

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of)
ARM 42.15.204, 42.15.216,)
42.17.101, 42.17.103, 42.17.105,)
42.17.111, 42.17.114, 42.17.131,)
42.17.134, 42.17.135, and 42.17.203)
pertaining to new Form MW-4 -)
Montana Employee's Withholding)
Allowance and Exemption Certificate,)
wage withholding exemptions, and)
tax treatment of interest on certain)
government obligations)

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT

TO: All Concerned Persons

1. On December 3, 2019, at 11:00 a.m., the Department of Revenue will hold a public hearing in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, located at 125 North Roberts, Helena, Montana, to consider the proposed amendment of the above-stated rules. The conference room is most readily accessed by entering through the east doors of the building.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, please advise the department of the nature of the accommodation needed, no later than 5 p.m. on November 15, 2019. Please contact Todd Olson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or todd.olson@mt.gov.

3. GENERAL STATEMENT OF NECESSITY. The federal government has made substantial changes to federal tax law. Due to the changes in the law regarding the suspension of personal and dependent exemptions, the federal Employee's Withholding Tax Allowance Certificate Form W-4 (federal Form W-4) is no longer available for taxing jurisdictions, employers, or employees to calculate allowances used in the determination of wage withholding. To avoid discrepancies in wage withholding collection and provide employers with the means to fulfill their withholding requirement, the department determined it necessary to develop a new form, Montana Employee's Withholding Allowance and Exemption Certificate (Form MW-4), for employees to claim allowances for Montana wage withholding purposes in a manner that remains consistent with the method used prior to the 2018 tax year. The department also proposes to include all applicable employee wage withholding exemptions that require employer notification onto the Form MW-4, which is necessary to simplify and centralize all matters of wage withholding.

Based on the necessary implementation of Form MW-4, it is also necessary for the department to amend all corresponding administrative rule references in ARM Title 42, chapter 17, from federal Form W-4 to Form MW-4, to remove references to military employee and spouse Form MSR, and remove references to Form MT-R which has been previously used in Montana's reciprocal tax agreement with North Dakota.

The department is also proposing amendments to ARM 42.15.204 and 42.15.216 regarding tax treatment of interest on certain government obligations, which is based on the department's review of input received from withholding agents. The proposed amendments are necessary for the department to clearly differentiate for withholding agents those obligations that may involve tax-exempt interest from other types of obligations, such as guarantees, which may give rise to taxable income.

Further, as the department reviewed the affected rules, it observed some rule text contains unnecessarily descriptive language, is not in plain language, and uses gender-specific pronouns. Numerous instances include the word "such" as an article to the noun with which it is associated instead of more appropriate articles. In response, the department proposes several minor grammar and general syntax amendments it believes are necessary to fulfill the legal requirement that rules be drafted in plain, easily understandable language.

The necessity for any other proposed amendments specific to a rule are provided at the end of each rule.

4. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

42.15.204 DEFINITIONS The following definitions apply to rules found in this subchapter:

(1) remains the same.

(2) "Obligation" means, for the purposes of determining the applicability of the exclusion of interest income, an interest-bearing financial instrument of the United States government, a state, or a political subdivision, in the form of a bond, other written certificate, or loan issued pursuant to the exercise of such governmental body's borrowing power for use in governmental operations.

AUTH: 15-30-2620, MCA

IMP: 15-30-2117, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department finds it necessary to propose a new definition in ARM 42.15.204(2) to clarify that an obligation that creates excludable interest must be an obligation issued by the United States government, or a state or a political subdivision pursuant to the exercise of its borrowing power. This proposed definition is consistent with 15-30-

2620, MCA, is contextually consistent with IRC 103 and the exclusion of interest from obligations of federal government subdivisions from gross income, and is limited in scope to borrowing instruments. As a result, other obligations which do not arise from governmental loans of U.S. dollars for use of governmental operations are excluded.

42.15.216 EXCLUSION OF INTEREST ON OBLIGATIONS OF UNITED STATES GOVERNMENT AND U.S. POSSESSIONS (1) Interest on United States government obligations, as defined in ARM 42.15.204, and mutual fund dividends attributable to that interest, to the extent included in federal adjusted gross income, are exempt from Montana income tax. Interest on obligations of U.S. territories and government agency obligations specifically exempted by federal law, and mutual fund dividends attributable to that interest, are also exempt from Montana income tax.

~~(2) Obligations guaranteed by the United States government are not tax-exempt. Interest on, and mutual fund dividends attributable to, Government National Mortgage Association (Ginnie Mae) bonds, Federal National Mortgage Association (Fannie Mae) bonds, and Federal Home Loan Mortgage Corporation (FHLMC) securities are not exempt.~~

(3) remains the same but is renumbered (2).

(3) Interest received from guarantees that do not conform to the definition in ARM 42.15.204, or obligations guaranteed by the United States government including mutual fund dividends attributable to Government National Mortgage Association (Ginnie Mae) bonds, Federal National Mortgage Association (Fannie Mae) bonds, and Federal Home Loan Mortgage Corporation (FHLMC) securities, are not tax-exempt.

AUTH: 15-30-2620, MCA

IMP: 15-30-2110, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, and for the reasons provided by the department in its statement of reasonable necessity for ARM 42.15.204, it is necessary for the department to amend ARM 42.15.216(1) and (3) to cross-reference the authority and proposed definition in ARM 42.15.204 for consistency between the rules. The department's proposed amendments to the catchphrase of this rule are necessary to reflect the amended content of the rule and to comply with ARM 1.2.214.

42.17.101 DEFINITIONS The following terms pertain to this chapter:

(1) remains the same.

~~(2) "Employer's agent" with regard to state withholding means a third party that bears no insurance risk and is reimbursed on a cost-plus-fee basis for payment of sick pay and similar amounts.~~

(3) remains the same but is renumbered (2).

(4) (3) "Lookback letter" means the letter sent to employers notifying them of their filing frequency for employee wage withholding.

(5) and (6) remain the same but are renumbered (4) and (5).

~~(7) (6) "Net taxable earnings" means an employee's gross earnings minus~~

~~the product of the number of the employee's claimed withholding allowances multiplied by the withholding exemption amount provided in 15-30-2114, MCA for the year the Montana withholding tables were last revised.~~

(8) through (10) remain the same but are renumbered (7) through (9).

~~(11) (10) "Remitter" means the individual, entity, or trust obligated under a mineral lease to pay royalties to the royalty owner or his their assignee, to deliver minerals to a purchaser to the credit of ~~such~~ the royalty owner or his their assignee, or to pay a portion of the proceeds of the sale of ~~such~~ the minerals to the royalty owner or his their assignee.~~

~~(12) (11) "Reporting forms" includes, but is are not limited to:~~

~~(a) and (b) remain the same.~~

~~(c) Montana Employee's Withholding Allowance and Exemption Certificate form (Form MW-4);~~

~~(c) and (d) remain the same but are renumbered (d) and (e).~~

~~(e) (f) Form RW-3, the Montana Annual Mineral Royalty Withholding Tax Reconciliation form; and~~

~~(f) Form W-4, the federal Employee's Withholding Tax Allowance Certificate; and~~

~~(g) remains the same.~~

~~(13) "Sole proprietor" includes the individual owner of a single-member limited liability company that is disregarded for income tax purposes and may include a husband and wife partnership for the purpose of withholding.~~

~~(14) remains the same but is renumbered (12).~~

~~(15) "Withholding exemption" is the amount used in the computation of net taxable earnings. The withholding exemption for the 2017 annual table and computations is \$2,110. For other tables, the withholding exemption is divided by the divisor in ARM 42.17.105 corresponding to the payroll period.~~

AUTH: 15-30-2547, 15-30-2620, MCA

IMP: 15-30-2501, 15-30-2538, MCA

REASONABLE NECESSITY: In connection with the general statement of reasonable necessity provided at the beginning of this notice, the department finds it necessary to propose to remove the definitions in ARM 42.17.101(2), (13), and (15), because the term "sole proprietor" in (2) is already defined under 15-30-2501(5), MCA, the role of third-party administrators in benefits administration for employers in (13) has changed significantly since the current version of the rule was adopted, and the department will defer to the statutory authority referenced in the proposed amendments to (6) instead of what exists in (15). The department contends the proposed amendments, if adopted, will align the rule more closely to what is permitted under federal law.

The department also proposes to amend existing (12) to add the Form MW-4 and remove federal Form W-4 references and renumber sections. The department also proposes to correct grammar and subject identification or remove unnecessary verbiage in (2), (3), (4), (7), (11), and (15), which the department believes will further clarify rule requirements using plain language.

42.17.103 OTHER PAYMENTS; DESIGNATED DISTRIBUTIONS;

ELECTION TO WITHHOLD (1) Employee contributions to pensions, profit sharing, stock bonus, or annuity plans, deferred compensation and cafeteria plans where the payments are not otherwise considered wages, an IRA, or a commercial annuity contracts are exempt from withholding to the extent that the contributions are not includable in the employee's adjusted gross income for federal income tax purposes.

(2) ~~Third party's Sick pay, paid by an employer's agent, a third party is not subject to withholding taxes unless the payor receives subject to withholding tax if requested in writing by a written request from the employee-, or the employer and the third party entered into an agreement that makes the third party responsible for the reporting and payment of withholding taxes. When a third party reports and pays withholding taxes, the third party must use its own name and tax identification number instead of the employer's.~~

~~(a) A third party may be an employer's agent even if the third party is responsible for determining which employees are eligible to receive payments. Whether an insurance company or the other third party is the employer's agent depends on the terms of the agreement.~~

~~(b) A third party that makes payments of sick pay as the employer's agent is not considered the employer and generally has no responsibility for withholding taxes. This responsibility remains with the employer. However, under an exception to this rule, the parties may enter into an agreement that makes the third party agent responsible for reporting and payment of these taxes. In this situation, the third party agent should use its own name and customer identification number rather than the employer's.~~

~~(3) Payment of sick pay by a third party, other than an employer's agent, is not subject to withholding tax unless requested in writing by the recipient of the sick pay, or as described in (2).~~

~~(4) (3) A recipient of any designated distribution from a deferred compensation plan, individual retirement plan, or commercial annuity, as defined in IRC 3405, may elect to have the payor withhold state income tax from such these payments by filing a written election Form MW-4 with the payor.~~

~~(a) Such The recipient's tax withholding election shall specify a flat dollar amount of income tax to be withheld by the payor from each designated distribution or a number of allowances claimed by the recipient to be used with the withholding tax tables provided by the department. Such The election shall also specify the name, current address, and taxpayer identification number of the recipient. Any change or revocation of a previously filed election shall include the same information as required in this section rule for an initial election except the recipient should indicate whether a change or revocation of a previously filed election is being made. In this case, the payor shall remit the withholding tax to the department as required in ARM 42.17.113.~~

~~(5) (b) The payor has the option to choose not to withhold from any designated distribution if the amount to be deducted and withheld is less than \$10. Additionally, income tax withholding by the payor from any designated distribution shall not be required if the amount to be withheld would reduce the net amount of such the distribution to less than \$10.~~

~~(6) remains the same but is renumbered (c).~~

(a) and (b) remain the same but are renumbered (i) and (ii).

AUTH: 15-30-2620, MCA

IMP: 15-30-2501, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department proposes to amend ARM 42.17.103 to add the words "designated distributions" and "election to withhold" to the rule's catchphrase. The department believes this amendment is necessary to better summarize the rule's subject matter in accordance with ARM 1.2.214 and assist taxpayers who are not employees and practitioners to better locate and identify rules pertaining to elective withholding.

The department believes it necessary to refer to all plans described in (1) in the plural as the current subject-verb agreement in (1) is currently inconsistent.

In the interest of consistent rule organization, the department proposes to consolidate current (3) into current (2) because they are topically the same and (3) provides an additional requirement of that in (2).

The department proposes to amend (2) which is necessary to clarify that the subject the department is referencing is the withholding requirements with regard to employee's sick pay. Proposed amendments reflect necessary changes for consistency based on the removal of the employer's agent definition in ARM 42.17.101.

The department proposes to include in proposed (3) the specific IRC reference to designated distributions, which has expanded in recent years, to provide necessary federal law attribution and guidance in the rule. Additional amendments to proposed (3)(a) are necessary to allow payees that are not employees access to the same method of determining withholding tax used by employees.

The department believes it necessary in the interest of brevity and rule consistency to consolidate current (4), (5), and (6) because they all involve distributions stemming from the series of employee tax-exempt contribution plans referenced in (1).

42.17.105 COMPUTATION OF WITHHOLDING (1) Employers shall calculate the state income tax amount to withhold from employees according to the length of the payroll period, the employee's gross wages, the number of allowances claimed by the employee on Form MW-4, and the department's "Montana Wage Withholding Tax Tables," provided online by the department at www.mtrevenue.gov. The tables are based on the formulas provided in (2) and (3) and show the amount to withhold each pay period. and available:

~~(a) online at revenue.mt.gov; or~~

~~(b) by calling (406) 444-6900 in Helena; or~~

~~(c) by writing to:~~

~~Montana Department of Revenue~~

~~P.O. Box 5835~~

~~Helena, Montana 59604-5835.~~

(2) Montana wage withholding tables are based on the following annual

withholding formulas as adjusted annually for inflation. Wage withholding is equal to:

- (a) 1.80% of the first \$7,105 of net taxable earnings; plus
- (b) 4.40% of the next \$8,120 of net taxable earnings; plus
- (c) 6.00% of the next \$106,575 of net taxable earnings; plus
- (d) 6.60% of net taxable earnings over \$121,800.

(3) remains the same.

~~(4) The department publishes the tables based on the formulas in (2) and (3) at revenue.mt.gov, showing the amount to withhold each pay period for taxable incomes within ranges of taxable earnings.~~

(5) (4) By October 1 of each year, the department shall adjust the withholding formulas for inflation by multiplying the dollar amounts in (2) and the withholding exemption amount used in the determination of net taxable earnings in ARM 42.17.101 by the inflation factor, as defined in 15-30-2101, MCA.

(6) remains the same but is renumbered (5).

AUTH: 15-30-2620, MCA

IMP: 15-30-2103, 15-30-2502, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department proposes amending ARM 42.17.105 to add text in (1) to describe the process and criteria of wage withholding calculations. These changes are necessary since the federal Form W-4 has been discontinued and contained much of this information, and a growing segment of the population has no prior withholding experience and has no reference to state income tax withholding compliance.

The department also proposes to remove references in (1)(a) through (c) to the department's phone number and mailing address as the primary means of obtaining information on withholding tables since that information is available through the department's internet website, which has become the primary access point for the public to receive this information. The department believes the changes are necessary for the department's withholding tax business references to be as current as other similarly adopted areas of the department.

The department also believes it necessary, in the interest of rule organization consistency, to move rule text from (4) and consolidate it with (1) and combine (6) to proposed (4), which are topically the same. The department intends the result will be a better organized and more concise rule. In addition, the department proposes to amend former (5) to align this section with the deletion of the definition of withholding exemption from ARM 42.17.101 and clarify what is adjusted for inflation.

42.17.111 WHO MUST WITHHOLD MONTANA INCOME TAX AND WHO IS SUBJECT TO WITHHOLDING; FORM MW-4 FILING REQUIREMENTS (1) Every employer ~~residing in Montana and every nonresident employer~~ transacting business in Montana is required to withhold Montana state income tax from wages paid to an employee for services rendered within Montana, unless the compensation is specifically exempted under Montana law.

~~(2) Wages paid to nonresidents or nonresident aliens rendering services within Montana are subject to withholding in all cases unless the compensation is specifically exempted under Montana law.~~

(3) remains the same but is renumbered (2).

~~(4) (3) Temporary employment or employment of short duration within Montana of residents or nonresidents does not relieve the employer of the obligation to withhold on such employee wages.~~

~~(5) (4) The Amtrak Reauthorization and Improvement Act of 1990 exempts from state income tax and withholding the compensation of certain railroad, trucking, and air and water carrier employees unless they are Montana residents. The exemption from withholding applies only to nonresident interstate carrier employees and the employer applies the exemption based on the residency status claimed by the employee. No Form MW-4 is required for this exemption.~~

~~(6) (5) Wages paid to an enrolled member of a Native American tribe are subject to withholding, except: as provided in ARM 42.15.220.~~

(a) When the employee is an enrolled tribal member of the governing tribe of the reservation on which the enrolled tribal member works and resides:

(i) remains the same.

(ii) the employee submits a Form MW-4 statement to the employer attesting that the employee resides on his or her reservation, together with a certificate of enrollment.

(b) When wages are derived from both reservation sources and nonreservation sources, only wages derived from reservation sources are exempt from withholding, provided the employee meets all the criteria in ~~(6) (5)(a)~~.

(c) When an employee does not reside on his or her reservation for an entire pay period, only wages earned while the employee was residing on the reservation are exempt from taxation, provided the employee meets all the criteria in ~~(6) (5)(a)~~.

~~(7) (6) Wages paid to a resident of North Dakota for personal services rendered within Montana are not subject to withholding provided the employee has filed a Form MT-R, Reciprocity Exemption from Withholding MW-4, in accordance with ARM 42.17.134.~~

~~(8) (7) Wages paid to the nonmilitary spouse of a military serviceperson for personal services rendered in Montana which meet the criteria in ARM 42.15.112, are not subject to withholding provided the employee has completed a Form MSR, Employee Certificate of Status under the Military Spouses Residency Relief Act MW-4.~~

(8) A withholding exemption claimed on Form MW-4 must be renewed annually. When an employee no longer needs or qualifies for an exemption, the employee must notify the employer by providing a new Form MW-4 without the previously claimed exemption. If an employee fails or refuses to provide the updated Form MW-4, the employer must withhold on the basis of zero withholding allowances, in compliance with ARM 42.17.131.

AUTH: 15-30-2620, MCA

IMP: 15-30-2502, MCA

REASONABLE NECESSITY: In addition to the general statement of

reasonable necessity provided at the beginning of this notice which relates to the department's proposed amendments in ARM 42.17.111(1), (4), (7), and (8), the department determines it necessary to amend this rule's catchphrase for ease of reference, to better summarize the rule's contents, and reflect the purpose of the rule, in accordance with ARM 1.2.214.

The department also proposes to amend (5) to clarify that the department will not use Form MW-4 to grant wage withholding exemptions to inter-state carriers. This amendment is necessary because it is existing practice to have the employer directly apply this exemption based on the residency status of the employee and a rule provision should not conflict with current practice.

The department proposes to amend (6) to reference current ARM 42.15.220 for clarity and to replace the attestation from the enrolled tribal member by Form MW-4 to apply for the withholding exemption. The information on the form will be used by the employer in its wage withholding reporting to the department.

Proposed (8) provides that Form MW-4 must be renewed every year which is the same for all other claimed withholding exemptions. The department contends this is necessary to achieve the reporting compliance goals with minimal burden to employers and employees. The provisions pertaining to what happens when an employee no longer needs or qualifies for the withholding exemption is necessary for consistency with existing requirements in ARM 42.17.131.

42.17.114 ANNUAL RECONCILIATION AND WAGE STATEMENTS (1) On or before January 31 of each year, every employer must file with the department a Form MW-3, Montana Annual W-2 1099 Withholding Tax Reconciliation. Form MW-3 must be accompanied by the original copies of each employee's earnings statements on federal Form W-2.

(a) Employee's earning statements and the federal Form W-2 must be prepared for each employee, regardless of whether or not withholding taxes were actually withheld from the employee's wages. The state non-exempt wages as provided in ARM 42.17.111 or 42.17.134 and state income tax withheld must be shown in the boxes labeled for state information.

(b) through (5) remain the same.

AUTH: 15-30-2620, MCA

IMP: 15-30-2506, 15-30-2507, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.17.114(1)(a) to clarify the employer requirement that non-exempt wages and related withholding be recorded on Form W-2, and that a partial employee exemption is not an employer exemption to complete and provide Form W-2 for state tax purposes. As similarly stated in the department's statement of reasonable necessity for ARM 42.17.111, this requirement is consistent with other wage-based calculation and reporting requirements of an employer and is an extension of existing department policy and a reasonable request to place on employers of tribal employees that seek exemption from withholding.

42.17.131 EMPLOYEE'S WITHHOLDING ALLOWANCES (1) For purposes

of determining the employee's withholding allowances and withholding exemptions, the amount claimed for Montana may be different than the amount claimed on the federal Employee's Withholding Allowance Certificate (Form W-4), reported on the line stating "total number of allowances you are claiming," furnished by the employee to the employer for federal withholding tax purposes. ~~The department may determine whether the amount claimed on the federal Form W-4 should be adjusted for state withholding purposes. The department does not provide a separate form for this purpose Form MW-4.~~ The department has determined that the federal child tax credit that allows extra allowances for federal withholding is not allowed for Montana purposes when determining the number of allowances for Montana withholding.

(2) remains the same.

(3) If an employee fails or refuses to provide the number of allowances on federal Form W-4 MW-4 reported on the line stating "total number of allowances you are claiming," the employer shall withhold, for Montana purposes, on the basis of zero withholding allowances.

~~(4) Any change to the "total number of allowances you are claiming" on federal Form W-4 for federal purposes, including federal redeterminations of allowances, automatically changes the number of allowances for Montana purposes unless the allowances have been set at a maximum number by the department under (5). If a redetermination allows extra allowances for the federal child tax credit for federal purposes, these extra allowances will not be allowed for state purposes.~~

(5) (4) The department may revise the number of withholding allowances claimed to a maximum allowed for state tax purposes.

(a) For any federal Form W-4 MW-4 on which an employee has claimed more than ten withholding allowances, the following apply:

(a) (i) The employer must provide the department with a an electronic copy of the federal Form W-4 MW-4 provided by the employee as described in (5), no later than the last day of the payroll period during which the employer received the form to the following address:

Department of Revenue
P.O. Box 7149
Helena, Montana 59604-7149.

~~(b) The department may revise the number of withholding allowances claimed to a maximum allowed for state tax purposes.~~

(c) (ii) The employer shall must continue to withhold based on the most recently filed federal Form W-4 MW-4 with fewer than 11 allowances claimed. If no Form W-4 MW-4 with fewer than 11 allowances has been was previously filed, the employer shall withhold for Montana purposes on the basis of zero withholding allowances.

(d) (iii) If upon review, the department determines that the federal Form W-4 MW-4 provided is defective, the department may require that the employer disregard the allowances claimed and advise the employer in writing of the maximum number of withholding allowances permitted the employee ~~for state tax withholding purposes.~~

~~(e)~~ (b) The filing of a new federal Form ~~W-4~~ MW-4 by an employee whose withholding allowances have been set at a fixed maximum number by the department shall be disregarded by the employer unless a number equal to or fewer than the set maximum is claimed or written notice by the department is given authorizing a different maximum.

~~(6)~~ (c) When adjusting claimed withholding allowances for an employee under ~~(5)~~, the department shall consider:

(a) through (c) remain the same but are renumbered (i) through (iii).

~~(d)~~ (iv) ~~estimated allowable deductions under 15-30-2111, 15-30-2131, 15-30-2132, and 15-30-2133, MCA, to the extent that such deductions exceed the average itemized deductions taken into account in the withholding tables;~~

~~(e)~~ (v) ~~business losses~~ any Montana net operating loss deduction carryover or allowable tax credit carried over from past years;

~~(f)~~ (vi) annuity plan contributions; and

~~(g)~~ (vii) residency; and

~~(h)~~ federal Form W-4, personal allowances worksheet.

~~(7)~~ (d) If the department does not have sufficient information to determine the maximum number of permitted allowances in ~~(5)~~, the department shall use its best estimate of the employee's eligible exemptions when determining the withholding allowances.

~~(8)~~ (5) Employers shall provide a copy of an employee's federal Form ~~W-4~~ MW-4 no later than the last day of the payroll period during which the employer received the form, if more than ten allowances or one of the exemptions referenced on the form were claimed, or at any time upon request by the department, at any time, for the purposes of state tax administration. The employer's electronic submission must be made to the department as instructed on Form MW-4.

AUTH: 15-30-2620, MCA

IMP: 15-30-2502, MCA

REASONABLE NECESSITY: In connection with the general statement of reasonable necessity provided at the beginning of this notice, the department proposes to amend ARM 42.17.131(1), (3), (4), and (5) by striking claimed allowances language because it is no longer relevant in light of the discontinuation of the Form W-4 and inserting necessary Form MW-4 references. As an extension of the discontinuation of the federal Form W-4, the department also proposes to transfer, reorganize, and renumber content from current (5) through (8), to proposed (4) and (5) for economy of referencing. The department intends these amendments will better reflect the department's general authorization to revise withholding allowances and then address specific withholding compliance matters when employees claim more than ten withholding allowances, which was also present in the former federal Form W-4.

The department also proposes to remove references in (4) to the department's mailing address as the means of filing payroll reports with the department. These changes are necessary because employers file wage and withholding reports via the department's online portal.

The department proposes amendments as renumbered (4)(c) which seek to

simplify the adjustment of allowances by removing calculations a taxpayer can claim under 15-30-2111 and 15-30-2131, MCA, because these calculations could be dependent on future facts and circumstances and not historical or existing ones. All estimations will be based on standard deduction instead, which is necessary to provide more consistently applied department withholding calculations. Net operating loss deductions will continue to be included in the estimation. In addition, the estimation will now include credits carried forward from previous years.

42.17.134 RECIPROCAL AGREEMENT - NORTH DAKOTA (1) Under the terms of the Income Tax and Withholding Tax Reciprocal Agreement between Montana and North Dakota, and to the extent this agreement is in effect, An an employer is not required to deduct withhold Montana state income tax withholding on wages earned by residents of North Dakota under the provisions of the Income Tax and Withholding Tax Reciprocal Agreement between Montana and North Dakota. Relief from withholding is subject to all of the provisions in (2) through (5) this rule.

(2) A North Dakota resident performing services in Montana for compensation must annually provide Form MT-R, Reciprocity Exemption from Withholding, MW-4 to their employer before the employer may discontinue withholding on compensation earned in Montana. The certificate must be filed with the employer within 30 days of the start of employment. The certificate is valid only from the date filed to December 31 of the year in which filed. A new certificate to renew the exemption from withholding must be filed with the employer by the last day in February of each year. The certificate is rendered invalid if the employee changes his or her residence to any state other than North Dakota from January first of the exemption year or from the date the certificate is provided to the employer whichever comes last, and until December 31 of the exemption year or until the date when the employee establishes residency in a state other than North Dakota whichever comes first.

(3) ~~Withholding from a North Dakota resident's compensation earned in Montana must be treated as if earned in North Dakota. If North Dakota requires withholding from the compensation, the North Dakota withholdings must be deducted from the compensation.~~

(4) ~~A copy of the employee's Form MT-R must be submitted by the employer to the department within 30 days of when it is provided to the employer in the case of new employment, or by March 31 if the form is renewing an exemption.~~

(5) remains the same but is renumbered (3).

AUTH: 15-30-2620, MCA

IMP: 15-30-2502, 15-30-2509, 15-30-2621, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department proposes amending ARM 42.17.134(1) to better state the existence and current effect of the Income Tax and Withholding Tax Reciprocal Agreement (Reciprocal Agreement) between Montana and North Dakota.

The department's proposed amendment to (2) is necessary, for consistency, as the department has specified in other rules that the withholding exemption

claimed under Form MW-4 is valid for a maximum of one year. The application of this amendment is consistent with the other rules where an employee's claim for exemption has a limited duration.

The department proposes to strike current (3) because of potential conflicts between the rule and the Reciprocal Agreement involving North Dakota residents, and (4) because the Form MT-R has been replaced with the Form MW-4 and the rule language is no longer valid. As a result of the amendments to (3) and (4), current (5) will be renumbered.

42.17.135 FALSE STATEMENTS BY EMPLOYEES - RECOMPUTATION AND ESTIMATION OF WITHHOLDING (1) Where the department determines that an employee has provided a false ~~statement through withholding certificate or falsified certificate of North Dakota residency~~ a Form MW-4, it may require the employer to deduct and withhold from the employee's current wages a recomputed amount of withholding for the current year wages of the employee based on the proper amount of withholding which would have been taken had the false filing not been made. If the employee has terminated employment and has been paid all wages earned prior to notification of required recomputation, the employer shall not be held liable for the uncollected withholding.

(2) If an employer has knowledge that a falsified ~~certificate~~ Form MW-4 has been provided by the employee and fails to notify the department as required, the employer may be held liable for withholding not collected.

(3) The department may estimate the amount of non-exempt wages and withholding owed by the employer if it determines that the method used to account for non-exempt wages reported on Form W-2 or MW-3 does not accurately reflect the proportion of non-exempt wages earned by an employee. When no records have been kept, or no records are provided, the department may subject all wages to withholding, as required by 15-30-2502, MCA.

AUTH: 15-30-2620, MCA

IMP: 15-30-2502, 15-30-2509, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department proposes to amend ARM 42.17.135(1) to match the false statement text in the rule with the rule's catchphrase. This change is necessary to clarify that employee withholding forms - including the proposed Form MW-4 - are not the only types of statements which are relied upon by the employer and the department.

The department also proposes the addition of (3) to explain the statutory authority given the department to estimate an employee's non-exempt wages even if the employee has claimed an exemption. The addition of (3) is necessary and consistent with other tax and reporting regulations to indicate under what circumstances the department may apply its authority to correct or amend tax calculations and reports for errors or fraud. The proposed amendment also states that when no records are provided, and in spite of the exemption claimed, the department is allowed under statute to subject up to the entire wages to withholding, because the exemption has not been substantiated. Based on the proposed

amendment in (3), the department also proposes to add the words "and estimation" to the rule's catchphrase to convey the additional content and comply with ARM 1.2.214.

42.17.203 RECORDS TO BE KEPT BY EMPLOYER (1) ~~As required by ARM 42.2.305, e~~Employers must keep employment records for each employee for five years from date of payment and make records available for department review for five years, as provided by ARM 42.2.305. ~~Such~~ The records must show:

- (a) For each pay period:
 - (i) remains the same.
 - (ii) the total wages, as defined in 15-30-2501, MCA, for employment in ~~such~~ the pay period; and
 - (iii) remains the same.
- (b) For each employee:
 - (i) the employee's full name;
 - (ii) through (iii)(B) remain the same.
 - (C) estimated or actual amount of gratuities received from persons other than employer; ~~and or~~
 - (D) special payments of any kind, including annual bonuses, gifts, prizes, etc.
 - (iv) remains the same.
 - (v) the date employment was terminated ~~by layoff, quit, discharge, or death;~~
 - (vi) the cause of any termination, such as voluntary by employee, layoff, discharge, or death;
 - (vii) and (vii)(A) remain the same.
 - (B) if the employee is paid on a fixed daily basis, the employee's daily rate and the customarily scheduled days per week prevailing in the establishment for ~~his~~ their occupation; and
 - (C) remains the same.
 - (viii) documents supporting employee expense reimbursements; ~~and~~
 - (ix) when an exemption under ARM 42.17.111 is in effect, the portion of non-exempt wages paid to the employee for each pay period, and the method used to calculate this portion.
- (2) remains the same.
- (3) The department is authorized to examine ~~any and~~ all records necessary for the administration of the withholding and estimated tax law (Title 15, chapter 30, part 25, MCA). Examples of Tthese records include, ~~but are not limited to:~~
 - (a) through (e) remain the same.
 - (f) loan documentation; ~~and~~
 - (g) federal and state withholding allowance and exemption certificates; and
 - (g) remains the same but is renumbered (h).

AUTH: 15-30-2620, MCA
IMP: 15-30-2504, MCA

REASONABLE NECESSITY: In addition to the general statement of reasonable necessity provided at the beginning of this notice, the department proposes amending ARM 42.17.203(1) by primarily reorganizing the structure of the

sentence for increased clarity. Based on employer feedback, the department also believes it necessary to specify the time period that the employer must keep employment records for department review referred to in the stricken reference to ARM 42.2.305. The department also proposes some minor grammatical amendments to (1)(a) and (b) and a relocation of text in (1)(b)(v)(D) to (1)(b)(vi)(D), both of which add to the readability of the rule.

The department proposes inserting new (1)(b)(ix)(D) to require that employers keep in their employment records the calculations of non-exempt wages. This is necessary to complete the other non-exempt wage rulemaking requirements proposed in this rulemaking in ARM 42.17.111, 42.17.114, 42.17.131, and 42.17.135, because the employer's recordkeeping is often relied upon for audit purposes and in an employer's defense of adverse audit findings.

5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Todd Olson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-7905; fax (406) 444-3696; or e-mail todd.olson@mt.gov and must be received no later than 5:00 p.m., December 13, 2019.

6. Todd Olson of the Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

7. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. A written request may be mailed or delivered to the person in number 5 above or faxed to the office at (406) 444-3696 or may be made by completing a request form at any rules hearing held by the Department of Revenue.

8. An electronic copy of this notice is available on the department's web site at www.mtrevenue.gov, or through the Secretary of State's web site at sosmt.gov/ARM/register.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Todd Olson
Todd Olson
Rule Reviewer

/s/ Gene Walborn
Gene Walborn
Director of Revenue

Certified to the Secretary of State October 29, 2019.