

SUBJECT: Employee's Withholding Certificate (W-4/IT-2104/2104E) Procedures  
DATE: January 15, 2020  
UB#: 015-20  
TO: All Agencies

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The City of New York Office of Payroll Administration (OPA), in cooperation with the Law Department and the Department of Investigation (DoI), has set forth the following detailed guidelines for Agency payroll/personnel officers. This procedure is issued to guide the proper processing of withholding certificates and to increase the awareness of Agency payroll/personnel officers of spurious employee tax evasion schemes. Such schemes are inconsistent with the City's particular responsibility as a public sector employer to ensure that it and its employees are in full compliance with applicable federal, state, and City tax statutes.

This procedure details Agencies' responsibilities in the proper handling of employee withholding allowance and exemption certificates. The City of New York does not condone the evasion of tax payment through withholding by its employees. The City expects that each employee will act responsibly in their obligation to have taxes accurately withheld.

The goal of employees should be to adjust their withholding such that at the end of the tax year neither the employee nor the taxing authority owes the other a balance. To accomplish this, employees may adjust their allowances to take into consideration valid circumstances that will affect their tax liability. These circumstances include such things as qualifying home mortgage interest, charitable contributions, state and local taxes, medical expenses, or dependents. While certain situations exist that entitle an employee to be fully tax exempt, they are few, and are described in this procedure. In no event will the City accept a claim of full tax exemption made by a tax protestor.

When employees claim total tax exemptions or more than more than 14 State/City allowances, and in other situations as specified below, Agencies are instructed to send copies of the employees' Forms W-4, IT-2104, or IT-2104E to the Office of Payroll Administration (OPA).

If employees submitting a withholding certificate and any accompanying documentation indicates in any way that the certificate does not fairly and accurately reflect their relevant circumstances, or if the employee's relevant circumstances are known to be at variance with those represented, that certificate shall be treated as false or fraudulent and therefore invalid. In such case, the Agency payroll/personnel officer is directed to accept but not process the documents and to refer immediately copies of the documents to the Agency's Inspector General. Copies must also be sent to OPA.

If OPA determines that a certificate and accompanying documentation sent to OPA might be false or fraudulent and therefore invalid, such documentation will be referred to the Department of Investigation.

### **Typical Form IT-2104**

A typical Form IT-2104 has 14 or fewer allowances. The following steps will be followed:

- Review forms. The forms must be filled out in their entirety by the employee.
- Implement tax marital status in the New York City Automated Personnel System (NYCAPS/Pi) as indicated on the withholding certificate.
- Implement number of allowances in NYCAPS/Pi, as indicated on the withholding certificate.
- File original documents in the employee's personnel file.

### **Frequently Filed Form W-4/IT-2104**

Frequently filed Form W-4/IT-2104 are typical in other respects but are submitted by an employee four or more times in a calendar year. Upon submission of the fourth and any subsequent withholding certificate in a single calendar year, copies of all forms in effect during the current calendar year must be sent to OPA. The following steps will be followed:

- Review forms. The forms must be filled out in their entirety by the employee.
- Implement tax marital status in NYCAPS/Pi, as indicated on the withholding certificate.
- Implement number of allowances in NYCAPS/Pi, as indicated on the withholding certificate.
- Forward photocopies of current tax year withholding certificates to OPA. Label documents “Frequently Filed.”
- File original documents along with a detailed written record of any relevant conversations with the employee in the employee’s personnel file.

**NOTE:** The employee must be advised that exemption (allowance) increases requested in anticipation of large special payments, including but not limited to Uniform Allowance and back pay, may result in underwithholding and end-of-year tax liabilities.

**Form IT-2104 With Excessive Numbers of Withholding Allowances**

Employees’ Form IT-2104 with excessive numbers of allowances, defined as a form IT-2104 with more than 14 allowances, must be sent to OPA. The employees will be asked if they wish to supply supporting documentation. Copies of the certificate, along with copies of any supporting documentation employees choose to provide, will be sent to OPA. Examples of supporting documentation include the prior year’s tax returns, proof of qualifying home mortgage interest, charitable contributions, state and local taxes (but not sales taxes), medical expenses as stipulated in IRS guidelines, number of dependents or other qualifying miscellaneous deductions. Documentation may consist of or be supplemented by a letter to the Agency from the employee. The employee’s withholding certificate must be accompanied by a signed, unaltered “Withholding Certificate Affirmation.” A withholding certificate submitted without an affirmation will not be accepted. The following steps will be followed:

- Review forms. The forms must be filled out in their entirety by the employee.
- Implement tax marital status in NYCAPS/PMS, as indicated on the withholding certificate.
- Implement change of exemptions in NYCAPS/PMS, as indicated on the withholding certificate.
- Forward photocopies of documents to OPA.
- File original documents along with a detailed written record of any conversations with the employee in the employee’s personnel file.

OPA forwards documents to the Internal Revenue Service (IRS) or the New York State Department of Taxation and Finance (NYS), as appropriate.

**Forms W-4 or IT-2104E Claiming Full Exemption**

Employees’ Form W-4 or IT-2104E claiming full exemption from withholding tax must be sent to OPA. Employees will be asked if they wish to supply supporting documentation. Copies of the certificate, along with copies of any supporting documentation the employee chooses to provide, will be sent to OPA. Examples of supporting documentation include the prior year’s tax returns, proof of qualifying home mortgage interest, charitable contributions, state and local taxes (but not sales taxes), medical expenses as stipulated in IRS guidelines, number of dependents or other qualifying miscellaneous deductions. Documentation may consist of or be supplemented by a letter to the Agency from the employee. The employee’s withholding certificate must be accompanied by a signed, unaltered “Withholding Certificate Affirmation.” A withholding certificate submitted without an affirmation will not be accepted. The following steps will be followed:

- Review forms. The forms must be filled out in their entirety by the employee.
- Implement residency code in NYCAPS, as indicated on the withholding certificate.
- Forward photocopies of documents to OPA.
- File original documents along with a detailed written record of any relevant conversation with the employee in the employee’s personnel file.

OPA forwards documents to the IRS or NYS, as appropriate.

No employee is automatically exempt from tax liability. Employees claiming full exemption are certifying on their withholding certificate that:

- last year they had a right to a refund of **ALL** federal income tax withholding because they had **NO** tax liability; **AND**
- this year they expects a refund of **ALL** federal income tax withholding because they expect to have **NO** tax liability.

Employees are not automatically exempt from NYS/NYC income tax withholding. An employee must be able to certify in writing both of the following conditions:

- The employee is under age 18, or is a full-time student under age 25, or over age 65 **AND**
- The employee had no New York income tax liability for the previous tax year **AND** expects to have none in the current tax year.

An employee, except as otherwise noted below, must file a new Form W-4 each year by February 15 to continue to claim full exemption from withholding. If the employee does not submit a new Form W-4, modify NYCAPS/Pi to withhold tax as if the employee is single or married filing separately. Continue to withhold as if the employee is “single or married filing separately” until a new, acceptable Form W-4 is submitted.

An employee must file a new Form IT-2104E each year by April 30 to continue to claim full exemption from NYS/NYC withholding. If the employee does not submit a new Form IT-2104E, modify NYCAPS/Pi to withhold tax as if the employee is single with zero withholding allowances. Continue to withhold as if the employee is single with zero withholding allowances until a new, acceptable Form IT-2104E is submitted.

### **Students**

Students claiming exemption must be advised of the following information. Students are not automatically exempt from federal income tax liability. A student must be able to certify in writing both of the following conditions:

- Last year they had a right to a refund of **ALL** federal income tax withheld because they had **NO** tax liability; **AND**
- this year they expect a refund of **ALL** federal income tax withheld because they expect to have **NO** tax liability.

Currently, a student **CANNOT** claim exemption from federal income tax withholding if:

- his or her income exceeds \$1,050 (annually) and includes more than \$350 of unearned income (e.g., interest and dividends) **AND**
- another person claims the student as a dependent on their tax return.

Students are not automatically exempt from NYS/NYC income tax withholding. A student must be able to certify in writing both of the following conditions:

- They are a full-time student under age 25, **AND**
- They had no New York income tax liability for the previous tax year **AND** expect to have none in the current tax year.

### **Resident Aliens**

Resident aliens of the United States (U.S.) are taxed in the same manner as a U.S. citizen. An employee is a resident alien if they have a green card or meets the substantial presence test for the calendar year. To meet the substantial presence test, an individual must be physically present in the U.S. on at least:

- 31 days during the current year, **AND**
- 183 days during the three-year period that includes the current year and the two years immediately before that, counting:
  - all days present in the current year, **AND**
  - one-third of the days present in the first year before the current year, **AND**
  - one-sixth of the days present in the second year before the current year.

Certain exceptions apply to the application of the Substantial Presence Test, including students holding valid “F,” “J,” “M,” or “Q” visas. See Internal Revenue Service Publication 519, “U.S. Tax Guide for Aliens,” for further definitions and details.

### **Nonresident Aliens**

In general, if Agencies pay wages to nonresident aliens, Agencies must withhold income tax (unless excepted by regulations) as for a U.S. citizen. However, see IRS Publication 515, “Withholding of Tax on Nonresident Aliens and Foreign Entities,” for exceptions to these general rules.

To avoid underwithholding of income taxes, Agencies must require nonresident aliens when completing W-4 forms to:

- not claim exemption from income tax withholding;
- request withholding as if they are single, regardless of their actual marital status;
- not claim the child tax credit or credit for other dependents in Step 3 of Form W-4 (if the nonresident alien is a resident of Canada, Mexico, or South Korea, or a student from India, or a business apprentice from India, they may claim, under certain circumstances (see Notice 1392), the child tax credit for other dependents); and
- write "Nonresident Alien" or "NRA" in the space below step 4(c) of the Form W-4.

In order for a nonresident alien to claim full exemption, they must complete a withholding certificate as detailed above. In addition, **Form 8233**, "Exemption Form Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual," **MUST** be completed by the employee **AND MUST** accompany the Form W-4 and/or IT-2104E. See IRS Publication 515, "Withholding of Tax on Nonresident Aliens and Foreign Entities," for further definitions and details.

Form 8233 should be used by nonresident alien students, teachers, and researchers to claim exemption from withholding on compensation for services that are exempt from taxation under a U.S. tax treaty. Students must provide the statement required by Revenue Procedure 87-8 and teachers and researchers must provide the information required by Revenue Procedure 87-9 as supplemented by Revenue Procedures 93-22 and 93-22A. These statements are in IRS Publication 519, "U.S. Tax Guide for Aliens." See IRS Publication 515, "Withholding of Tax on Nonresident Aliens and Foreign Entities," for further definitions and details. All these individuals must also provide the information required by Form 8233, disregarding references to independent personal services.

#### **Invalid (False, Fraudulent, or Frivolous) Form W-4, IT-2104 and/or IT-2104E**

Under no circumstances shall an Agency condone the filing of false, fraudulent or frivolous withholding certificates. A Form W-4, IT-2104, and/or IT-2104E is invalid when it includes any unauthorized changes or additions, such as:

- any alteration to the "under penalties of perjury" statement,
- any accompanied words including but not limited to "without prejudice," "U.C.C. ..." or "in lieu of," and/or
- any accompanied obscenities or drawings.

The employee's withholding certificate must be accompanied (when required) by a signed, unaltered "Withholding Certificate Affirmation." A withholding certificate submitted without an affirmation will not be accepted. The following steps will be followed:

- Do **NOT** implement withholding in NYCAPS/Pi as registered on the invalid withholding certificate. Inform the employee that the Withholding Certificate is invalid and advise the employee that he or she must submit a valid withholding certificate.
  - If an employee does not submit valid forms, withhold federal taxes as if the employee is "single or married filing separately."
  - If an employee does not submit valid forms, withhold state/city taxes as if the employee is single and claiming no withholding allowances.
- Forward to the Agency's Inspector General. OPA will forward documentation to the Department of Investigation.
- Forward photocopies of documents to OPA.
- File original documents along with detailed written records of any relevant conversation with the employee.

#### **Tax Protestors**

Under no circumstances should an Agency condone the filing of tax protestor withholding allowance certificates. An employee is considered a tax protestor upon submission of Form W-4, IT-2104, or IT-2104E with accompanied statements claiming that the employee is not subject to taxation on wages because federal, State or City governments

are not authorized to impose taxes upon the employee. Reasons cited may include, but are not limited to, statements that:

- income tax is unconstitutional;
- the employee is a citizen of a (nonexistent or spurious) country which precludes them from paying taxes; and/or
- the employee's income is not derived from revenue producing activities.

Employees' Form W-4, IT-2104 or IT-2104E claiming exemption based on tax protest status must be sent to OPA along with any supporting documents supplied by the employee. The employee's withholding certificate must be accompanied by a signed, unaltered "Withholding Certificate Affirmation." A withholding certificate submitted without an affirmation will not be accepted. The following steps will be followed:

- Do **NOT** implement exemptions based on tax protestor status in NYCAPS/Pi.
  - If a new employee does not submit valid forms, withhold taxes as if the employee is "single or married filing separately" for federal taxes or is single and claiming no withholding allowances.
  - For an existing employee, withhold as single with no allowances for State/City taxes.
- Forward photocopies of documents to OPA.
- File original documents along with detailed written records of any relevant conversations with the employee in the employee's personnel file.
- Provide employee with a copy of the "Withholding Tax Inquiry" (attached).

OPA will forward documentation to the Department of Investigation.

### **Lock - In Letters**

The IRS uses information reported on Form W-2 to identify employees with withholding compliance problems. In some cases, if a serious underwithholding problem is found to exist for a particular employee, the IRS may issue a lock-in letter to the City specifying the employee's permitted filing status and providing withholding instructions for the specific employee. The City will receive and then send the employee's copy of the lock-in letter to the Agency to distribute to the employee. The lock-in letter identifies the permitted filing status and provides a description of the withholding instructions that the City is required to follow and the process by which the employee can provide additional information to the IRS for purposes of determining the appropriate withholding and/or modifying the specified filing status. The Agency must furnish the employee copy to the employee within 10 business days of receipt. The City may follow any reasonable business practice to furnish the employee copy to the employee. OPA will begin withholding based on the notice on the date specified in the notice.

When the City receives the notice specifying the permitted filing status and providing withholding instructions, OPA may not withhold immediately on the basis of the notice. OPA must begin withholding tax on the basis of the notice for any wages paid AFTER the date specified in the notice. The delay between the City's receipt of the notice and the date to begin the withholding as indicated on the notice permits the employee time to contact the IRS.

If the City receives a notice for an employee who isn't currently performing services for the City, the City is still required to furnish the employee copy to the employee and withhold based on the notice if any of the following apply.

- The City is paying wages for the employee's prior services and the wages are subject to income tax withholding on or after the date specified in the notice.
- The City reasonably expects the employee to resume services within 12 months of the date of the notice.
- The employee is on a leave of absence that doesn't exceed 12 months or the employee has a right to reemployment after the leave of absence.

If the City must furnish and withhold based on the notice and the employment relationship is terminated after the date of the notice, the City must continue to withhold based on the notice if the City continues to pay any wages subject to income tax withholding. The City must also withhold based on the notice or modification notice if the employee resumes the employment relationship with the City within 12 months after the termination of the employment relationship.

After issuing the notice, specifying the permitted filing status and providing withholding instructions, the IRS may issue a subsequent notice (modification notice) that modifies the original notice. The modification notice may

change the permitted filing status and withholding instructions. The City must withhold federal income tax based on the effective date specified in the modification notice.

After the IRS issues a notice or modification notice, if the employee provides the City with a new Form W-4 claiming complete exemption from withholding or a completed Form W-4 that results in less withholding than would result under the IRS notice or modification notice, disregard the new Form W-4. The City must withhold based on the notice or modification notice unless the IRS notifies the City to withhold based on the new Form W-4. If the employee wants to put a new Form W-4 into effect that results in less withholding than required, the employee must contact the IRS. If, after the City receives an IRS notice or modification notice, your employee gives you a new completed Form W-4 that results in more withholding than would result under the notice or modification notice, the City must withhold tax based on the new Form W-4. Otherwise, disregard any subsequent Forms W-4 provided by the employee and withhold based on the IRS notice or modification notice.

The IRS or NYS may instruct the City of New York in writing (Lock-in Letter) to implement a prescribed number of withholding allowances and/or a particular tax marital status for an employee. OPA will change the allowances and/or tax marital status in NYCAPS/Pi based on the notice and send the original notice to the Agency. The Agency must give a copy to the employee. State/City withholding allowances will NO LONGER be set and maintained to match those requested by the IRS for federal withholding allowances. NYCAPS/Pi tax marital status codes will be set to be in accordance with IRS instructions.

**NOTE:** These employees should be encouraged to deal directly with the IRS or NYS regarding withholding status.

#### **Nonresident Employees of the City of New York**

If a person became an employee of the City of New York on or after January 4, 1973, and if, while so employed, they were City nonresident during any part of the current year, employees are subject to Section 1127 of the New York City Charter. The employees agree to pay the City the difference between the nonresident City income tax and the tax computed as if they were a City resident. The required payment is not to be construed as a payment of any City tax, but is a payment made to the City as a condition of employment. Agency payroll/personnel officers are responsible for the entry of proper NYCAPS Residency Codes.

The following Agencies are exempt from Section 1127:

- Department of Education
- City University of New York
- District Attorneys' Offices
- NYC Municipal Water Finance Authority
- NYC Housing Authority
- NYC Housing Authority and Transit Police transferred into the NY Police Department

#### **Washington DC Employees**

As per the tax code of Washington D.C. (**District of Columbia**), which shall be addressed as DC hereafter, City employees who both work and reside in DC are required to have income taxes withheld from wages and paid to the DC taxing authority. The City of New York maintains an office in DC; therefore, the city is considered to be 'present' and is thus affected by DC's personal income tax law.

As such, the City must obtain withholding certificates, Form D-4, from its employees who are determined to be required to have DC income taxes withheld while working in DC. Employees are, however, entitled to claim exemptions from withholding (if their permanent residence is outside DC during the entire tax year, or do not reside in DC for more than 183 days in the tax year) for which there is a certificate that must be filled out by the employee (Form D-4A to be attached). In either case, said City employees working in DC must complete form D-4 or D-4A and file it with his/her employer OR may be completed and submitted online (except in the case where an employee is claiming 10 or more withholding allowances - the City is then required to submit the D4 forms). Additional instructions can be found on the forms.

The City has a few employees who are based outside of New York City in Washington DC. These employees will need to complete an additional tax form, IT 2104.1, as part of their onboarding and every year thereafter. If these employees travel to New York and work here more than 14 days in a calendar year, the human resources department must change the employee's NYCAPS residency code to begin NYS and/or NYC withholding.

Employees who will be based full-time outside of NYC should be advised:

- That they need to complete the Form IT 2104.1;
- That they should keep track of how many days they are physically present in NYC for work in a calendar year. Any part of a day spent working in New York State counts as a full day;
- Employees should provide a schedule of days worked in New York State to their payroll department;
- Employees must alert their payroll department immediately when they work their 15<sup>th</sup> day in New York State; and
- That if they work in New York State more than 14 days in a calendar year, they may need to pay New York State/New York City tax.

The City cannot offer individual tax advice, but employees who have general questions may refer to the New York State Department of Taxation and Finance website and/or their own tax advisors. See also New York State Department of Taxation and Finance Technical Memorandum TSB-M-12 (5)1 (July 5, 2012).