

SEPTEMBER 5, 2019**ILLINOIS ENACTS MOBILE WORKFORCE 30 WORK DAYS
INCOME TAX EXEMPTION**

Revised Rule. Effective for 2020, nonresident employees that travel and work in Illinois for 30 work days or less in a calendar year are not subject to Illinois income tax and employers do not have an Illinois income tax withholding obligation. Currently, Illinois law does not provide any de minimis income tax exemption for days worked by nonresidents, except for a reciprocity exemption for residents of Iowa, Kentucky, Michigan, and Wisconsin.

Counting 30 Illinois Work Days. To determine whether a nonresident individual is within the 30-work day limit, an Illinois work day is defined as a day in which the greatest amount of services performed by the individual are in Illinois, ignoring travel time. Days that are exclusively for travel to an Illinois location are also included as Illinois work days. On the flip side, days that are exclusively for travel from Illinois to another State would seem to be not counted as Illinois work days.

Days in which the nonresident is in Illinois but performs no services (weekends, vacation days, sick days, and holidays) are not counted as an Illinois work day.

Examples:

An Illinois nonresident who works in a nonreciprocity State for most or a portion of a day and arrives in Illinois in the evening would typically not count that day as an Illinois work day.

An Illinois nonresident who leaves Illinois during the morning and spends most of the day (excluding travel time) working outside of Illinois would not count that day as an Illinois work day.

An Illinois nonresident who works a little in Illinois in the morning and spends most of the day traveling to another State without working when he or she arrives in the other State might be able to exclude such day from the Illinois work days, depending on the work provided on such date.

Application to Fiscal Year Employer. Until further guidance, the 30-work day exemption should be measured on a calendar year basis, even when an employer's tax year is not a calendar year.

Application to Annual Bonuses. Typically, annual bonuses are based on a performance period with the requirement of continued employment through the payment date of the subsequent year. Clarity is needed on whether the 30-day exemption should be applied to the performance year or

the subsequent year when payment is made. Nonresidents avoid Illinois income tax if the Illinois work days for each year do not exceed 30.

Application to Multi-Year Compensation. Many bonuses are based on a multi-year performance period with the requirement of continued employment through the payment date of the subsequent year. Clarity is needed on whether the 30-day exemption is applied to (1) the last year of the multi-year performance period, (2) the year of payment, or (3) to each year of the multi-year performance period. Future guidance might address this point. Nonresidents avoid Illinois income tax if the Illinois work days for each year do not exceed 30.

Employer Income Tax Withholding--Reliance on Certain Illinois Work Days Information.

1. Employers that maintain a time and attendance system tracking where employees perform services daily are required to apply information from that system to count Illinois work days. A time and attendance system is in effect where employees are required, on a contemporaneous basis, to record their work location for every day worked outside of their primary work State.
2. If an employer's time and attendance system reflects that the nonresident employee has worked in Illinois for more than 30 days, then income tax withholding is to begin. Future guidance will hopefully address whether withholding against compensation paid following the 30th Illinois work day is sufficient or whether withholding an amount to cover compensation for the first 30 days is also required. In all events, the employee has a tax liability based on a fraction that takes all Illinois work days into account.
3. For employers that do not maintain a time and attendance system, they must obtain an annual written statement from their nonresident employees on the number of reasonably expected Illinois work days. The nonresident employee statement should be provided to employers during the early part of each calendar year with consideration given (but not necessary) to whether to obtain confirmation by December 1 that the 30-work day limit is not exceeded. Employers must retain these statements.

Employee statements are important with respect to nonresident employees that state that they will exceed the 30-Illinois work days to determine the proportional amount of the aggregate compensation subject to Illinois income tax withholding.

4. If employers do not receive a written statement from an employee regarding their Illinois work days, it seems that the employer has a withholding obligation for each Illinois work day. However, the withholding obligation should be eliminated if the employer can demonstrate that the Illinois work days did not exceed 30.
5. If a nonresident employee's statement is that he or she will not exceed the 30-work day limit and the employer has no basis to question such statement but such limit is, in fact, exceeded, the employer might not have a withholding obligation to collect Illinois income taxes for the year. In this situation, the employer might also not need to issue an Illinois W-2 for such year, but the employee does have an Illinois income tax obligation.

Deferred Compensation. Nonresidents who defer their base salary and/or bonus and receive such amounts at a later date need to consider whether any portion of such payouts are subject to Illinois income tax. Until guidance is issued, the year of the payout could be the relevant tax year to measure whether the 30-work day limit is exceeded. Nonresidents have no Illinois income tax obligation if the Illinois work days for each year do not exceed 30.

Application to Directors. Same 30-work day exemption seems available for nonresident board of director members who attend meetings in Illinois.

Possible Additional Exemption. While its reach is unclear, the new provision would seem to allow an income tax exemption if the nonresident services performed in Illinois are considered incidental when compared to services performed in other States, even though the aggregate Illinois work days exceed 30. A point for consideration in limited circumstances.

Calculation of Illinois Income Tax if Exceed 30 Work Day Limit. If the 30-day limit is exceeded, a portion of an individual's total compensation for a tax year is subject to Illinois income tax based on a fraction using the Illinois work days as the numerator and the aggregate work days within and outside of Illinois as the denominator. The aggregate number of work days typically used in the denominator of this calculation ranges from 260 to 330.

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