

DEPARTMENT OF REVENUE
CLEARINGHOUSE RULE NUMBER 18-081
SECTION 227.19(2) AND (3), STATS., REPORT

1. Basis and Purpose of the Proposed Rule

The proposed rule revises sec. Tax 2.82 to clarify the level of activity and/or types of activities that, when performed by an out-of-state business, establishes nexus in Wisconsin and requires the filing of a Wisconsin income/franchise tax return.

Currently sec. Tax 2.82 provides a listing of activities that constitute nexus for an unlicensed foreign corporation, and require the filing of Wisconsin corporate income or franchise tax returns. The current list of activities uses the terms "usual or frequent" or "regularly" to describe certain activities that create nexus. The department wishes to establish a standard of "usual or frequent" or "regularly" that can be administered clearly and consistently.

In addition, the department wishes to clarify that ownership of a tangible personal property in Wisconsin (e.g., inventory or equipment) establishes nexus in Wisconsin.

2. Comments and Response

A. Public Hearing

A public hearing was held on December 3, 2018. Kim Roberts appeared at the hearing, but did not testify or register.

B. Pre-Public Hearing Written Comments with DOR's Response

Written comments were received from Tiffany Davister and Dan Kidney, CliftonLarsonAllen LLP.

Comment 1 – Tiffany Davister (August 14, 2018):

Agreed with the clarifying language that was added in the rule.

DOR's Response to Comment 1 – No response needed as individual is in agreement with the rule changes.

Comment 2 – Dan Kidney, CliftonLarsonAllen LLP (November 26, 2018):

Wants to see a similar threshold to that of 15 person-days' worth of business activity applied to companies who have no physical presence in Wisconsin, just an economic presence. Questioned the imposition of nexus on any company who makes a sale of services or intangibles, because the Commerce Clause requires that a business have "substantial nexus" with a state before tax can be imposed. Suggests adoption of a bright-line standard of in-state property, payroll, or sales to better protect small businesses.

DOR's Response to Comment 2 – The department recognizes that application of Wisconsin statutes and rules is limited by the boundaries set by federal law and the U.S. Constitution when asserting nexus on an out-of-state businesses with no physical presence. However, income/franchise tax encompasses a much wider variety of fact situations and federal laws than sales tax, which impedes adoption of bright-line standards for every circumstance.

3. Legislative Council Staff Recommendations

Legislative Council suggested that DOR consider the following:

- *Form, Style, and Placement in Administrative Code*

The treatment clause for SECTION 3 notes that s. Tax 2.82 (4) (a) is amended, however certain subdivisions in par. (a) are not treated by the proposed rule, while others are repealed or created. The provisions treated by the proposed rule should be identified more accurately.

DOR's response – These sections were changed to more accurately reflect their treatment.

4. Regulatory Flexibility Analysis

This rule affects all businesses, regardless of size. No regulatory flexibility analysis was received in response to the email sent on October 30, 2018.