

**WISCONSIN DEPARTMENT OF REVENUE  
DIVISION OF INCOME, SALES, AND EXCISE TAX**

**NOTICE OF PROPOSED GUIDANCE DOCUMENTS**

Pursuant to sec. 227.112, Wis. Stats., the Wisconsin Department of Revenue, Division of Income, Sales, and Excise Taxes hereby seeks comment on the proposed guidance document listed in the table below.

**SUBMITTING PUBLIC COMMENTS**

Public comments on proposed or adopted guidance documents may be submitted online at: <https://www.revenue.wi.gov/Pages/contactUs/proposed-Guidance.aspx>.

**DEADLINE FOR SUBMISSION**

The period for public comment for proposed guidance documents ends 21 days after publication in the Administrative Register, unless the Governor approves a shorter commenting period.

<b>Document Number</b>	<b>Document Title</b>
<b>100178</b>	Pass-Through Entity Withholding - Common Questions

State of Wisconsin  
Department of Revenue

## Pass-Through Entity Withholding Common Questions

**This is a proposed guidance document. The document has been submitted to the Legislative Reference Bureau for publication in the Administrative Register for public comment as provided by sec. 227.112(1), Wis. Stats.**

1. What is a "pass-through entity"?
2. Who is required to withhold?
3. Who is a "nonresident"?
4. How do I file and pay the withholding?
5. What exemptions apply?
6. How does a nonresident file an exemption affidavit?
7. What is a continuous exemption and how do I apply for one?
8. If exemptions apply, do I still have to file Form PW-1?
9. Am I required to make estimated payments?
10. How do I make payments electronically?
11. What about composite income tax returns?
12. Does the nonresident still have to file a Wisconsin return?
13. Does the 30% long-term capital gain exclusion apply?
14. Can prior year losses be used to offset the amount subject to withholding?
15. What happens when a pass-through entity is in a "tiered" structure, where it owns another pass-through entity?
16. What penalties and interest apply for failure to follow these requirements?

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### 1. **What is a "pass-through entity"?**

A pass-through entity is an organization whose income, loss, deductions and credits flow through and are taxed at the shareholder, partner, member, or beneficiary level. Partnerships, limited partnerships, limited liability partnerships, limited liability companies, tax-option (S)

corporations, estates and trusts not taxed at the entity level are all pass-through entities.

## 2. Who is required to withhold?

Any pass-through entity that has Wisconsin income for a taxable year that is allocable to a nonresident partner, member, shareholder, or beneficiary must withhold Wisconsin tax on that income to the extent it is Wisconsin income to the nonresident. The withholding applies regardless of whether the income is actually distributed by the pass-through entity.

The following entities are **not** required to withhold:

- An entity that is disregarded for federal income tax purposes.
- A grantor trust that is not required to file a federal income tax return.
- A publicly traded partnership as defined under section 7704(b) of the Internal Revenue Code, provided the partnership files a Wisconsin Schedule 3K-1 for each partner.
- A joint venture that has elected not to be treated as a partnership under section 761 of the Internal Revenue Code.

## 3. Who is a "nonresident"?

A "nonresident" includes:

- An individual who is not domiciled in Wisconsin.
- A partnership, limited liability company or corporation whose commercial domicile is outside Wisconsin.
- An estate or trust that is a nonresident under sec. 71.14(1) to (3m), Wis. Stats.

## 4. How do I file and pay the withholding?

Pass-through entities are required per sec. Tax 1.12(4)(a)13, Wis. Adm. Code, to make their payments electronically, as further explained in "Am I required to make estimated payments?" below.

In addition to the quarterly estimated payments, a pass-through entity is required to file Form PW-1, Wisconsin Nonresident Income or Franchise Tax Withholding on Pass-Through Entity Income, on an annual basis and pay any additional withholding tax due.

Form PW-1 is due on the unextended due date of the pass-through entity's Wisconsin income or franchise tax return. For tax-option (S) corporations, partnerships, and limited liability companies treated as partnerships, the filing deadline for the Form PW-1 is the **15th day of the 3rd month** following the close of the entity's taxable year. For trusts and estates, the filing deadline for the PW-1 is the **15th day of the 4th month** following the close of the entity's taxable year. Wisconsin statutes provides for an automatic 7 month extension to file the Form PW-1. If tax is due, interest will be assessed on the tax due during the extension period.

The Department of Revenue requires that Form PW-1 be filed electronically and the payment be made electronically. Two electronic filing methods are available, including a free program offered by the Department of Revenue. To file your Form PW-1 electronically, go to the department's Pass-Through Entity Withholding page.

If electronic payment presents an undue hardship, the pass-through entity may request a waiver from the department to pay by non-electronic means.

## 5. What exemptions apply?

Certain types of entities are not required to withhold, as described in "[Who is required to withhold?](#)" above. Further, a nonresident is not subject to the withholding if any of the following exemptions apply:

- The nonresident's share of Wisconsin income from the pass-through entity is less than \$1,000.
- The nonresident files an affidavit with the department using Wisconsin [Form PW-2, Wisconsin Nonresident Partner, Member, Shareholder, or Beneficiary Withholding Exemption Affidavit, or Beneficiary Pass-Through Withholding Exemption Affidavit](#). The pass-through entity must maintain a department-approved copy of the nonresident's Form PW-2 in its records to substantiate the exemption.
- The nonresident receives a continuous exemption letter from the department. For additional information, see [Wisconsin Tax Bulletin #182](#).
- The nonresident is exempt from Wisconsin income and franchise taxation. The pass-through entity may rely on a written statement from the member claiming to be exempt from taxation, if the pass-through entity includes a copy of the statement to its income or franchise tax return for the taxable year. The statement must specify the nonresident's name, address, federal employer identification number, and reason for claiming an exemption.
- The pass-through entity has elected under sec. 71.21(6)(a) or 71.365(4m)(a), Wis. Stats., to be taxed at the entity level.

## 6. How does a nonresident file an exemption affidavit?

To file the affidavit, the nonresident partner, member, shareholder, or beneficiary must use Wisconsin [Form PW-2, Wisconsin Nonresident Partner, Member, Shareholder, or Beneficiary Withholding Pass-Through Withholding Exemption Affidavit](#). For each taxable year of the nonresident, a separate Form PW-2 is required.

Form PW-2 must be completed and filed with the department on or before the filing deadline to be valid. The filing deadline depends on the type of pass-through entity for which the nonresident is claiming the exemption:

- For tax-option (S) corporations, partnerships, and LLCs taxed as partnerships, the nonresident must file Form PW-2 with the department by the last day of the first month following the close of the entity's taxable year. For example, for a shareholder of a calendar year S corporation, Form PW-2 for the 2019 taxable year is due **January 31, 2020**.
- For estates and trusts, the nonresident must file Form PW-2 with the department by the last day of the second month following the close of the entity's taxable year. For example, for a beneficiary of a calendar year estate, Form PW-2 for the 2019 taxable year is due **March 2, 2020**.

The department will then approve Form PW-2 as appropriate and return it to the nonresident within approximately 30 days. To obtain the withholding exemption, the nonresident must present an approved copy of Form PW-2 to the pass-through entity. The pass-through entity

must maintain this copy in its records as documentation for why it did not pay withholding tax on income allocable to that nonresident.

#### 7. **What is a continuous exemption and how do I apply for one?**

Based on a review of previously approved Forms PW-2, *Wisconsin Nonresident Partner, Member, Share-holder, or Beneficiary Pass-Through Withholding Exemption Affidavit*, the department has changed its approval process. On a case-by-case basis, the department will be issuing a "continuous" exemption, which relieves a nonresident of the requirement to file Form PW-2 in future years.

As a nonresident may not apply for a "continuous" exemption, there is no change in how Form PW-2 is filed. Exemptions will be issued using criteria similar to that used to approve Form PW-2. The exemption will be reviewed annually to ensure the nonresident is paying estimated tax and filing returns as required. Noncompliance by the nonresident will result in revocation of the exemption.

The department anticipates this process change will benefit both nonresidents and pass-through entities by reducing annual recordkeeping and filing requirements.

#### 8. **If exemptions apply, do I still have to file Form PW-1?**

You do not have to file Form PW-1 for a taxable year if no members of the pass-through entity are required to be reported on Form PW-1. However, if a nonresident claims exemption by filing Form PW-2 affidavit, the pass-through entity is still required to report that nonresident on Form PW-1 and check the box indicating that the nonresident filed the affidavit.

Additionally, if a nonresident will be included in a composite Wisconsin income tax return (Form 1CNS or 1CNP), the pass-through entity must still report that nonresident on Form PW-1 and pay the withholding accordingly. (See "[What about composite income tax returns?](#)" below for more details).


A nonresident partner, member, shareholder, or beneficiary is not required to be reported on Form PW-1 if either of the following apply:

- The nonresident is exempt from Wisconsin income and franchise taxation.
- The nonresident's share of pass-through income attributable to Wisconsin is less than \$1,000.

#### 9. **Am I required to make estimated payments?**

A pass-through entity is required to make quarterly estimated payments of pass-through entity withholding.

The quarterly payments of withholding tax are due on or before the **15th day of the 3rd, 6th, 9th, and 12th month** of the entity's taxable year.

Pass-through entities are required to make their payments electronically. If electronic payment presents an undue hardship, a pass-through entity may obtain a  [waiver](#) from the department to pay by other means. If the waiver is granted, taxpayers must use [Form PW-ES](#)

to make the quarterly estimated withholding tax payments. Do not use Form PW-1 as a substitute for Form PW-ES. In general, the required installment is calculated as follows:

If the pass-through entity filed a return for the preceding taxable year and that taxable year was not less than 12 months, the required installment is 25% of the lesser of the following amounts:

- 90% of the withholding tax that is due for the taxable year.
- The withholding tax due for the preceding taxable year.

If the pass-through entity's preceding taxable year was less than 12 months or if the pass-through entity did not file a return for the preceding taxable year, the required installment is 25% of 90% of the withholding tax that is due for the taxable year. Section 71.775(4)(h), Wis. Stats., also authorizes the use of an annualization method, if applicable.

#### 10. **How do I make payments electronically?**

Make payments electronically through My Tax Account, the departments online account management system.

The pass-through entity needs to register for electronic funds transfer if using the ACH Debit payment method when making electronic payments. A pass-through entity using the ACH Debit payment method (authorizing the department's bank to initiate the funds transfer) needs to select the tax type code of 20100, which labels the payment as a Pass-Through Withholding payment.

A pass-through entity using ACH Credit (authorizing its financial institution to initiate the funds transfer) needs to indicate in the addenda (7) record that the tax type code is 20300 when making an estimated tax payment. When using the ACH Credit payment method, no EFT registration is needed. For further information on making ACH Credit payments, refer to Payment Instructions for Financial Institutions on our website.

#### 11. **What about composite income tax returns?**

If a nonresident will be included in a composite Wisconsin income tax return (Form 1CNS or 1CNP), the pass-through entity must report that nonresident on Form PW-1, pay any additional withholding due, and file Form 1CNS or 1CNP.

The pass-through entity pays the withholding with Form PW-1, as described in "How do I file and pay the withholding?" above, which is due on the unextended due date of the pass-through entity's Wisconsin income or franchise tax return.

Quarterly estimated payments of pass-through entity withholding may be made using Form PW-ES, as described in "Am I required to make estimated payments?" above.

#### 12. **Does the nonresident still have to file a Wisconsin return?**

Pass-through entity withholding does not relieve nonresidents from their requirement to file a Wisconsin individual income tax return. For nonresidents who elect to be included in a composite Wisconsin income tax return, the pass-through entity must report such nonresidents on both Form PW-1 and the composite income tax return (Form 1CNS or 1CNP).

#### 13. **Does the 30% long-term capital gain exclusion apply?**

The 30% long-term capital gain exclusion (60% for sale of farm assets) provided under Wisconsin law may be used to reduce the amount of pass-through capital gain income allocable to nonresidents who are individuals. This exclusion may also be used to determine if the nonresident has less than \$1,000 of income from the pass-through entity.

**14. Can prior year losses be used to offset the amount subject to withholding?**

No. Only the pass-through income and losses of the current year may be used to compute the pass-through income subject to withholding. However the nonresident may elect out of withholding by filing an exemption affidavit (Form PW-2).

**15. What happens when a pass-through entity is in a "tiered" structure, where it owns another pass-through entity?**

If a pass-through entity (called an "upper-tier entity") owns another pass-through entity (called a "lower-tier" entity), the lower-tier entity is required to withhold on the Wisconsin income allocable to the upper-tier entity. The upper-tier entity may then take credit for tax already withheld by the lower-tier entity when it withholds on behalf of its own nonresident members.

Alternatively, the upper-tier entity may file an exemption affidavit (Form PW-2) to elect out of withholding from the lower-tier entity. In this case, the upper-tier entity would pay the withholding on its total Wisconsin income allocable to its nonresident members even if that income is from the lower-tier entity.

**16. What penalties and interest apply for failure to follow these requirements?**

The pass-through entity may be liable for a penalty if it does not withhold on the Wisconsin income allocable to a nonresident, does not obtain Form PW-2 from the nonresident, and no other exemption applies. The penalty for failure to withhold is 5% of the amount of tax required to be withheld if the failure is for not more than one month, with an additional 5% for each additional month or fraction thereof during which the failure continues, not to exceed 25% of the amount of tax required to be withheld. This penalty may apply even if the nonresident files a Wisconsin income or franchise tax return reporting the income allocable from the pass-through entity.

**For quarterly estimated withholding tax payments for a pass-through entity:**

In the case of any underpayment of quarterly estimated withholding taxes, interest shall be added to the aggregate withholding tax for the taxable year at the rate of 12% per year on the amount of the underpayment for the period of the underpayment. "Period of the underpayment" means the time period beginning with the due date of the installment and ending on either the unextended due date of the return or the date of payment, whichever is earlier. If 90% of the tax due for the taxable year is not paid by the unextended due date of the return, the difference between that amount and the estimated taxes paid, along with any interest due, shall accrue delinquent interest in the same manner as income and franchise taxes.

However, no interest is required if any of the following conditions apply: (1) the amount of withholding tax due is less than \$500; or (2) the amount of withholding tax due is less than \$5,000, the pass-through entity had no withholding tax liability for the preceding taxable year,

and the preceding taxable year was 12 months.

## Applicable Laws and Rules

This document provides statements or interpretations of the following laws and regulations in effect as of December 12, 2019: Sections 71.03, 71.05, 71.14, 71.195, 71.775 and 71.83, Wis. Stats., and secs. Tax 1.12 and 2.04, Wis. Adm. Code.

Laws enacted and in effect after December 12, 2019, new administrative rules, and court decisions may change the interpretations in this document. Guidance issued prior to December 12, 2019, that is contrary to the information in this document is superseded by this document, pursuant to sec. 73.16(2)(a), Wis. Stats.

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