

# DEPARTMENT OF TAXATION

## 2016 Fiscal Impact Statement

1. **Patron** Richard C. "Rip" Sullivan, Jr.

3. **Committee** House Finance

4. **Title** Income Tax; Employer Filing Requirements

2. **Bill Number** HB 399

**House of Origin:**

  X   **Introduced**

       **Substitute**

       **Engrossed**

**Second House:**

       **In Committee**

       **Substitute**

       **Enrolled**

**5. Summary/Purpose:**

This bill would impose a penalty on employers that fail to file copies of certain documents for withholding tax purposes with the Department of Taxation ("the Department") by January 31 of each year. This bill would impose a penalty on employers that fail to file such documents in an electronic medium. This bill would also codify existing withholding filing requirements that are currently set forth in the Appropriations Act, thereby eliminating inconsistencies between the Appropriations Act and statutory provisions.

This bill would be applicable to written statements of withholding and withholding tax returns relating to taxable years beginning on or after January 1, 2016.

**This is a Department of Taxation bill.**

6. **Budget amendment necessary:** No

7. **Fiscal Impact:** Preliminary (See Line 8.)

**8. Fiscal implications:**

Administrative Costs

The Department considers implementation of this bill as routine, and does not require additional funding.

Revenue Impact

This bill would have a minimal positive revenue impact, to the extent that it reduces the number of individual income tax returns that are subject to audit. This would allow the Department to dedicate its resources to other issues that may result in increased revenue collections.

**9. Specific agency or political subdivisions affected:**

Department of Taxation

**10. Technical amendment necessary:** No

**11. Other comments:**

Virginia Withholding Requirements

Every employer making payment of wages is generally required to withhold Virginia income tax with respect to the wages of each employee for each payroll period. Such employers are required to file withholding returns and make periodic withholding payments throughout the year. Depending on a particular employer's average monthly liability and the aggregate amount required to be withheld, periodic withholding returns are required to be filed on a quarterly, monthly, or semi-weekly basis. In addition to filing periodic withholding returns throughout the year, employers are required to file an annual withholding return, which must be accompanied by written statements for each employee who had Virginia income tax withheld. Examples of written statements include Forms W-2 and Forms 1099.

Prior to July 1, 2014, all employers were required to file the annual withholding return and accompanying written statements by February 28. Effective July 1, 2014 and thereafter, the date by which all employers are required to submit such documentation was moved from February 28 to January 31. The date change is contained in the Appropriations Act but has not been codified in the Code of Virginia.

Effective July 1, 2013, all employers are required to file periodic withholding returns, annual withholding returns, and written statements electronically. The electronic filing mandate is contained in the Appropriations Act but has not been codified in the Code of Virginia.

Employers are permitted to request waivers from the January 31 due date and the electronic filing mandate in cases where such requirements create an unreasonable burden. Neither the Appropriations Act nor existing statutory language imposes a penalty for the failure to meet either of these requirements. As a result, many employers have failed to comply with the January 31 due date and the electronic filing mandate.

Federal Withholding Requirements

Employers are generally required to file Forms W-2 with the federal government by February 28. However, if an employer elects or is required to file electronically, such forms are due by March 31. All employers that are required to file 250 or more Forms W-2 must file such forms with the federal government electronically.

On December 18, 2015, Congress passed the Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, which advanced the date by which all employers are required to submit Forms W-2 from February 28 and March 31 to January 31. This change is effective for Forms W-2 filed with regard to calendar years beginning after the date of the

enactment of the Act. Therefore, the due date for filing Forms W-2 with regard to Calendar Year 2016 and each calendar year thereafter will be January 31, whether the employer files using paper forms or electronically.

If a taxpayer fails to file a correct Form W-2 by the due date and cannot show reasonable cause for his failure to do so, he may be subject to a penalty. The penalty applies if the taxpayer fails to file timely, fails to include all information required to be shown on Form W-2, includes incorrect information on Form W-2, files paper forms when he is required to file electronically, reports an incorrect taxpayer identification number, fails to report a taxpayer identification number, or fails to file paper Forms W-2 that are machine readable. The amount of the penalty is based on when he files a correct Form W-2. Such penalties are indexed for inflation. On June 29, 2015, Congress increased the amount of such penalties pursuant to the Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, effective with respect to returns and statements required to be filed after December 31, 2015. Penalty amounts for Taxable Years 2015 and 2016 are shown below:

|                                                                                                       | <b>2015</b>                                                                                       | <b>2016</b>                                                                                         |
|-------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|
| <b>Employer correctly files within 30 days of the due date.</b>                                       | \$30 per Form W-2; The maximum penalty is \$250,000 per year (\$75,000 for small businesses).     | \$50 per Form W-2; the maximum penalty is \$532,000 per year (\$186,000 for small businesses).      |
| <b>Employer correctly files more than 30 days after the due date but by August 1.</b>                 | \$60 per Form W-2; the maximum penalty is \$500,000 per year (\$200,000 for small businesses).    | \$100 per Form W-2; the maximum penalty is \$1,596,500 per year (\$532,000 for small businesses).   |
| <b>Employer files after August 1, does not file corrections, or does not file required Forms W-2.</b> | \$100 per Form W-2; the maximum penalty is \$1,500,000 per year (\$500,000 for small businesses). | \$260 per Form W-2; the maximum penalty is \$3,193,000 per year (\$1,064,000 for small businesses). |

For purposes of the lower maximum penalties shown above, a taxpayer is considered a small business if its average annual gross receipts for the three most recent tax years (or for the period that taxpayer was in existence, if shorter) ending before the calendar year in which the Forms W-2 were due are \$5 million or less.

#### Withholding Requirements in Other States

In addition to Virginia, eight other states (Alabama, Connecticut, Kentucky, Nebraska, Pennsylvania, Rhode Island, Utah, and Wisconsin) and the District of Columbia have advanced their filing deadlines from February 28 to either January 31 or February 1. Thirty states (Alabama, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Oklahoma,

Oregon, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wisconsin) and the District of Columbia require or will require that employers file withholding returns and associated withholding documents electronically.

Approximately twenty-two states (Alabama, California, Colorado, Connecticut, Idaho, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Oregon, Rhode Island, Utah, West Virginia, and Wisconsin) impose a penalty for each Form W-2 that is not timely filed. Certain states, including Nebraska and Utah, impose such late-file penalties for each W-2 that is not electronically filed. Other states, including Georgia, Massachusetts, and New York, impose separate penalties specifically for failing to file Forms W-2 electronically.

#### Non-Compliance with Virginia Withholding Requirements

To combat refund fraud and identity theft, the Department currently compares employer-filed written statements with data reported on a taxpayer's return. Where there is inconsistency between the data reported by a taxpayer and the data reported by the taxpayer's employer, the Department can stop a return before issuing potentially fraudulent refunds. This process, where the Department compares employer-filed written statements against taxpayer-filed return data, works most effectively when employers file written statements by the January 31 due date and comply with the electronic filing mandate.

Current law does not impose a penalty for the failure to file by the January 31 due date and by electronic means and, as a result, not all employers have complied with these requirements. Non-compliance with these requirements makes it more difficult for the Department to protect taxpayers from being victims of refund fraud and identity theft. It also results in delays processing individual tax returns and refunds to the extent that the Department must hold such returns and refunds until the employer files written statements.

#### Proposed Legislation

This bill would impose a penalty on employers that fail to file copies of written statements for withholding purposes with the Department by January 31. Such employers would be liable for a penalty of \$5 for each written statement that is not filed by January 31. An additional \$5 penalty would be imposed for each written statement that is not filed within the required time for each additional month or fraction thereof during which such failure to file a written statement continues, not exceeding six months in the aggregate. Therefore, such penalty would be limited to a maximum of \$30 for each written statement that is not filed by January 31.

This bill would impose a penalty on employers that fail to file annual withholding returns, along with copies of written statements, using an electronic medium in a format prescribed by the Tax Commissioner. The penalty would be imposed as follows:

- For employers with no more than 50 employees, the penalty would be \$5 for each written statement that is not filed electronically.

- For employers with more than 50 but fewer than 100 employees, the penalty would increase to \$10 for each written statement that is not filed electronically.
- For employers with 100 or more employees, the penalty would equal \$20 for each written statement that is not filed electronically.

This bill would permit employers to request waivers from the January 31 due date and the electronic filing mandate in cases where such requirements create an unreasonable burden.

This bill would also codify existing withholding filing requirements that are currently set forth in the Appropriations Act, thereby eliminating inconsistencies between the Appropriations Act and statutory provisions.

This bill would be effective for taxable years beginning on or after January 1, 2016.

### Similar Bills

**Senate Bill 230** is identical to this bill.

**House Bill 880** would allow an employee to make a withholding allowance for an itemized deduction in lieu of a standard deduction. Such employee would be allowed additional exemptions to approximate the difference between the employee's itemized deduction and the standard deduction allowed under the income tax laws of the Commonwealth.

**Senate Bill 506** would waive any tax penalties for certain small businesses during their first two years of operation as long as such businesses enter into an installment agreement with the Tax Commissioner for the payment of taxes.

cc : Secretary of Finance

Date: 1/19/2016 JJS  
HB399F161