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**PERMANENT ADMINISTRATIVE RULES**

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Date prior to or same as filing date

Department of Revenue 150  
Agency and Division Administrative Rules Chapter Number

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to become effective January 20, 2006 Rulemaking Notice was published in the November 2005 Oregon Bulletin.\*\*  
Date upon filing or later Month and Year

**RULE CAPTION**

Nonresident taxation and severance pay; unemployment compensation; stock options; partnership and limited liability company sales.

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

**RULEMAKING ACTION**  
List each rule number separately, 000-000-0000.

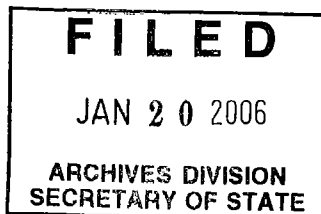
**ADOPT:**

**AMEND:** 150-316.127-(A); 150-316.127-(D)

**REPEAL:**

**RENUMBER:**

**AMEND & RENUMBER:**



Stat. Auth.: ORS 305.100

Other Authority

Stats. Implemented: ORS 316.127

**RULE SUMMARY**

150-316.127-(A) – Amended to clarify how severance pay, unemployment compensation and income from stock options is taxed to a nonresident.

150-316.127-(D) – Amended to provide that a nonresident limited partner is not taxable on the gain or loss from the sale of the partnership interest unless the interest has acquired business situs in Oregon.

Authorized Signer

Durinda Goodwin 1-20-05  
Printed name Date

\*With this original, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules.

\*\*The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday.  
ARC 930-2005

**150-316.127-(A)**

**Gross Income of Nonresidents; Personal Services**

*(1) Personal service.*

(a) Except as provided in section (2) of this rule, the gross income of a nonresident (who is not engaged in the conduct of a business, trade, profession or occupation on the nonresident's own account, but receives compensation for services in the status of employee) includes compensation for personal services only to the extent that the services were rendered in this state.

(b) Compensation for personal services rendered by a nonresident wholly outside this state and in no way connected with the management or conduct of a business in this state is excluded from gross income regardless of the fact that payment is made from a point within this state or that the employer is a resident individual, partnership or corporation.

(c) Compensation for personal services rendered by a nonresident wholly within this state is included in gross income although payment is received at a point outside this state or from a nonresident individual, partnership or corporation.

(2) *Exception:* Various federal laws affecting certain non-residents are explained separately. See OAR 150-316.127-(E).

*(3) Allocation of personal services.*

(a) Where compensation is received for personal services rendered partly within and partly without this state, that part of the income allocable to this state is included in gross income. In general, income is allocable to this state to the extent the employee is physically present in this state at the time the service is performed. Physical presence is determined by the location of the employee at the time services are rendered. Physical presence is not dependent on the location of the employer or the location from which payment of compensation is made. Employees who work in Oregon and at an alternate work site located outside of Oregon may allocate their compensation under the provisions of this rule.

*Example 1:* Dick, a nonresident, works as a medical transcriptionist for an Oregon employer. During the year, Dick spends about 80 percent of his time working from his home in Washington. Dick spends the remainder of his work time in the Portland office. Only the time Dick spends at the Portland office is considered time worked in Oregon.

(A) The gross income from commissions earned by a nonresident traveling salesperson, agent, or other employee for services performed or sales made, whose compensation is in the form of a specified commission on each sale made, or services rendered, includes the specific commissions earned on sales made, or services rendered, in this state; and allowable deductions must be computed on the same basis.

(B) If nonresident employees are employed in this state at intervals throughout the year, as would be the case if employed in operating boats, planes, etc., between this state and other states and foreign countries, and are paid on a daily, weekly or monthly basis, the gross income from sources within this state includes that portion of the total compensation for personal services which the total number of actual working days employed within the state bears to the total number of working days both within and without the state.

(C) If the employees are paid on a mileage basis, the gross income from sources within this state includes that portion of the total compensation for personal services which the number of miles traversed in Oregon bears to the total number of miles traversed within and without the state.

(D) If the employees are paid on some other basis, the total compensation for personal services must be apportioned between this state and other states and foreign countries in such a manner as to allocate to Oregon that portion of the total compensation which is reasonably attributable to personal services performed in this state.

(b) The gross income of all other nonresident employees, including corporate officers, includes that portion of the total compensation for services which the total number of actual working days employed within this state bears to the total number of actual working days employed both within and without this state during the taxable period.

*Example 2:* Jan is a nonresident of Oregon. She works for A-Corp. Jan manages offices in Oregon and Washington. A-Corp pays her a salary of \$30,000 for the management of both offices. She worked in Oregon 132 days. She would figure her compensation subject to Oregon tax as follows:

<u>Days actually worked in Oregon</u>	<u>132</u>			
Total days actually worked in both states	220	x	\$30,000=	\$18,000

Her compensation subject to Oregon tax is \$18,000.

An exception to this general rule is made when the compensation is received for performance of services that, by their nature, have an objective or an effect that takes place within this state. In the case of corporate officers and executives who spend only a portion of their time within this state, but whose compensation paid by a corporation operating in Oregon is exclusively for managerial services rendered by such officers and executives, the entire amount of compensation so earned is taxable without apportionment.

*Example 3:* John is a nonresident of Oregon. He works for B-Corp. John manages B-Corp's only office, which is located in Oregon. B-Corp pays him a salary exclusively for managerial services in the total amount of \$30,000. Even though John may perform some administrative duties from his home, the compensation he receives is for managing the Oregon office. The entire \$30,000 is taxable to Oregon.

(c) Total compensation for personal services includes sick leave pay, holiday pay, and vacation pay. Sick leave days, holidays, and vacation days are not considered actual working days either in or out of this state and are to be excluded from the calculation of the portion of total compensation for personal services taxable to this state.

*Example 4:* Joan is a nonresident of Oregon. She actually worked a total of 220 days during the year and was paid for 40 non-working days (holidays, sick days and vacation days). She worked 110 days in Oregon. Her compensation (including compensation for holidays, sick leave and vacations) was \$26,000. She would figure her compensation subject to Oregon tax as follows:

<u>Days actually worked in Oregon</u>	<u>110</u>			
Total days actually worked everywhere	220	x	\$26,000 =	\$13,000

Her compensation subject to Oregon tax is \$13,000.

(d) *Payment in forms other than money.* Total compensation for personal services includes amounts paid in a form other than money. To the extent the payments are recognized as compensation income for federal income tax purposes, the payments will be recognized as compensation income for Oregon tax purposes and must be apportioned as provided in section (3) of this rule. Examples include but are not limited to, nonstatutory stock options, taxable fringe benefits such as personal use of a business asset, and employer-paid membership fees.

(A) *Nonstatutory stock options with a readily ascertainable fair market value.* Compensation income will be allocated to Oregon in the year an option is required to be reported on the federal return if a nonresident taxpayer performed services in connection with the grant of such option in Oregon during the year in which the option was granted and:

(i) Is required to report under IRC section 83(a) as compensation income the value of a nonstatutory stock option granted in connection with the performance of services that has a "readily ascertainable fair market value", as described in Treasury Regulation 1.83-(7)(b), as of the date the option was granted; or

(ii) Elects under IRC 83(b) to report the value of such an option as of the date the option was granted.

If a nonresident taxpayer performed personal services partly within and partly without Oregon in the year in which the option was granted, the taxpayer must use the allocation applied to the taxpayer's other compensation under section (3) of this rule for the tax year in which the option was granted and apply that ratio to the compensation income required to be reported on the federal return. For example, if the taxpayer allocates his income under subsection (3)(a) of this rule and worked 25 percent of his time in Oregon during the year the option was granted, he must include in Oregon income 25 percent of the compensation income related to the option included

in federal taxable income. Generally, Oregon will not tax the subsequent gain or loss on the sale of the stock unless the stock has acquired a business situs in Oregon. See OAR 150-316.127-(D). (B) *Nonstatutory stock options without a readily ascertainable fair market value that are taxable at exercise, or in a pre-exercise disposition.* If a nonstatutory stock option granted in connection with performance of services that does not have a readily ascertainable fair market value at the date of the grant is recognized as compensation income for federal tax purposes and the taxpayer worked in Oregon during the year the option was granted, the taxpayer must allocate the compensation related to the option to Oregon in the same year it is taxable for federal purposes. The income that is recognized for federal purposes must be allocated to Oregon if the taxpayer worked in Oregon during the tax year the option was granted. The amount of compensation includable in Oregon source income is computed using the following formula:

Total Days worked in Oregon from  
date of grant to date of federal recognition x Compensation Related = Amount taxable by Oregon  
Total Days worked everywhere from to Option Exercise  
date of grant to federal recognition

Any further appreciation or depreciation in the value of the stock after the date of exercise represents investment income or loss and is not includable in the Oregon source income of a nonresident unless the stock acquired a business situs in Oregon (see OAR 150-316.127(D)).

(C) *Treatment of taxable fringe benefits.* Income recognized for federal purposes must be allocated to Oregon if the nonresident worked in Oregon during the tax year the benefit was received. The nonresident must use the same allocation rules applicable to the taxpayer's other compensation under section (3) of this rule to the taxable fringe benefits. For example, if the taxpayer allocates his income under subsection (3)(a) of this rule and worked 55 percent of his time in Oregon, 55 percent of the amount of the taxable fringe benefit that is included in federal taxable income is included in Oregon taxable income.

(e) *Unemployment compensation.* Total compensation includes unemployment compensation benefits to the extent the benefits pertain to the individual's employment in Oregon. If unemployment compensation benefits are received for employment in Oregon and in one or more other states, the unemployment compensation benefits must be apportioned to Oregon using any method that reasonably reflects the services performed in Oregon.

*Example 5:* Gary, a nonresident, worked in Oregon and Washington for the last 5 years. On January 1, 2005, he was laid off by his employer and received unemployment compensation of \$2,000. Gary may use the Oregon wages as a percentage of total wages reported on his nonresident tax return for the prior year (2004) to determine the percentage of unemployment benefits to be included in Oregon income for 2005. In 2004, Gary earned a total of \$45,000 of which \$30,000 was earned in Oregon. The unemployment compensation taxable to Oregon is \$1,334, computed as follows:

$$\frac{\$30,000 \text{ (Oregon wages)}}{\$45,000 \text{ (Total wages)}} \times \$2,000 \text{ (Total 2005 unemployment compensation)} = \$1,334$$

Oregon will tax Gary's unemployment compensation even though he received it in a tax year when he did not work in Oregon because the unemployment compensation is based on Oregon employment.

(f) *Severance pay.* Compensation includes severance pay to the extent the pay is attributable to services performed in Oregon. For purposes of this rule, "severance pay" means compensation payable on voluntary termination or involuntary termination of employment based on length of service, a percentage of final salary, a contract between the employer and the employee, or some other method but does not include "retirement income" as defined in ORS 316.127(9). If severance pay is received for employment within and without Oregon, the severance pay is allocated to Oregon using any method that reasonably reflects the services performed in Oregon. Severance pay is taxable to Oregon even though a taxpayer received it in a tax year when the taxpayer did not work in Oregon if the severance pay is based on Oregon employment.

*Example 6:* JT, a nonresident, worked for Plumbing Inc. for twenty years: eight years in Idaho and twelve years in Oregon. At the end of his 20<sup>th</sup> year, Plumbing Inc. reorganized and eliminated JT's position. Because of JT's loyalty to the company for his twenty years of service, the company gave JT a lump-sum payment of \$36,000. This lump-sum was based on 3% of his final annual salary (\$60,000 x 3% = \$1,800) multiplied by his number of years of service (20). The lump-sum payment was made because of prior services, thus it is allocable to Oregon to the extent the services were performed in Oregon. JT will include \$36,000 in federal taxable income and \$21,600 in the Oregon taxable income, computed as follows:

$$\frac{12 \text{ (years worked in Oregon for company)}}{20 \text{ (Total years worked for company)}} \times \$36,000 = \$21,600$$

*Example 7:* Shawn, a nonresident, worked for Lincoln Foods, Inc. for six years before resigning from the company. Lincoln Foods, Inc. and Shawn entered into a termination agreement that provided \$25,000 for Shawn to release a specific claim he may have against the company for wrongful termination or other potential claims. The termination agreement also provided \$10,000 to require that Shawn not work for any other food chain within a 100 mile radius of Lincoln Foods, Inc. for a period of 36 months. No employment agreement, benefit plan, or any facts or circumstances indicate that Shawn is entitled to a payment for services he rendered prior to resigning from the company. The payment that Shawn receives pursuant to the termination agreement is in exchange for the release of the wrongful termination claim and the covenant not to compete and is not allocable to Oregon because it is not based on services performed in Oregon.

*Example 8:* Assume the same facts in Example 7 except that the termination agreement also provided for a lump-sum payment of one month's salary per year worked (\$42,000) in addition to a \$25,000 payment for release of a wrongful termination claim and \$10,000 payment for the covenant not to compete. No employment agreement, benefit plan, or other agreement indicates that Shawn is entitled to a payment for services he rendered prior to resigning from the company. The \$25,000 payment for the release of the wrongful termination claim and the \$10,000 payment for the covenant not to compete are not allocable to Oregon because neither is based on services performed in Oregon. The \$42,000 lump-sum cash payment based on Shawn's salary and years of service associates the payment with the employer-employee relationship. It is allocable to Oregon because the facts and circumstances indicate that it is paid because of prior performance of services and no other reason.

**Stat. Auth.** ORS 305.100

**Stats. Implemented:** ORS 316.127

### **150-316.127-(D)**

#### **Gross Income of Nonresidents; Other Income and Sale of Property**

##### *(1) Income from intangible personal property.*

(a) *Business situs.* Intangible personal property, including money or credits, of a nonresident has a situs for taxation in Oregon when used in the conduct of the taxpayer's business, trade, or profession in Oregon. Income from the use of such property, including dividends, interest, royalties, and other income from money or credits, constitutes a part of the income from a business, trade, or profession carried on in Oregon when such property is acquired or used in the course of such business, trade, or profession as a capital or current asset and is held in that capacity at the time the income arises.

(b) If a nonresident pledges stocks, bonds, or other intangible personal property in Oregon as security for the payment of indebtedness, taxes, etc., incurred in connection with a business in this state, the property has a business situs here. Thus, if a nonresident maintains a branch office here and a bank account on which the agent in charge of the branch office may draw for the payment of expenses in connection with the activities in this state, the bank account has a business situs here. If intangible personal property of a nonresident has acquired a business situs here, the entire income from the property, including gains from the sales of the property,

regardless of where the sale is consummated, is income from sources within this state and is taxable to the nonresident.

(2) *Sales of property.*

(a) *Tangible property.* The gain from any sale, exchange, or other disposition by a nonresident of real or tangible personal property located in Oregon is taxable, even though it is not connected with a business carried on in this state. The loss from such a transaction is deductible if it is a business loss or a transaction entered into for profit. The gain or loss from the sale, exchange, or other disposition of real property or tangible personal property located in Oregon is determined in the same manner and recognized to the same extent as the gain or loss from a similar transaction by a resident.

(b) *Intangible property.* The gain from the sale, exchange, or other disposition of intangible personal property, including stocks, bonds, and other securities is not taxable unless the intangible personal property has acquired a business situs in Oregon. See section (1) of this rule. Likewise, losses from the sale, exchange, or other disposition of such property are not deductible, unless they are losses incurred in a business carried on within Oregon by the nonresident taxpayer.

(c) *S corporation stock.* In general, a nonresident's gain or loss from the sale, exchange, or disposition of S corporation stock is not attributable to a business carried on in this state and is not Oregon source income. The gain or loss from the S corporation stock may not be used in the determination of Oregon taxable income unless the stock has acquired a business situs in this state. See section (1) of this rule.

(d) *General Partnership Interests.* A nonresident's gain or loss from the sale, exchange, or disposition of a general partnership interest in an Oregon partnership is attributable to a business carried on in Oregon and is Oregon source income. The gain or loss is allocated as provided in ORS 314.635.

(e) *Limited Partnership Interests.* In general, a nonresident's gain or loss from the sale, exchange, or disposition of a limited partnership interest is not attributable to a business carried on in Oregon and is not Oregon source income. The gain or loss from the sale of the interest will not be used in the determination of Oregon taxable income unless the limited partnership interest has acquired a business situs in this state (see section (1) of this rule.)

(f) *Limited Liability Company Interests.* The taxation of a nonresident's gain or loss from the sale, exchange, or disposition of an interest in a limited liability company (LLC) operating in Oregon is Oregon source income and is taxed in the same manner as:

(A) The sale of a general partnership interest under subsection (2)(d) of this rule if the selling member is a member-manager of the LLC; or

(B) The sale of a limited partnership interest under subsection (2)(e) of this rule if the selling member is not a member-manager of the LLC.

(C) For purposes of this rule, a person is a "member-manager" of an LLC if that member has the right to participate in the management and conduct of the LLC's business. For an LLC that is designated as a member-managed LLC in its articles of organization, all members of the LLC will be member-managers. For an LLC that is designated as a manager-managed LLC in its articles of organization, only those persons who are both members of the LLC and are designated as a manager in the LLC's operating agreement (or elected as managers by the LLC members pursuant to the operating agreement) will be member-managers.

(g) *Limited Liability Partnership Interests.* A nonresident's gain or loss from the sale, exchange, or disposition of an interest in a limited liability partnership is taxed in the same manner as if it were a general partnership interest under subsection (2)(d) of this rule.

(3) *Interest income received on contract sale of property.*

Interest income received by a nonresident from the sale of Oregon property is not Oregon source income. The source of the income is not from the sale of the property but rather from the use of the money permitted the buyer in an installment contract.

(4) *Distribution of a trust's income accumulation to a nonresident.*

See ORS 316.737 and OAR 150-316.737 for the treatment of trust income accumulation distributions.

(5) *Net operating losses.* See OAR 150-316.007 and OAR 150-316.014 for the treatment of net operating losses.

(6) *Passive activity losses.* See OAR 150-314.300 for the treatment of passive activity losses.

**Stat. Auth.** ORS 305.100

**Stats. Implemented:** ORS 316.127