

## **103 KAR 16:090. Apportionment; payroll factor.**

RELATES TO: KRS 141.010, 141.120(12)(a)2., 141.121, 141.901

STATUTORY AUTHORITY: KRS 131.130, 141.018, 141.121, 141.901

NECESSITY, FUNCTION, AND CONFORMITY: KRS 141.121 and 141.901 require business or apportionable income of multi-state corporations to be apportioned to Kentucky by multiplying the income by a fraction. KRS 131.130(1) authorizes the department to promulgate administrative regulations to administer and enforce Kentucky's tax laws. This administrative regulation provides a detailed explanation of the payroll apportionment factor.

Section 1. Compensation. (1)(a) Compensation shall not include payments to an independent contractor or any other person not properly classifiable as an employee.

(b) Only amounts paid directly to employees shall be included in the payroll factor. Amounts considered paid directly shall include the value of board, rent, housing, lodging, and other benefits or services furnished to employees by the corporation in return for personal services, if the amounts constitute income to the recipient under KRS 141.900(12) and (13).

(2)(a) The total amount paid or payable for compensation during the taxable year shall be determined by the corporation's accounting method and shall be the same method used by the corporation for federal taxation purposes. If the corporation has adopted the accrual method of accounting, all compensation properly accrued shall be deemed to have been paid.

(b) The corporation shall be consistent in the treatment of compensation paid in filing returns or reports to all states. If the corporation is not consistent in its reporting, it shall disclose in its Kentucky return the nature and extent of the inconsistency.

(3) Compensation paid to employees whose services are performed entirely in a state where the corporation is exempt from taxation, for example, by Pub. L. 86-272, codified as 15 U.S.C. §§ 381 to 384, shall be included in the denominator of the payroll factor.

(4) An individual shall be considered an employee if the individual is included by the corporation as an employee for purposes of the payroll taxes imposed by 26 U.S.C. 3121(d). Independent contractors shall not be considered employees.

Section 2. Payroll Factor-Numerator. (1) The total wages reported by the corporation to Kentucky for unemployment compensation purposes, except for compensation excluded by this administrative regulation, shall be considered as a factor in determining if an employee's compensation is properly reportable to Kentucky.

(2) In determining if a service performed without Kentucky is incidental to the employee's service in Kentucky, a service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction, shall be considered an incidental service.

(3) In determining where the employee's base of operations is located, the place of more or less permanent nature from which the employee starts work and to which the employee customarily returns in order to receive instructions from the corporation or communications from customers or other persons, or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of the employee's trade or profession at some other point or points, shall be considered to be the base of operations.

(4) The place from which the power to direct or control is exercised by the corporation shall be the place from which the service is directed or controlled.

Section 3. This administrative regulation shall be effective for tax periods beginning on or after January 1, 2005. (32 Ky.R. 1819; 2287; 33 Ky.R. 62; eff. 8-7-2006; 45 Ky.R. 1305, 2059; eff. 2-1-2019.)