

1 FINANCE AND ADMINISTRATION CABINET

2 Department of Revenue

3 (Amendment)

4 103 KAR 16:090. Apportionment; payroll factor.

5 RELATES TO: KRS 141.010, 141.120, 141.121

6 STATUTORY AUTHORITY: KRS 131.130[~~(+)~~], 141.018

7 NECESSITY, FUNCTION, AND CONFORMITY: All[~~KRS 141.120(8) requires that all~~]

8 business or apportionable income of multi-state corporations shall be apportioned to Kentucky by

9 multiplying the income by a fraction, the numerator of which is the property factor plus the payroll

10 factor plus a double weighted sales factor and the denominator of which is four (4). KRS

11 131.130(1) authorizes the department to promulgate administrative regulations to administer and

12 enforce Kentucky's tax laws. This administrative regulation provides a detailed explanation of the

13 payroll apportionment factor.

14 Section 1. Compensation. (1)(a) Compensation shall not include payments to an independent

15 contractor or any other person not properly classifiable as an employee.

16 (b) Only amounts paid directly to employees shall be included in the payroll factor. Amounts

17 considered paid directly shall include the value of board, rent, housing, lodging, and other benefits

18 or services furnished to employees by the corporation in return for personal services, if the amounts

19 constitute income to the recipient under KRS 141.039[~~141.010(12) and (13)~~].

20 (2)(a) The total amount paid or payable for compensation during the taxable year shall be

21 determined by the corporation's accounting method and shall be the same method used by the

1 corporation for federal taxation purposes. If the corporation has adopted the accrual method of
2 accounting, all compensation properly accrued shall be deemed to have been paid.

3 (b) The corporation shall be consistent in the treatment of compensation paid in filing returns
4 or reports to all states. If the corporation is not consistent in its reporting, it shall disclose in its
5 Kentucky return the nature and extent of the inconsistency.

6 (3) Compensation paid to employees whose services are performed entirely in a state where
7 the corporation is exempt from taxation, for example, by Pub. L. 86-272, codified as 15
8 U.S.C. §§ 381 to 384, shall be included in the denominator of the payroll factor.

9 (4) An individual shall be considered an employee if the individual is included by the
10 corporation as an employee for purposes of the payroll taxes imposed by 26 U.S.C. 3121(d).
11 Independent contractors shall not be considered employees.

12 Section 2. Payroll Factor-Numerator. (1) The total wages reported by the corporation to
13 Kentucky for unemployment compensation purposes, except for compensation excluded by this
14 administrative regulation, shall be considered as a factor in determining if an employee's
15 compensation is properly reportable to Kentucky.

16 (2) In determining if a service performed without Kentucky is incidental to the employee's
17 service in Kentucky, a service which is temporary or transitory in nature, or which is rendered in
18 connection with an isolated transaction, shall be considered an incidental service.

19 (3) In determining where the employee's base of operations is located, the place of more or
20 less permanent nature from which the employee starts work and to which the employee
21 customarily returns in order to receive instructions from the corporation or communications from
22 customers or other persons, or to replenish stock or other materials, repair equipment, or perform
23 any other functions necessary to the exercise of the employee's trade or profession at some other


1 point or points, shall be considered to be the base of operations.

2 (4) The place from which the power to direct or control is exercised by the corporation shall
3 be the place from which the service is directed or controlled.

4 Section 3. This administrative regulation shall be effective for tax periods beginning on or after
5 January 1, 2005.

103 KAR 16:090

APPROVED:



DANIEL BORK, COMMISSIONER
Department of Revenue
Finance and Administration Cabinet

10-12-2018
DATE APPROVED BY AGENCY

PUBLIC HEARING AND PUBLIC COMMENT PERIOD

A public hearing on this administrative regulation will be held on November 26, 2018 at 10:00 a.m. in Room 8A, State Office Building, 501 High Street, Frankfort, KY 40601. Individuals interested in being heard at this hearing shall notify this agency in writing by five (5) workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments will be accepted through November 30, 2018. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Lisa Swiger, Revenue Tax Policy/Research Consultant II, Department of Revenue, 501 High Street, Station 1, Frankfort, Kentucky, 40601, (502) 564-9526 (telephone), (502) 564-3875(fax), Lisa.Swiger@ky.gov(email).

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Regulation Number: 103 KAR 16:090

Contact Person: Lisa Swiger
Phone Number: (502)564-9526
Email: Lisa.Swiger@ky.gov

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation updates 103 KAR 16:090 with recent law changes as a result of the passage of HB 487/GA2018. This regulation provides detailed guidance for calculating the payroll factor for taxpayers able or required to use this factor when apportioning income to Kentucky.

(b) The necessity of this administrative regulation: The detailed considerations of what constitutes compensation for purposes of calculating a payroll apportionment factor must be set forth for taxpayers to understand and comply with the law.

(c) How this administrative regulation conforms to the content of the authorizing statutes: The authorizing statutes direct certain taxpayers to utilize a payroll factor. Furthermore, some alternative apportionment formulas make use of a payroll apportionment factor. This regulation provides guidance in accordance with statutory requirements.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This regulation will help taxpayers better understand how the payroll apportionment factor is calculated.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: See (1)(a).

(b) The necessity of the amendment to this administrative regulation: This regulation must be amended to be compliant with the requirements of Chapter 13A.

(c) How the amendment conforms to the content of the authorizing statutes: See (1)(c) above.

(d) How the amendment will assist in the effective administration of the statutes: See (1)(d) above.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: Businesses, particularly providers of telecommunications, cable, and internet services, utilize the payroll factor when apportioning income to Kentucky.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No additional actions are required as the guidance is merely updated.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There are no costs associated with the changes herein.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Taxpayers will better understand how to calculate the payroll apportionment factor and will

potentially avoid future tax assessments, penalties, and interest.

(5) Provide an estimate of how much it will cost to implement this administrative regulation:

(a) Initially: None.

(b) On a continuing basis: None.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: The department's current budget covers ongoing compliance related to this regulation.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change, if it is an amendment: No increased fees or funding are required by this amendment.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: No direct or indirect fees result from this regulation amendment.

(9) TIERING: Is tiering applied? Tiering was not applied, because all taxpayers utilizing the payroll apportionment factor are treated equally.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Regulation Number: 103 KAR 16:090

Contact Person: Lisa Swiger
Phone Number: (502)564-9526
Email: Lisa.Swiger@ky.gov

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Department of Revenue is the only unit, part or division of state or local government impacted by the changes made herein.

2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. None.

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? There are no new revenues expected as a result of this administrative regulation.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None.

(c) How much will it cost to administer this program for the first year? None.

(d) How much will it cost to administer this program for subsequent years? None.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): \$0

Expenditures (+/-): \$0

Other Explanation:
