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PROPOSED INCOME TAX WITHHOLDING REGULATIONS
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Neb. Rev. Stat. § 77-2753. ~~November 11, 1998~~____.

NEBRASKA DEPARTMENT OF REVENUE
PROPOSED WITHHOLDING REGULATIONS
TITLE 316, CHAPTER 21

REG-21-001 ~~REQUIREMENTS OF WITHHOLDING TAX FROM WAGES~~ 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 ~~within the State of~~ in Nebraska; ~~and~~

001.02B The wages ~~making payment of any wages that~~ are taxable under the Nebraska Revenue Act ~~of 1967, as amended,~~; and

001.02C The wages are subject to withholding under the Internal Revenue Code (I.R.C.), as amended~~, to a resident or nonresident individual shall deduct and withhold from such wages~~.

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

~~001.02~~ 001.04 Every payor who is ~~making payment~~ paying for personal services performed or to be performed substantially in ~~this state to~~ Nebraska must deduct and withhold income tax if the payments are to a nonresident individual who is not subject to withholding on ~~such~~ the payment under the ~~Internal Revenue Code~~ I.R.C., or to a corporation, partnership, or limited liability company (LLC) described in ~~this subsection shall~~ Reg-21-001.04C through 001.04C(5) ~~deduct and withhold from such payment for the Nebraska individual income tax~~.

~~001.02A~~ 001.04A Payments ~~to a nonresident for personal services a~~ made by any person ~~engaged in~~ maintaining an office or transacting business in ~~this state or with a business location in this state~~ Nebraska to a nonresident individual for personal services are not subject to withholding if the payments made during the year total less than ~~six hundred dollars ($600.00)~~.

~~001.02B~~ 001.04B Payments ~~to a nonresident~~ made by any person who is neither maintaining an office, nor transacting business in Nebraska to a nonresident individual for personal services ~~made by any person not included in 001.02A above~~ are not subject

to income tax withholding if the payments made during the year total less than ~~five thousand dollars ($5,000.00)~~.

~~001.03~~ 001.04C Payments to ~~the following~~ business entities for personal services performed by ~~nonresidents~~ nonresident individuals are considered to be payments for personal services that are subject to income tax withholding ~~under this regulation~~.

~~001.03A~~ 001.04C(1) ~~For~~ When a corporation ~~which~~ is receiving a payment for personal services performed or to be performed substantially in ~~this state and of which~~ Nebraska when all or substantially all of the shareholders are the persons performing personal services of the same type, ~~such~~ the payment ~~shall be deemed the~~ 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 ~~of 1967~~. The amount withheld ~~shall be deemed~~ is considered to be income tax withheld from the individuals.

~~001.03B~~ 001.04C(2) ~~For~~ When a partnership ~~which~~ is receiving a payment for personal services performed or to be performed substantially in ~~this state and of which~~ Nebraska when all or substantially all of the partners are the persons performing personal services of the same type, ~~such~~ the payment ~~shall be deemed~~ 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 ~~of 1967~~. The amount withheld ~~shall be deemed~~ is considered to be income tax withheld from the individuals.

~~001.03C~~ 001.04C(3) ~~For~~ When a ~~limited liability company~~ LLC ~~which~~ is receiving a payment for personal services performed or to be performed substantially in ~~this state and of which~~ Nebraska when all or substantially all of the members are the persons performing personal services of the same type, ~~such~~ the payment ~~shall be deemed~~ 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 ~~of 1967~~. The amount withheld ~~shall be deemed~~ 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. ~~November 11, 1998~~_____.)

REG-21-002 DEFINITIONS FOR INCOME TAX WITHHOLDING ~~TAX~~ PURPOSES

002.01 For the purposes of ~~these regulations,~~ 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 ~~the~~ provisions of the ~~Internal Revenue Code (IRC)~~ I.R.C. and its applicable regulations ~~with respect to~~ regarding deductions and withholding of federal income tax by employers apply, (including the meaning of ~~the various~~ federal terms ~~(such as~~ like ~~employer, employee, wages,~~ payroll period~~,~~ and withholding allowances)~~ shall apply~~ ~~for Nebraska purposes,~~ except as otherwise specifically provided in these regulations or where ~~such~~ the federal rules and definitions are clearly inconsistent with and inapplicable to the provisions of the Nebraska Revenue Act ~~of 1967, as amended~~.

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.

~~002.02~~ 002.07~~An employer is~~ Employer means any person or organization qualifying as an employer for federal income tax withholding purposes and maintaining an office or transacting business ~~within~~ in Nebraska~~, whether or not a paying agency is maintained within the state~~.

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 ~~002.02A~~ Employer ~~also~~ includes the ~~State of Nebraska~~ state, ~~or~~ any political subdivision~~, agency, or instrumentality~~ ~~thereof~~ of the state, ~~and~~ the ~~United States~~ U.S., ~~or~~ and any agency or instrumentality ~~thereof~~ of the U.S.

~~002.02B~~ 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 ~~the~~ filing ~~of~~ returns and ~~the imposition of~~ imposing penalties, ~~the term~~ employer ~~shall also include~~ includes any payor required to withhold under Reg-21-001.04, ~~Reg-21-001.02~~, and any contractor required to withhold under Reg-21-001.05.

~~002.03 Employee shall mean any person defined as an employee under the IRC and shall also include the nonresident individual, partnership, or corporate payee from whom withholding is required.~~

~~002.04 For the purposes of withholding from nonresidents not subject to federal withholding, personal services does not include services performed where capital furnished by the nonresident is a material income-producing factor. Capital will be considered a material income-producing factor whenever the value of the use of capital, or the value of the capital furnished, is in excess of 50 per cent of the amount of the payment.~~

~~Examples of such services include the construction of improvements to real estate where the nonresident contractor furnishes the materials incorporated into the improvement, or custom combining where the nonresident furnishes the machinery and equipment used.~~

~~002.05 Substantially all shall mean:~~

~~002.05A For a corporation, the shareholders who own eighty per cent of the voting stock. A shareholder will be considered as owning any share of stock owned directly and every share he or she is considered to own under either IRC section 267 or 318, and~~

~~002.05B For a partnership, the partners who own eighty per cent of the partnership. A partner will be considered as owning any part of the partnership owned directly, and all parts of the partnership he or she is considered to own under either IRC section 267 or 318.~~

~~002.06.~~ 002.08 Native American ~~Reservation~~ Indian ~~shall mean~~ means any enrolled member of a recognized Native American Indian Tribe~~, or any person who is at least one-fourth Native American Indian blood, who resides in Nebraska on a Native American Indian reservation~~.

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.

~~002.07 Reservation shall mean all land within the original boundaries of any Native American Indian Reservation in Nebraska which has not been specifically removed by Act of Congress or Executive Order.~~

002.11 ~~002.08~~ Wages ~~shall include~~ 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:

~~002.08A~~002.11A ~~Wages shall also include the amount~~ Amounts paid for personal services performed or to be performed in ~~this state~~ Nebraska from which income tax withholding is required~~.~~;

~~002.08B~~002.11B ~~Wages shall also include the amount~~ Amounts paid for pensions and annuities when the recipient has requested or when the payor is required to withhold federal income tax from ~~such~~ 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.

~~002.08C~~002.11E Wages ~~shall~~ do not include any employer contributions to retirement plans, such as I.R.C ~~section~~ § 401(k) plans, made on behalf of persons subject to federal income tax withholding ~~on payments from the employer~~ if the specific contributions are not subject to federal withholding.

~~002.09 Federal Form W-2 shall include all versions of the form for reporting different payments subject to federal withholding, including the Federal Form W-2G, Federal Form 1099-R, and Federal Forms 1099-MISC reporting nonresident withholding.~~

(Neb. Rev. Stat. §§ 48-2103 and 48-2117, and 77-2753.~~ March 7, 2006~~ _____.)

REG-21-004 DETERMINING ~~TAX TO BE WITHHELD~~ THE AMOUNT OF INCOME TAX WITHHOLDING

004.01 The Nebraska income tax ~~to be~~ withheld by an employer ~~or a payor~~ from wages must be determined ~~in accordance with~~ using one of the following income tax withholding methods ~~on wages and other payments subject to withholding~~:

004.01A Method I - The ~~percentage method~~ Percentage Method. The amount of income tax to be withheld ~~will be~~ is determined by subtracting ~~from the gross wages~~ 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 ~~at~~ multiplied by a comparable flat percentage.

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

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

004.01A(3) These rate schedules ~~as~~ are published in the Nebraska Circular EN~~, Nebraska Tax Withholding,~~ ~~will~~ and must be ~~applied~~ 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 ~~and subject to the withholding tax under the Internal Revenue Code~~, except payments subject to ~~Subtitle C, Chapter 24, section~~ 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~~ Wage Bracket Method. The amount of income tax to be withheld ~~will be~~ is determined by taking the gross amount of wages and the number of withholding allowances claimed on the Federal Form W-4 ~~to~~ on the appropriate table in the Nebraska Circular EN, and using the amount shown where the row and column intersect. ~~All employers and payors that hold an active Nebraska Withholding Identification Certificate will be mailed the~~ The Nebraska Circular EN, ~~Nebraska Tax Withholding,~~ which contains the income tax withholding ~~tax~~ 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 ~~Where~~ 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 ~~should be~~ 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 ~~tax to be withheld~~ amount of income tax withholding by adding the supplemental wages to either ~~to~~ the regular wages for the current payroll period, or ~~to~~ 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 ~~State~~ Tax Commissioner.

004.03 The Nebraska income tax ~~is to~~ must be withheld based on ~~the basis of~~ the same payroll period ~~which~~ 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 ~~and a payor and payee may agree that an additional amount be withheld from the payment subject to withholding~~.

> 004.04A The agreement is effective for ~~such~~ any period ~~as~~ that the ~~employer and employee or the payor and payee mutually~~ parties agree to be bound.
>
> 004.04B If the agreement fails to provide a termination date, either ~~the employer or the employee or the payor or the payee~~ party may terminate the agreement, by furnishing ~~a~~ written notice to the other party~~,~~. ~~may terminate the agreement~~ This notice is effective ~~with respect to~~ for the first payment subject to income tax withholding made on or after the beginning of the next calendar quarter ~~which occurs~~ occurring at least 30 days after the date ~~on which such~~ the notice is furnished.
>
> ~~004.05~~ 004.04C The amount deducted and withheld pursuant to an agreement ~~as described in the above paragraph shall~~ will be considered ~~as~~ income tax required to be deducted and withheld under the Nebraska Revenue Act~~,~~. ~~and all~~ All provisions of law and regulations applicable to ~~such tax~~ income tax withholding are also applicable ~~with respect~~ to any amount of income tax deducted and withheld pursuant to ~~such~~ the agreement. At no time ~~can an employee and employer or a payor and payee~~ may the parties agree to withhold an amount less than would be withheld using the established Nebraska withholding rate schedules or tables.

~~004.06~~ 004.05 The amount of income tax ~~to be~~ withheld from gambling winnings ~~shall be~~ is a flat withholding rate applied to the winnings. The flat withholding rate ~~shall~~ will be determined and published in the Circular EN by the ~~State~~ Tax Commissioner.

~~004.07~~ 004.06 The ~~amount~~ income tax ~~to be~~ withheld from pensions and annuities ~~shall be~~ is based on the federal income tax withholding method. The amount of income tax ~~to be~~ withheld from periodic payments ~~shall be~~ is calculated in the same manner as withholding from wages. The amount of income tax ~~to be~~ withheld from nonperiodic payments ~~shall be~~ is a flat withholding rate ~~applied to such payment. The flat withholding rate~~ ~~shall be~~ as determined and published in the Circular EN by the ~~State~~ 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.

~~004.08~~ 004.10 **Alternative** ~~methods of withholding~~ **Methods of Withholding**. An employer using a federally-approved alternative method of calculating withholding may use the same method for computing ~~state~~ the income tax withheld. ~~Such~~ These methods include ~~Annualized Wages, Average Wages, Cumulative Wages~~ annualized wages, average wages, cumulative wages, and other methods allowed under ~~Internal Revenue Code section~~ I.R.C. § 3402(h).

(Neb. Rev. Stat. § 77-2753. ~~March 7, 2006~~_____.)

REG-21-005 DETERMINING ~~TAX TO BE WITHHELD~~ 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, ~~then~~ all wages paid to a resident of Nebraska are subject to withholding even ~~though~~ if some or all of his or her work ~~services~~ for which the wages are paid ~~are~~ was performed outside ~~of~~ Nebraska.

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

Examples:

> 005.02A If a Nebraska resident ~~of Nebraska~~ is paid ~~$100~~ $1,000 per week by an employer who is required to deduct and withhold ~~from his or her wages~~ both Nebraska and Kansas income taxes from these wages, and ~~if~~ the amount of income tax required to be withheld is ~~$2.00~~ $20 for Nebraska and ~~$1.26~~ $12.50 for Kansas, the amount of Nebraska tax required to be deducted and withheld is ~~$0.74~~ $7.50.
>
> 005.02B If a Nebraska resident is paid ~~$100~~ $1,000 per week by an employer who is required to deduct and withhold ~~from his or her wages~~ both Nebraska and Iowa income taxes from these wages and ~~if~~ the amount of income tax required to be withheld is ~~$2.00~~ $20 for Nebraska and ~~$2.50~~ $25 for Iowa, ~~then~~ no Nebraska ~~tax is to be withheld~~ income tax withholding is required.

(Neb. Rev. Stat. §§ ~~77-2715 and~~ 77-2753, and 77-2790. ~~September 15, 1975~~_____.)

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

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

006.02 If a nonresident employee ~~performs services~~ works partly ~~within~~ in and partly ~~without~~ outside Nebraska, ~~he~~ the employee ~~should~~ may file a Nebraska Nonresident Employee Certificate ~~of~~ for Allocation of Withholding Tax, Form 9N, with his or her ~~the~~ employer ~~for the purpose of determining~~ so that ~~his~~ the correct amount of Nebraska income tax withholding ~~tax liability~~ 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 ~~the certificate~~ Form 9N, but must ~~nevertheless~~ 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 ~~proportion of~~ ~~remuneration~~ portion of the employee's wages which is paid for ~~services~~ ~~rendered within~~ work performed in Nebraska ~~shall be~~ is determined as follows:

> 006.03A If the ~~services are rendered~~ work is performed by a traveling ~~salesman~~ sales representative, agent, or other employee ~~whose compensation~~ ~~on the basis of commission depends~~ whose pay is based directly on the volume of business transacted by him or her, the amount attributable to ~~services within~~ work in Nebraska is that ~~proportion~~ portion of the ~~compensation~~ wages received ~~which the volume of~~ from business transacted by the employee ~~within the state of~~ in Nebraska bears to the total volume of business transacted ~~by him both within and without Nebraska~~.
>
> Example:
>
> Employee's Nebraska ~~Gross~~ sales = $1,000~~.00~~
>
> Employee's ~~Gross (Total)~~ total sales = $5,000~~.00~~
>
> Nebraska's ~~Proportion~~ portion of ~~Gross~~ total sales = 20%

Nebraska ~~Withholding~~ withholding on total from ~~Tables~~ tables =	~~$10.00~~$300
~~(x)~~ Multiplied by the Nebraska ~~Proportion~~ portion of ~~Gross~~ total sales =	20%
Nebraska ~~Withholding Tax~~ income tax withholding =	~~$2.00~~$60

006.03B ~~With respect to~~ ~~other~~ For employees ~~whose compensation is computed~~ paid on an hourly basis, the amount of wages attributable to ~~services within~~ work in Nebraska is that portion of the total ~~compensation~~ wages, which the total number of hours ~~to be~~ worked ~~within~~ in Nebraska bears to the total number of hours ~~to be~~ worked ~~both within and without Nebraska~~.

Example:

Employee's ~~Monthly~~ ~~Nebr.\ Hours~~ monthly Nebraska hours =	80
Employee's ~~Monthly Total Hours~~ monthly total hours =	160
Nebraska ~~Proportion~~ portion of ~~Hours~~ hours =	50%
Nebraska ~~Withholding~~ withholding from ~~Tables~~ tables =	~~$10.00~~$300
~~(x)~~ Multiplied by the Nebraska ~~Proportion~~ portion of ~~Hours~~ hours =	50%
Nebraska ~~Withholding~~ ~~Tax~~ income tax withholding =	~~$5.00~~$150

006.03C ~~With respect to~~ For employees who are paid on a ~~per mile~~ per-mile basis, the amount of wages attributable to ~~services within~~ work in Nebraska is that ~~proportion~~ portion of the total ~~compensation~~ wages, which the ~~monthly~~ total number of miles traveled monthly ~~within~~ in Nebraska bears to the ~~monthly~~ total number of miles traveled monthly ~~both within and without Nebraska~~.

Example:

Employee's ~~Monthly Nebr.\ Mileage~~ monthly Nebraska mileage =	2,000
Employee's ~~Monthly Total Mileage~~ monthly total mileage =	10,000
~~Nebr.~~ ~~Proportion~~ Nebraska portion of ~~the Mileage~~ mileage =	20%
Nebraska ~~Withholding~~ withholding from ~~Tables~~ tables =	~~$10.00~~$300
~~(x)~~ Multiplied by ~~Nebr.~~ ~~Proportion~~ Nebraska portion of ~~Mileage~~ mileage =	20%

Nebraska ~~Withholding Tax~~ income tax withholding =	~~$2.00~~$60

006.03D ~~With respect to~~ For all other employees, the ~~amount~~ portion of wages attributable to ~~services within~~ work in Nebraska is ~~that proportion of~~ that portion of the total ~~compensation~~ wages ~~which the total number of~~ paid for working days ~~employed~~ in Nebraska bears to the total wages paid, ~~number of working days employed both within and without Nebraska~~, ~~exclusive of~~ not counting nonworking days. Nonworking days ~~usually include Saturdays, Sundays~~ 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~~ days worked in ~~Nebr.~~ Nebraska in the ~~Month~~ month =	10
Total ~~Employee Days~~ employees days worked in the ~~Month~~ month =	20
Nebraska ~~Proportion~~ portion of the total ~~Days~~ days =	50%
Nebraska ~~Withholding~~ withholding from ~~Tables~~ tables =	~~$10.00~~$300
~~(x)~~ Multiplied by the Nebraska ~~Proportion~~ portion of the days =	50%
Nebraska ~~Withholding Tax~~ income tax withholding =	~~$5.00~~$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 ~~services~~ ~~rendered to his or her employer~~ work performed in Nebraska to remain ~~relatively constant with~~ approximately the same as the prior year, ~~he or she should~~ the employee may compute the percentage of income applicable to ~~such~~ the prior years' experience and use that percentage on the Form 9N.

(Neb. Rev. Stat. §§ 77-2733 and 77-2753. ~~May 8, 1988~~ _____.)

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

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

007.01A A ~~return~~ Form 941N is required for each filing period or portion of a filing period. ~~The~~ A return must be filed for every ~~tax~~ 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. ~~of Revenue. Normally~~ For most employers, it will be quarterly, but ~~in the case of~~ employers who have ~~small tax~~ liabilities of ~~, five hundred dollars ($500.00)~~ or less for a calendar year, ~~or who~~ and employers that are allowed to file their federal returns annually~~, they~~ may be assigned an annual filing frequency.

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

007.01D ~~Taxpayers~~ Employers who file a ~~Nebraska Quarterly Employer's Withholding Return,~~ Form 941N, ~~have the option of filing electronically via the Internet~~ 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 ~~can~~ may access ~~this system~~ the electronic filing (e-file) program and the electronic payment options from the ~~Department of Revenue's Web site~~ 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 ~~five hundred dollars ($500.00)~~, the employer ~~shall~~ must make monthly deposits by filing a Nebraska ~~Employer's~~ Monthly Withholding Deposit, Form 501N, with the Department ~~of Revenue~~. The Form 501N ~~shall~~ must be filed on or before the 15th day of the second and third month of each calendar quarter. ~~The amount so paid shall be~~ The amounts paid are allowed as a credit against any liability shown on the employer's next quarterly ~~Nebraska withholding tax return~~ Form 941N.

007.02A Form 501N is not required ~~to be filed~~ when monthly payments are made electronically ~~if the taxpayer is enrolled in the Department of Revenue's electronic funds transfer (EFT) program~~.

007.03 On or before ~~March 15~~ February 1 of each year, each employer ~~shall~~ must file with the Department ~~of Revenue~~ a copy of each statement furnished to each of its

employees ~~which~~ ~~showed~~ showing the total Nebraska income taxes withheld from wages during the prior calendar year. ~~The~~ This statement ~~required to be filed~~ 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 ~~shall~~ must also file a Nebraska Reconciliation of Income Tax Withheld, Form W-3N, on or before ~~March 15~~ February 1 of each year in accordance with ~~the instructions contained in~~ Reg-21-013.

~~007.04~~ 007.05 The last Form 941N ~~return~~ ~~of withholding~~ ~~tax~~ for any employer ~~which~~ who discontinues ~~its~~ business or ~~which~~ permanently ceases to pay wages ~~shall~~ must be clearly marked "Final Return." This ~~return~~ Form 941N and the full ~~remittance~~ payment for amounts deducted and withheld ~~shall~~ must be sent to the Department ~~of Revenue~~ ~~on a Nebraska Employer's Quarterly Withholding Return, Form 941N~~. The employer ~~shall file with the Department of Revenue~~ must also file a completed ~~Nebraska Reconciliation of Income Tax Withheld,~~ Form W-3N, and the state copies of Federal Form W-2, ~~which shall cover that~~ for the part of the calendar year ~~in which~~ that the employer operated its business or paid wages.

~~007.05~~ 007.06 An employer ~~which temporarily ceased~~ who ceases to pay wages temporarily, including an employer engaged in seasonal activities, ~~shall~~ must continue to file all applicable ~~returns~~ Form 941Ns ~~but shall enter on the face of the return the date of the last payment of wages and the date when it expects to resume making such payments~~.

~~007.06~~ 007.07 Every employer which is considered ~~under the Internal Revenue Code~~ to be a successor of another employer under the I.R.C., ~~shall be~~ is a successor for Nebraska income tax withholding purposes and ~~shall~~ must file returns and make payments for Nebraska in a ~~comparable~~ similar manner.

(Neb. Rev. Stat. §§ 77-1784 and 77-2756. ~~February 22, 2009~~_____.)

REG-21-008 INFORMATION STATEMENTS ~~FOR EMPLOYEES~~

008.01 Every employer required to deduct and withhold ~~a~~ income tax from an employee's wages ~~is required to~~ must furnish to each ~~such~~ employee~~,~~ ~~in respect to those wages,~~ a ~~legible~~ statement ~~in duplicate~~, 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 ~~as tax~~, and ~~the~~ all other information required to be shown on ~~such form~~ 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 ~~form~~ Federal Form W-2.

008.02 The required statement~~, in duplicate,~~ ~~shall~~ must be furnished to the employee on or before ~~March 15~~ February 1 following the close of ~~such~~ the calendar year.~~, or if~~ If his or her employment is terminated before the close of ~~such~~ 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-~~21-001.02A~~ 21-001.04A or Reg-21-001.04B ~~is required to~~ must furnish a ~~legible~~ statement showing the amount of the payments and withholding ~~in duplicate~~ 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-~~21-001.02~~ 21-001.04C ~~is required to~~ must furnish a ~~legible~~ statement showing the amount of the payments and withholding ~~in duplicate~~ on a Federal Form 1099-MISC to each shareholder, partner, or member of ~~such~~ the corporation, partnership, or LLC who performed services ~~within the state~~ in Nebraska.

> 008.04A The total amount of the payment ~~shall~~ must be divided among the shareholders, partners, or members performing the service in Nebraska according to each of their ~~interest~~ ownership interests in the corporation, partnership, or LLC. The amount of income tax withheld~~, which~~ is computed on the total payment to the corporation, partnership, or LLC, ~~shall~~ and must be divided among the shareholders, partners, or members in a similar manner. ~~and~~ 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 ~~provide to~~ furnish the payor the information necessary to prepare the Federal Form 1099-MISC for the shareholders, partners, or members, the payor ~~shall~~ must prepare the Federal Form 1099-MISC in the name of the corporation, partnership, or LLC and ~~shall~~ deliver the copies normally given to the employee to the Department ~~of Revenue~~ in the same manner as forms that ~~are not deliverable~~ cannot be delivered under Reg-21-013.0~~3~~2.

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. ~~May 14, 1994~~ _____.)

REG-21-009 ~~PERSONS FROM WHOM THE TAX IS NOT WITHHELD~~ PAYMENTS THAT ARE NOT SUBJECT TO INCOME TAX WITHHOLDING

009.01 ~~The withholding tax does not apply to payments that are not either wages under the Internal Revenue Code, or payments for personal services performed in this state as described in Reg-21-001.02B. Resident self-employed persons are not subject to withholding. Partners are considered business proprietors and, therefore, amounts payable to resident partners are not subject to withholding, even though such payments are made as personal service compensation. Corporate directors are not employees, and therefore, director fees paid to directors who are residents of Nebraska are not subject to withholding.~~

~~009.02 Generally, unless compensation paid to individuals is subject to federal withholding, or is a payment to a nonresident for the performance of personal services within this state, such compensation is not subject to Nebraska withholding. However, persons receiving such income may be required to make estimated tax payments. For an explanation of estimated tax payments, see Reg-20-001 through Reg-20-008.~~

~~009.03~~ The income tax withholding ~~tax~~ requirement does not apply to wages paid to a Native American ~~Reservation~~ Indian who resides in Nebraska in Indian country, as defined in federal law, for services performed ~~on a Native American Indian Reservation~~ in Indian country in Nebraska. If the services are performed both ~~on and off a Native American Indian Reservation~~ in and outside Indian country in Nebraska, the allocation procedure ~~contained~~ in Reg-21-006.02 must be used or the employer must withhold from the entire amount of the wages.

~~009.04~~ 009.02 The income tax withholding ~~tax~~ 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. § ~~77-2769,~~ 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) ~~March 7, 2006~~ _____.)

REG-21-010 INCOME TAX WITHHOLDING EXEMPTIONS

010.01 ~~In~~ Except as provided in Reg-21.010.01B, when determining the proper ~~tax~~ amount of income tax to be deducted and withheld from an employee's wages, the employer ~~shall~~ 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 ~~shall rely upon the number of federal withholding exemptions claimed by the employee, and~~ must ~~maintain~~ retain a completed copy of the ~~Employee's Withholding Allowance Certificate,~~ Federal Form W-4~~,~~ for audit purposes ~~by the State of Nebraska~~.

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

010.03 Any ~~person~~ employee who receives a state income tax credit, ~~other than~~ except the personal exemption credit, that is not based on ~~the receipt of~~ a federal income tax credit may request ~~that his or her~~ 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 ~~request~~ application must be made in writing by the employer. The ~~request~~ application must include: ~~a~~

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

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

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

010.03B The income tax withholding must exceed the estimated tax liability by more than ~~three hundred dollars ($300.00)~~ for the Tax Commissioner to consider an alternative method of calculation ~~to be considered by the Tax Commissioner~~.

(Neb. Rev. Stat. § 77-2753(2). ~~May 14, 1994~~ _____.)

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 ~~tax shall~~ must be stated separately from the wages and withholding ~~tax~~ for any other jurisdiction. ~~The words "payroll record" as used in this regulation shall apply to the payroll check stub, a federal Form W-2, or any other document which the employer may furnish an employee.~~

(Neb. Rev. Stat. §§ 77-2753 and 77-2772. ~~September 15, 1975~~ _____.)

REG-21-012 ~~EMPLOYEE LIABILITY~~ CREDIT FOR ~~AMOUNT~~ INCOME TAX WITHHELD ~~BY~~ BUT NOT REMITTED TO THE DEPARTMENT ~~OF REVENUE~~

012.01 Any amount of income tax actually deducted and withheld from a payment to an employee by ~~his or her~~ an employer is deemed to have been paid to the Department ~~of Revenue~~ on behalf of the employee, and may be taken as a credit on the employee's income tax return even ~~though~~ if the employer subsequently fails to remit the withheld ~~amounts~~ income tax to the Department ~~of Revenue~~. ~~Such an employee shall be credited with having paid that amount of income tax for the taxable year beginning in the calendar year when the withholding occurred. In claiming said~~ To claim the credit on ~~his or her~~ the income tax return for the taxable year, the employee ~~shall~~ must attach ~~to his or her return~~ the state copy of Federal Form W-2 or 1099-MISC.

(Neb. Rev. Stat. § 77-2755. ~~May 14, 1994~~ _____.)

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

013.01 **Electronic Filing.** ~~Where the number of state copies of Federal Form W-2 or Federal Form 1099-MISC is substantial, they may be forwarded to the Department of Revenue in packages of convenient size. When this is done, the packages should be identified with the name and Nebraska employer identification number of the employer and the packages should be numbered consecutively. (For example: 3 packages should be numbered "1 of 3", "2 of 3", and "3 of 3".) Form W-3N should be placed in package number 1 and the number of packages should be indicated on that form.~~

~~013.01A Beginning with state copies of Forms W-2 and other statements reporting withholding for payments made in 2008 to be transmitted in 2009, any~~ Any employer~~, payor, or agent~~ who furnishes more than ~~two hundred fifty statements~~ 50 Federal Forms W-2, Forms 1099-MISC, or other statements reporting withholding for a year ~~shall~~ must electronically file (e-file) the required copies ~~electronically~~ in a manner approved by the Tax Commissioner that is compatible with federal ~~electronic filing~~ e-file requirements or methods.

~~013.02 If an employer's total payroll consists of a number of separate units or establishments, or the employer is filing Federal Forms W-2G to report gambling winnings or Federal Forms 1099-MISC to report nonresident withholding, the state copies of Federal Form W-2 or 1099-MISC may be assembled accordingly and a separate list submitted for each unit, establishment, or type of form being submitted. In such case, a summary list should be prepared, the total of which should agree with the corresponding entry made on Form W-3N.~~

~~013.03~~ 013.02 **Undeliverable Forms.** ~~Any~~ If an employer cannot deliver any employee copies of Federal ~~Form~~ Forms W-2 or 1099-MISC to employees ~~be attached to the state return which,~~ after reasonable effort, ~~cannot be delivered to employees, should~~ these employee copies must be transmitted with the Nebraska ~~Employer's Quarterly~~ Withholding Return, Form 941N, ~~during the month of~~ due the following July ~~of the next calendar year. Any undeliverable state copies of Federal Form W-2 or 1099-MISC submitted to the Department of Revenue should be~~ accompanied by a signed letter ~~stating~~ explaining that they were submitted because they could not be delivered to the employees ~~involved~~.

~~013.04~~ 013.03 **Corrected or Reissued Forms.** When Federal Forms W-2 or 1099-MISC are corrected by the employer or are reissued ~~by an employer~~, ~~such~~ 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 ~~of Revenue as required by the Regulations~~. If a correction is necessary, the employer may also use Federal Form W-2c to make the correction.

~~013.05~~ 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 ~~of Revenue~~ ~~shall~~ must be completed in full, including the ID of the employer and the state income tax withholding, and must be ~~entirely~~ legible. ~~In the event that said~~ If the copies are not fully completed or are not legible, they will not be considered ~~to have been~~ furnished by the employer in compliance with

the law, ~~thereby subjecting the employer~~ and the employer may be subject to the penalties for noncompliance as ~~prescribed by~~ provided in Reg-21-01~~7~~6.

~~013.06~~ 013.05 **Retention of Records** Every employer ~~is to~~ must retain copies of all ~~reconciliations~~ forms filed with the Department ~~of Revenue~~ and copies of all documents furnished to employees for at least three years. If the employer reports ~~Federal Form W-2 or 1099-MISC~~ information ~~on magnetic media~~ electronically, the employer may retain ~~either~~ the supporting documentation or ~~a~~ an electronic copy ~~of the magnetic media for the time required~~. 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). ~~February 22, 2009~~_____.)

REG-21-014 EMPLOYER'S LIABILITY FOR ~~WITHHELD TAXES~~ 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 ~~such tax~~ the withholding whether or not it is collected from the employee. For purposes of assessment and collection, any amount required to be ~~with held~~ withheld and paid ~~over~~ to the Department ~~of Revenue~~, plus any additions, penalties, or interest, ~~shall be~~ is considered ~~the~~ a tax obligation of the employer.

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

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

(Neb. Rev. Stat. § 77-2757. ~~September 15, 1975~~ _____.)

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

015.01 If ~~the~~ any employer fails to deduct and withhold ~~the~~ income tax as required under the Nebraska Revenue Act, ~~and thereafter, the~~ 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 ~~income tax against which the withholding tax may be credited, is paid, the tax required to be deducted and withheld shall not be collected from the employer by the Department of Revenue. Such payment of the tax does not, however, operate to relieve the employer from liability for~~ penalties, interest, or other additions ~~caused by~~ related to the failure to deduct and withhold income tax.

015.02 The employer ~~will not be~~ is not relieved ~~under this regulation~~ from liability for payment of the income tax withholding ~~tax~~ unless he or she can ~~show~~ prove that the employee's individual income tax~~, against which the withholding tax may be credited,~~ has been paid.

(Neb. Rev. Stat. § 77-2758. ~~September 15, 1975~~ _____.)

REG-21-016 ~~EMPLOYER'S~~ PENALTIES FOR FAILURE TO WITHHOLD AND REMIT INCOME TAXES, FILE ~~A~~ RETURNS, ~~AND PAY WITHHELD TAXES OR FAILURE TO PROPERLY WITHHOLD FROM WAGES – PENALTY~~ OR FILE FEDERAL FORM W-2

016.01 Any employer who fails to file ~~a~~ any income tax withholding ~~tax~~ return by the required due date~~, determined with regard to an extension of time to file, shall be~~ is subject to a penalty of ~~five percent (~~5%~~)~~ of the amount required to be shown on the return for each month or portion of a month ~~in which~~ the return is late, up to ~~twenty-five percent (~~25%~~)~~, or ~~twenty-five dollars (~~$25~~.00)~~, 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 ~~upon a showing~~ 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 ~~shall be~~ is reduced by the amount ~~of tax~~ paid prior to the due date and any credit properly claimed on the return.

016.02 If an employer~~, without intent to evade the provisions of the Act, shall withhold~~ withholds income tax from ~~his or her~~ employees' wages but ~~shall fail~~ fails to file a ~~return on~~ Form 941N and ~~pay the tax~~ remit the amount withheld, ~~he or she shall be~~ the employer is liable for those taxes ~~together with~~ and interest at the rate specified in ~~section~~ Neb. Rev. Stat. § 45-104.02 from the due date of the return until the date payment is received. In addition, the employer ~~shall be~~ is liable for a penalty of 5% of the amount unpaid. If the penalty is not paid within ~~ten~~ 10 days of the notice and demand for payment ~~thereof~~, interest ~~shall~~ also ~~apply~~ applies to the amount of the penalty.

016.03 If the employer fails to withhold the proper ~~tax~~ amount of income tax withholding as required under the Nebraska Revenue Act~~, without an intent to defraud or evade,~~ interest will be imposed at the rate specified in ~~section~~ Neb. Rev. Stat. § 45-104.02, on the amount which should have been withheld and paid. ~~plus the 5%~~ The employer is also subject to a 5% penalty on the amount which should have been withheld and paid to the Department ~~of Revenue~~.

016.04 If the nonpayment of income tax withholding ~~tax~~ to the Department ~~of Revenue~~ is a result of fraud by the employer, the amount of penalty ~~shall be~~ 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, ~~or to~~ account for and pay over the proper amount of income tax withholding, or

willfully attempts to evade ~~and~~ or defeat the income tax withholding obligation, the penalty ~~assessed shall be~~ is 100% of the amount ~~of tax~~ evaded, not collected, or not accounted for and paid, instead of 5% or 50%.

016.06 If ~~the employer's conduct is~~ ~~done~~ it can be determined that the employer acted with ~~a~~ fraudulent intent, the Department ~~of Revenue~~ may assess an additional penalty of up to ~~one thousand dollars (~~$1,000~~.00)~~.

016.07 In ~~all these~~ situations described by Reg-21-016.04 through Reg-21-016.06, the employer is subject to interest at the rate specified in ~~section~~ Neb. Rev. Stat. § 45-104.02, on the amount due and on any penalty not paid within ~~ten~~ 10 days of notice and demand ~~of~~ 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. ~~November 11, 1998~~_____.)

~~REG-21-017 EMPLOYER'S FAILURE TO FILE FEDERAL FORM W-2 - PENALTY~~

~~017.01 If any employer fails to file with the Department of Revenue the state copy of federal Form W-2 on or before the date specified, or on or before the due date resulting from an extension, that employer shall be subject to a penalty of $2.00 for each statement not so filed. If the employer can prove that the failure to properly file was the result of a reasonable cause and not negligence, the Department of Revenue will not assess this penalty. The maximum penalty assessable under this regulation on any one employer during any calendar year shall be $2,000.~~

~~(Neb. Rev. Stat. § 77-2789(2). September 15, 1975.)~~

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

018.01 The Department ~~of Revenue~~ may, ~~by~~ after notice is given to the employer, ~~upon an employer~~ require ~~such~~ the employer to ~~make~~ file a return and pay ~~to the state~~ the income tax deducted and withheld by ~~such~~ the employer at any time, or ~~from time to time~~ at frequent intervals, ~~whenever~~ if the Department ~~of Revenue~~ determines ~~such~~ this action is necessary ~~for the protection of revenue~~ to assure that the income tax withheld is remitted to the Department. ~~The Department of Revenue will include in such notice a direction requiring the employer to remit the withheld taxes to the state. The notice provided for in this paragraph shall be served either personally or by registered or certified mail.~~

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

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. ~~September 15, 1975~~ ____.)

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 ~~of Revenue~~, a proper adjustment ~~shall~~ must be made on the first return filed after the error is discovered. If no ~~tax~~ withholding is ~~withheld~~ deducted, or if less than the correct amount ~~of tax~~ is withheld from any ~~wage payment~~ wages, the employer ~~is authorized to~~ may deduct the amount of undercollection from later ~~wage payments~~ wages paid to the employee. ~~However, the~~ The employer ~~personally~~ is liable to the Department ~~of Revenue~~ for any underpayment, and reimbursement of the employer is ~~a matter~~ ~~for private settlement~~ between the employer and the employee.

019.02 In any filing period, if more than the correct amount of income tax withholding is ~~actually~~ deducted from any ~~wage payment~~ wages and paid to the Department ~~of Revenue~~, the excess deducted ~~shall~~ will not be repaid directly to the employer or to the employee. The Department ~~of Revenue~~ may credit any overpayment against any income tax liability ~~imposed by the laws of the State of Nebraska on~~ of the employee. Any balance ~~shall~~ will ~~then~~ be refunded ~~by the State Treasurer~~ pursuant to the law regarding refunds.

019.03 If there has been an overpayment of income tax withholding ~~tax~~ to the Department ~~of Revenue~~ by the employer, a refund ~~shall~~ 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 ~~wage payment~~ wages.

(Neb. Rev. Stat. §§ 77-2753, 77-2757, and 77-2791. ~~September 15, 1975~~ _____.)

~~**REG-21-020 EMPLOYERS WITH PAYROLLS ON AUTOMATIC DATA EQUIPMENT**~~

~~020.01 Any employer who uses automatic data equipment for computing payroll may submit a computer print-out or magnetic tape in lieu of the state copy of Federal Form W-2, or may use electronic methods to transfer the information, when filing this information with the Department of Revenue. However, before any computer print-out, magnetic tape, or other electronic reporting can be accepted by the Department of Revenue, the employer must have obtained written approval from the Department of Revenue, based upon compatibility of the employer's system and the system used by the Department of Revenue.~~

~~(Section 77-2772, R.R.S. 1943. May 14, 1994.)~~