

## ORDER OF THE DEPARTMENT OF REVENUE REPEALING, AMENDING, REPEALING AND RECREATING, AND CREATING RULES

The Wisconsin Department of Revenue proposes an order to: **create** sec. Tax 3.045; **relating to** the active duty military pay subtraction.

The scope statement for this rule, SS 082-21, was approved by the Governor on September 16, 2021, published in Register No. 789A3 on September 20, 2021, and approved by the Secretary of Revenue on December 2, 2021. This emergency rule was approved by the Governor on February 4, 2022.

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### *Analysis by the Department of Revenue*

**Statutes interpreted:** 71.05 (6) (b) 56., Stats.

**Statutory authority:** ss. 71.80 (1) (c) and 227.11 (2), Stats.

**Explanation of agency authority:** Under s. 71.80 (1) (c), Stats., the department may make such regulations as it shall deem necessary in order to carry out chapter 71 of the Wisconsin Statutes, relating to income and franchise taxes.

Section 227.11 (2), Stats., provides statutory rule-making authority as follows:

(a) "Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute..."

(b) "Each agency authorized to exercise discretion in deciding individual cases may formalize the general policies evolving from its decisions by promulgating the policies as rules ..."

**Related statute or rule:** There are no other applicable statutes or rules.

**Plain language analysis:** A new subtraction is available for active duty military pay, as adopted in 2021 Wisconsin Act 58. Due to differing definitions of active duty in the US Code, the rule proposes to establish a definition of active duty. The proposed rule also provides guidance as to what type of military pay is nontaxable income in Wisconsin because it is received while on active duty.

**Summary of, and comparison with, existing or proposed federal regulation:** There is no existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

**Summary of public comments and feedback on scope statement:** The department received the following public comment.

Comment – Tim Schnese expressed concern that members of the reserves and National Guard that are on full-time active duty, attending military school, or on training duty would not qualify for the subtraction. Tim suggested the department collaborate with the Wisconsin National Guard and/or Wisconsin Department of Military Affairs to gain more knowledge of the various active duty situations relating to members of the reserves and National Guard.

DOR's response to comment – The department met with Wisconsin Department of Military Affairs and the U.S. Armed Forces (Truax Field – Madison) to go over the various pay which would be allowed as a subtraction under current law. The two agencies provided to the department which types of activities would qualify as active duty. Active duty and eligible pay are defined in the rule based on feedback from these agencies.

**Comparison with rules in adjacent states:** The department is not aware of a similar rule in an adjacent state.

**Summary of factual data and analytical methodologies:** 2021 Wisconsin Act 58 created a subtraction for active duty military pay. Active duty is not defined in the statutes. The rule needs to be created to define active duty so it is clear which military pay is eligible for the subtraction. No other data or analytical methodologies were used in the preparation of this proposed rule order or this analysis.

**Analysis and supporting documents used to determine effect on small business:** This rule order makes changes to reflect current law and current department policy. It makes no policy or other changes having an effect on small business.

**Anticipated costs incurred by private sector:** This proposed rule does not have a fiscal effect on the private sector, as no changes to existing policies are being made.

**Effect on small business:** This proposed rule does not affect small business, as no changes to existing policies are being made.

**Agency contact person:** Please contact Jen Olson at (608) 266-8253 or [jennifer.olson@wisconsin.gov](mailto:jennifer.olson@wisconsin.gov), if you have any questions regarding this proposed rule.

**Place where comments are to be submitted and deadline for submission:** Comments may be submitted to the contact person shown below no later than the date on which the public hearing on this proposed rule is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

Jen Olson  
Department of Revenue  
Mail Stop 6-40  
2135 Rimrock Road  
P.O. Box 8933  
Madison, WI 53708-8933  
[jennifer.olson@wisconsin.gov](mailto:jennifer.olson@wisconsin.gov)

### **FINDING OF EMERGENCY**

The Department of Revenue finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of the facts constituting the emergency is:

Section 71.05(6)(b)56., Stats., provides a subtraction from income for certain pay received by an individual on active duty in the U.S. Armed Forces. A definition of active duty was not provided in the statutes, and differing definitions exist within the US Code.

The rule needs to be created to define active duty so it is clear which military pay is eligible for the subtraction, and an emergency rule is needed as filing season has already begun for the 2021 tax year.

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**SECTION 1.** Tax 3.045 is created to read:

**Tax 3.045 Subtraction for basic, special, or incentive pay received from the federal government while on active duty in the U.S. armed forces.**

(1) PURPOSE. This section clarifies the subtraction from federal adjusted gross income in sec. 71.05 (6) (b) 56., Stats., for basic, special, or incentive pay received from the federal government by an individual who is on active duty in the U.S. armed forces.

(2) DEFINITIONS. For purposes of sec. 71.05 (6) (b) 56., stats., all of the following apply:

(a) "Active duty" means full-time duty as a uniformed service member in the active service of the U.S. armed forces and includes full-time training duty, annual training duty, full-time National Guard duty, and attendance, while in the active service, at a school designated as a federal military service academy. Active duty does not include training while on inactive duty or attendance for training not required by the U.S. armed forces.

(b) "U.S. armed forces" has the meaning given in 26 USC 7701 (a) (15) and includes uniformed service members in the reserve components identified under 37 USC 101 (24).

(3) ELIGIBLE PAY. Basic, special, or incentive pay eligible for the subtraction includes only income received while the individual is on active duty. Amounts the individual receives while on inactive duty in a civil service position in the military, while on inactive duty training, or while on inactive duty waiting for reenlistment to inactive duty, are not eligible for the subtraction.

**SECTION 2.** EFFECTIVE DATE; GENERAL. This rule takes effect upon publication in the state newspaper and shall remain in effect for 150 days, as provided in s. 227.24(1)(c), Stats., subject to extensions under s. 227.24(2), Stats.