North Dakota Office of State Tax Commissioner
Guideline - Income Tax Withholding

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Tax Commissioner

Table of Contents

- Income Tax withholding on wages
  - Income Tax Withholding Requirement
  - Wages Exempt from Withholding Requirements
  - Amount to withhold from wages
  - Employer Registration
  - Reporting and Payment Requirements on wage withholding
  - Rates & Instructions for wages paid
    - Income Tax Withholding: Rates & Instructions for wages paid guideline
    - Income Tax Withholding Tables
- Annual Filing Requirements - W-2 and 1099's
  - Information Returns for wages - W-2
    - Who must file
    - W-2 Corrections
  - Information Returns for nonwage payments - 1099, 1042-S, and W-2G
    - Who must file
    - Corrections to nonwage payments
  - How to submit.
    - Method 1: Electronic Upload or Keying
    - Method 2: Electronic Media
      - Option 1 - Email with text file attachment
      - Option 2 - Secured Email Attachment
      - Option 3 - Combined federal/state program
  - When to file
  - Failure to file
- Income Tax Withholding: Oil and Gas Royalty Payments
  - Introduction/Definitions
  - Income Tax Withholding requirement
  - Exceptions
  - Amount to withhold
  - Registration requirement
  - Reporting and payment requirements
  - Annual return
  - Information returns for royalty payments
  - Corrections
- Contact options

For a list of our **Frequently Asked Questions**, go to www.nd.gov/tax/faqs.

For more information about the withholding requirements for pass-through entities, email the Individual Income Tax Section.

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Income Tax Withholding on Wages

Income Tax Withholding Requirement

An employer is required to withhold North Dakota income tax from wages paid to an employee if the employee performs services within North Dakota and the wages are subject to federal income tax withholding. Amounts withheld by an employer are only held in trust until paid to the state. Wages that are not subject to federal income tax withholding, such as wages paid for domestic labor, are not subject to North Dakota income tax withholding. If an employer and employee mutually agree to withhold federal income tax from wages that are not subject to federal income tax withholding, the wages are *not* subject to North Dakota income tax withholding. N.D.C.C. § 57-38-59(1)

Definitions: The terms *wages, employer, employee, payroll period, and calendar quarter* have the same meaning as defined in the Internal Revenue Code of 1986, as amended, for purposes of federal income tax withholding on wages. N.D.C.C. §§ 57-38-59(1) and 57-38-01(10)

Payroll service provider: If an employer contracts with a payroll service provider to file and pay the federal and state withholding taxes on behalf of the employer, and the payroll service provider files and pays the employer's federal withholding taxes electronically, the payroll service provider is required to electronically file and pay the employer's North Dakota withholding taxes.

North Dakota resident working in another state: If an employer's main place of business is located in North Dakota, the employer must withhold North Dakota income tax from wages paid to a resident employee who performs services in another state. However, this does not apply if the employer is required by the other state to withhold that state's income tax from the wages. N.D.C.C. § 57-38-59(1)(2)

Nonresident alien of United States working in North Dakota: Wages paid to a nonresident alien of the United States for services performed within North Dakota are subject to North Dakota income tax withholding if they are subject to federal income tax withholding. If wages paid to a nonresident alien are exempt from federal income tax withholding because of an income tax treaty between the United States and a foreign country, they are not exempt from North Dakota income tax withholding. Except where an income tax treaty between the United States and a foreign country specifically exempts income from state taxation, income tax treaties between the United States and foreign countries are not recognized for North Dakota income tax purposes. N.D.C.C. § 57-38-59(1)(2)

To determine the amount of North Dakota income tax to withhold from the wages paid to a nonresident alien for services performed in North Dakota, do the following:

- Complete a separate Federal Form W-4 for North Dakota withholding purposes. Write "North Dakota only—nonresident alien" at the top of the form.
- Fill in the name and address of the nonresident alien. For the address, provide the permanent address in the home country of the nonresident alien. If there is no permanent address in the home country, provide the address used in the United States.
- Fill in the social security number if one is available. If the nonresident alien does not have to obtain a social security number for any federal purpose, one does not have to be obtained just for North Dakota withholding purposes, in which case write "Not required" in the space for the social security number.
- Check the "Single" box.
- Enter "1" for the number of withholding allowances.
- Calculate the North Dakota income tax withholding based on the Federal Form W-4 as filled out above. (Note: The "Exempt" status may not be claimed.)

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Wage exempt from withholding requirement

All wages that are subject to federal income tax withholding are subject to North Dakota income tax withholding, except:

- Wages paid to a nonresident of North Dakota for performing regularly assigned duties in more than one state for an interstate motor, rail, air, or water carrier company, as provided for under federal interstate commerce law.
- Wages paid to an eligible resident of Minnesota or Montana for services performed in North Dakota (see "Reciprocity" below for more information). N.D.C.C. § 57-38-59.1
- Wages paid to a Native American Indian for services performed on an Indian reservation, provided the employee (1) is an enrolled member of a federally-recognized Indian tribe, (2) lives on any reservation, and (3) performs the services for which the wages are paid on any reservation.
- Wages paid by a farmer or rancher to an employee solely for agricultural labor. N.D.C.C. § 57-38-60(10)
- Wages paid to an eligible spouse of a U.S. armed forces service member for services performed by the spouse in North Dakota (see "Spouse of U.S. Armed Forces Service member" below for more information).
- Wages paid that qualify for the nonresident mobile workforce exclusion. N.D.C.C. § 57-38-59.3

Reciprocity: Income tax reciprocity agreements between North Dakota and the states of Minnesota and Montana provide that wages paid to residents of Minnesota and Montana for services performed in North Dakota are exempt from North Dakota income tax withholding, provided the employee completes and gives a Form NDW-R, Reciprocity exemption from withholding for qualifying Minnesota and Montana residents working in North Dakota, to the employer. (Note: Under the agreement with Minnesota, the employee must return to his or her home in Minnesota at least once every month to qualify for the exemption.) The employee must renew the exemption from withholding at the beginning of each year by completing and giving a new Form NDW-R to the employer on or before February 28. The employer is responsible for making Form NDW-R available to employees. N.D.C.C. § 57-38-59.1

Spouse of U.S. Armed Forces Service member: On November 11, 2009, the Military Spouses Residency Relief Act was signed into law. The Act exempts from state income tax wages paid to the spouse of a U.S. armed forces service member if the spouse is a nonresident of the state in which the wages are earned and is present in the state solely to be with the service member who is stationed in the state. The Act was effective starting with the 2009 tax year. In order to be exempt from withholding, the spouse of the service member must give a complete Form NDW-M, Exemption from withholding for a qualifying spouse of a U.S. armed forces service member, to the employer. The employee must renew the exemption from withholding at the beginning of each year by completing and giving a new Form NDW-M to the employer on or before January 31.

Voluntary agreement to withhold: An employer and an employee may mutually agree to have North Dakota income tax withheld from wages otherwise exempt from North Dakota's income tax withholding requirement, in which case the employer must comply with the registration, reporting, and payment requirements explained in this guideline. N.D.C.C. § 57-38-61

Amount to withhold from wages

An employer may use one of two methods to determine the amount of North Dakota income tax to withhold. Method One (Percentage of Wages Method), which is functionally similar to the federal percentage method (in Circular E), is recommended for all wage levels and is best suited for computerized payroll systems. Method Two (Withholding Tables), which is functionally similar to the federal wage bracket method (in Circular E), is recommended for employers having both a manual payroll system and a small number of employees. Instructions on the use of each method are provided in a separate publication entitled North Dakota Income Tax Withholding Rates and Instructions Booklet. N.D.C.C. § 57-38-59

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Minimum amount to withhold: If the amount of North Dakota income tax to withhold from an employee's wages for a pay period is calculated to be less than $1.00, the employer is not required to withhold that amount. However, if the employer withholds an amount of less than $1.00, the employer must remit the amount to the Office of State Tax Commissioner. N.D.C.C. § 57-38-61

Federal Form W-4: North Dakota does not have a form comparable to Federal Form W-4. The information on the W-4 is also used for North Dakota income tax withholding purposes. If an employee claims exempt status on the W-4, the exempt status is recognized for North Dakota income tax withholding purposes. If an employer is required to submit a copy of the W-4 to the IRS, the employer must also submit a copy of the W-4 to the North Dakota Office of State Tax Commissioner. N.D.C.C. § 57-38-61

Funds held in trust: North Dakota income tax withheld from an employee's wages is deemed to be held in trust by the employer for the State of North Dakota. N.D.C.C. § 57-38-60(8)

EMPLOYER REGISTRATION

Every employer required to withhold North Dakota income tax must register with the Office of State Tax Commissioner by completing and filing Application to Register for Income Tax Withholding and Sales and Use Tax Permit in Taxpayer Access Point (TAP), the online tax filing and account access application. If an employer is a new business in North Dakota, this form is included in the booklet New Business Registration Forms, which contains information and forms for common state business requirements and other purposes. The application may be found on TAP. North Dakota Administrative Code § 81-03-03.1-02

Change in federal employer identification number (FEIN): If an employer's FEIN is changed for any reason, the employer must complete a new Application to Register for Income Tax Withholding and Sales and Use Tax Permit to register the change. The application may be found on TAP.

Cash deposit or bond or undertaking executed by surety company: If required by the tax commissioner, an employer must either make a cash deposit or post a bond or undertaking executed by a surety company authorized to do business in North Dakota. The amount of the cash deposit, bond or undertaking must be reasonably calculated to ensure the payment of North Dakota income tax withheld from wages by the employer. N.D.C.C. § 57-38-60(9)

Closing an account: If an employer goes out of business or permanently ceases to pay wages, the employer must immediately notify our office. Notification may be in writing or through TAP. Upon notification, our office will provide the proper forms and other information that the employer will need to satisfy any remaining income tax withholding requirements and close the employer's account. N.D.C.C. § 57-38-61

Personal liability of corporate officer, or LLC governor, manager, or member: North Dakota tax law makes the corporate officer, manager or governor of a limited liability company, or member of a member-controlled limited liability company who controls, supervises, or is charged with the responsibility of filing the withholding or sales and use tax returns and payments personally liable for the failure of the business to file the returns or remit the tax. Dissolution of the business does not discharge this personal liability.

Cash deposit or bond or undertaking executed by surety company in lieu of personal liability: The corporate officers, governors or managers of a limited liability company, or members of a member-controlled limited liability company may elect to not be personally liable for a failure to file or pay, if the corporation or LLC makes a cash deposit or posts a

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bond or undertaking executed by a surety company authorized to do business in North Dakota. The amount of the cash deposit, bond or undertaking must be equal to the estimated annual income tax withholding liability of the corporation or LLC. Contact the Office of State Tax Commissioner if the corporation or LLC wishes to exercise this option. N.D.C.C. §§ 57-38-60.1 and 57-38-60.2

Reporting and Payment Requirements on Wage Withholding

Every employer required to withhold North Dakota income tax must file an income tax withholding return on a calendar quarter basis (or, if eligible, on a calendar year basis) and pay the tax withheld with the return. The income tax withholding return may be filed either electronically on TAP or on paper. In addition to the income tax withholding return, every employer must file a copy of all Federal Form W-2s issued and any Federal Form 1099s with state income tax withheld with a Transmittal of Wage and Tax Statement Form 307 at the end of the calendar year.

Paper filing: The income tax withholding return may be filed by paper with payment for the tax. If a paper form is needed, the form can be found on our website at: www.nd.gov/tax/withholding/forms. Failure to receive the proper form does not relieve the obligation to file or pay on time.

Income tax withholding return: Except as provided below under **Annual filing**, Form 306, North Dakota Income Tax Withholding Return, must be filed for each calendar quarter on or before the following due dates. This return is comparable to the Federal Form 941 quarterly return. N.D.C.C. § 57-38-60(1)(2)

Calendar Quarter	Due Date
January, February and March	April 30
April, May and June	July 31
July, August and September	October 31
October, November and December	January 31

Annual filing: An annual filing option is available to eligible employers under which one Form 306 may be filed for the entire calendar year on or before January 31 following the end of the calendar year. An employer is eligible for annual filing if all of the following conditions apply:

1. The employer had an obligation to file Form 306 for all four quarters of the preceding calendar year;
2. The employer filed a Form 306 and paid the full amount of North Dakota income tax required to be withheld on or before the due date for all four quarters of the preceding calendar year; and,
3. The total North Dakota income tax withheld by the employer during the preceding calendar year was less than $500.00. Contact the Office of State Tax Commissioner for information on the procedures that apply for annual filing. N.D.C.C. § 57-38-60(1)

Payment of income tax withheld: The total amount of North Dakota income tax withheld during the period covered by Form 306 must be remitted with Form 306. N.D.C.C. § 57-38-60(1)(2)

Electronic Filing: There are two electronic filing options available to taxpayers that satisfy their Form 306 filing and payment obligations.

- **Taxpayer Access Point (TAP)/ACH Debit** – Allows employers to submit their returns online and make the payment as an Automated Clearing House (ACH) Debit (electronic funds transfer where our office withdraws the funds from the employer's bank account). There is no cost to the employer to use this option. Taxpayers may go to http://www.nd.gov/tax/tap and create an account by clicking *Sign Up for Access*.

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Note - If you have selected to pay by ACH debit and have an ACH debit block on your bank account, you must inform your financial institution of our Originator ID to avoid your payments being rejected. The originator ID is a 10-digit number used to identity an originator of the transaction.

- o If you make the payment through **TAP, use the ID 1450309764**.
- o If you make the payment through our **website (Link2Gov Corp), use the ID 1621868563**.

- **ACH Credit** – Allows employers to electronically submit the return and payment through ACH Credit (electronic funds transfer where the taxpayer contacts their bank with instructions to initiate the electronic payment from its bank account to the state's bank account). The taxpayer is responsible to pay any bank fees under this option. The ACH Credit acts as the return and no additional information needs to be submitted. Taxpayers must register for this option by completing the Form 301-EF which is available at www.nd.gov/tax/withholding/forms.

Transmittal return: Form 307, North Dakota Transmittal of Wage and Tax Statements Return, must be filed on or before January 31 following the close of the calendar year. This return is comparable to the Federal Form W-3, and it is filed with the W-2s at the end of the year. See "Information returns for wages" below for more information about W-2 requirements. N.D.C.C. § 57-38-60(3)

RATES AND INSTRUCTIONS FOR WAGES PAID

Click here for information regarding the Rates & Instructions for wages paid, and for the income tax withholding tables.

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Annual Filing Requirements - W-2 and 1099's

Every employer is required to file a copy of all Federal Forms W-2s issued and any Federal Form 1099's with state income tax withheld with the Office of State Tax Commissioner to report income earned during the calendar year. This requirement applies even if an employer is not required to register for North Dakota income tax withholding purposes. In addition to the information required to be shown on W-2 or 1099 for federal tax purposes, the copy of W-2 or 1099 filed with North Dakota must show the total amount of North Dakota wages or income earned and North Dakota income tax withheld for the calendar year. Except where an employer is required to file W-2 or 1099 information electronically, an employer may file the information in paper document form or electronically. N.D.C.C. § 57-38-60(3)(4)(6)

Form 307, North Dakota Transmittal Of Wage And Tax Statements Return: Employers and other persons required to register for North Dakota income tax withholding purposes must complete and submit Form 307 with the W-2 and 1099 (with North Dakota withholding) information that is filed with the Office of State Tax Commissioner. This applies only when the information is filed on paper. If the Form W-2 information is submitted by email with text file attachment, or by electronic upload/keying, do not send in a paper copy of the Form 307. If the 1099s with no withholding are being sent in by paper, do not attach the Form 307, the federal form 1096 may be attached to those 1099s. For the annual filing requirements on Oil and Gas Royalty Payments, see more information on page 13.

Information Returns for Wages – W-2's

Who Must File:

Every employer must file a North Dakota annual information return - Form 307 Transmittal of Wage and Tax Statement, for the payment of wages to an employee if all of the following apply:

1. The employer is located in or carries on a trade or business in North Dakota.
2. The employer pays wages to an employee who performs services:
   a. In North Dakota, regardless of the employee's legal residence, or
   b. Outside North Dakota, if the employee is a legal resident of North Dakota.
3. The employer is required to file a Form W-2 for federal purposes to report the wages.

For this purpose, "employer" includes the state of North Dakota and any of its political subdivisions.

For a list of exemptions, see wage exemptions from withholding requirement (page 3).

W-2 Corrections:

Corrections to W-2 forms should be made using Federal Form W-2C. Instructions can be found on the Social Security Administration website. Paper forms can be obtained by calling the IRS at 1.800.829.3676. A paper copy of the W-2C should be submitted with the state Form 307 to the Office of State Tax Commissioner.

Information Returns for Nonwage Payments –1099, 1042-S, and W-2G

Who Must File:

Every person making certain payments (see **Reportable payments**) must file a North Dakota information return if both of the following conditions apply:

1. The person resides, owns property, or carries on a trade or business in North Dakota.
2. The person is required to file a 1099, 1042-S or W-2G to report the same payment for federal purposes. (Note: Other types of information returns, such as 1098, 1098-E, 1098-T, or 5498, are not required for North Dakota purposes.)

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For this purpose, "person" includes a corporation, fiduciary, individual, limited liability company, partnership, and an officer or employee of the state of North Dakota or any of its political subdivisions.

Reportable payments: Reportable payments include:

- Rents, royalties, crop insurance proceeds, taxable prizes and awards given to nonemployees (for example, corporate directors or independent contractors), payments for services performed by a nonemployee and any other payment for which a 1099-MISC must be filed.
- Gambling winnings (W-2G).
- Unemployment benefits, taxable grants, agricultural payments, and any other payment for which a 1099-G must be filed.
- Proceeds from real estate transactions, including sales of mineral rights (1099-S).
- Proceeds from broker and barter exchange transactions (1099-B).
- Gambling winnings, royalties, lease bonuses, compensation for services, and any other payment to a nonresident alien, foreign partnership or corporation, or a foreign fiduciary of an estate or trust for which a 1042-S must be filed, but only if the recipient is subject to North Dakota income tax on the payment.

Information returns must be filed for payees who are North Dakota residents as well as nonresidents with North Dakota sourced income. (For example, nonresidents receiving payments for property located in North Dakota, services performed in North Dakota, gambling winnings sourced in North Dakota.)

Please include the state abbreviation code in box 17, (example: ND, MN) indicating where the income reported was sourced.

Nonreportable payments: Except where North Dakota income tax is withheld from the payment, the following payments do not have to be reported:

- Interest (1099-INT or 1042-S).
- Original issue discount (1099-OID).
- Dividends (1099-DIV, 1042-S or 1099-PATR).
- Distribution from a retirement or profit-sharing plan, an IRA, a SEP, or an annuity contract (1099-R or 1042-S).

Conditions and procedures applicable to payments from which North Dakota income tax is withheld. If North Dakota income tax is withheld from any payment, the requirements and procedures in this section (covering information returns for payments other than wages) apply with the following modifications:

1. The payor must register for income tax withholding with our office by completing and filing Application For Income Tax Withholding and Sales & Use Tax Permit. This form, along with information on reporting and paying North Dakota income tax withheld, may be obtained from the Office of State Tax Commissioner
2. The amount of North Dakota income tax withheld must be shown on the information return.
3. An annual transmittal form, ND Transmittal of Wage & Tax Statement (Form 307), must be completed and filed with the information returns showing North Dakota income tax withheld. The due date for filing Form 307 and the information returns showing North Dakota income tax withheld is January 31 following the end of the calendar year in which the payments were made.
4. The Combined Federal/State Program may not be used to transmit information returns for payments from which North Dakota income tax is withheld. (See page 11 for information on the Combined Federal/State Program.)

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Corrections to nonwage payments:
Corrections to Federal Form 1099 should be made using Form 1099 with the box marked corrected. Paper forms can be obtained by calling the IRS at 1-800-829-3676. All corrections to 1099-MISC forms must be reported to our office. This includes corrections to the recipients name and/or federal identification number. A paper copy of the corrected 1099 with state income tax withheld should be submitted with the state Form 307 to the Office of State Tax Commissioner.

Transmittal form for paper documents: A separate transmittal form is not provided for purposes of filing these information returns in paper form with North Dakota. A copy of the 1096 filed for federal purposes may be provided with the information returns filed for North Dakota purposes, but it is not required. If you withhold North Dakota state income tax under a voluntary agreement you may submit paper copies of 1099 forms with Form 307 Transmittal of Wages and Tax Statement.

How to Submit Annual Return and Attachments

A requirement to file a North Dakota information return is satisfied by filing with our office a copy of the federal information return that is filed with the IRS or Social Security Administration. Information returns must be filed electronically if any of the following apply:

- There is a requirement to file the information electronically for federal purposes
- The quantity of returns required to be filed with North Dakota is 250 or more
- The information is submitted by a payroll service provider, regardless of the number of returns. A "payroll service provider" means any person who files and pays the federal and North Dakota withholding taxes on behalf of an employer **and** uses electronic means to file and pay the federal withholding taxes.

Waiver of North Dakota electronic filing requirement: If the IRS grants a hardship waiver of the requirement to file electronically for federal purposes, the federal waiver automatically applies for North Dakota purposes. A separate waiver does not have to be requested for North Dakota purposes.

Electronic Filing Methods

The copy of the Form and attachments must be filed with our office in one of the two following ways:

Method One (Preferred): Electronic Upload or Keying
Information returns may be electronically uploaded or keyed using TAP. Go to www.nd.gov/tax/tap and click on *Sign Up for Access* to get started. (Tip: If you are only using TAP to file W-2s or 1099s, select third party access.) Once in your TAP account, select *File W-2s or 1099s* on the top right. For more information about TAP go to www.nd.gov/tax/tap and click on *HELP*.

Method Two: Electronic Media
Information returns that are filed on electronic media may be submitted to the Office of State Tax Commissioner using one of the following options:

1. Email with text attachment
2. Secure Email attachment
3. Combine Federal/State Program

Format the information according to the specifications contained in the SSA's publication Specifications for Filing Forms W-2 Electronically (EFW2) or in the IRS Publication 1220.

Data must be recorded in the ASCII character set. The use of record delimiters is preferred.

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The RA, RE, RW, RS, RT, and RF records must be included in the information provided for W2s. The A, B, and T records must be included in the information provided for 1099s.

State code for North Dakota = 38.

For additional information regarding file specifications, please visit www.nd.gov/tax/softwaredevelopers.

Option 1- Email with text file attachment (not secure)
As an alternative to using electronic media, the information may be submitted by email with a text file attachment The attachment may be a plain text file or a text file that is compressed with WinZip or 7ZIP, and it must be formatted according to the specifications in the SSA's publication Specifications for Filing Forms W-2 Electronically (EFW2) and the specifications in the IRS Publication 1220. Zip files must be renamed with a .zpp file extension. Use the ASCII character set; the use of record delimiters is preferred. In the body of the email, include the following:

- Sender's name
- Company name
- Company telephone number
- Type of data (1099 or W2)
- Calendar year being reported

An acknowledgement by email will be sent after the email is received. A confirmation email will be sent after it has been processed with a confirmation number. **Keep this confirmation number for your records.** Send the email to magmedia@nd.gov. If there is an error in the information or specifications, the email will be returned for correction.

Please note that this information is not secure until it reaches our email server.

Option 2 -Secure email attachments:

- Email magmedia@nd.gov requesting a secure email be sent. (Note: list email address you want used)
- Once you receive the email just reply to the email and include your attachment along with the following information:
  - Sender's name
  - Company name & telephone number
  - Type of data (1099 or W-2)
  - Calendar year being reported
- Press the send button.
- The data will remain secure

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Testing the attachments for W-2 and/or 1099 data files can be done one of two ways:

Test Option 1
In the subject line of the email you must enter the word TEST followed by type of document being tested (W2 or 1099) and the name of the company/business. Example of subject line: "Test W2 for XYZ Co." In the body of the email, include the same information listed above.

An acknowledgement by email will be sent after the email is received by us. Once the file has been tested you will receive another email by us letting you know if you file has passed or failed. If your file has failed we will let you know why your test file failed.

Send test files via email to: magmedia@nd.gov.

Test Option 2
Another option for testing is by sending your W2/1099 data files secured through the TAP messaging system. Sign up for third party TAP access, if you don't already have a TAP logon. In TAP you can send us a secure message attaching the document. Please click on the HELP button in TAP for further assistance.

Option 3 - Combined Federal/State Program

****FORM 1099 DATA ONLY WITH NO NORTH DAKOTA WITHHOLDING****
North Dakota participates in the Combined Federal/State Program offered by the IRS. Rather than submitting Form 1099 information electronically to both the IRS and North Dakota, the payor can request that the IRS provide a copy of the information to North Dakota.

If this option is chosen, the following requirements and procedures apply:

1. The payor must notify the Office of State Tax Commissioner in writing that the IRS has granted permission to file Form 1099 information electronically, and that the payor intends to satisfy part or all its North Dakota information return filing requirement through the Combined Federal/State Program.
2. The payor must follow the IRS guidelines for creating a "B" record for the state data. North Dakota does not require any separate notification when filing in this manner. See IRS Publication 1220 for more details.
3. This option may not be used to report any payment from which North Dakota income tax is withheld. See Conditions and procedures applicable to payments from which North Dakota income tax is withheld on page 2 of this guideline for more information.

Paper Filing
Important: This method may not be used if there is a requirement to file the W-2, 1099, 1042-S or W-2G information electronically. Unless there is a requirement to use electronic media, a copy of W-2, 1099, 1042-S or W-2G may be filed in paper document form. Federal information returns obtained from the U.S. Government Printing Office or other provider of approved federal tax forms may or may not include a copy that may be furnished to the state. If there is no state copy, a legible photocopy of the payor's copy will satisfy this requirement.

When to File
Information returns for wage payments must be filed with our office on or before the due date for filing with the SSA and the IRS. In the case of Form 1099 information filed through the Combined Federal/State Program, the North Dakota information returns are considered timely filed if the federal information returns are timely filed with the IRS.

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Failure to File

A penalty of $10 per information return, up to a maximum amount of $2,000, may be assessed for failure to file North Dakota information returns. This penalty may be assessed if information returns are not filed within thirty days after the Office of State Tax Commissioner provides written notice of the failure to file.

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Income Tax Withholding: Oil and Gas Royalty Payments

Introduction/Definitions

This guideline is for persons responsible for making royalty payments to royalty owners of oil or gas produced in North Dakota. It explains the requirements for withholding North Dakota income tax from North Dakota oil or gas royalty payments made to nonresident individuals and non-North Dakota domiciled business entities. This guideline reflects changes made by the 2015 North Dakota Legislature and applies to royalty payments made on or after January 1, 2016. For information applicable to payments made prior to January 1, 2016, contact the North Dakota Office of State Tax Commissioner. The income tax withholding on oil and gas royalties is administered in a similar manner as employers' withholding of income tax on wages.

Non-North Dakota domiciled business entity: A business entity with a commercial domicile located outside North Dakota. Commercial domicile is the principal place from which the trade or business is directed or managed. A business entity includes a partnership, corporation, and any person other than an individual.

Nonresident individual: An individual who is not a legal resident of North Dakota for income tax purposes for the entire year. This includes an individual who is a legal resident of a foreign country. Legal residence refers to an individual's place of permanent residence to which an individual always returns whenever absent from it. Absences attributable to employment, vacation, military service, attending college, etc., do not affect an individual's place of legal residence if the individual intends on returning to it when the activity is completed.

North Dakota oil or gas royalty: A payment to a royalty owner that represents the royalty owner's share of receipts from the sale of oil or gas extracted from within the boundaries of North Dakota. The amount that is subject to North Dakota income tax withholding is the gross amount of the North Dakota oil or gas royalty reported in Box 2 of the federal or state-only Form 1099-MISC or 1042-S.

Person: An individual, estate, trust, partnership, corporation, limited liability company, and any other type of entity recognized under North Dakota law.

Remitter: A person that distributes a royalty payment to a royalty owner. A remitter may be the person that produces the oil or gas or the person that distributes the royalty on behalf of a producer. In all cases, the remitter is the person whose name and federal employer identification number (FEIN) are required to be entered in the payer boxes on the federal or state-only Form 1099-MISC or 1042-S.

Royalty owner: A person entitled to receive periodic royalty payments for a nonworking interest in the production of oil or gas, and the person to whom a remitter is required to issue a federal or state-only Form 1099-MISC or 1042-S to report the royalty payments. If a royalty owner is a single-member limited liability company (LLC) that is a disregarded entity for federal income tax purposes, the owner of the single-member LLC is considered to be the royalty owner, and the federal or state-only Form 1099-MISC or 1042-S must be issued in the name and taxpayer identification number (social security number or FEIN) of the LLC's owner. (Note: If a remitter receives a federal Form W-9 on which it is indicated that the royalty owner is a single-member LLC that is disregarded, the name and taxpayer identification number on the Form W-9 should be that of the LLC's owner instead of the LLC itself.)

State-only Form 1099-MISC or 1042-S: A federal Form 1099-MISC or 1042-S prepared on a pro forma basis for North Dakota income tax purposes for a royalty owner with North Dakota oil or gas royalty payments for whom a federal Form 1099-MISC or 1042-S is not required to be issued for federal income tax purposes. See "Information returns for royalty owners" later in this guideline for more information.

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Income tax withholding requirement

A remitter is required to withhold North Dakota income tax from North Dakota oil or gas royalty payments made on or after January 1, 2014, to nonresident individuals and non-North Dakota domiciled business entities.

Determining residency or commercial domicile status of a royalty owner: A remitter needs to know the residency or commercial domicile status of a royalty owner to properly comply with this withholding requirement. If a remitter does not know the residency or commercial domicile status of a royalty owner, the remitter may use any reasonable means to determine the status. This may include reliance on the address to which a royalty payment is mailed or the address provided by the royalty owner on a federal Form W-9. In some cases, a remitter may need to contact the royalty owner to obtain the information.

Nonresident alien: This withholding requirement applies to an individual royalty owner who is a nonresident alien of the United States. It applies even if the royalty income is exempt from U.S. income tax because of an income tax treaty between the United States and a foreign country. Except where an income tax treaty between the United States and foreign country specifically exempts oil or gas royalty income from state taxation, income tax treaties between the United States and foreign countries are not recognized for North Dakota income tax purposes, and North Dakota oil or gas royalty income is subject to North Dakota income tax.

Voluntary agreement to withhold: A remitter and a royalty owner other than a nonresident individual or non-North Dakota domiciled business entity may mutually agree to have North Dakota income tax withheld on a voluntary basis from the royalty owner's North Dakota oil or gas royalty payments. If North Dakota income tax is voluntarily withheld, the remitter must comply with the registration, reporting, and payment requirements explained in this guideline.

Accounting service provider: A remitter may arrange with a third-party accounting service to handle the withholding, reporting, and payment duties on behalf of the remitter. However, the remitter remains responsible for any failure to comply with any of the withholding requirements. See "Registration requirement" later in this guideline for more information.

Exceptions

This section of the guideline explains the three exceptions to the withholding requirement.

Exception 1: Exception for a small producing remitter:
A remitter is exempt from the withholding requirement if the remitter is an oil or gas producer whose production in North Dakota for the preceding calendar year was less than 350,000 barrels of oil or 500 million cubic feet of gas. This exception does not apply if a remitter is not a producer.

Even though a remitter is not required to withhold tax because of this exception, the remitter is required to file an annual return (Form RWT-1096) to report the North Dakota oil or gas royalties paid to each nonresident individual and non-North Dakota domiciled business entity royalty owner. On the annual return, the remitter must also report the amount of the oil or gas production for the preceding calendar year to certify that the remitter qualifies for the small producing remitter exception. See "Annual return" under "Reporting and payment requirements" later in this guideline for more information.

Even though a remitter is exempt from the withholding requirement under this exception, the remitter is not prohibited from withholding income tax from the royalty payments made to royalty owners.

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Measuring the production threshold: The volume of production used to determine whether the threshold is exceeded is the amount reported by a well operator to the North Dakota Industrial Commission, Oil and Gas Division, on Forms 5 and 5B for the preceding calendar year. If the production data reported to the Industrial Commission by the remitter includes production attributable to other producers, only use the production data for the remitter's respective interest in the production for purposes of the production threshold. If the remitter acquired or disposed of production interests during the calendar year, only use the production attributable to the time period in which the remitter had an interest in the production for purposes of the production threshold.

Exception 2: Exception for certain royalty owners:
A remitter is not required to withhold North Dakota income tax from North Dakota oil or gas royalty payments made to any of the following entities:

- The United States or any of its agencies, or any state and its political subdivisions.
- A federally recognized Indian tribe with respect to on-reservation oil and gas production pursuant to a lease entered under the Mineral Leasing Act of 1938 [25 U.S.C. 396a – 396g].
- The United States as trustee for individual Indians
- A publicly traded partnership, as defined in Internal Revenue Code § 7704, that is not treated as a corporation.
- An organization that is exempt from North Dakota income tax under N.D.C.C. § 57-38-09.
- The same person or entity as the remitter.

Notification of exempt status by publicly traded partnership or tax-exempt organization: A publicly traded partnership or an organization exempt from North Dakota income tax must complete and provide Form RWT-EXM to each remitter and the Office of State Tax Commissioner to verify its exempt status. This form needs to be filed only one time; a new form does not have to be filed each year. If the entity receives North Dakota oil or gas royalty payments from more than one remitter, the entity should provide a copy of the Form RWT-EXM to each remitter. If an entity fails to meet the definition of a publicly traded partnership or loses its exempt status under N.D.C.C. § 57-38-09, the entity must complete a new Form RWT-EXM on which it indicates that it is no longer exempt from withholding and provide a copy to the remitter and the Office of State Tax Commissioner.

Year-end reporting by publicly traded partnership: For information on the year-end reporting requirement by certain publicly traded partnerships, see "Reporting by a publicly traded partnership" under "Reporting and payment requirements" later in this guideline.

Unrelated business taxable income of tax-exempt organization: This exception does not affect the taxation of an entity's unrelated business taxable income (UBTI), if any, under North Dakota income tax law.

Exception 3: Exception for payment amount below statutory threshold:
Upon written request, the Office of State Tax Commissioner will allow a remitter to forego withholding North Dakota income tax from any North Dakota oil or gas royalty payment that is less than a statutory threshold amount, as explained below:

- For royalty payments made on a quarterly basis, no withholding is required from a payment that is less than $600.
- For royalty payments made on other than a quarterly basis—for example, monthly or semiannually—no withholding is required from a payment that, when annualized, is less than $1,000.
    - Example 1: If a remitter makes royalty payments on a monthly basis, no withholding is required if the amount of the payment is $83.33 or less. This is because $83.33, when annualized, equals $999.96 ($83.33 x 12 months), which is less than $1,000. Withholding would be required on a monthly payment that is more than $83.33.

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- Example 2: If a remitter makes royalty payments on a semiannual basis, no withholding is required if the amount of the payment is $499.99 or less. This is because $499.99, when annualized, equals $999.98 ($499.99 x 2 semiannual periods), which is less than $1,000. Withholding would be required on a semiannual payment that is $500 or more.

Making the written request: A remitter may request to use this exception by completing the applicable part of the Application to Register for Royalty Withholding, the registration form that all remitters must complete and file with the Office of State Tax Commissioner. If a remitter has already filed the registration form without requesting the use of this exception, the remitter may submit a letter to the Office of State Tax Commissioner to request the use of the exception under N.D.C.C. § 57-38-59.4(6). For more information, see "Registration requirement" later in this guideline.

Amount to withhold

The amount to withhold is determined by multiplying the gross amount of the North Dakota oil or gas royalty by the highest marginal individual income tax rate reduced by 0.75%. For calendar year 2016, the highest individual income tax rate is 2.90%, resulting in a withholding tax rate of 2.15% (2.90% - 0.75%). This withholding tax rate applies to all types of royalty owners, regardless of whether the royalty owner is an individual, estate, trust, partnership, or other type of business entity. The rate is subject to change by the North Dakota Legislature, and this guideline will be updated as needed to reflect any change in the rate.

Funds held in trust: North Dakota income tax withheld from royalty payments made to royalty owners is deemed to be held in trust by the remitter for the State of North Dakota. All amounts withheld must be submitted to the Office of State Tax Commissioner in the manner set out in this guideline, regardless of whether or not the amount was properly withheld.

Registration Requirement

Every remitter must register with our office by completing and filing the registration form Application to Register for Royalty Withholding. A remitter must register even if any of the exceptions to the withholding requirement apply or the remitter does not withhold any tax for any reporting period. Every remitter is subject to certain reporting requirements regardless of whether or not the remitter is required to withhold any tax—see "Reporting and payment requirements" later in this guideline for more information.

Accounting service provider: A remitter that arranges with another party to handle the remitter's royalty withholding filing and payment duties must complete the appropriate part of the registration form to designate and identify the provider. The designation of the provider on the registration form will constitute the remitter's consent for the Office of State Tax Commissioner to communicate directly with the provider about the remitter's royalty withholding returns and payments. A remitter may revoke the provider designation and consent by completing and filing a new Application to Register for Royalty Withholding on which the remitter requests the revocation.

Request to forego withholding from a payment amount below the statutory threshold: As explained under "Exceptions to the withholding requirement," a remitter may submit a written request to forego withholding North Dakota income tax from a North Dakota oil or gas royalty payment that is less than the statutory threshold. A remitter may make this request by completing the appropriate part of the registration form.

Change in FEIN: If a remitter's FEIN is changed for any reason, or the quarterly or annual return will be filed under a different FEIN, the remitter must complete and file a new Application to Register for Royalty Withholding to register the change.

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Cash deposit or bond or undertaking executed by surety company: If required by the Office of State Tax Commissioner, a remitter must either make a cash deposit or post a bond or undertaking executed by a surety company authorized to do business in North Dakota. The amount of the cash deposit, bond, or undertaking will be reasonably calculated to ensure the payment of the tax withheld by the remitter.

Closing an account: If a remitter will be permanently ceasing activity as a remitter or will no longer be making North Dakota oil or gas royalty payments, it must notify our office. Upon notification, our office will provide the information that the remitter will need to satisfy any remaining royalty withholding requirements and close the account.

Reporting and payment requirements

Quarterly withholding return and payment of withheld tax:
Every remitter required to withhold North Dakota income tax must file Form RWT-941, Royalty Withholding Return, on a calendar year quarterly basis and pay the royalty withholding tax due with the return. The return may be filed electronically or on paper.

Electronic filing: A remitter may register to electronically file Form RWT-941 using ACH Credit transactions. The remitter registers for this program by signing the Application to Register for Royalty Withholding. This allows a remitter to electronically submit the return information and pay any tax due through an ACH Credit electronic funds transfer transaction. (An ACH Debit electronic funds transfer is not available for royalty withholding purposes.) The remitter is responsible for any applicable bank fees. The ACH Credit transaction satisfies the return filing requirement, and no additional information is required to be submitted. A timely reminder to file will be sent to the email address that the remitter provides at the time the remitter registers for withholding or electronic filing. Failure to receive a reminder does not relieve the remitter's obligation to timely file the return. For more information about using the ACH Credit transactions, go to www.nd.gov/tax/businesspayment. The addenda record specified for royalty withholding must be used and is found on page 14 of the document.

Paper filing: If a remitter filed a paper return for the preceding tax period, a preaddressed Form RWT-941 is mailed to the registered remitter prior to the end of the calendar quarter. If a registered remitter does not receive a preaddressed form, the remitter should contact the Office of State Tax Commissioner before the due date of the return. Blank forms are also available on the Office of State Tax Commissioner's website. Failure to receive a form does not relieve the remitter's obligation to timely file the return.

Due dates: Form RWT-941 must be filed on or before the following due dates:

Calendar quarter	Due date
January, February, March	April 30
April, May, June	July 31
July, August, September	October 31
October, November, December	January 31

Payment of income tax withheld: The total amount of North Dakota income tax withheld during the quarter must be remitted with Form RWT-941. If filing electronically, payment is automatically made as part of the ACH Credit transaction. *(Note: Payment by ACH Debit electronic funds transfer is not available for royalty withholding purposes.)* If a paper return is filed, a check or money order must be submitted with Form RWT-941.

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Monthly filing and payment option: In lieu of filing and paying on a quarterly basis, a remitter may elect to file Form RWT-941 and pay the tax due on a monthly basis. This option is available only if a remitter files and pays electronically. A remitter must contact the Office of State Tax Commissioner to arrange for monthly filing and payment. If this election is made and approved, a remitter must continue to file and pay on a monthly basis until it obtains permission to change.

Annual filing and payment option: In lieu of filing and paying on a quarterly basis, a remitter may elect to file Form RWT-941 and pay the tax due on an annual basis if all of the following conditions apply:

- The remitter had an obligation to file Form RWT-941 for all four quarters of the preceding calendar year.
- The remitter filed Form RWT-941 and paid the full amount of North Dakota income tax required to be withheld on or before the due date for all four quarters of the preceding calendar year.
- The total North Dakota income tax withheld by the remitter during the preceding calendar year was less than $500.

A remitter must contact the Office of State Tax Commissioner to arrange for annual filing and payment.

Annual Return

All remitters must file Form RWT-1096, Royalty Withholding Annual Return and Transmittal. The due date for the annual return is February 28. The annual return is used to report the total North Dakota oil and gas royalties paid and the total North Dakota income tax withheld from the payments during the calendar year and to transmit copies of the federal and state-only Form 1099-MISC and 1042-S forms issued to the royalty owners. For more information on issuing yearend information returns to the royalty owners, see “Information returns for royalty owners” later in this guideline.

The annual return is also used to report:

- A change in tax on one (or more) of the four quarterly Form RWT-941 returns filed for the same calendar year to which the Form RWT-1096 applies.
- A reissuance of a federal Form 1099-MISC or 1042-S for a prior tax year to reflect a corrected federal Form W-9 received from a royalty owner. A copy of the corrected federal Form 1099-MISC or 1042-S must be submitted with Form RWT-1096.

Small producing remitter: Even though a remitter is a small producing remitter that is exempt from the North Dakota oil or gas royalty withholding requirement, the remitter must file Form RWT-1096 to report the North Dakota oil or gas royalties paid to each nonresident individual and non-North Dakota domiciled business entity royalty owner. The remitter must also report the amount of the oil or gas production for the preceding calendar year to certify that the remitter qualifies for the small producing remitter exception.

Paper filing only: Form RWT-1096 may not be filed electronically; it must be filed on paper. A preaddressed Form RWT-1096 is mailed to every registered remitter in early January following the end of the calendar year. A remitter may also obtain a copy of the form on the Office of State Tax Commissioner’s website at www.nd.gov/tax.

Information returns for royalty payments

Regardless of whether or not North Dakota income tax is withheld from any royalty payment, every remitter must file with the Office of State Tax Commissioner a copy of all federal Form 1099-MISC and 1042-S forms reporting North Dakota oil or gas royalty payments. If a remitter is not required to file a federal Form 1099-MISC or 1042-S for a royalty owner for federal income tax purposes—for example, the royalty owner is a corporation—the remitter must prepare and

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file a copy of a state-only Form 1099-MISC or 1042-S. The state-only Form 1099-MISC or 1042-S must show the same information that would have been reported on a federal Form 1099-MISC or 1042-S had one been required to be filed for federal income tax purposes.

Electronic filing: If a remitter is required to electronically file federal Forms 1099-MISC and 1042-S for federal income tax purposes and the number of copies required to be filed with North Dakota is 250 or more, the remitter must electronically file them for North Dakota income tax purposes. Even if not required, electronic filing is recommended. If a remitter electronically files the forms, no paper copies should be filed with Form RWT-1096; however, the remitter must indicate the date of the electronic transmission on Form RWT-1096. See the Guideline: Income Tax Withholding Information Returns for more information on how to electronically file the forms.

Paper filing: Unless a remitter is required to electronically file the copies of federal Forms 1099-MISC and 1042-S, a remitter may file paper copies of the forms. The paper copies must be submitted with Form RWT-1096 when it is filed.

If a remitter transmits federal Form 1099-MISC information to the IRS under the Combined Federal/State Program administered by the IRS, it must separately submit any federal Form 1099-MISC containing North Dakota income tax withheld with the Form RWT-1096.

Other reportable payments: If any other type of North Dakota reportable payment, such as rental income or nonemployee compensation, is reported along with North Dakota oil or gas royalties on the same federal Form 1099-MISC, the submission of the one federal Form 1099-MISC as part of the Form RWT-1096 filing (whether in paper or electronic form) satisfies all of the North Dakota reporting requirements. A separate submission of the same federal Form 1099-MISC under the information return requirements for non-royalty payments does not have to be made for North Dakota tax purposes.

Reporting to royalty owners: On or before January 31 following the end of the calendar year, a remitter must provide each royalty owner a copy of the federal or state-only Form 1099-MISC or 1042-S showing the total North Dakota oil or gas royalties paid and the total North Dakota income tax withheld from them for that calendar year. The form issued to each royalty owner must have the correct taxpayer identification number (social security number or FEIN) as reported to the remitter on federal Form W-9, and North Dakota must be identified as the state in Box 17 of Form 1099-MISC or Box 17c of Form 1042-S.

Reporting by a publicly traded partnership: A royalty owner that is a publicly traded partnership must electronically transmit a copy of all of its federal Schedule K-1 forms to the Office of State Tax Commissioner if (1) the publicly traded partnership's North Dakota oil or gas royalty payments are exempt from North Dakota income tax withholding and (2) the publicly traded partnership electronically files its federal Schedule K-1 forms with the IRS. Contact the Office of State Tax Commissioner for instructions on how to submit this information.

Corrections

Corrections to 1099-MISC royalty payments must be reported to our office. This includes corrections to the recipients name and/or FEIN. These corrections must be reported using the 1099-MISC with the appropriate box indicating it is a corrected form. A paper copy of the corrected 1099-MISC must be submitted with the state Form RWT-1096 to this office.

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