the payroll check stub, a Federal Form W-2, or any other payroll document the employer furnishes an employee.

002.10 Personal services means services performed by an individual who is not an employee under the I.R.C. for the payor, including, but not limited to: consultants; entertainers; performers; practicing professionals, athletes; public speakers; and service on a corporate or other entity board of directors.

002.11 Wages means any payments that are subject to federal income tax withholding including gambling winnings. For the purposes of these regulations, including filing returns and imposing penalties, the term wages also includes:

002.11A Amounts paid for personal services performed or to be performed in Nebraska from which income tax withholding is required;

002.11B Amounts paid for pensions and annuities when the recipient has requested or when the payor is required to withhold federal income

tax from these payments;

002.11C Amounts paid by a contractor for construction services performed in Nebraska to;

002.11C(1) Another contractor, or

002.11C(2) Any person who is not an employee subject to withholding under Nebraska law.

002.11D Wages include severance payments made upon termination or retirement of an employee pursuant to an employment contract or employer policy if determining the amount of the payments does not require future administration by the employer, and if the payments that were made to the employee prior to termination or retirement were considered wages.

002.11E Wages do not include any employer contributions to retirement plans, such as I.R.C § 401(k) plans, made on behalf of persons subject to federal income tax withholding if the specific contributions are not subject to federal withholding.

(Neb. Rev. Stat. §§ 48-2103 and 48-2117, and 77-2753. October 26, 2014.)

REG-21-003 NEBRASKA EMPLOYER IDENTIFICATION NUMBER

003.01 Each employer will be identified by a Nebraska employer identification number, which will be obtained prior to the first payment of wages subject to Nebraska withholding. To request a Nebraska employer identification number, a Nebraska Tax Application must be completed and forwarded to the Nebraska Department of Revenue, Box 94818, Lincoln, Nebraska 68509-4818. Every application for said number must be completed in each detail and in no event will an employer be considered registered unless the employer has previously obtained or applied for a federal employer identification number. Each employer identification number issued to an employer is a permanent number and the same number will not be issued to any other business entity. Should the character of the business entity change, resulting in a new legal entity, e.g., conversion from a partnership to a corporation, a new identification number must be obtained.

003.02 A Nebraska Withholding Identification Certificate containing the employer's name, address, and assigned Nebraska employer identification number will be issued by the Department of Revenue. This certificate should be maintained in the employer's permanent records. The Nebraska employer identification number is nontransferable and should be referred to on all reports, returns, and correspondence concerning the employer's withholding account.

003.03 An employer who does not maintain centralized payroll records or who has regional pay centers may request an identification number for each separate location that prepares and maintains payroll records. An employer

may also request a separate identification number for the nonresident withholding required by Reg-21-001.02.

(Section 77-2753, R.S.Supp., 1993. May 14, 1994.)

REG-21-004 DETERMINING THE AMOUNT OF INCOME TAX WITHHOLDING

004.01 The Nebraska income tax withheld by an employer from wages must be determined using one of the following income tax withholding methods:

004.01A Method I - The Percentage Method. The amount of income tax to be withheld is determined by subtracting the value of the withholding allowances claimed on the Federal Employee's Withholding Allowance Certificate, Form W-4, from gross wages and taking the result to the withholding rate schedule or multiplied by a comparable flat percentage.

004.01A(1) The Tax Commissioner must publish withholding rate schedules for different pay periods.

004.01A(2) The income levels and rates must be established so that the withholding will approximate the actual income tax liability using the standard deduction and personal exemption credit.

004.01A(3) These rate schedules are published in the Nebraska Circular EN and must be used by the employer to properly calculate the correct amount of withholding on the amount of wages or payments subject to income tax by Nebraska, except payments subject to backup withholding as required by I.R.C. § 3406. The Nebraska Circular EN may be found on the Department's website.

004.01B Method II - The Wage Bracket Method. The amount of income tax to be withheld is determined by taking the gross amount of wages and the number of withholding allowances claimed on the Federal Form W-4 on the appropriate table in the Nebraska Circular EN, and using the amount shown where the row and column intersect. The Nebraska Circular EN, which contains the income tax withholding tables based upon the amount of wages paid, the length of the pay period, the number of federal withholding allowances claimed, and reflecting the above Nebraska withholding schedules, may be found on the Department's website.

004.01C If the calculation by an employer under either Method I or Method II results in income tax withholding from an employee that is less than 1½% of gross wages minus tax-qualified deductions, the employer must obtain from the employee satisfactory evidence that a lesser amount of withholding is justified. Satisfactory evidence includes marriage or birth certificates; Social Security information for dependents; or other evidence that reasonably assures the employer that the employee is not improperly or fraudulently evading or defeating the income tax by reducing or eliminating withholding.

004.02 If supplemental wages such as bonuses, commissions, overtime pay, and sales awards are paid at the same time as regular wages, the income tax to be deducted and withheld is determined as if the total of the supplemental and regular wages were a single wage payment for the regular payroll period. If these supplemental wages are paid at a different time, the employer may determine the amount of income tax withholding by adding the supplemental wages to either the regular wages for the current payroll period, or the regular wages for the last preceding payroll period within the same calendar year; or the employer may elect to withhold on the supplemental wages by using a flat withholding rate as determined and published in the Circular EN by the Tax Commissioner.

004.03 The Nebraska income tax must be withheld based on the same payroll period that is properly used for federal income tax withholding purposes.

004.04 In addition to the income tax required to be withheld under this regulation, an employer and employee may agree in writing that an additional amount will be withheld from the employee's wages.

004.04A The agreement is effective for any period that the parties agree to be bound.

004.04B If the agreement fails to provide a termination date, either party may terminate the agreement, by furnishing written notice to the other party. This notice is effective for the first payment subject to income tax withholding made on or after the beginning of the next calendar quarter occurring at least 30 days after the date the notice is furnished.

004.04C The amount deducted and withheld pursuant to an agreement will be considered income tax required to be deducted and withheld under the Nebraska Revenue Act. All provisions of law and regulations applicable to income tax withholding are also applicable to any amount of income tax deducted and withheld pursuant to the agreement. At no time may the parties agree to withhold an amount less than would be withheld using the established Nebraska withholding rate schedules or tables.

004.05 The amount of income tax withheld from gambling winnings is a flat withholding rate applied to the winnings. The flat withholding rate will be determined and published in the Circular EN by the Tax Commissioner.

004.06 The income tax withheld from pensions and annuities is based on the federal income tax withholding method. The amount of income tax withheld from periodic payments is calculated in the same manner as withholding from wages. The amount of income tax withheld from nonperiodic payments is a flat withholding rate as determined and published in the Circular EN by the Tax Commissioner. The recipient may also select an additional fixed amount to be withheld per periodic or nonperiodic payment. See Reg-21-004.04.

004.07 The amount of income tax withheld from payments for personal services performed or to be performed substantially in Nebraska by a nonresident individual other than an employee is determined under this section.

004.07A If the individual provides a statement of ordinary and necessary business expenses reasonably related to providing the service, the amount of expenses may be deducted for purposes of determining the amount of income tax withholding. The amount claimed for expenses may not exceed 50% of the total amount paid for personal services performed or substantially performed in Nebraska (Nebraska Withholding Certificate for Nonresident Individuals, Form W-4NA).

004.07B For amounts less than \$28,000, paid throughout any calendar year for the same personal services, the rate of income tax withholding is four percent of the total amount after deduction of allowable expenses, if any.

004.07C For amounts of \$28,000 or more, paid throughout any calendar year for the same personal services, the rate of income tax withholding is six percent of the total amount after deduction of allowable expenses, if any.

004.07D If the amount to be paid throughout the calendar year for the same personal services was expected to be less than \$28,000 at the beginning of the calendar year, and the amount withheld was four percent, but the amount paid for the same personal services becomes \$28,000 or more during the calendar year, the amount of income tax withholding for amounts greater than \$28,000 must be increased until the total amount withheld equals six percent for all payments.

004.08 Corporate Directors. Except as provided in Reg-21-004.08B, if a corporation or other entity pays members of its board of directors fees for serving on its board, any amounts paid to nonresident directors is subject to income tax withholding.

004.08A If all meetings are held in Nebraska, the total amount taxable under the I.R.C. is subject to income tax withholding as calculated under this section. If the corporation or other entity holds its meetings both within and outside Nebraska, the total amount taxable under the I.R.C. to the nonresident board member must be multiplied by a fraction, the numerator of which is the number of meetings physically attended by the director in Nebraska or via electronic means while the director is physically located in Nebraska, and the denominator of which is all board meetings attended by the director either physically or electronically. The result is subject to income tax withholding as calculated under Reg-21-004.07.

004.08B The corporation or other entity may, in lieu of withholding under Reg-21-004.07, remit income tax withholding to the Department on behalf of the nonresident directors on the total paid, including the

amounts remitted on behalf of the nonresident directors, multiplied by the highest individual income tax rate.

004.08B(1) If all meetings are held in Nebraska, the amount remitted to the Department is equal to the total amount taxable under the I.R.C., including the amount remitted to the Department on behalf of the nonresident director, multiplied by the highest individual income tax rate.

004.08B(2) If the corporation or other entity holds its meetings both within and outside Nebraska, the total amount taxable under the I.R.C. must first be multiplied by a fraction, the numerator of which is the number of meetings physically attended by the director in Nebraska or via electronic means while the director is physically located in Nebraska, and the denominator of which is all board meetings attended by the director either physically or electronically. The amount remitted to the Department is this result including the amount remitted to the Department on behalf of the nonresident director, multiplied by the highest individual income tax rate.

004.08B(3) If the corporation or other entity elects this option, the nonresident board member may choose not to file a return, and the amount remitted as income tax withholding will be retained in satisfaction of the liability. The nonresident board member may also choose to file a return and claim the withholding as a credit against any Nebraska income tax liability.

004.09 The amount of income tax to be withheld from payments made by a contractor for construction services performed in Nebraska to any contractor or any person that is not an employee is five percent of the total payments. A payment is exempt from withholding under this subsection if:

004.09A The payments made during the year to the person or contractor total less than \$600;

004.09B The contractor making the payment determines that the contractor receiving the payment is registered in the Contractor Database; or

004.09C The contractor or person receiving the payment is not subject to tax on the payment because of a treaty obligation of the U.S.

004.10 Alternative Methods of Withholding. An employer using a federally-approved alternative method of calculating withholding may use the same method for computing the income tax withheld. These methods include annualized wages, average wages, cumulative wages, and other methods allowed under I.R.C. § 3402(h).

(Neb. Rev. Stat. § 77-2753. October 26, 2014.)

REG-21-005 DETERMINING INCOME TAX WITHHOLDING ON WAGES PAID TO A NEBRASKA RESIDENT - WHEN OTHER STATES' WITHHOLDING

APPLIES

005.01 If an employer is required to withhold Nebraska income tax pursuant to Reg-21-001, all wages paid to a resident of Nebraska are subject to withholding even if some or all of his or her work for which the wages are paid was performed outside Nebraska.

005.02 If an employer is required to deduct and withhold income taxes of other states, political subdivisions of other states, or the District of Columbia, from wages paid to a resident of Nebraska, the employer must deduct and withhold the amount of Nebraska income tax withholding determined under these regulations minus the amount required to be deducted and withheld from those wages under the laws, rules, and regulations of another state, political subdivision of another state, or the District of Columbia.

Examples:

005.02A If a Nebraska resident is paid \$1,000 per week by an employer who is required to deduct and withhold both Nebraska and Kansas income taxes from these wages, and the amount of income tax required to be withheld is \$20 for Nebraska and \$12.50 for Kansas, the amount of Nebraska tax required to be deducted and withheld is \$7.50.

005.02B If a Nebraska resident is paid \$1,000 per week by an employer who is required to deduct and withhold both Nebraska and Iowa income taxes from these wages and the amount of income tax required to be withheld is \$20 for Nebraska and \$25 for Iowa, no Nebraska income tax withholding is required.

(Neb. Rev. Stat. §§ 77-2753, and 77-2790. October 26, 2014.)

REG-21-006 DETERMINING INCOME TAX WITHHOLDING ON WAGES PAID TO A NONRESIDENT

006.01 An employer must deduct and withhold Nebraska income tax from all wages paid to an employee who is a nonresident of Nebraska for services performed in Nebraska. The income tax withholding to be deducted is determined according to the methods in Reg-21-004. If the work of a nonresident employee is performed entirely in Nebraska, his or her employer must deduct and withhold income tax from all wages paid to the employee. Wages paid to a nonresident employee for work performed entirely outside of Nebraska are not subject to Nebraska income tax withholding.

006.02 If a nonresident employee works partly in and partly outside Nebraska, the employee may file a Nebraska Nonresident Employee Certificate for Allocation of Withholding Tax, Form 9N, with his or her employer so that the correct amount of Nebraska income tax withholding may be determined. This section does not apply to income tax withholding on gambling winnings, pensions and annuities, nonresidents performing personal services substantially in Nebraska, or persons or contractors

receiving payments from another contractor for construction services performed in Nebraska. The requirements of Reg-21-004.05 through Reg-21.004.09 apply in these situations.

006.03 The employer may withhold Nebraska income tax on the basis of the apportionment shown by the nonresident employee on his or her Form 9N, but must make necessary adjustments during the year so that the proper amount of income tax is withheld and deducted from the employee's wages. For the purpose of making these adjustments, the portion of the employee's wages which is paid for work performed in Nebraska is determined as follows:

006.03A If the work is performed by a traveling sales representative, agent, or other employee whose pay is based directly on the volume of business transacted by him or her, the amount attributable to work in Nebraska is that portion of the wages received from business transacted by the employee in Nebraska bears to the total volume of business transacted.

Example:

Employee's Nebraska sales =	\$1,000
Employee's total sales =	\$5,000
Nebraska's portion of total sales =	20%
Nebraska withholding on total from tables =	\$300
Multiplied by the Nebraska portion of total sales =	20%
Nebraska income tax withholding =	\$60

006.03B For employees paid on an hourly basis, the amount of wages attributable to work in Nebraska is that portion of the total wages, which the total number of hours worked in Nebraska bears to the total number of hours worked.

Example:

Employee's monthly Nebraska hours =	80
Employee's monthly total hours =	160
Nebraska portion of hours =	50%
Nebraska withholding from tables =	\$300
Multiplied by the Nebraska portion of hours =	50%
Nebraska income tax withholding =	\$150

006.03C For employees who are paid on a per-mile basis, the amount of wages attributable to work in Nebraska is that portion of the total wages, which the total number of miles traveled monthly in Nebraska bears to the total number of miles traveled monthly.

Example:

Employee's monthly Nebraska mileage =	2,000
Employee's monthly total mileage =	10,000
Nebraska portion of mileage =	20%
Nebraska withholding from tables =	\$300
Multiplied by Nebraska portion of mileage =	20%
Nebraska income tax withholding =	\$60

006.03D For all other employees, the portion of wages attributable to work in Nebraska is that portion of the total wages paid for working days in Nebraska bears to the total wages paid, not counting nonworking days. Nonworking days means all days given off work, for example weekends, holidays, and days absent because of illness, personal injury, vacation, or leave with or without pay.

Example:

Employee days worked in Nebraska in the month =	10
Total employees days worked in the month =	20
Nebraska portion of the total days =	50%
Nebraska withholding from tables =	\$300
Multiplied by the Nebraska portion of the days =	50%
Nebraska income tax withholding =	\$150

006.03E The apportionment calculations and examples in this section do not apply to income tax withholding on gambling winnings, pensions and annuities, nonresidents performing personal services substantially in Nebraska, or persons or contractors receiving payments from another contractor for construction services performed in Nebraska. The requirements of Reg-21-004.05 through Reg-21.004.09 apply in these situations.

006.04 If an employee expects the portion of work performed in Nebraska to remain approximately the same as the prior year, the employee may compute the percentage of income applicable to the prior years' experience and use that percentage on the Form 9N.

(Neb. Rev. Stat. §§ 77-2733 and 77-2753. October 26, 2014.)

REG-21-007 EMPLOYER'S RETURNS AND PAYMENT OF WITHHELD INCOME TAXES

007.01 Every employer required to deduct and withhold Nebraska income tax from an employee's wages must file a withholding return and pay to the Department the amount required to be deducted and withheld, or the amount actually deducted and withheld, whichever is larger. The return must be filed using the Nebraska Withholding Return, Form 941N.

007.01A A Form 941N is required for each filing period or portion of a filing period. A return must be filed for every filing period, even if there

has been no income tax withholding.

007.01B The filing period is the reporting frequency as assigned by the Department. For most employers, it will be quarterly, but employers who have liabilities of \$500 or less for a calendar year, and employers that are allowed to file their federal returns annually may be assigned an annual filing frequency.

007.01C The Form 941N must be received by the Department, or postmarked, on or before the last day of the month following the close of each filing period.

007.01D Employers who file a Form 941N must file the form and pay the Department in the manner and method that the Tax Commissioner prescribes for the efficient and proper administration of the Nebraska Revenue Act, including filing and paying electronically. Taxpayers may access the electronic filing (e-file) program and the electronic payment options from the Department's website.

007.02 When the total amount to be deducted and withheld by any employer for either the first or second month in a calendar quarter exceeds \$500, the employer must make monthly deposits by filing a Nebraska Monthly Withholding Deposit, Form 501N, with the Department. The Form 501N must be filed on or before the 15th day of the second and third month of each calendar quarter. The amounts paid are allowed as a credit against any liability shown on the employer's next quarterly Form 941N.

007.02A Form 501N is not required when monthly payments are made electronically.

007.03 On or before February 1 of each year, each employer must file with the Department a copy of each statement furnished to each of its employees showing the total Nebraska income taxes withheld from wages during the prior calendar year. This statement is the state copy of Federal Form W-2. Any employer who furnishes more than 50 statements for any year must electronically file (e-file) the required copies in the manner approved by the Department. Taxpayers may access the e-file program from the Department's website.

007.04 The employer must also file a Nebraska Reconciliation of Income Tax Withheld, Form W-3N, on or before February 1 of each year in accordance with Reg-21-013.

007.05 The last Form 941N for any employer who discontinues business or permanently ceases to pay wages must be clearly marked "Final Return." This Form 941N and the full payment for amounts deducted and withheld must be sent to the Department. The employer must also file a completed Form W-3N, and the state copies of Federal Form W-2, for the part of the calendar year that the employer operated its business or paid wages.

007.06 An employer who ceases to pay wages temporarily, including an employer engaged in seasonal activities, must continue to file all applicable

Form 941Ns.

007.07 Every employer which is considered to be a successor of another employer under the I.R.C., is a successor for Nebraska income tax withholding purposes and must file returns and make payments for Nebraska in a similar manner.

(Neb. Rev. Stat. §§ 77-1784 and 77-2756. October 26, 2014.)

REG-21-008 INFORMATION STATEMENTS

008.01 Every employer required to deduct and withhold income tax from an employee's wages must furnish to each employee a statement, on a Federal Form W-2, showing the amount of wages paid by the employer to the employee during the calendar year, the amount deducted and withheld, and all other information required to be shown on the Federal Form W-2. To meet this requirement, an employer must furnish his or her employee with a "state copy" and an "employee's copy" of the completed Federal Form W-2.

008.02 The required statement must be furnished to the employee on or before February 1 following the close of the calendar year. If his or her employment is terminated before the close of the calendar year, the employer must provide the employee a copy of the Federal Form W-2 within 30 days after the last payment of wages is made.

008.03 Every payor required to deduct and withhold income tax from a payment to a nonresident individual under Reg-21-001.04A or Reg-21-001.04B must furnish a statement showing the amount of the payments and withholding on a Federal Form 1099-MISC to the payee.

008.04 Every payor required to deduct and withhold income tax from a payment to a corporation, partnership, or limited liability company (LLC) under Reg-21-001.04C must furnish a statement showing the amount of the payments and withholding on a Federal Form 1099-MISC to each shareholder, partner, or member of the corporation, partnership, or LLC who performed services in Nebraska.

008.04A The total amount of the payment must be divided among the shareholders, partners, or members performing the service in Nebraska according to each of their ownership interests in the corporation, partnership, or LLC. The amount of income tax withheld is computed on the total payment to the corporation, partnership, or LLC, and must be divided among the shareholders, partners, or members in a similar manner. The amount of withholding will be allowed as a credit on the Nebraska individual income tax returns of the shareholders, partners, or members.

008.04B If the corporation, partnership, or LLC fails to furnish the payor the information necessary to prepare the Federal Form 1099-MISC for the shareholders, partners, or members, the payor must prepare the Federal Form 1099-MISC in the name of the corporation, partnership, or LLC and deliver the copies normally given to the employee to the Department in the

same manner as forms that cannot be delivered under Reg-21-013.02.

008.05 Every contractor required to deduct and withhold income tax from a payment to a person or contractor performing construction services in Nebraska under Reg-21-001.05 must furnish a statement showing the amount of the payments and withholding on Federal Form 1099-MISC to the payee.

(Neb. Rev. Stat. §§ 77-2754 and 77-2756. October 26, 2014.)

REG-21-009 PAYMENTS THAT ARE NOT SUBJECT TO INCOME TAX WITHHOLDING

009.01 The income tax withholding requirement does not apply to wages paid to a Native American Indian who resides in Nebraska in Indian country, as defined in federal law, for services performed in Indian country in Nebraska. If the services are performed both in and outside Indian country in Nebraska, the allocation procedure in Reg-21-006.02 must be used or the employer must withhold from the entire amount of the wages.

009.02 The income tax withholding requirement does not apply to a Nebraska nonresident employee for services performed in more than one state who is exempted from Nebraska income tax by federal law covering certain railroad, motor carrier, and airline employees.

009.03 The income tax withholding requirement does not apply to nonresident members of the U.S. Uniformed Forces, or spouses of these servicemembers who are residents of the same state as the servicemember and are in Nebraska to accompany the servicemember.

(Neb. Rev. Stat. § 77-2753, 49 U.S.C. 11502, & 14503, Oklahoma Tax Com'n v. Sac and Fox Nation, 508 U.S. 114 (1993), McClanahan v Arizona State Tax Comm'n, 411 U.S. 164 (1973), and Bryan v Itaska County, Minnesota, 426 U.S. 373 (1976). October 26, 2014.)

REG-21-010 INCOME TAX WITHHOLDING EXEMPTIONS

010.01 Except as provided in Reg-21.010.01B, when determining the proper amount of income tax to be deducted and withheld from an employee's wages, the employer will allow the number of exemptions claimed by the employee on his or her Employee's Withholding Allowance Certificate, Federal Form W-4, for federal income tax purposes.

010.01A An employer must retain a completed copy of the Federal Form W-4 for audit purposes.

010.01B If the calculation by an employer using the number of claimed exemptions results in income tax withholding from an employee that is less than 1½% of gross wages minus qualified tax deductions, the employer must obtain satisfactory evidence from the employee that a lesser amount of withholding is justified. Satisfactory evidence includes birth certificates or Social Security information for dependents or other

evidence that reasonably assures the employer that the employee is not improperly or fraudulently evading or defeating the income tax by reducing or eliminating withholding.

010.02 Nebraska income tax withholding is not required if the employer properly accepts a Federal Form W-4 claiming an exemption from federal income tax withholding because the employee had no federal income tax liability the previous year and expects no federal income tax liability for the current year.

010.03 Any employee who receives a state income tax credit, except the personal exemption credit, that is not based on a federal income tax credit may request the employer to apply for permission from the Tax Commissioner for an alternative method of calculating the proper amount of income tax withholding.

010.03A The application must be made in writing by the employer. The application must include:

010.03A(1) A proposed alternative method of determining the income tax withholding;

010.03A(2) The identification of the specific employee for whom the method will be used; and

010.03A(3) The type and expected amount of the credit.

010.03B The income tax withholding must exceed the estimated tax liability by more than \$300 for the Tax Commissioner to consider an alternative method of calculation.

(Neb. Rev. Stat. § 77-2753(2). October 26, 2014.)

REG-21-011 NEBRASKA INCOME TAX WITHHOLDING TO BE SEPARATELY STATED

011.01 In each payroll record furnished to an employee by the employer for any purpose, the amount of Nebraska wages and income tax withholding must be stated separately from the wages and withholding for any other jurisdiction.

(Neb. Rev. Stat. §§ 77-2753 and 77-2772. October 26, 2014.)

REG-21-012 CREDIT FOR INCOME TAX WITHHELD BUT NOT REMITTED TO THE DEPARTMENT

012.01 Any amount of income tax actually deducted and withheld from a payment to an employee by an employer is deemed to have been paid to the Department on behalf of the employee, and may be taken as a credit on the employee's income tax return even if the employer subsequently fails to remit the withheld income tax to the Department. To claim the credit on the income tax return for the taxable year, the employee must attach the state

copy of Federal Form W-2 or 1099-MISC.

(Neb. Rev. Stat. § 77-2755. October 26, 2014.)

**REG-21-013 MANNER OF FILING NEBRASKA RECONCILIATION OF
INCOME TAX WITHHELD AND STATE COPIES OF FEDERAL FORMS W-2**

013.01 Electronic Filing. Any employer who furnishes more than 50 Federal Forms W-2, Forms 1099-MISC, or other statements reporting withholding for a year must electronically file (e-file) the required copies in a manner approved by the Tax Commissioner that is compatible with federal e-file requirements or methods.

013.02 Undeliverable Forms. If an employer cannot deliver any employee copies of Federal Forms W-2 or 1099-MISC to employees after reasonable effort, these employee copies must be transmitted with the Nebraska Withholding Return, Form 941N, due the following July accompanied by a signed letter explaining that they were submitted because they could not be delivered to the employees.

013.03 Corrected or Reissued Forms. When Federal Forms W-2 or 1099-MISC are corrected by the employer or are reissued, these forms must be clearly marked either “corrected by employer” or “reissued by employer” and copies must be furnished to the employee and to the Department. If a correction is necessary, the employer may also use Federal Form W-2c to make the correction.

013.04 All Copies to be Complete and Legible. All copies of any forms prepared by the employer and furnished to the employee or to the Department must be completed in full, including the ID of the employer and the state income tax withholding, and must be legible. If the copies are not fully completed or are not legible, they will not be considered furnished by the employer in compliance with the law, and the employer may be subject to the penalties for noncompliance as provided in Reg-21-016.

013.05 Retention of Records Every employer must retain copies of all forms filed with the Department and copies of all documents furnished to employees for at least three years. If the employer reports information electronically, the employer may retain the supporting documentation or an electronic copy. If the Department issues a balance due notice or a notice of proposed deficiency determination for a taxable year, the taxpayer must retain all records relating to that taxable year until the balance due or proposed deficiency determination has been satisfied, abated, settled, or disallowed, and has become final.

013.06 Availability of Records. The Department, or its agents, has the right to examine, inspect, or make and retain copies of any records, electronic media, and equipment of any person to audit or review the accuracy of any income tax withholding return filed; or if no return is filed by the person, to ascertain and determine the amount that must be paid.

013.07 Administrative Subpoena. The Tax Commissioner may require any person to provide records that are necessary to make a proper determination of any person's compliance with and the liability under the laws of this state. If a reasonable request to produce records is refused, the Tax Commissioner may issue an administrative subpoena.

013.07A An administrative subpoena must clearly state the scope of the demand for records and any other requirements, and state when, where, and how to comply with the administrative subpoena.

013.07B An administrative subpoena may be enforced by the Attorney General, acting on behalf of the Tax Commissioner, in an action filed in the district court for Lancaster County.

013.07C The Tax Commissioner may also apply to the district court of the county of residence for an individual, for an order directing compliance with the request for records. If the records are in the custody of a corporation, partnership, or LLC the order may be directed to any principal officer of the corporation, or any principal officer, responsible partner, or responsible member of the partnership or LLC. If any individual refuses an order from the district court, he or she is guilty of contempt of court.

013.08 Records Reconstruction. Records that are destroyed by a natural disaster should be reconstructed by the taxpayer to the greatest extent possible from records kept by financial institutions, employers, vendors, and others.

(Neb. Rev. Stat. §§ 77-375, 77-2756, 77-2771, 77-2772, 77-2786(1), 77-27-109, 77-27,115, and 77-27,119(3). October 26, 2014.)

REG-21-014 EMPLOYER'S LIABILITY FOR INCOME TAX WITHHOLDING

014.01 Every employer required to deduct and withhold Nebraska income tax from the wages of an employee is liable for payment of the withholding whether or not it is collected from the employee. For purposes of assessment and collection, any amount required to be withheld and paid to the Department, plus any additions, penalties, or interest, is considered a tax obligation of the employer.

014.02 Any amount of income tax actually withheld from employees constitutes a special fund held in trust for the Department.

014.03 No employee has any right of action against an employer regarding any income tax deducted and withheld from wages and paid to the Department in compliance with or intended to be in compliance with the Nebraska Revenue Act.

(Neb. Rev. Stat. § 77-2757. October 26, 2014.)

REG-21-015 EMPLOYER'S FAILURE TO WITHHOLD INCOME TAX

015.01 If any employer fails to deduct and withhold income tax as required under the Nebraska Revenue Act, but the employee ultimately pays any income tax that is due when he or she files the return that relates to the withholding, the employer will not be assessed a deficiency for the withholding, but may be assessed penalties, interest, or other additions related to the failure to deduct and withhold income tax.

015.02 The employer is not relieved from liability for payment of the income tax withholding unless he or she can prove that the employee's individual income tax has been paid.

(Neb. Rev. Stat. § 77-2758. October 26, 2014.)

REG-21-016 PENALTIES FOR FAILURE TO WITHHOLD AND REMIT INCOME TAXES, FILE RETURNS, OR FILE FEDERAL FORM W-2

016.01 Any employer who fails to file any income tax withholding return by the required due date is subject to a penalty of 5% of the amount required to be shown on the return for each month or portion of a month the return is late, up to 25%, or \$25, whichever is greater.

016.01A Penalties assessed under Reg-21-016.01 are due and payable at the time the assessment is final. If the amounts due are not paid when final, an additional penalty of 10% of the total amount due, excluding interest and other penalties, will be added to the amount due.

016.01B The penalty may be abated if the employer can show that there was a reasonable cause for the late filing and that it was not the result of willful neglect.

016.01C For purposes of determining the amount of the penalty, the amount shown on the return is reduced by the amount paid prior to the due date and any credit properly claimed on the return.

016.02 If an employer withholds income tax from employees' wages but fails to file a Form 941N and remit the amount withheld, the employer is liable for those taxes and interest at the rate specified in Neb. Rev. Stat. § 45-104.02 from the due date of the return until the date payment is received. In addition, the employer is liable for a penalty of 5% of the amount unpaid. If the penalty is not paid within 10 days of the notice and demand for payment, interest also applies to the amount of the penalty.

016.03 If the employer fails to withhold the proper amount of income tax withholding as required under the Nebraska Revenue Act interest will be imposed at the rate specified in Neb. Rev. Stat. § 45-104.02, on the amount which should have been withheld and paid. The employer is also subject to a 5% penalty on the amount which should have been withheld and paid to the Department.

016.04 If the nonpayment of income tax withholding to the Department is a result of fraud by the employer, the amount of penalty is 50% of the unpaid

amount instead of 5%.

016.05 If the employer willfully fails to collect the proper amount of income tax withholding, account for and pay over the proper amount of income tax withholding, or willfully attempts to evade or defeat the income tax withholding obligation, the penalty is 100% of the amount evaded, not collected, or not accounted for and paid, instead of 5% or 50%.

016.06 If it can be determined that the employer acted with fraudulent intent, the Department may assess an additional penalty of up to \$1,000.

016.07 In situations described by Reg-21-016.04 through Reg-21-016.06, the employer is subject to interest at the rate specified in Neb. Rev. Stat. § 45-104.02, on the amount due and on any penalty not paid within 10 days of notice and demand for payment.

016.08 A penalty of \$500 for each occurrence may be assessed if any person, for frivolous or groundless reasons, or with intent to delay or impede the administration of the Nebraska income tax:

016.08A Fails to file a return or to pay any income tax due; or

016.08B Files what purports to be a return that does not contain sufficient information to calculate the liability or indicates that the self-assessed liability is substantially incorrect.

016.08C This penalty is in addition to any other penalties that may be imposed.

016.09 If any employer fails to file the state copy of Federal Form W-2 with the Department, or fails to provide the statement of income tax withholding to the payee, on or before the due date, or on or before the due date resulting from an extension, the employer is subject to a penalty of \$2 for each statement not filed. If the employer can prove that the failure to properly file was the result of a reasonable cause and not negligence, the Department will not assess this penalty. The maximum penalty assessable under this regulation on any one employer during any calendar year is \$2,000.

016.10 If any employer employing 25 or more employees fails to either: (a) withhold at least one and one-half percent of the wages of any employee; or (b) obtain satisfactory evidence from the employee justifying a lower withholding amount as required by Neb. Rev. Stat. § 77-2753(1)(b), the employer may be assessed a penalty of not more than \$1,000 per violation.

016.11 If any nonresident individual provides false information to an employer or payor regarding wages subject to Nebraska income tax withholding, which resulted or would result in the amount of income tax withholding being less than 75% of the correct amount, or if any employer knowingly uses this false information, the employer or individual may be assessed a penalty equal to the total amount of income tax withholding evaded and \$1,000.

016.12 Willful failure to keep, retain, or make available any records as required under this regulation is a Class II misdemeanor. If records are destroyed in a natural disaster, the failure to retain those records is not considered willful.

016.13 Criminal Penalties

016.13A Any taxpayer, with intent to evade or defeat the Nebraska income tax, who claims an excessive number of exemptions is guilty of a Class II misdemeanor.

016.13B Any person who willfully attempts in any manner to evade the Nebraska income tax is guilty of a Class IV felony, in addition to any other penalties.

016.13C Any person required to withhold, deduct, and truthfully account for and pay over any income tax withholding who willfully fails to withhold, deduct, or truthfully account for and pay over is guilty of a Class IV felony, in addition to other penalties.

016.13D Any person who willfully makes and signs any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and who does not believe the return, statement, or document to be true and correct as to every material matter, is guilty of a Class IV felony.

016.13E Any person who willfully aids or procures the preparation or presentation of a return, affidavit, claim, or other document, which is fraudulent or which is false as to any material matter, is guilty of a Class IV felony.

016.13F Statute of Limitations. The statute of limitations for criminal prosecution for the offenses in this section is four years after the commission of the offense except that any violation of Reg-21-016.12A or C is three years after the commission of the offense.

(Neb. Rev. Stat. §§ 77-2757, 77-2758, 77-2788, 77-2789, 77-2790, 77-27,113, 77-27,114 and 77-27,116. October 26, 2014.)

REG-21-017 REPEALED

REG-21-018 DEPARTMENT MAY REQUIRE AN EARLY RETURN AND PAYMENT OF INCOME TAX WITHHELD

018.01 The Department may, after notice is given to the employer, require the employer to file a return and pay the income tax deducted and withheld by the employer at any time, or at frequent intervals, if the Department determines this action is necessary to assure that the income tax withheld is remitted to the Department.

018.02 Whenever any employer fails to collect, trustfully account for, pay, or file a return as required by the Nebraska Revenue Act, the Department may give notice requiring the employer to collect any income tax withholding which becomes collectible after receiving the notice, and pay the withholding immediately to the Department electronically, by certified check, or by bank draft. The interval of this collection and remittance may be as frequent as the end of each payroll period. The Department may require that the payment must be received as early as the next business day following the close of the payroll period. A notice of these requirements remains in effect until the Department serves a notice of cancellation on the employer.

018.03 All notices described in this regulation may be served personally or by first class mail, to the last known address of the employer in the records of the Department.

(Neb. Rev. Stat. § 77-2756. October 26, 2014.)

REG-21-019 CORRECTING MISTAKES IN INCOME TAX WITHHOLDING

019.01 If less than the correct amount of income tax withholding is paid by the employer to the Department, a proper adjustment must be made on the first return filed after the error is discovered. If no withholding is deducted, or if less than the correct amount is withheld from any wages, the employer may deduct the amount of undercollection from later wages paid to the employee. The employer is liable to the Department for any underpayment, and reimbursement of the employer is between the employer and the employee.

019.02 In any filing period, if more than the correct amount of income tax withholding is deducted from any wages and paid to the Department, the excess deducted will not be repaid directly to the employer or to the employee. The Department may credit any overpayment against any income tax liability of the employee. Any balance will be refunded pursuant to the law regarding refunds.

019.03 If there has been an overpayment of income tax withholding to the Department by the employer, a refund will be made to the employer, but only to the extent that the amount of overpayment was not actually deducted and withheld by the employer from any wages.

(Neb. Rev. Stat. §§ 77-2753, 77-2757, and 77-2791. October 26, 2014.)

REG-21-020 REPEALED

