WEST VIRGINIA CODE: §11-21-31

§11-21-31. Mobile employee exclusion from state source income.

(a) As used in this section:

(1) “Professional athlete” means an athlete who performs services in a professional athletic event for compensation.

(2) “Professional entertainer” means a person who performs services in the professional performing arts for compensation on a per-event basis.

(3) “Public figure” means a person of prominence who performs services at discrete events, such as speeches, public appearances, or similar events, for compensation on a per-event basis.

(b) Compensation subject to withholding pursuant to §11-21-1 *et seq*. of this code, without regard to any withholding tax exception set forth in §11-21-71a of this code, paid to a nonresident individual is exempt from the tax levied under §11-21-1 *et seq*. of this code if all of the following conditions apply:

(1) The compensation is paid for employment duties performed by the individual in this state on thirty or fewer days in the calendar year;

(2) The individual performed employment duties in more than one state during the calendar year;

(3) The compensation is not paid for employment duties performed by the individual in the individual’s capacity as a professional athlete, professional entertainer, or public figure; and

(4) The nonresident individual’s state of residence:

(A) Provides a substantially similar exclusion; or

(B) Does not impose an individual income tax; or

(C) The individual’s income is exempt from taxation by this state under the United States Constitution or federal statute.

(c) Except as otherwise provided in this article, an employer is not required to withhold taxes under §11-21-1 *et seq*. from compensation that is paid to an employee described in subsection (b) of this section: *Provided,* That if, during the calendar year, the number of days an employee spends performing employment duties in this state exceeds the thirty-day threshold described in subsection (b) of this section, an employer shall withhold and remit tax to this state for every day in that calendar year, including the first thirty days, on which

WV Legislature

the employee performs employment duties in this state.

(d) *Special rule for determining liability* — For purposes of determining compensation paid and subject to withholding under this section:

(1) If an employer maintains a time and attendance system that tracks where employees perform services on a daily basis, then data from the time and attendance system shall be used. For purposes of this section, time and attendance system means a system:

(A) In which the employee is required, on a contemporaneous basis, to record the work location for every day worked outside of the State where the employment duties are primarily performed; and

(B) That is designed to allow the employer to allocate the employee's wages for income tax purposes among all states in which the employee performs services.

(2) In all other cases, the employer shall obtain a written statement from the employee of the number of days reasonably expected to be spent performing services in this State during the taxable year. Absent the employer's actual knowledge of fraud or gross negligence by the employee in making the determination or collusion between the employer and the employee to evade tax, the certification so made by the employee and maintained in the employer's books and records shall be prima facie evidence and constitute a rebuttable presumption of the number of days spent performing services in this State.

(e) For purposes of this section, an employee shall be considered present and performing employment duties within this state for a day if the employee performs more of the employee's employment duties in this state than in any other state during that day. Any portion of the day during which the employee is in transit shall not be considered in determining the location of an employee's performance of employment duties.

(f) The provisions of this section shall be effective on January 1, 2022.

www.legislature